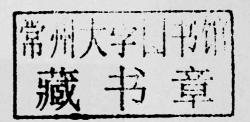


David W. Lee



2011 HANDBOOK OF SECTION 1983 LITIGATION

David W. Lee





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Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers and Kluwer Law International products.

Printed in the United States of America

ISBN 978-1-4548-0184-9

1234567890

2011 Handbook of Section 1983 Litigation

by David W. Lee

Title 42 U.S.C. § 1983 was designed to provide redress for violations of federally protected rights committed by persons acting under color of law. In the last few decades, there has been unprecented growth in the volume and type of cases filed under § 1983, which has generated a comprehensive, intricate, and complex body of law. *Handbook of Section 1983 Litigation* provides quick and concise answers to issues that frequently arise in § 1983 cases, from police misconduct to affirmative action to gender and race discrimination.

Highlights of the 2011 Edition

The 2011 Handbook includes many recent developments in the area of § 1983 and adds significant new and revised material, including:

- Recent U.S. Supreme Court Rulings:
 - In John Doe No. 1 v. Reed, a Washington state law regarding the required disclosure under the State Public Records Act of petitions containing the signatures of persons who signed the petition for an initiative referendum did not violate the First Amendment. The Court held, as applied to referendum petitions in general, that the disclosure requirements of the Washington Public Records Act were sufficiently related to the state's interest in protecting the scrutiny of the electoral process to satisfy the exacting scrutiny standard applicable to the First Amendment challenges. The state had a strong interest in rooting out both voting fraud and invalid signatures caused by a simple mistake. Also, the state had an interest in promoting transparency and accountability in the electoral process. The Supreme Court in Doe held that disclosure requirements of the Washington State Public Records Act were sufficiently related to the state's interest in protecting the integrity of the electoral process so as to satisfy the exacting scrutiny standard applicable to First Amendment challenges. (See Chapters 1 and 6)
 - In Hui v. Castaneda, the U.S. Supreme Court held that the federal Public Service Act, 42 U.S.C. § 2233(a), precluded a Bivens action against public health service personnel for constitutional violations



arising out of their official duties. There are two separate inquiries involved in determining whether a *Bivens* action may proceed against a federal agent. The first is whether the agent is amenable to suit, and the second is whether a damages remedy is available for a particular constitutional violation absent authorization by Congress. (See Chapter 1)

In *McDonald v. City of Chicago*, the U.S. Supreme Court noted that the Bill of Rights of the United States Constitution, including the Second Amendment, originally applied only to the federal government, but not to the states. The Court observed, however, that the constitutional amendments adopted after the civil war fundamentally altered the federal system. The Court noted that in the late nineteenth century, the Supreme Court began to hold that the Due Process Clause prohibited the states from infringing upon the protections of the Bill of Rights.

In *McDonald*, the Court held that the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the States. The Court held that the Second Amendment is fundamental to the Nation's scheme of ordered liberty. The need for defense of self, family, and property is most acute in the home. The Court held that under the Fourteenth Amendment, the right to keep and bear arms must be regarded as a substantive guarantee, not a prohibition that could be ignored as long as the states legislated in an even-handed manner. The Court held, therefore, that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment. For this reason, the Court held that there was no need for the Supreme Court in *McDonald* to reconsider the Court's interpretation of the Privileges or Immunities Clause in the *Slaughterhouse* cases. (See Chapter 1)

- In City of Ontario v. Quon, the U.S. Supreme Court noted that the Fourth Amendment applies when the government acts in its capacity as an employer. In Quon, the Supreme Court observed that the Fourth Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the government. This is so without regard to whether the government actor is investigating a crime or performing another function. In this case, the court held that the city's review of a police officer's text messages was reasonable and therefore, did not violate the Fourth Amendment. (See Chapter 2)
- In Los Angeles County v. Humphries, the U.S. Supreme Court held that the policy or custom requirement of Monell v. New York City Department of Social Services applies in § 1983 cases irrespective of whether the relief sought is monetary or prospective injunctive relief. In Humphries, a couple who had been accused of child abuse was later

exonerated. However, under California law, their names were added to a child abuse central index where they would remain available to various state agencies for at least ten years. The statute had no procedures for allowing individuals to challenge their exclusion in the index, and neither California nor the county had created such procedures. The court sued under § 1983, and the Ninth Circuit held that the plaintiffs were entitled to declaratory relief and might be able to prove damages as well on remand. The court of appeals also held that the plaintiffs were prevailing parties who were entitled to attorney's fees.

In *Humphries*, the Supreme Court reversed the Ninth Circuit, holding that *Monell's* holding applies to § 1983 claims against municipalities for prospective relief as well as for claims for damages. The court noted that in order for § 1983 plaintiffs to successfully sue a municipal entity, they must show that their injury was caused by municipal policy, custom, usage, or practice, irrespective of whether the remedy sought is money damages or prospective relief such as an injunction or declaratory relief. The court stated that whether the action or omission is the municipality's "own" for which they might be held liable under § 1983, has to do with the nature of the action or omission, not with the nature of the relief that is later sought in court. (See Chapters 3 and 9)

- In *Hussein v. City of Perrysburg*, the U.S. Supreme Court noted that not all arbitrary and capricious state action amounts to a violation of substantive due process. Otherwise, judicial review for compliance with substantive due process would become the equivalent of a typical state or federal Administrative Procedure Act. The court stated that the interest protected by substantive due process includes those protected by constitutional guarantees, freedom from government actions that shock the conscience, and certain interest that the Supreme Court has found so rooted in the traditions and conscience of people as to be fundamental. (See Chapter 5)
- In Citizens United v. Federal Election Committee, the U.S. Supreme Court held that a federal statute which barred corporate expenditures for electioneering communications violated the First Amendment rights of a nonprofit corporation. (See Chapter 6)
- In *Purdue v. Kenny A.*, the U.S. Supreme Court observed that § 1988 provides that the prevailing party in certain civil rights actions may recover a reasonable attorneys' fee as part of the costs, in order to insure that federal civil rights are adequately enforced. The Court noted that the lodestar approach to determining reasonable attorneys' fees under a fee-shifting statute looks to the prevailing market rates in the relevant community, and produces an award that roughly

approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who is billed by the hour in a comparable case. (See Chapter 13)

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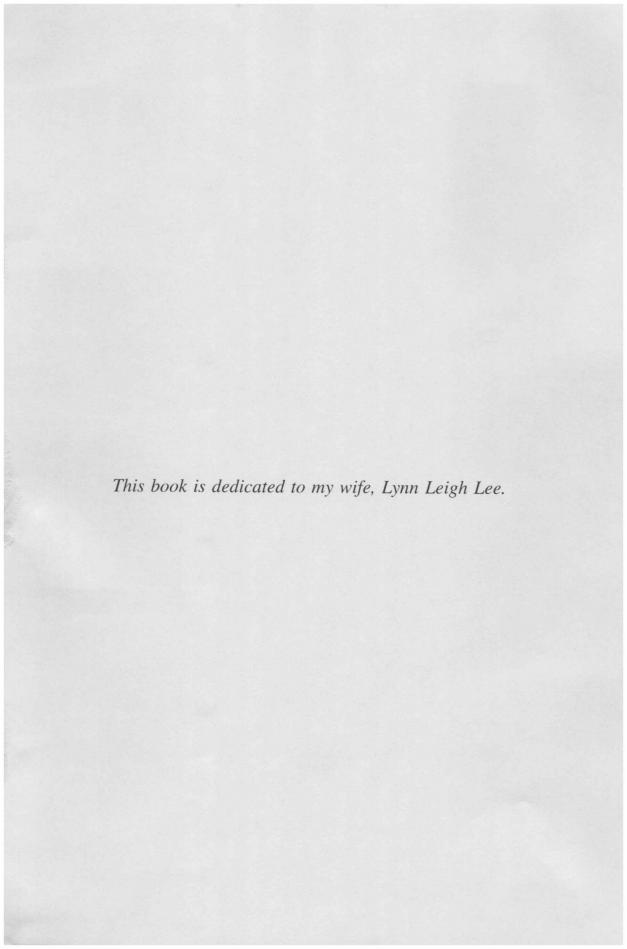
David W. Lee is an attorney and shareholder with the law firm of Lee Law Center, P.C., in Oklahoma City, Oklahoma. He is a litigator in the fields of civil rights and employment law, representing municipal and county officers and employees, state agencies, colleges and universities, and private employers. Prior to entering private practice, Mr. Lee served as Chief of the Criminal and Federal Divisions of the Oklahoma Attorney General's Office for three Attorneys General, Jan Eric Cartwright, Michael C. Turpen, and Robert H. Henry. He also served as an Assistant United States Attorney for the Western District of Oklahoma; an Assistant District Attorney and Assistant Public Defender in Oklahoma County, Oklahoma; and an Assistant District Attorney in Washington County, Oklahoma.

Mr. Lee was an adjunct professor at the University of Oklahoma College of Law and the Oklahoma City University School of Law, having taught courses in constitutional civil rights, trial practice, employment law, disability law, and appellate advocacy. Mr. Lee is a regular lecturer on civil rights subjects for the National College of District Attorneys and received that organization's Lecturer of Merit Award in 1992. In April, 2002, Mr. Lee spoke on 42 U.S.C. § 1983 to the 20th Annual Georgetown University Law Center's seminar, *Section 1983: Civil Rights Litigation*.

Mr. Lee has argued four cases before the United States Supreme Court: Thompson v. Oklahoma, 487 U.S. 815 (1988); Burlington Northern v. Oklahoma Tax Commission, 481 U.S. 454 (1987); Oklahoma v. Castleberry, 471 U.S. 146 (1985); and Oklahoma v. Eddings, 455 U.S. 104 (1982). He has also argued and written briefs regarding numerous cases before the United States Court of Appeals for the Tenth Circuit. Some of the civil rights and employment cases he has argued in the Tenth Circuit are: Martinez v. Beggs, 563 F.3d 1082 (10th Cir. 2009); Thomas v. City of Blanchard, 548 F.3d 1317, 1324-26 (10th Cir. 2008); Price-Cornelison v. Brooks, 524 F.3d 1103, 1114 (10th Cir. 2008); Fye v. Oklahoma Corporation Commission, 516 F.3d 1217, 1224-29 (10th Cir. 2008); Gray v. Baker, 399 F.3d 1241 (10th Cir. 2005); Gossett v. State ex rel. Board of Regents, 245 F.3d 1172 (10th Cir. 2001); Worrell v. Turner, 219 F.3d 1197 (10th Cir. 2000); Martin v. City of Del City, 179 F.3d 882 (10th Cir. 1999); Smith v. City of Enid, 149 F.3d 1151 (10th Cir. 1998); King v. Union Oil Company, 117 F.3d 443 (10th Cir. 1997); King v. Union Oil Company, 58 F.3d 586 (10th Cir. 1995); Crozier v. Board of Regents, 11 F.3d 967 (10th Cir. 1993); Winters v. Board of County Commissioners, 4 F.3d 848 (10th Cir. 1993); Garrett v. Rader, 831 F.2d

202 (10th Cir. 1987); *Coleman v. Turpen*, 826 F.2d 667 (10th Cir. 1987); and *Wolfenbarger v. Williams*, 826 F.2d 930 (10th Cir. 1987).

Mr. Lee's other legal publications and articles include: Three Steps Forward in the Continuing Search for the Parameters of the Public Policy Exception to the At-Will Doctrine in Oklahoma, 29 Okla. City U. L. Rev. (Spring 2004); Personal Liability Against Correctional Officials and Employees for Failure to Protect the Suicidal Inmate Under 42 U.S.C. § 1983, Jail Suicide/Mental Health Update (Spring 2002); Qualified Immunity for Public Officials Under 42 U.S.C. § 1983, 25 Urb. Law. 97 (Winter 1993); Defending 42 U.S.C. Section 1983 Actions (6th ed. 1999); Grand Juries in Oklahoma: Where Are We Now?, 68 Okla. B.J. 2604 (1997); Burden Shifting and Summary Judgment in Federal Employment Discrimination Cases, 67 Okla. B.J. 2861 (1996); The Need for New Criminal Discovery Code in Oklahoma State Courts, 60 Okla. B.J. 2259 (1989); and Grand Jury Procedure in Oklahoma State Courts, 59 Okla. B.J. 2087 (1988).



PREFACE

This book is meant to be a comprehensive yet basic study of that dynamic federal statute, 42 U.S.C. § 1983. It is intended to assist litigators and legal advisors alike.

This edition has been updated to include all recent relevant United States Supreme Court cases that involve 42 U.S.C. § 1983 and recent § 1983 cases decided in federal courts of appeal. It is hoped that this edition will keep the § 1983 practitioners across the country current on all aspects of 42 U.S.C. § 1983 litigation.

With regard to the publication of this book, I am greatly appreciative of all the persons at Aspen Publishers who have worked so diligently on the manuscripts and promotion of the previous and present editions of this book: Susan Chazin, Associate Publisher; Kenneth Litt, Senior Developmental Editor; Betsey Cohen, Managing Editor; Mary Stevenson, Senior Manuscript Editor; Gina A. Spiezia, Managing Editor; Bernard Johnston, Senior Manuscript Editor; Carol Benedicto, Developmental Editor; James Orefice, Senior Manuscript Editor; Elina Carmona, Manuscript Editor; Meggie Narisse, Mark Fellin, and Maryann Gross, Promotion Managers; Randy Kaplan, Marketing Specialist; Annie Cavlov, Product Manager; Anne C. Westall, Senior ECommerce Manager; and Kavitha Madhesswaran, Manuscript Editor. I also wish to thank Marc Gallant, Acquisitions Director, for his encouragement and guidance regarding getting my first manuscript published with Aspen.

I also wish to make special mention of and give thanks to the attorney that I practice with at Lee Law Center, Emily B. Fagan, for the invaluable counsel she provides me in our practice, and to Cyndi Allen, Office Administrator at Lee Law Center, P.C., who typed and proofread the draft prior to its submission to Aspen.

I want to thank John A. Makholm of The Makholm Law Group, St. Petersburg, Florida, for his support and advice concerning this book, and for his insight with regard to § 1983 litigation. I also want to convey my appreciation to Katrina M. Zabinski for everything she did in helping me get the book published, and Henry Cohen, Book Review Editor, *The Federal Lawyer*, for having published a review by Stephen Reel of "Handbook of Section 1983 Litigation" in the August, 2007 edition of that magazine.

I wish to express my special appreciation to Stephen Reel, General Counsel, and Jonathan D. Woods, Deputy General Counsel, of the Oklahoma Municipal Assurance Group, who have been of the greatest assistance and counsel; to

Charles Drake, General Counsel, and Michael Scott Fern, Associate General Counsel, and Victor N. Bird, Paula Johnson, and Doug Price, Assistant General Counsel, of the Board of Regents of Oklahoma State University; Greg Mashburn and Tim Kuykendall, District Attorneys, and David Brockman, David J. Batton, Mike McDanel, and John Hancock, Assistant District Attorneys, of the Cleveland County, Oklahoma, District Attorneys' Office; Charles Lee Waters, Richard W. Freeman, Joseph W. Strealy, John E. Douglas, and Rick Resetaritz, who are Legal Counsel at the Oklahoma Department of Human Services; and Norman Hill, General Counsel of the Oklahoma Department of Transportation, and Tamar Scott and Verner Hayhurst, Assistant General Counsel with that department. I also greatly value the communication on legal issues with Scott Rowland, former General Counsel of the Oklahoma Bureau of Narcotics and Dangerous Drugs, who is now First Assistant District Attorney for Oklahoma County.

The same sense of appreciation goes to Larry Stuart, District of Osage County, and John Boggs, First Assistant District Attorney; Max Cook, District Attorney of Creek County; David Prater, District Attorney, Scott Rowland, First Assistant District Attorney, Sandra H. Elliott and John Jacobsen, Assistant District Attorneys, Oklahoma County; and Suzanne McClain Atwood, Executive Coordinator, Oklahoma District Attorneys Council, and Trent H. Baggett, Assistant Executive Coordinator. Also, I have gained from my professional association with Martha Rupp Carter, Attorney, Tulsa County Health Department, and John Dorman, City Attorney, and Larry Simmons, Assistant City Attorney, Dennis McGrath, Assistant City Attorney, Stillwater, Oklahoma; Carol Lahman, City Attorney of Enid, Oklahoma; and Richard Smith, Wiley L. Williams, Diane Lewis and Tina A. Hughes, Assistant City Attorneys of Oklahoma City.

I want to thank Dean Mary M. Galvin, Robert J. Fertitta, Amie L. Clifford, James M. Dedman, III, Candace M. Mosley, Tom Weilert, and their colleagues at the National College of District Attorneys for inviting me to speak at their seminars across the country for numerous years. I also wish to express my gratitude to the colleagues with whom I lecture at the Government Civil Practice seminars of the National College of District Attorneys, especially the Honorable Paul P. Biebel, Jr., of Chicago, Illinois; the Honorable Charles R. Pyle, Magistrate Judge, Tucson, Arizona; Sharon E. Pandak, Woodbridge, Virginia; William A. Harding, Attorney at Law, Lincoln, Nebraska; and Mark Godwin, Deputy City Attorney, Des Moines, Iowa, for their wise counsel concerning civil rights issues. Thanks also goes to attorneys Perry Grimaldi of Chicago, Illinois; Debra Remington and Frank D. Remington, Madison, Wisconsin; Willie Griffin, of Greenville, Mississippi; William T. Payne, Decatur, Georgia; John M. Green, Jr., Ocala, Florida; Michael P. Kelly, Dallas, Texas, Mauro F. Ruiz, McAllen, Texas, Christine M. Schwamberger, Minden, Nevada; Brian Brown, Reno, Nevada; Benjamin G. Kelsen, Teaneck, N.J; and Joel F. Stroud, Chesterfield, South Carolina; Patrick S. Casey, Wheeling, West Virginia; Thomas S. Boyle, Pittsburg,

Pa.; Jamie B. Mather, Seattle, Washington, and Sean Olivas, Albuquerque, New Mexico for their support of this book.

I have also valued the encouragement in the writing of this book from Jerry E. Stephens, Branch Librarian, U.S. Court of Appeals for the Tenth Circuit; Dan Cordova, Librarian, United States Court of Appeals for the Tenth Circuit, Professor Judith A. Morgan, Library Science and Director, Oklahoma City University School of Law; Venita L. Hoover, Law Librarian, Oklahoma County Law Library; Alfred L. Brophy, Professor of Law, University of Alabama School of Law; Ron Comingdeer, Roberta Browning Fields, George S. Corbyn, Jr., Laura McConnell-Corbyn, Michael A. Fagan, Kieran D. Maye, George M. Emerson, Melvin C. Hall, Richard A. Mildren, David W. Kirk, Andrew W. Lester, Jami J. Fenner, Mark Weimer, Rabindranath Ramana, Robert A. Nance, Garvin A. Isaacs, Kenneth R. Coe, Robert F. Lafferandre, Elizabeth R. Sharrock, Jeff Black, Ambre C. Gooch, Chris J. Collins, Andy A. Artus, Jodi S. Casey, Alexander L. Bednar, James Drummond, Michael J. Massad, Nick Larby, Gary J. James, Michael Burrage, Phillip W. Jack Anderson, Seth Day, Alison A. Cave, Jerry Sokolosky, Randall J. Wood, attorneys in Oklahoma City; and Scott Wood, R. Jack Freeman, Tony M.Graham, Mark D. Lyons, Michael D. McBride, Jeff Nix, Wes Johnson, Joel L. Wohlgemuth, John E. Dowdell, Ryan A. Ray, Don Bingham, Thomas A. Mortensen, Phil Frazier, Gerald M. Bender and Kent Morlan of Tulsa, Oklahoma; Stanley M. Ward, Micheal Salem and Don G. Pope of Norman; Buddy Neal and Jeremy J. Beaver of McAlester; Kevin J. Murphy, City Attorney, Ponca City, and Brian T. Hermanson, District Attorney, Kay County; Lowell L. Peterson, City Attorney, Glenpool, and Cathy Stocker, District Attorney of Garfield County and Stephen Jones of Enid, Oklahoma. Also, thanks to Wellon B. Poe, Jr., General Counsel, John K. Lindsey, Associate General Counsel of the Oklahoma Department of Public Safety and Robert M. Anthony, General Counsel of the Oklahoma State Regents for Higher Education.

I also want to recognize the Attorney General of Oklahoma, Drew Edmondson, who is also President of the National Association of Attorneys General, for his counsel, support, and friendship for many years. Thanks also go to Tom Gruber, Guy Hurst, Susan K. Noland, Kevin L. McClure, Martha R. Kulmacz, Neal Leader, Lisa Davis, Charles Babb, and Jane Wheeler, Assistant Attorneys General with that office. Likewise, I wish to thank my previous bosses in the Oklahoma Attorney General's Office, former Attorneys General Michael C. Turpen, Robert H. Henry, and Susan B. Loving, for their encouragement and support when I worked for each. Thanks also go to my long-time friend and mentor, Thomas Hoffman of New York City. I also appreciate the interest in the previous books I have written on civil rights displayed by Assistant Attorneys General across the country, particularly Michael A. Nicefaro, Jr., of the Washington State Attorney General's Office, and John W. Renneisen, Christine Cox, Tom Rumpke and Theodore R. Racines of the Wyoming Attorney General's Office. My gratitude also goes to Donita Bourns Douglas of the Oklahoma Bar

Association for her sponsoring of that organization's "The Essential Section 1983 Seminar."

I want to thank Harold Pumford, Chief Executive Officer of the Association of Governmental Risk Pools (AGRIPE); Dusty Birdsong, Executive Director; and Denny Butler, Claims and Litigation Manager, County Claims of Oklahoma, Inc., for their support with regard to civil rights cases.

Of course, my greatest thanks go to my wife, Lynn, and our three children, Taylor, Bryan, and Blake.

David W. Lee Oklahoma City, Oklahoma leelawok@swbell.net May 2011

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