McCabe v. Life-Line Ambulance Service: Another Extension of the Over-Extended Administrative Search Exception

In *McCabe v. Life-Line Ambulance Service*,[1] the United States Court of Appeals for the First Circuit extended the administrative search exception to the Fourth Amendment ban on unreasonable searches. The suit alleged a novel violation of the ban in the form of a warrantless involuntary commitment procedure. However, the court found that the procedure fit neatly within the exception and declined to extend Fourth Amendment protection to involuntary commitments.[2]

I. FACTUAL BACKGROUND

Mrs. Zinger, a Lynn, Massachusetts resident with a long history of mental illness and high blood pressure, threatened her ex-husband and disturbed the other tenants in her building.[3] On September 6, 1989, a licensed psychiatrist signed an application for a ten-day involuntary commitment pursuant to Massachusetts law,[4] based on reports from her

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1. 77 F.3d 540 (1st Cir.), *cert. denied*, 117 S. Ct. 275 (1996).
2. *Id.* at 546.
3. *Id.* at 542.
4. MASS. GEN. LAWS ANN. ch. 123 § 12 (1996). "Entitled Emergency restraint of dangerous persons; application for hospitalization; examination," this statute provides in part:

> (a) Any physician who is licensed pursuant to section two of chapter one hundred and twelve or qualified psychiatric nurse mental health clinical specialist authorized to practice as such under regulations promulgated pursuant to the provisions of section eighty B of said chapter one hundred and twelve or a qualified psychologist licensed pursuant to sections one hundred and eighteen to one hundred and twenty-nine, inclusive of said chapter one hundred and twelve, who after examining a person has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a ten day period at a public facility or at a private facility authorized for such purposes by the department. If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician, qualified psychologist or

family and neighbors.[5] At the same time, Zinger's family attempted to have her evicted from her apartment.[6] On the morning of September 7, the constable charged with the eviction learned of the commitment order and arranged to meet at the apartment with the local police officers who were to carry out the order that afternoon.[7] Accompanied by an ambulance crew, the constable and the police officers first knocked on Mrs. Zinger's door, then kicked it in when there was no response.[8] Mrs. Zinger, alarmed at the presence of the police, tried to close the door, but they detained her. She suffered a fatal heart attack after she was handcuffed, forcibly carried to the ambulance, and strapped face down on a stretcher.[9]

Mrs. Zinger's administratrix, McCabe, filed a claim under 42 U.S.C. § 1983 against the City of Lynn, alleging that the City's policy authorizing police officers to use forcible, warrantless entries into residences to execute commitment orders in the absence of exigent circumstances deprived Mrs. Zinger of her Fourth Amendment right to be free from unreasonable searches.[10] Following a hearing, the court granted McCabe's cross-motion for summary judgment on the issue of liability

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qualified psychiatric nurse mental health clinical specialist on the basis of the facts and circumstances may determine that hospitalization is necessary and may apply therefore. In an emergency situation, if a physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist is not available, a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a ten day period at a public facility or a private facility authorized for such purpose by the department. An application for hospitalization shall state the reasons for the restraint of such person and any other relevant information which may assist the admitting physician or physicians. Whenever practicable, prior to transporting such person, the applicant shall telephone or otherwise communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person and also to give notice of any restraint to be used and to determine whether such restraint is necessary.

Id.

5. 77 F.3d at 542.

6. *Id.* Mrs. Zinger's children and ex-husband owned the apartment building. *Id.* at 542 n.1.

7. *Id.* at 542.

8. *Id.*

9. *Id.*

10. *Id.* at 543. The original complaint named the dispatching police officer, the psychiatrist, the three police officers who helped carry out the order, the constable, the ambulance crew, and the psychiatrist's hospital as additional defendants. McCabe also alleged common law assault and battery, and negligence. She settled the claims against the doctor and the hospital, and the claims against the officers, constable, and ambulance crew were dismissed after the jury verdict. *Id.* at 543 n.3.

against the City.[11] In the subsequent trial, the jury awarded $850,000 in damages against the City and $500,000 against the ambulance service.[12] The City appealed, and the Court of Appeals for the First Circuit reversed, holding the search reasonable under the administrative search exception.[13]

II. LEGAL BACKGROUND

Over the last forty years, the United States Supreme Court has developed the administrative search exception to the general requirement of a warrant to avoid violation of the Fourth Amendment. The exception balances the particular needs of the searching entity, usually the government, with the privacy rights of the individual being searched. The exception was first enunciated in *Frank v. Maryland*,[14] when the Court held that an ordinance could give the administrative arms of government the right to a limited inspection of property without a warrant when required by special needs, such as health and safety.[15] Tracing the history of the Fourth Amendment to a reaction against warrantless searches for criminal evidence and citing the long tradition of city health and safety inspections, the Court determined that the public good accomplished by inspections outweighed any minimal privacy invasion.[16] The Court said that the balancing of public and private interests was appropriate in these special areas.[17]

Less than ten years later, in 1967, the Supreme Court overruled the *Frank* decision in *Camara v. Municipal Court*[18] and *See v. City of*

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11. 77 F.3d at 543, *rev'g*, McCabe v. City of Lynn, 875 F. Supp. 53, 63 (D. Mass. 1995).

12. 77 F.3d at 543.

13. *Id.*

14. 359 U.S. 360 (1959), *overruling* Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967). A property owner refused to allow a city inspector in his home after the inspector noticed signs of rodent infestation and requested admission. The inspector had the homeowner fined pursuant to a city ordinance that allowed inspections of homes during the daytime when there was reason to suspect a nuisance inside. This ordinance was upheld by the Supreme Court. *Id.* at 361-62.

15. *Id.* at 373.

16. *Id.* at 368-72. Important in the determination was the ordinance's restriction of the search to daytime, the need for the inspector to suspect a problem, and the fact that findings of a problem would not result in criminal liability for the home owner. *Id.* at 366-67.

17. *Id.* at 371-72.

18. 387 U.S. 523 (1967). A lessee of a ground floor apartment refused to allow an inspection for violations of the city housing code. The lessee was arrested and filed for a writ of prohibition. *Id.* at 525.

Seattle.[19] Finding that *Frank* wrongly restricted Fourth Amendment protections solely to people suspected of criminal activity, the Court in *Camara* determined that even in the health and safety realms, the relaxation of the warrant requirement for inspections was too broad.[20] Instead, a warrant for an administrative search should be sought if a citizen refused an inspector entry, unless there had been a citizen complaint or there was another "satisfactory reason for securing immediate entry."[21] The Court balanced the long tradition of health and safety inspections, the public benefit, and the search's limited intrusion against the privacy interests to find the necessary reasonableness.[22] Probable cause for a warrant would "exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to [the] particular dwelling."[23] In *See*, the Court held that for searches of businesses, an inspector, in the absence of consent, would also need a warrant.[24] However, licensing programs that require preliminary inspections were not included.[25]

Three years later, the Supreme Court applied the administrative search exception to statutorily mandated visits by welfare officials to recipients' homes in *Wyman v. James*.[26] The Court characterized such visits not as searches that would fall under the Fourth Amendment, but rather as interviews.[27] Assuming that the visits had indeed been searches, the Court held they were reasonable based on the public interest in caring for the recipients' children, the protection of the public trust of taxpayers' money, the proper interest a charitable agency has in its clients, the emphasis of the controlling statute on a close relationship with the recipient, and the statute's detailed rules limiting visits to daytime and only after advance notice.[28] Furthermore, the fact that the visits were not made by the police demonstrated that they were carried out for welfare and not for prosecution.[29] The Court discounted the need for a warrant in such situations: in order to obtain a warrant,

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19. 387 U.S. 541 (1967). A warehouse owner refused to submit to a fire inspection. The owner was arrested and fined. *Id.* at 541.

20. *Camara*, 387 U.S. at 530-34.

21. *Id.* at 539-40.

22. *Id.* at 537-39.

23. *Id.* at 538.

24. *See* 387 U.S. at 545.

25. *Id.* at 546.

26. 400 U.S. 309 (1971). James received state aid for her dependent child and refused to allow a visit, claiming it was a warrantless search. Denial of the visit meant cessation of her aid, and Mrs. James sought injunctive relief. *Id.* at 313-14.

27. *Id.* at 317-18.

28. *Id.* at 318-24.

29. *Id.* at 322-23.

the welfare official would need to establish a more compelling need than seeing the child in the home, which would defeat the purpose of the visit.[30] Finally, the Court distinguished *Frank*, *Camara*, and *See* because those defendants were faced with potential criminal charges, whereas Mrs. James faced only the cessation of benefits, which while valuable, were not constitutionally guaranteed rights.[31]

In the five years following *Camara* and *See*, the Supreme Court developed another facet of the administrative search exception: the "closely regulated business" exception. In this version of the exception, the legislature grants search power through a statute to a governmental regulatory agency. In *Colonnade Catering Corp. v. United States*[32] and *United States v. Biswell*,[33] the Court acknowledged that certain industries (in these cases, liquor and firearms) had long histories of governmental regulation that permit Congress to authorize warrantless inspections through specific statutes.[34] The Court distinguished *See*, in which the inspectors were trying to discover things that could not be concealed in a short amount of time, from *Biswell* and *Colonnade*, in which, if the inspections were to be effective, they had to be unannounced.[35] In balancing the public interest of apprehending lawbreakers against the privacy rights of the business, the Court reasoned that the dealers had chosen and benefitted from their regulated businesses and knew that tight regulation would prevail.[36] Thus, the dealers gave implied consent to searches by merely entering into such businesses.[37]

In *Marshall v. Barlow's, Inc.*,[38] decided several years later, the Court declined to extend the closely regulated business exception to all businesses subject to Occupational Safety and Health Act ("OSHA")

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30. *Id.* at 324.

31. *Id.* at 325-26.

32. 397 U.S. 72 (1970). A catering company refused inspectors access to its liquor supply, and the inspectors forced their way into the storeroom. *Id.* at 73. The Court held that the liquor industry was heavily regulated; therefore, the federal statute allowed the inspectors' warrantless searches. *Id.* at 76-77. However, the statute did not allow forced entry. *Id.* at 77.

33. 406 U.S. 311 (1972). Inspectors showed a gun dealer a copy of the statute that permitted warrantless searches, and the dealer allowed access to his storeroom where guns he was not licensed to carry were found. *Id.* at 312.

34. *Colonnade*, 397 U.S. at 76.

35. *Biswell*, 406 U.S. at 316.

36. *Id.*

37. Geoffrey G. Hemphill, *The Administrative Search Doctrine: Isn't this Exactly What the Framers Were Trying to Avoid?* 5 REGENT U. L. REV. 215, 234-35 (1995).

38. 436 U.S. 307 (1978). The owner of a plumbing and electrical installation business denied an OSHA inspector access to private areas of his business without a warrant. *Id.* at 310.

inspections.[39] The Court stated that the exception rarely applied, and that the fact that a business engaged in interstate commerce, and thus fell under the OSHA statute, did not render it closely regulated.[40] The Court reiterated the *Camara* standard for probable cause, which requires that the agency show that it chose the business to be searched based on standards in accordance with the statute,[41] and determined that the efficacy of the search would not be hampered by procuring a warrant under such a relaxed definition.[42]

The Supreme Court then extended and altered the closely regulated business exception in *Donovan v. Dewey*.[43] In that case, the Court determined that the federal interest in protecting health and safety conditions in the mining industry, and the deleterious delaying effect of a warrant requirement, justified a statutory system of warrantless inspections.[44] The Court distinguished *Marshall* because the statute at issue there was not tailored closely enough and "devolve[d] almost unbridled discretion upon executive and administrative officers."[45] Conversely, in *Donovan*, the statute satisfied the exception because it was well-tailored and its detailed nature eliminated the exercise of raw discretionary power by inspectors.[46] The Court rejected "closely regulated business's" older definition of a long history of regulation in favor of a classification based on the intensity of regulation, regardless of duration.[47]

In *New York v. Burger*,[48] the Court announced a three-part test for determining the validity of an administrative search statute in a closely regulated industry. First, there must be a substantial governmental interest "that informs the regulatory scheme pursuant to which the inspection is made."[49] Second, the procurement of a warrant must defeat the success of the inspection by, for example, taking too much

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39. *Id.* at 324.

40. *Id.* at 313-14.

41. *Id.* at 320-21. The Court suggested that probable cause could be based on a general administrative plan that subjected businesses with a certain number of employees to regular inspections. *Id.* at 321.

42. *Id.*

43. 452 U.S. 594 (1981). The president of a company owning a quarry refused to allow the warrantless search of its mine. *Id.* at 597. The Secretary of Labor relied upon a statute that authorized such searches, and the Court upheld the statute. *Id.* at 602.

44. *Id.* at 602-03.

45. *Id.* at 601.

46. *Id.* at 604-05.

47. *Id.* at 605-06.

48. 482 U.S. 691 (1987).

49. *Id.* at 702.

time or alerting the intended target.[50] Finally, the statute's inspection provisions must furnish a "constitutionally adequate substitute" for a warrant.[51] To satisfy this last element, the statute must advise the owner of the possibility of searches and be sufficiently limited and closely tailored.[52]

Although the closely regulated business component of the exception became more sophisticated, the Court did not abandon the simple balancing of an authority's needs with an individual's right to privacy as a means of allowing warrantless searches. This balancing alone justified a warrantless search of a student's purse in *New Jersey v. T.L.O.*[53] Although the Court denied that children in school have a lesser privacy interest, it observed that where the "balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."[54] The maintenance of a stable school environment required modifying the suspicion level of criminal activity to justify the search.[55] Hence, to determine if a search was reasonable, it need only be proved that the search was justified in its inception and reasonably related in scope to the circumstances which justified the original interference.[56]

O'Connor v. Ortega[57] balanced the public employer's need to search an employee's desk with the employee's right to privacy at work. The Court determined that the employee's right to privacy, though well-founded, was subject to infringement by a supervisor for work-related reasons because the requirement of a warrant at that point would "seriously disrupt the routine conduct of business."[58] Likewise, requiring probable cause would not be appropriate when the supervisor's intrusion is work-related, or even when the intrusion results from a work-related employee misconduct investigation, because of the governmental interests of efficient and inexpensive operations.[59]

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50. *Id.* at 702-03.
51. *Id.* at 703.
52. *Id.*
53. 469 U.S. 325 (1985). A high school student found smoking in the bathroom denied the charge, but her principal, upon opening her purse, found cigarettes and marijuana. The student argued for suppression of the marijuana on the basis of an unreasonable search. *Id.* at 328-29.
54. *Id.* at 341.
55. *Id.* at 342-43.
56. *Id.* at 341.
57. 480 U.S. 709 (1987).
58. *Id.* at 722.
59. *Id.* at 723-24.

Instead, the Court relied on the reasonableness standard for a warrantless search and found that this less demanding standard had been met because the employer's special needs exceeded the normal needs of law enforcement.[60]

Before *McCabe*, Fourth Amendment challenges to involuntary commitment focused on the seizure aspect of the Amendment. The Seventh Circuit Court of Appeals determined in *Villanova v. Abrams*[61] that probable cause existed for detainment and did not entertain any exceptions to the warrant requirement.[62] Likewise, the Tenth Circuit used the traditional probable cause standard with no discussion of a lesser standard of proof.[63] Thus, the law regarding violations of the search component of the Fourth Amendment as applied to involuntary confinements was neither settled nor even addressed at the time the First Circuit decided *McCabe*.

III. COURT'S RATIONALE

Recognizing that *McCabe* was a case of first impression, the Court of Appeals for the First Circuit began its discussion of the constitutional claims by exploring two exceptions to the presumption that a search is unreasonable in the absence of a warrant.[64] Apart from the administrative search exception is the exigent circumstances exception, which allows an agent to make a sudden decision that a search is necessary when it is impractical for the police to delay.[65] The court determined that it did not need to find an exigent circumstances exception because the facts fit the administrative search exception so well.[66]

Following this determination, the court turned to the *Burger* three-part administrative search test. First, the court discussed the government's interests: the legitimacy of the State's *parens patriae*[67] and police power interests in assuring that dangerous people do not harm

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60. *Id.* at 724-25.

61. 972 F.2d 792 (7th Cir. 1992).

62. *Id.* at 795.

63. Pino v. Higgs, 75 F.3d 1461, 1468 (10th Cir. 1996).

64. 77 F.3d 540, 545 (1st Cir. 1996).

65. *Id.* Plaintiff addressed only the exigent circumstances exception, and pointed to the entire day delay from the time the commitment notice was issued until the following afternoon when the constable arrived at the apartment as evidence of the lack of such circumstances. She also contended that no exigent circumstanes would have allowed the constable to arrange a meeting time with the police officers. Conversely, the City argued that every commitment is exigent per se because a physician can only issue the order if there is evidence that the subject is likely to seriously harm herself or others. *Id.* at 546.

66. *Id.* at 545.

67. This term characterizes the role of the state as sovereign and guardian of persons under a legal disability, such as the insane. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

themselves or others was beyond dispute.[68] The court compared the urgency and the compelling nature of the facts to the facts in *Burger* and *Ortega*, and determined that because *McCabe* dealt with the potential of death or bodily injury, it easily satisfied the state interest test.[69] Next, the court inquired whether the residential search procedures were appropriately tailored to the above interests.[70] The court examined the four categories of commitment procedures contained in the Massachusetts involuntary commitment statute.[71] Mrs. Zinger's condition fit the second provision, which allowed a physician, who had not seen the patient, to sign an order if the situation suggested that the person would create the likelihood of serious harm.[72] Noting that the Massachusetts statute defined likelihood of serious harm as "evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them," the court determined the physician satisfied this element through his evaluation of Mrs. Zinger's threats.[73] Furthermore, the statute provided as precise a standard for human behavior as the court thought could be expected.[74] Finally, the statute was sufficiently well-tailored because the police officer was permitted to enter the residence for the sole purpose of executing the commitment order.[75]

Next, the court examined whether a warrant would defeat the important purposes of the search.[76] Although plaintiff pointed to the full-day delay before the police acted, the court replied that determining whether a delay would harm the efficacy of the procedure is based on the systemic attributes of the procedure itself.[77] Thus, although the delay may not have caused a negative effect in the instant case, a delay in the process in such cases would, in the aggregate, significantly risk the chance of a negative outcome because the commitment procedure dealt with people who were potentially dangerous.[78] More importantly, the court posited, little additional protection would be offered by a magistrate executing a warrant in such a case because the physician, not the magistrate, has expertise in this area.[79]

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68. 77 F.3d at 547.
69. *Id.*
70. *Id.*
71. 77 F.3d at 547-48 (citing MASS. GEN. LAWS ANN. ch. 123 § 12(a) (1996)).
72. *Id.*
73. *Id.* at 548.
74. *Id.*
75. *Id.* at 548-49.
76. *Id.* at 549.
77. *Id.*
78. *Id.* at 550.
79. *Id.*

Finally, the court considered whether the procedure infringes on the interests of the mentally ill.[80] Echoing *O'Connor*, the court indicated that the sometimes different standards of intrusiveness for searches in the civil context were appropriate, compared to those for criminal activity.[81] Supporting this characterization was the fact that a physician, not law enforcement officials, made the decision to search.[82] The physician's relationship with the patient, unlike that of the parties conducting a criminal search, is not adversarial, and the physician performs an ostensibly neutral role akin to that performed by a magistrate.[83] By contrast, the lower court had rejected the statute because it found that no therapeutic relationship was disrupted by a warrant procedure, because police officers and not orderlies or nurses acted as the agents of the search.[84] However, the court of appeals countered that many municipalities do not have the personnel to assign nonpolice officers to such duties, and that the scope of the police officers' search is so confined that it was irrelevant that police officers carried out the commitment order.[85] The court emphasized that it was approving only the statute before it.[86]

IV. IMPLICATIONS

The administrative search exception has been criticized for denying citizens the very rights that the Fourth Amendment seeks to protect.[87] Upon examining the history of the Fourth Amendment it becomes clear that general warrants permitting searches of citizens without the intervention of a magistrate were precisely what the Framers sought to prevent.[88] Cases such as *Burger* and *Donovan* involved statutes that resembled in breadth a general warrant from the colonial period because of the lack of individualized suspicion regarding the entity to be searched.[89] *T.L.O.* and *O'Connor*, on the other hand, involved such

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80. *Id.* at 551.
81. *Id.* at 552.
82. *Id.*
83. *Id.*
84. *Id.* at 553.
85. *Id.*
86. *Id.* at 554.
87. *See, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978); Hemphill, *supra* note 37, at 218-31.
88. *Marshall*, 436 U.S. at 311; Hemphill, *supra* note 37, at 220-22.
89. Hemphill, *supra* note 37, at 256; Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEMPHIS L. REV. 483, 485-86 (1995).

individualized specificity, but relied only on special needs and did not have the statutory substitute for a warrant.

Approving the search in *McCabe* required only a small step beyond the principles set forth in cases mentioned above. Not only did the police officers who conducted the search have a substitute for a warrant, but that substitute was also highly individualized because of the burdens of proof regarding Mrs. Zinger's behavior. As the court of appeals noted, the physician functioned as a surrogate magistrate. Also, unlike *Burger*, in which the defendant was convicted as a result of evidence found in the search, the search in *McCabe* could not lead to criminal charges. Yet in *McCabe*, the procedure could have been significantly improved had the statute authorized the committing physician to dictate the escalation of force and how the police should carry out the commitment procedure.[90] It is the physician, after all, who is aware of the nature of the psychiatric condition suffered by the person to be committed. Furthermore, the physician in this case, as a result of the report by her children, may have been aware that Mrs. Zinger was scared of the police and could have thus mitigated the confrontation. Such intervention may have prevented Mrs. Zinger's death.

Extensions of the administrative search exception are often viewed as eroding Fourth Amendment rights.[91] In the years since *Burger* and *Griffin*, the Supreme Court has extended the exception to suspicionless drug testing[92] and individualized AIDS testing.[93] Because the test used in determining the reasonableness of the search balances individual rights against society's safety, one commentator argues that the formula is skewed towards upholding the searches' reasonableness.[94] Each expansion seems to erode the protections the Fourth Amendment once granted, and for this reason, any extension should be closely scrutinized.

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90. Although the Lynn Police Department had various rules about the escalation of force, none of them took into account the known behaviors of the particular person being committed—information that a physician could give through specific instructions. McCabe v. City of Lynn, 875 F. Supp 53, 57, 58 (D. Mass. 1995).

91. *See, e.g.*, Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 90 (1992).

92. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

93. Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820 (5th Cir. 1990).

94. Nuger, *supra* note 91, at 131.