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COURT OF APPEALS, STATE OF COLORADO

101 W. Colfax Avenue, Suite 800
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District Court for the City and County of Denver
Honorable Larry J. Naves, Judge
Case No. 06CV11473

PLAINTIFF-APPELLANT: WARD CHURCHILL

DEFENDANTS-APPELLEES: THE UNIVERSITY OF COLORADO, THE REGENTS OF THE UNIVERSITY OF COLORADO, a Colorado body corporate.

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Case Number: 09CA1713

APPELLANT'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g). It contains 5,669 words.

2. C.A.R. 28(k) is not applicable to this brief. The Opening Brief contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

s/ Antony M. Noble

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Congress enacted 42 U.S.C. § 1983 to ensure that persons deprived of constitutional rights by state officials would have meaningful legal remedies. *See Monell v. Dept. of Social Services*, 436 U.S. 658, 685 (1978). In this case, the jury found that the University violated Professor Churchill's First Amendment rights. These rights are given specific protection in universities through the principle of academic freedom. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (noting that speech by professors is a "special concern of the First Amendment").

The United States Supreme Court has recognized that academic freedom protects a vital national interest, and that "universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). In *Sweezy v. New Hampshire*, the Court noted educators' "vital role in a democracy" and cautioned that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." 354 U.S. 234, 250 (1957).

Officials seeking immunity must show that exemption from liability "is justified by overriding considerations of public policy," *Forrester v. White*, 484 U.S. 219, 224 (1988), and absolute immunity should be granted only when required by public policy. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807-808 (1982). The policy implications of restrictions on political speech and academic freedom by state university officials must

be considered in deciding each of the issues raised in this appeal. It is insufficient to address only implications relating to the efficient functioning of state government, as the University and its amici have done.

I. The trial court erred by granting the University's motion for a directed verdict as to the first claim for relief because Professor Churchill presented ample evidence at trial for the jury to determine that the investigation into his writings and public speeches was an adverse employment action.

The University contends that, as a matter of law, an investigation of a government employee is not an adverse employment action that is cognizable under section 1983. [Answer Brief, p. 25]. It fails to acknowledge that there is an established test that courts must apply to determine whether an action by a government employer is an adverse employment action.

As stated in the Opening Brief, when analyzing First Amendment claims under section 1983, courts must apply the test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), as modified by *Garcetti v. Ceballos*, 547 U.S. 410 (2006). [Opening Brief, p. 9, *citing* *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1301-02 (10th Cir. 2009)]. The Tenth Circuit has noted that "[i]mplicit in the *Pickering*[/*Garcetti*] test is a requirement that the public employer have taken some adverse employment action against the employee." *Belcher v. City of McAlester, Okla.*, 324 F.3d 1203, 1207 n.4 (10th Cir. 2003). An adverse employment action in this context is one that would deter a reasonable

person from exercising his First Amendment rights. *Couch v. Bd. of Trs. of the Mem. Hosp.*, 587 F.3d 1223, 1238 (10th Cir. 2009).

The University does not contest that the investigation into Professor Churchill would have deterred a reasonable person from exercising his First Amendment rights. Instead, it argues that there is a general rule that investigations by government employers are not adverse employment actions. [Answer Brief, p. 25]. In support of this contention, the University cites to opinions, including unpublished opinions and district court opinions, in which courts have held that the investigations in the cases before them were not adverse employment actions.

The University has not cited to, nor attempted to distinguish, the published opinions in which federal courts of appeals have held that an investigation is an adverse employment action. *See, e.g., Poland v. Chertoff*, 494 F.3d 1174, 1180 (9th Cir. 2007) (holding that an initiation of an administrative inquiry against a Customs employee was an adverse employment action); *Coszalter v. City of Salem*, 320 F.3d 968, 976–77 (9th Cir. 2003) (holding that an unwarranted disciplinary investigation was an adverse employment action); *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 977 (9th Cir. 2002) (holding that a hospital's investigation of a doctor that threatened to take away the doctor's clinical privileges was an adverse employment action); *Allen v. Iranon*, 283 F.3d 1070, 1076 (9th Cir. 2002) (discussing internal affairs investigations as

adverse employment actions that could ground section 1983 liability); *Hetzel v. County of Prince William*, 89 F.3d 169, 171 (4th Cir. 1996) (noting that an internal affairs investigation can constitute an adverse employment action); *Levin v. Harleston*, 966 F.2d 85, 89 (2nd Cir. 1992) (holding that a university president's announcement of the appointment of an ad hoc committee to investigate a professor's speech is actionable under section 1983); *Rakovich v. Wade*, 819 F.2d 1393, 1397 (7th Cir. 1987) (holding that an investigation undertaken in retaliation for exercise of constitutionally protected rights is actionable under section 1983), *vacated on issue of damages on reh'g*, 850 F.2d 1180 (7th Cir. 1988).

To determine whether the University's investigation in this case was an adverse employment action, this Court must determine whether the investigation would have deterred a reasonable person from exercising his First Amendment rights. The case that provides the most guidance to this Court is *Levin v. Harleston, supra,* in which the Second Circuit held that the threat of discipline implicit in a university's investigation was sufficient to create a judicially cognizable chilling effect on a professor's First Amendment rights. *Levin*, 966 F.2d at 89. The Second Circuit explained that "[i]t is the chilling effect on free speech that violates the First Amendment, and it is plain that an implicit threat can chill as forcibly as an explicit threat." *Id.*

Here, there were implicit and explicit threats of discipline and termination

when the University investigated Professor Churchill's writings and public speeches. Philip DiStefano, the interim chancellor at the time of the investigation, admitted during his testimony that the ad hoc committee was charged only with examining the content of Professor Churchill's speech, and that it was trying to find "cause for dismissal." [Trial Transcript, 3/10/09, pp. 459:5-460:9]. Regent Patricia Hayes admitted during cross-examination that she voted in favor of launching the investigation into everything that Professor Churchill had ever written to see if there were grounds for dismissal. [Trial Transcript, 3/30/09, p. 3651:11-17]. Regent Lucero, appearing on Scarborough Country, said, "We, the Board of Regents, have called this special meeting in part to hear from the Boulder campus chancellor and to hear what his course of disciplinary action is." [Trial Transcript, 3/31/09, p. 3942:15-21]. Regent Carrigan told a New York Times reporter, "We can fire Churchill. We just can't fire him tomorrow." [Trial Transcript, 3/27/09, pp. 3281:3-3283:8]. These implicit and explicit threats of discipline and termination would deter a reasonable person from exercising his First Amendment rights. *See Levin*, 966 F.2d at 89; *see also Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990) (threats of dismissal based on an employee's speech may constitute adverse employment action).

In the *Levin* case, the professor turned down at least twenty invitations to speak or write about his controversial views because he feared the University would fire

him. *Levin*, 966 F.2d at 89. Similarly, Professor Churchill missed deadlines, defaulted on book contracts, and had speaking engagements canceled. [Trial Transcript, 3/24/09, p. 2628:8-25 and 3/25/09, pp. 2880:18-2881:7]. The University contends that it did not take these actions and therefore is not liable. [Answer Brief, p. 31]. Nevertheless, these are examples of the chilling effect that such investigations have on the exercise of First Amendment rights, and the University was responsible for launching the investigation in this case.

The University acknowledges that Trial Exhibit 14-1 shows that Professor Churchill was not allowed to take a sabbatical or to "unbank" courses during the investigation into his public writings and speeches. [Answer Brief, p. 31]. The University contends, however, that Professor Churchill did not present any testimony to demonstrate how these actions could constitute adverse employment actions. [Answer Brief, pp. 31-32]. Exhibit 14-1 was admitted into evidence by stipulation of the parties, and Professor Churchill's attorneys could have referred to it during closing argument and explained to the jury how these actions were adverse employment actions (if the trial court had not entered a directed verdict on the first claim for relief). No limitations were placed on any of the trial exhibits pursuant to CRE 105, and the jury was specifically instructed that it could consider "all exhibits which have been received in evidence." [Jury Instruction No. 5].

If the trial court had not entered the directed verdict, the jury could have considered the exhibit to determine whether the University's refusal to allow Professor Churchill to take a sabbatical or to "unbank" courses were adverse employment actions. These refusals could constitute adverse employment actions because they affected Professor Churchill's employment and could deter a reasonable person from exercising his First Amendment rights. *See, e.g.,* *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1245 (8th Cir. 1998) (denial of vacation days "easily qualifies" as an adverse employment action because it was a material change in employment benefits).

The trial court erred by entering a directed verdict on the first claim for relief because there was ample evidence presented at trial for the jury to determine that the University's investigation into Professor Churchill's public writings and speeches was an adverse employment action. The directed verdict should therefore be vacated and this case should be remanded for a new trial on the first claim for relief.

II. The trial court erred in granting the University's motion for judgment as a matter of law based on quasi-judicial immunity because the Regents did not meet the requirements of functioning in a judicial capacity in this case.

Contrary to the University's assertion [Answer Brief, p. 40], Professor Churchill, the American Association of University Professors, and other amici are

absolutely serious that quasi-judicial immunity does not apply to the University in this case. This contention is supported by the overwhelming weight of federal precedent.

The University acknowledges that in *Wood v. Strickland*, 420 U.S. 308, 320 (1975), the Supreme Court held that school officials and elected board members taking disciplinary action against students are not entitled to quasi-judicial immunity. [Answer Brief, p. 40]. The University's failure to address the implications of *Wood* is significant because the Supreme Court has repeatedly emphasized that academic freedom—the unique safeguard afforded the First Amendment in universities—"is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian*, 385 U.S. at 603.

The Supreme Court has insisted that officials who seek absolute immunity bear "the burden of showing that such an exemption is justified by overriding considerations of public policy." *Forrester*, 484 U.S. at 224. Yet the University fails to address the federal precedent denying quasi-judicial immunity to school officials taking adverse action against faculty members. *See, e.g., Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 224-25 (5th Cir. 1999), *cert. denied*, 528 U.S. 1022 (1999) (denying quasi-judicial immunity to school district Board of Trustees); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1508 (11th Cir. 1990) (denying quasi-judicial immunity to school board members for teacher dismissal); *Purisch v. Tenn. Technological Univ.*, 76

F.3d 1414, 1422 (6th Cir. 1996) (denying quasi-judicial immunity to university officials because they lacked sufficient independence); *see also* *Osteen v. Henley*, 13 F.3d 221, 224 (7th Cir. 1993) (noting that university officers were "most unlikely" to have absolute immunity "given the Supreme Court's refusal to grant such immunity to members of school boards that adjudicate violations of school disciplinary regulations").

The University and the State of Colorado rely on two district court cases in which university officials were granted immunity. One is *Hulen v. State Board of Agriculture*, 98-B-2170 (D. Colo. 2001), an unpublished opinion in which the trial court granted certain defendants quasi-judicial immunity in their individual capacities, but nonetheless denied them qualified immunity and allowed the plaintiff's constitutional claims to proceed to trial for a determination of equitable relief.

The second case is *Gressley v. Deutsch*, 890 F. Supp. 1474 (D. Wyo. 1994), which has not been cited favorably in any other case since it was issued. The University relies upon *Gressley*'s three-factor analysis (similarity to judicial process, likelihood of lawsuits by disappointed parties, and regulatory safeguards) to argue that the Regents qualify for absolute immunity in this case. [Answer Brief, pp. 43-44]. This test is loosely derived from *Butz v. Economou*, 438 U.S. 478, 512 (1978), and, for reasons explained in the Opening and Amici Briefs, the University fails to meet each of the prongs of the *Butz* formulation. More significantly, however, the University fails to

acknowledge that the *Butz* analysis was clarified by the Supreme Court in *Cleavinger v. Saxner*, 474 U.S. 193 (1985).

In *Cleavinger*, the Court denied quasi-judicial immunity to a prison disciplinary committee, articulating six factors "characteristic of the judicial process" to be considered:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

Cleavinger, 474 U.S. at 202, *citing Butz*, 438 U.S. at 512.

The *Cleavinger* formulation has been "follow[ed] carefully" by the Tenth Circuit in assessing claims for absolute immunity. *See Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315, 1317 (10th Cir. 2002) (upholding denial of quasi-judicial immunity to a medical peer-review committee); *see also Mee v. Ortega*, 967 F.2d 423, 428 (1992) (denying quasi-judicial immunity to parole officer and noting that "[c]onsideration of the factors outlined in *Cleavinger* necessarily informs our decision").

The University does not apply the *Cleavinger* test. *Cleavinger* is not even cited in its Answer Brief, and is cited only in passing by the trial court. [Order, 7/7/09, p. 19, para. 53]. In *Harris v. Victoria Indep. Sch. Dist.*, *supra*, a First Amendment retaliation

case brought by dismissed teachers, members of the Board of Trustees and the district court relied upon a test for quasi-judicial immunity developed by Texas courts. On appeal, the Fifth Circuit overturned the grant of immunity, noting that the precedent relied upon by the defendants had "analyzed the procedure using different factors from the federal rule" and that the trial court had failed to apply the *Cleavinger* factors. *Harris*, 168 F.3d at 224.

The University and its amici rely heavily on *Widder v. Durango School Dist. No. 9-R*, 85 P.3d 518 (Colo. 2004), which the University describes as "solid precedent." [Answer Brief, p. 34; State of Colorado Amicus Brief, pp. 19-21; Colorado Counties Amicus Brief, pp. 10-11]. *Widder*, brought by a custodian fired for an altercation with a student, involved only questions of state law. It was not brought under section 1983, did not involve questions of federal law, did not implicate the First Amendment or academic freedom, and did not apply *Cleavinger* or any other federal cases. For similar reasons, *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622 (Colo. 1988), which involved zoning restrictions and was decided under state law, is inapplicable.

Supreme Court precedent cannot be ignored in assessing claims brought under section 1983 for violations of rights guaranteed by the federal Constitution. With respect to quasi-judicial immunity, this means applying the Supreme Court's analysis

in *Cleavinger*. *See* *Harris*, 168 F.3d at 224. Notably, *Cleavinger* analogized the prison disciplinary committee, which was denied quasi-judicial immunity, to the school board in *Wood*. *Cleavinger*, 474 U.S. at 204-205 (*quoting* *Wood*, 420 U.S. at 320). In applying *Cleavinger* to deny immunity in *Harris,* the Fifth Circuit also relied upon *Wood*, noting that "at least one other circuit has extended [*Wood*'s holding concerning student discipline] to deny absolute immunity to school boards' decisions concerning a faculty member's employment." *Harris,* 168 F.3d at 224 (*citing* *Stewart*, 908 F.2d at 1507-08).

The factors identified in *Cleavinger* are addressed in Professor Churchill's Opening Brief, pp. 16-24, as well as in the Amicus Brief of the National Lawyers Guild, Center for Constitutional Rights, and Society of American Law Teachers, pp. 22-26. Without repeating those arguments, it must be noted that the University's Answer relies heavily on the proposition that because quasi-judicial immunity is determined according to a functional analysis, "[i]t is the nature of the decision, not the official's conduct in a particular case that confers" immunity. [Answer Brief, p. 33].

This overgeneralization disregards the need to apply the *Cleavinger* factors with specificity, and improperly assumes that the existence of procedure *per se* entitles the University to absolute immunity. The *Cleavinger* factors provide guidance for assessing the adequacy of extant procedures. Moreover, when constitutional rights are at stake,

"not only must applicable statutes and regulations be consulted as to the function of each particular governmental officer, but *inquiry must be directed to the reality of custom and practice* (emphasis added)." *Mason v. Melendez*, 525 F.Supp. 270, 277 (W.D. Wis. 1981). In this case, the University and amici State of Colorado provide detailed explanations of the rules governing faculty dismissal, but disregard "the reality of custom and practice." [Answer Brief, pp. 2-4, 8-12, 15-16; State of Colorado Amicus Brief, pp. 4-10].

In *Moore*, the Tenth Circuit applied a detailed *Cleavinger* analysis before denying quasi-judicial immunity to hospital administrators and peer-review committees. *Moore*, 310 F.3d at 1317-1319. In analyzing potential harassment or intimidation, the court weighed not only the potential for harassment of committee members, but also the reality that in that particular community "there is the potential for [the reviewers requesting immunity] to harass other members of their profession by initiating frivolous investigations and disciplinary proceedings." *Id.* at 1317. In contrast, the University claims that its officials should be granted absolute immunity regardless of bias. [Answer Brief, p. 34].

Considering the political influence factor, the *Moore* court found that because members of the review committee worked at the same hospital as the plaintiff, and were peers as well as competitors in a small community, the defendants lacked the

requisite political independence. *Id.* at 1318. In *Cleavinger*, the Supreme Court denied quasi-judicial immunity to members of a disciplinary board because they were not independent, professional hearing officers but employees of the Bureau of Prisons and co-workers of those bringing the allegations and, therefore, were "under obvious pressure to resolve a disciplinary dispute in favor of the institution. . . ." *Cleavinger*, 474 U.S. at 204.

As these examples illustrate, the realities of a workplace or community and the pressures likely to influence particular decision makers must be taken into account under *Cleavinger*. The University attempts to avoid such scrutiny. Instead of addressing the precedent relevant to determinations of quasi-judicial immunity, it relies upon cases holding that state actors *already* found to be absolutely immune cannot be personally liable for malicious or biased actions. [Answer Brief, p. 33].

The final *Cleavinger* factor requires that errors made by those granted quasi-judicial immunity be correctable on appeal. Rather than considering the availability of judicial review as part of the determination for *whether* quasi-judicial immunity is appropriate, the University relies on the fact that C.R.C.P. 106 provides limited review of decisions by those already deemed to be exercising quasi-judicial functions. [Answer Brief, p. 37]. Neither the University nor its amici cite any federal precedent indicating that Rule 106 would provide adequate appellate review under the *Cleavinger*

test.

Under Rule 106(a) only decisions "so devoid of evidentiary support that [they] can only be explained as an arbitrary and capricious exercise of authority" will be overturned. *Widder*, 85 P.3d at 526-27. This does not constitute adequate appellate review. *See DiBlasio v. Novello*, 344 F.3d 292, 299 (2nd Cir. 2003) (finding a New York civil practice rule providing similar relief inadequate "in the context of determining whether absolute immunity is appropriate").

States may not impose procedural rules that restrict substantive federal rights in a section 1983 lawsuit. *See Felder v. Casey*, 487 U.S. 131, 139 (1988). Our supreme court has stated explicitly that "an action challenging a quasi-judicial decision of a governmental body and requesting money damages under §1983" cannot be constrained by the limits on Rule 106 actions because "claims under §1983 exist as a 'uniquely federal remedy' that 'is to be accorded a sweep as broad as its language.'" *Board of County Commissioners of Douglas County v. Sundheim*, 926 P.2d 545, 548 (Colo. 1996) (citations omitted).

Finally, the University and its amici fail to respond at all to Supreme Court precedent clearly establishing that quasi-judicial immunity is a defense which is not available to those sued in their official capacities. [Opening Brief, p. 18]. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

For these reasons, the trial court erred in ruling that the University was entitled to quasi-judicial immunity and in entering judgment as a matter of law on the second claim for relief. The judgment should therefore be reversed, and this case remanded with instructions to reinstate the jury's verdict and reinstate Professor Churchill to his position at the University.

III. The trial court erred by denying Professor Churchill's motion for reinstatement of employment because reinstatement, which is the preferred remedy, is supported by the jury's verdict and the evidence on the record.

The University erroneously states that this Court is only required to consider reinstatement if it overturns the trial court's ruling on quasi-judicial immunity. [Answer Brief, p. 49]. The University relies heavily on the unpublished opinion in *Hulen v. State Board of Agriculture*, 98-B-2170 (D. Colo. 2001) to make its immunity arguments. However, it completely ignores the fact that the *Hulen* court also stated, "While quasi-judicial immunity prevents Dr. Hulen from receiving damages from these two Defendants, it does not prevent his suit against them so far as it requests equitable relief." *Id.* at 20. On appeal, the Tenth Circuit confirmed that the university president's quasi-judicial immunity "insulates him only from monetary damages and not from the burden of litigation on the due process claim, as would a grant of qualified immunity." *Hulen v. Yates*, 322 F.3d 1229, 1236 (10th Cir. 2003). Thus,

regardless of whether this Court affirms or reverses the trial court's ruling that the University had quasi-judicial immunity, reinstatement must also be addressed.

The jury found that the University violated Professor Churchill's rights under the First Amendment and that it would not have fired him for other reasons in the absence of his protected speech. [Jury Verdict Form, Questions 1, 3]. Thus, state officials were found to have engaged in precisely the sort of constitutional violation that section 1983 is intended to redress, yet the University claims that Professor Churchill is not entitled to any equitable remedy. Its arguments conflate liability, monetary damages for past injury, and prospective equitable relief. The University disregards the legal standards established by relevant case law, relying instead on a selective reading of the evidence and a counterfactual interpretation of the jury verdict.

A. Consistency with the Jury Verdict

In arguing against reinstatement, the University ignores the jury's finding of liability and relies solely on its award of nominal damages. [Answer Brief, pp. 49-50]. It correctly observes that a district court "may not ignore" a jury's finding of fact even when "considering equitable claims with elements different from those of the legal claims which the jury had decided." [Answer Brief, p. 50, *citing* *Ag Services of America, Inc. v. Nielsen*, 231 F.3d 726, 732 (10th Cir. 2000)]. In *Nielsen,* the Tenth Circuit held

that the trial court's denial of equitable relief after a favorable jury verdict on the legal issues violated the Seventh Amendment. *Id.* at 732-734. Because the jury found that Professor Churchill's First Amendment rights were violated, this principle supports the granting of equitable relief in this case.

Professor Churchill emphasized in his trial testimony that he was not concerned with compensation for past damages, but only with reinstatement. [Trial Transcript, 3/24/09, p. 2626: 4-11]. To ensure that this was clearly conveyed, he made a strategic decision not to call his expert witness on economic damages. [Reinstatement Transcript, 7/1/09, pp. 132:12-133:9]. Professor Churchill's emphasis on the importance of equitable remedies rather than money damages cannot be the basis for denying him an equitable remedy. The jury was not empowered to address prospective remedies and made no finding, explicit or implicit, supporting a denial of equitable relief.

Nominal damages can vindicate "rights whose deprivation has not caused actual, provable injury," *Memphis Community School District v. Stachura*, 477 U.S. 299, 308 n11 (1986), but the Supreme Court has never equated nominal damages with the absence of injury, or said that they preclude equitable relief. Rather, as the Third Circuit summarized, "[o]nce a jury has found in favor of plaintiff on liability, the existence of a constitutional deprivation is an established fact which may not be re-

examined in the district court's subsequent determinations—including determinations of appropriate equitable remedies." *Squires v. Bonser*, 54 F.3d 168, 174 (3rd Cir. 1995). The trial court's failure to comply with this well-established principle of law constituted an abuse of discretion.

B. Reinstatement

The fundamental issue is whether the University can fire tenured professors at will, in violation of the Constitution, without consequence. The purpose of section 1983 is to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Reinstatement is the legally preferred remedy because it provides the most appropriate relief for wrongfully terminated employees and is most likely to deter state actors from willfully violating the Constitution. *See Reeves v. Claiborne County Bd. of Education*, 828 F.2d 1096, 1102 (5th Cir. 1987) (overturning denial of reinstatement despite replacement hire because otherwise "the deterrent effect of the remedy of reinstatement would be rendered a nullity").

"Although reinstatement is not 'absolute and automatic,' it is clear that 'once the plaintiff establishes that his discharge resulted from constitutionally impermissible motives, he is *presumed* to be entitled to reinstatement.' (Emphasis of the court)."

Jackson v. City of Albuquerque, 890 F.2d 225, 233 (10th Cir. 1989) (*quoting* *Reeves*, 828 F.2d at 1101). "[R]einstatement is a basic element of the appropriate remedy in wrongful employee discharge cases and, except in extraordinary cases, is *required* (emphasis added)." *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1305 (11th Cir. 1982). None of the University's claims provide grounds for overcoming this presumption.

The University asserts that hostility between the parties precludes reinstatement [Answer Brief, p. 52-53]. While animosity occasionally justifies nonreinstatement, this is usually when the employee would be further penalized by returning to the workplace. *See, e.g.,* *Starrett v. Wadley*, 876 F.2d 808, 824 (10th Cir. 1989) (upholding denial of reinstatement where plaintiff's expert provided evidence of detrimental health effects).

It is an abuse of discretion to allow the University to create conditions that preclude reinstatement. In *Price v. Marshall Erdman & Associates, Inc.*, the Seventh Circuit held that "'mutual dislike and defendants' continued opinion that plaintiff is incompetent' are not satisfactory" reasons to deny reinstatement. 966 F.2d 320, 325 (7th Cir. 1992). It emphasized that the discharged employee's desires may provide good reason for denying reinstatement, but that an "employer's dislike of the employee's returning is a far more problematic ground for declining to order

reinstatement" because accepting of this reason would likely "reward the employer for the very attitudes that precipitated his violation of the law. . . ." *Id.*

In *EEOC v. Century Broadcasting Corp.*, the Seventh Circuit rejected the hostility argument and ordered reinstatement because there was no evidence of animosity prior to the defendant's adverse employment actions. 957 F.2d 1446, 1462 (7th Cir. 1992). The evidence in this case established that there was no hostility between the University and Professor Churchill until the University took unconstitutional action in response to his protected speech. [Trial Transcript, 3/10/09, pp. 384:12-385:9; 3/12/09, pp. 864:20-866:3; 3/25/09, pp. 2927:24-2932:12].

In determining if denial of reinstatement is required, the critical question is whether the employee will be able to perform his job. In universities, divergent views and approaches are not simply to be tolerated but encouraged. [ACLU Amicus Brief, pp. 33-37]. Professor Churchill testified that he harbors no ill-will which would prevent him from fulfilling his job responsibilities. [Reinstatement Transcript, 7/1/09, pp. 122:10-125:4, 126:2-21, 161:23-163:10]. Emma Perez, his department Chair and immediate supervisor, testified that Professor Churchill was needed and would be welcomed back by the department. [Reinstatement Transcript, 7/1/09, pp. 13:5–24:13, 43:2–44:11]. Professors Thomas Mayer and Margaret LeCompte testified

similarly. [Reinstatement Transcript, 7/1/09, pp. 46:20-59:14, 87:12-88:3, 88:19-90:25, 92:4-93:2].

Professor Churchill's rejection of the legitimacy of the University's research misconduct investigation is not a legally valid reason to deny reinstatement. The jury found that the University would not have dismissed Professor Churchill for other reasons—i.e., research misconduct—in the absence of his protected speech activity. [Jury Verdict Form, Question 3]. Moreover, the faculty committee that assessed the evidence on the research misconduct charges did not recommend dismissal. [Order, 7/7/09, p. 33, para. 97].

If the research misconduct investigation did not provide legal grounds for termination, it is an abuse of discretion to rely on the results of that investigation—or Professor Churchill's opinions about its accuracy—to deny reinstatement. *See* *Century Broadcasting*, 957 F.2d at 1462 (overturning trial court's denial of reinstatement because it was based in part on reasons rejected by the jury); *Price*, 966 F.2d at 325 (in deciding reinstatement district court was bound by jury's implied rejection of plaintiff's alleged incompetence as reason for termination).

The University's claim that reinstating Professor Churchill would prevent it from holding Professor Churchill or others to accepted academic standards in the future [Answer Brief, p. 53] is similarly unfounded. Contrary to the University's

assertion, Professor Churchill has never expressed an unwillingness to conform to accepted academic standards. Indeed, the bulk of the evidence he provided at trial went to establishing that he did comply with such standards. Reinstating Professor Churchill would not preclude any legitimate investigations but only those used pretextually to terminate employees for constitutionally invalid reasons.

Finally, the University cites research misconduct complaints filed by Professor Churchill against other faculty members as grounds to deny reinstatement. [Answer Brief, p. 53]. There is no evidence in the record that Professor Churchill ever filed complaints in bad faith or with retaliatory purpose. His testimony to that effect [Reinstatement Transcript, 7/1/09, p. 131:9-12] was corroborated by Dean Todd Gleason [Reinstatement Transcript, 7/1/09, p. 198:19-21]. In addition, the record reflects that research misconduct complaints were filed against the University investigative committee by outside experts and scholars, evidencing a substantive basis for such complaints. [Trial Transcript, 3/17/09, pp. 1746:23-1747:14; 3/18/09, 1828:12-1829:22; 3/19/09, pp. 2070:16-2072:15; 3/20/09, pp. 2254:22-2258:8, 2286:13-2288:2, 2302:21-2303:10, and Reinstatement Transcript, 7/1/09, p. 42:3-24].

The University argues that complaints filed by Professor Churchill justify a denial of reinstatement, yet the allegations against Professor Churchill came primarily from University administrators who were also faculty members. [Trial Transcript,

3/10/09, pp. 490:14-496:18; Joint Exhibit 1b]. If those faculty members' complaints did not require their termination, allegations made by Professor Churchill cannot be legally adequate grounds for refusing to reinstate him.

For all of these reasons, the trial court's order denying reinstatement is not supported by the law or the facts, and constitutes an abuse of discretion.

C. Front Pay

After a constitutional violation has been established, the trial court is charged with "tailoring the remedy to 'make the injured party whole.'" *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 730 (8th Cir. 1992) (citation omitted). In claiming that Professor Churchill is precluded from an award of front pay because he did not specifically request it, the University cites only a case holding that a substantive defense may not be introduced in a criminal appeal. [Answer Brief, p. 54, *citing People v. Yascavage*, 80 P.3d 899, 901 (Colo. App. 2003)]. Having requested equitable relief, Professor Churchill had no obligation to specify all possible forms it might take. *See Williams*, 964 F.2d at 730 (front pay may be awarded even where plaintiff has not requested reinstatement).

The University also argues that Professor Churchill is not entitled to front pay because he failed to mitigate his damages. This argument disregards evidence introduced at trial and fails to take into account the nature of academic employment.

Professor Churchill testified that he continued to lecture and publish, and made numerous inquiries about fulltime teaching positions, but that these efforts were hampered by the University's very public efforts to discredit his scholarship. [Trial Transcript, 3/24/09, pp. 2630:16-2631:20, 2805:19-2808:1]. Under these circumstances, Professor Churchill could not credibly apply for available positions until after he had established, at trial, that he was fired *not* for research misconduct, as the University claimed, but for speech protected by the First Amendment. *See Jackson*, 890 F.2d at 234 (noting difficulty of finding comparable positions and reluctance of prospective employers to consider plaintiff until his wrongful termination lawsuit was concluded).

The University mistakenly presumes that Professor Churchill bore the burden of establishing that he sufficiently mitigated his damages. According to *Denesha v. Farmers Ins. Exch.*, the only case the University cites on mitigation, the plaintiff must use reasonable diligence and "not refuse a position substantially equivalent to the one at issue," but "[t]he defendant bears the burden of showing that there were suitable positions and that the plaintiff failed to use reasonable care in seeking them." 161 F.3d 491, 502 (8th Cir. 1998), *cert. denied*, 526 U.S. 1115 (1999). The University offered no evidence regarding mitigation in this case and, therefore, cannot have met this burden.

CONCLUSION

The Plaintiff-Appellant, Ward Churchill, respectfully requests the Court to reverse the trial court's directed verdict on the first claim for relief, reverse the trial court's order granting the University's motion for judgment as a matter of law on the second claim for relief, reverse the trial court's order denying Professor Churchill's motion for reinstatement, and remand this case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 4th day of June 2010, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** and a copy of the CD-ROM filed with the Court were placed in the U.S. Mail, postage prepaid, and addressed as follows:

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