Court of Appeals, State of Colorado 2 East 14th Avenue, Denver, Colorado 80203	
District Court for the City and County of Denver The Honorable Larry J. Naves, Judge Case No. 06-CV-11473	
Plaintiff-Appellant: WARD CHURCHILL, v. **Defendants-Appellees:** THE UNIVERSITY OF COLORADO, THE REGENTS OF THE UNIVERSITY OF COLORADO, a Colorado body corporate.	**▲ COURT USE ONLY ▲** Case No. 09-CA-1713
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AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION (ACLU), ACLU OF COLORADO, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AND NATIONAL COALITION AGAINST CENSORSHIP

Court of Appeals, State of Colorado **2 East 14th Avenue, Denver, CO 80203** Name of Lower Court(s): Denver County District Court Trial Court Judges(s): The Honorable Larry J. Naves Case Number(s): 06-CV-11473	
Appellant(s): WARD CHURCHILL, **v.** **Appellee(s):** THE UNIVERSITY OF COLORADO, THE REGENTS OF THE UNIVERSITY OF COLORADO, a Colorado body corporate.	▲ ▲ **COURT USE ONLY**
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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:

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It 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 (R.____, p.____), not to an entire document, where the issue was raised and ruled on.

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Following a four-week trial, the jury in this case concluded that Professor Ward Churchill was fired from his position as a tenured professor at the University of Colorado because of his speech and that he would not have been fired if he had not engaged in that speech. Under the United States Supreme Court's decision in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977) – a decision not mentioned by the trial court – that verdict means that the University violated Churchill's First Amendment rights. The trial court nevertheless ruled that Churchill was not entitled to a remedy for this violation of his constitutional rights, holding that: the Board of Regents defendants were absolutely immune from liability for damages on the ground that they acted as quasi-judicial officers in firing Churchill; the insulation from injunctive relief that a 1996 amendment to 42 U.S.C. § 1983 provides to "judicial officers" applies broadly to any defendant who enjoys quasi-judicial immunity from damages; and, even if injunctive relief were available, Churchill was not entitled to reinstatement because the jury only awarded him nominal damages and because the relationship between the University and Churchill was fractured as a result of the events underlying this lawsuit. These holdings are wrong as a matter of law and fail properly to take into

account the purpose of § 1983 and the critical First Amendment principles that are at issue here.

First, the trial court's decision to award absolute immunity to the University defendants and to bar injunctive relief against them is based on the erroneous premise that the Regents were acting in a role analogous to judicial officers when they terminated Churchill. The trial court ignored Supreme Court caselaw emphasizing the limited availability of absolute immunity and the importance of neutrality and independence in decisionmakers entitled to this quasi-judicial immunity. Here, the Regents were far from neutral or independent, as they represent the University, Churchill's employer. Because the Regents were not entitled to absolute quasi-judicial immunity from damages, injunctive relief was also available against them under § 1983, regardless of the broader issue of whether the 1996 amendments to § 1983 were meant to bar injunctive relief against quasi-judicial officers.

Second, that the jury awarded only nominal damages and that Churchill harbors some animosity for those who unconstitutionally fired him does not mean that reinstatement is not appropriate. Under *Mt. Healthy*, the jury's verdict makes clear that as a matter of law, the University violated Churchill's First Amendment rights. Churchill is therefore entitled to receive an equitable remedy to make him

whole, regardless of whether the jury awarded him significant monetary relief. Where, as here, there is a proven First Amendment violation, the presumed equitable remedy is reinstatement. Although reinstatement can be denied in certain circumstances if the relationship between the parties is completely fractured, that principle does not make sense here, in the unique context of the university setting, where discord and debate between faculty members and between faculty members and the university administration is expected and even encouraged, and where a professor like Churchill is not in a position requiring the loyalty to and close working relationship with administrators that otherwise might be grounds for a denial of reinstatement.

The First Amendment prohibits government officials from suppressing lawful speech or retaliating against those who engage in such speech, no matter how unpopular or offensive the speech may be to some. That is especially the case in the university setting, where the Supreme Court has made clear that First Amendment freedoms must be vigilantly protected. The Supreme Court has also made clear that § 1983 was specifically enacted to provide wronged plaintiffs like Churchill with complete remedies for the violation of their constitutional rights. The trial court failed to recognize these vital principles, resulting in a decision fundamentally at odds with the First Amendment and with § 1983.

Amici submit this brief to urge this Court to reverse the trial court's decision and, in so doing, to preserve the protections of the First Amendment for university professors and to ensure that the University of Colorado and other universities cannot violate the constitutional rights of university professors with impunity.

INTEREST OF *AMICI*

The American Civil Liberties Union, the American Civil Liberties Union of Colorado, the American Association of University Professors and the National Coalition Against Censorship ("*Amici*") submit this brief urging this Court to reverse the trial court's Order granting the University's motion for judgment as a matter of law and denying Churchill's motion for reinstatement.

Amici represent organizations who believe strongly in the First Amendment and the principle that all speakers, no matter how offensive or unpopular some may find their speech to be, are protected by the First Amendment. Upholding that principle requires ensuring that meaningful remedies are available when First Amendment rights are violated.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, including members in Colorado, dedicated to the principles of liberty and equality embodied in the U.S. Constitution. The ACLU of Colorado is one of the ACLU's affiliates. Freedom of

speech has been a central concern of the ACLU since the organization's founding in 1920. Over the last nine decades, the ACLU has repeatedly advocated and litigated to preserve the protections of the First Amendment, including the First Amendment rights of public employees.

The American Association of University Professors (AAUP), founded in 1915, is a non-profit organization of over 45,000 faculty members and research scholars in all academic disciplines. The AAUP's purpose is to advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good, including the free exchange of ideas in scholarly and creative work. The AAUP has frequently participated in cases raising First Amendment issues in higher education, *see, e.g., Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271 (1984); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Whitehill v. Elkins,* 389 U.S. 54 (1967), and the United States Supreme Court has cited to AAUP policies, *see, e.g., Del. State College v. Ricks*, 449 U.S. 250, 264 (1980); *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-82 (1971). In addition, this Court has relied upon AAUP policies in construing the "norms and usages of higher educational institutions." *Saxe v. Bd. of Trs. of Metro. State College of Denver*, 179 P.3d 67, 76 (Colo. Ct. App. 2007).

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, NCAC has defended the First Amendment rights of professors and students in public colleges and universities, as well as the free speech rights of countless artists, authors, teachers, librarians, readers, and others around the country. NCAC regularly appears as *amicus curiae* in free speech cases in the United States Supreme Court and in other courts addressing significant and potentially far-reaching First Amendment issues. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

STATEMENT OF THE CASE[1]

Professor Ward Churchill filed a § 1983 claim against the University of Colorado and its Board of Regents (collectively, the "University") challenging the Regents' decision to fire him from his job as a tenured professor, alleging that he was unconstitutionally terminated because of a controversial and unpopular essay

[1] Because the factual and procedural background to this case will be discussed in greater detail by the parties, *Amici* detail only those background facts relevant to this brief.

he had written. The University, in turn, claimed that Churchill was terminated not for his speech, but because of academic misconduct.

A four-week jury trial was held. The jury concluded that despite the University' claims to the contrary, Churchill's speech was the motivating factor for his termination, *see* Jury Verdict Form – Question 1 (Motion for Reinstatement, Exhibit One, Verdict Form and Trial Transcript 4/2/09), and that the University would not have terminated Churchill in the absence of his protected speech. Jury Verdict Form – Question 3. The jury awarded Churchill $1 in nominal damages, but $0 for his economic and non-economic losses. Jury Verdict Form – Question 4.

Following the jury's verdict, Churchill filed a motion for reinstatement and the University filed a motion for judgment as a matter of law on the ground that it was entitled to absolute quasi-judicial immunity for its termination of Churchill. In an Order dated July 7, 2009, the trial court granted the University's motion, holding that the Regents were entitled to quasi-judicial immunity from damages. The court further held that the Regents were "judicial officers" as that term is used in the 1996 amendment to § 1983, making injunctive relief an unavailable remedy. The trial court separately denied Churchill's motion for reinstatement, holding that

even if injunctive relief were an available remedy, Churchill was not entitled to reinstatement.

STANDARD OF REVIEW

The trial court's decision that the Regents are entitled to absolute immunity from damages and that the 1996 amendment bars injunctive relief is reviewed *de novo*. *Perez v. Ellington*, 421 F.3d 1128, 1133 (10th Cir. 2005); *see* Order, 7/7/09, at 26, ¶ 69. The court's holding that reinstatement is not appropriate in these circumstances is reviewed, by contrast, under an abuse of discretion standard. *Roberts v. Colo. State Bd. of Agric.,* 998 F.2d 824, 826 (10th Cir. 1993), *cert. denied,* 510 U.S. 1004 (1993); *see* Order at 42, ¶ 120.

ARGUMENT

I. THE TRIAL COURT DECISION IMPERMISSIBLY DESTROYS THE FIRST AMENDMENT PROTECTION OF OVER 8,000 PROFESSORS IN THE UNIVERSITY OF COLORADO SYSTEM.

Speech engaged in by a university professor, such as the essay at issue in this case, is a "special concern of the First Amendment." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). For that reason, the United States Supreme Court has long made clear that First Amendment protections must especially be safeguarded in the unique context of a university setting:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy

that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

The Supreme Court has consistently adhered to this principle. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (noting particular danger of censorship "in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (a "university is a traditional sphere of free expression ... fundamental to the functioning of our society"); *Univ. of Penn. v. EEOC*, 493 U.S. 182, 195-200 (1990) (emphasizing importance of freedom from government-imposed content restrictions on scholarship); *Keyishian*, 385 U.S. at 603 ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."); *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) ("To regard teachers – in our entire educational system, from the primary grades to the university – as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of

teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them.").

Despite this very clear protection of the right of university professors to engage in lawful speech without fear of retaliation, the trial court's opinion renders this protection illusory for the over 8,000 professors in the University of Colorado system. The jury in this case decided that Churchill's First Amendment rights were violated. The trial court nevertheless ruled that Churchill was not entitled to a remedy for the violation of these rights. The trial court's decision effectively means that regardless of the deep commitment to academic freedom, a professor cannot ever recover on a § 1983 claim for unconstitutional termination based on the First Amendment, no matter how egregious or unconstitutional the termination, because the Board of Regents – the entity with the ultimate authority to terminate professors – is absolutely immune from liability for damages and injunctive relief is not available. Making matters worse, the court also held that even if reinstatement were an available remedy, a professor would still not be entitled to

reinstatement if, as is to be expected in the vast majority of such situations, the professor – as here – has some hard feelings and choice words for those who unconstitutionally terminated him or her in the first place.

Over two hundred years ago, the Supreme Court stated that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, Commentaries *23). Congress passed § 1983 to ensure the availability of such a remedy for violations of federally protected civil rights. *See Monell v. Dept. of Social Services*, 436 U.S. 658, 685 (1978). In light of the Supreme Court's clear principles protecting the First Amendment rights of university professors, and Congress's equally clear intention to provide remedies for violations of such rights, it cannot and should not be the law that a professor whose First Amendment rights were violated is not entitled to any remedy.

II. THE TRIAL COURT ERRED IN GRANTING QUASI-JUDICIAL IMMUNITY FROM DAMAGES AND BARRING INJUNCTIVE RELIEF.

The trial court erroneously concluded that the Regents were entitled to absolute quasi-judicial immunity from damages, and that therefore the Federal Courts Improvement Act of 1996 (FCIA) – which amended § 1983 to limit the availability of injunctive relief "in any action brought against a judicial officer" –

also foreclosed reinstatement here. As explained below, the Regents are not entitled to absolute quasi-judicial immunity from damages, and therefore § 1983 continues to authorize injunctive relief even under the trial court's erroneous expansive reading that the FCIA applies not only to "judicial officer[s]," but to any defendants who enjoy absolute quasi-judicial immunity from suits for damages.[2]

Amici address the issue of quasi-judicial immunity briefly to explain that the trial court erred by disregarding Supreme Court precedent which limits the availability of absolute immunity.[3]

A. Absolute Immunity Is Only Recognized In Narrow Circumstances.

The trial court failed to recognize Supreme Court caselaw making clear that absolute immunity is a limited defense available only in rare circumstances. The

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[2] For this reason, this Court does not need to resolve the scope of the FCIA's amendment to § 1983. If this Court were to reach that question, *Amici* urge that, in light of the plain language of the amendment's reference to "suits against a judicial officer" and the broad remedial purpose of § 1983, the limitations on injunctive relief in the FCIA should not be read to extend to all actors who are entitled to quasi-judicial immunity from damages. In the absence of clear guidance from Congress, the amendment's limitations on equitable relief should be read to apply only to defendants who are judicial officers, such as "justices, judges and magistrates." S. Rep. No. 104-366, at 37 (1996), reprinted in 1996 U.S.C.C.A.N. 4202, 4217.

[3] *Amici* recognize that there may be additional reasons to deny absolute immunity here, as discussed in the briefs submitted by Churchill and other *amici*.

Supreme Court has been "quite sparing in its recognition of claims to absolute official immunity," *Forrester v. White*, 484 U.S. 219, 224 (1988), because such immunity has the grave consequence of precluding remedies for constitutional violations – thus undermining the very purpose of § 1983. For this reason, "[o]fficials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy . . . ." *Id.* at 224. Even a common law tradition of absolute immunity for a given function may not be enough to warrant absolute immunity if "§ 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1993)). Moreover, the general public interest in permitting the vigorous exercise of official authority, which is the basis for granting immunity, is satisfied by granting defendants qualified immunity from damages where appropriate, not absolute immunity, from § 1983 actions. *See id.* at 268; *Forrester*, 484 U.S. at 224; *see also Morse v. Frederick*, 551 U.S. 393, 400 n.1 (2007) ("Qualified immunity shields public officials from damages only.")

Here, because, as explained below, no public interest rationale or overriding public policy justifies shielding the Regents from liability for unconstitutional actions, the trial court erred in granting absolute immunity to the Regents. *See*

Wood v. Strickland, 420 U.S. 308, 320 (1975) (rejecting absolute immunity for school board members because of lack of common law tradition or public policy), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

B. Absolute Immunity Is Not Appropriate Where Officials Are Not Neutral And Independent Parties To A Dispute.

The trial court also ignored Supreme Court caselaw emphasizing that the quasi-judicial officers who are granted this rare form of absolute immunity are neutral and independent. Quasi-judicial immunity is warranted when the overriding need to protect the independence and impartiality of entities working in judicial capacities outweighs the risk of unconstitutional conduct. *See Butz v. Economou*, 438 U.S. 478, 514 (1978) (holding that absolute immunity was appropriate because "the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women," where the Administrative Procedures Act (APA) was "designed to guarantee the independence of hearing examiners"); *Hoffler v. Colo. Dept. of Corrs.*, 27 P.3d 371, 374 (Colo. 2001) ("The judicial process is . . . structured to enhance the reliability of information and the impartiality of the decisionmaking process, and justifies granting immunity to those participants acting within the scope of their official duties" (internal quotation marks omitted)). Where, as here, there is no independent and impartial

body, there is nothing to protect, and the importance of providing a remedy for unconstitutional conduct prevails over the need for absolute immunity.

The Board of Regents lacks the independence and neutrality that merits protection through absolute immunity. The Regents are Churchill's employer, with the power to make a final decision as to the termination or retention of faculty members. *See* Laws of the Regents, Article 5.C.1, 5.C.2 (c).[4] As such, the Regents are parties to the dispute who cannot serve as independent and neutral adjudicators. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome"); *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985) (rejecting absolute immunity based, in part, on the fact that the "old situational problem of the relationship between the keeper and the kept" is "hardly . . . conducive to a truly adjudicatory performance").

Moreover, the Regents are not only tasked with employment decisions, they are never separated from their roles as administrators of the University who generally supervise the University, exercise exclusive control over its funds and

[4] The Laws of the Regents are available at Laws of the Regents, University of Colorado Board of Regents, https://www.cu.edu/regents/Laws/laws.html.

appropriations, and appoint faculty members. Laws of the Regents 2.A.4(a). Their loyalty, even when deciding whether to dismiss an employee, lies with the institution. *Id.* at 5.C.1 (granting the Regents authority to dismiss a faculty member if in their judgment "the good of the university requires such action"). Absolute immunity is not appropriate in such circumstances where individuals are not "professional hearing officers," but are "officials . . . temporarily diverted from their usual duties . . . under obvious pressure to resolve a disciplinary dispute in favor of the institution . . . ." *Cleavinger*, 474 U.S. at 203-04 (rejecting absolute immunity for prison disciplinary committee members even though they perform an adjudicatory function, the committee proceedings contain certain procedural safeguards including prior notice and the right to judicial review, and "many inmates do not refrain from harassment and intimidation"); *Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315, 1318 (10th Cir. 2002) (members of a peer review committee that suspended plaintiff were not entitled to absolute immunity because they "all work at the same hospital as [plaintiff] and, as peers in a small medical community, are his competitors," thus lacking the "kind of independence typical of judicial bodies"); *Purisch v. Tenn. Technological Univ.*, 76 F.3d 1414, 1422 (6th Cir. 1996) (university president and dean are not entitled to quasi-judicial immunity when serving on the university grievance committee because they do not

have the requisite independence); *Ramirez v. Okla. Dept. of Mental Health*, 41 F.3d 584, 592 (10th Cir. 1994) (individuals serving on employer's disciplinary committee were not entitled to absolute immunity for terminating employee because their dual functions as hearing officers and as the superintendent and director of the program "undermine[d] the objectivity and impartiality required for absolute immunity to apply"), *overruled on other grounds by Ellis v. Univ. of Kansas Med. Ctr.*, 163 F.3d 1186 (10th Cir. 1998).

These problems are compounded by the lack of any procedural safeguards to ensure the neutrality and independence of the Board. As described above, the Regents perform multiple duties that may at times be inconsistent with being fair adjudicators of an employee termination case, and they are subject to the pressures of reelection, Laws of the Regents 2.A.2. The Regents' actions prior to the initiation of Churchill's disciplinary proceedings – for example, convening a special meeting to address public concern over Churchill's comments,[5] and publicly stating that his comments embarrassed the University[6] – confirm the

[5] *See* Press Release, CU Board of Regents to Hold Special Meeting (Jan. 30, 2005), http://www.colorado.edu/news/releases/2005/39.html (announcing, prior to the initiation of dismissal proceedings, that the Board of Regents is taking the "unusual action" of convening a special meeting to discuss Churchill's comments).

[6] Special Reports, Statement by University of Colorado Board of Regents Chair Jerry Rutledge (Mar. 24, 2005),

absence of the neutrality and independence that are the hallmarks of judicial officers. *Cf.* Code of Conduct for United States Judges Canon 3A (6) ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *Butz*, 438 U.S. at 513 (listing procedural safeguards in the APA that assure independence of hearing officers, including the requirements that they not perform work inconsistent with their duties and that they not consult any person or party concerning a fact at issue in the hearing without notice and opportunity for all parties to participate).

There is no principled way to distinguish the Regents from the members of the school board who were denied absolute immunity in *Wood v. Strickland*, 420 U.S. 308, 320 (1975), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and in other cases, *see Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 224-25 (5th Cir. 1999) (members of the Board of Trustees of a school district who transferred plaintiffs-employees as a result of a grievance hearing are not entitled to absolute immunity), *cert. denied*, 528 U.S. 1022 (1999); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1508 (11th Cir. 1990) (holding that

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http://www.colorado.edu/news/reports/churchill/rutledgestatement.html ("Let me reiterate my very, very strong belief that Professor Churchill's essay and subsequent remarks are outrageous, egregious and patently offensive. Those incendiary remarks are an embarrassment to a tremendously strong teaching and research university such as CU.").

school board members who discharged teacher are not entitled to quasi-judicial immunity). Indeed, the same principles discussed in *Wood* should apply to foreclose absolute immunity to adjudicators in a university setting. *See Osteen v. Henley*, 13 F.3d 221, 224 (7th Cir. 1993) ("Conceivably, absolute immunity is available to the university's judicial officers, though this is most unlikely given the Supreme Court's refusal to grant such immunity to members of school boards that adjudicate violations of school disciplinary regulations . . . .") (Posner, J.); *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973) (holding that members of the Utah State Board of Education who dismissed plaintiff from the Dixie Junior College faculty were entitled to qualified immunity, not absolute immunity, in a case cited approvingly by *Wood*).

The Supreme Court held in *Wood* that any benefit from granting absolute immunity to school board members did not justify "the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." 420 U.S. at 320. The Board of Regents, which is no more neutral or independent than a school board, should likewise not be given absolute immunity at the expense of a meaningful remedy to the victims of the Regents' unconstitutional conduct, such as Churchill. *See Cleavinger*, 474 U.S. at 204 (holding that the members of the prison disciplinary committee did not deserve absolute immunity because they

were more like the school board members in *Wood* than neutral and detached hearing officers who constitute traditional parole boards). Rather, the Regents are adequately protected by the availability of qualified immunity from damages.

As in *Wood*, then, the Regents are not entitled to the rare and sweeping defense of absolute immunity that would otherwise insulate them from monetary liability for their unconstitutional conduct. By extension, injunctive relief remains available against them even if the FCIA is interpreted broadly. That is the only result consistent with Supreme Court precedent and with ensuring the availability of a remedy to the over 8,000 professors in the University of Colorado system who could otherwise be terminated unconstitutionally without recourse.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN HOLDING THAT CHURCHILL WAS NOT ENTITLED TO REINSTATEMENT.

The trial court's alternative holding that Churchill was not entitled to reinstatement is similarly flawed and constitutes an abuse of discretion. The jury's findings make clear that Churchill's First Amendment rights were violated as a matter of law. The jury expressly found that the University was motivated to terminate Churchill because of his speech, Jury Verdict Form, Question 1, and that, despite the University's claims about Churchill's academic misconduct, Churchill would not have been terminated but for his speech. Jury Verdict Form, Question 3. Under *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977) – a case

ignored by the trial court – that means that the University violated Churchill's First Amendment rights as a matter of law and that reinstatement is appropriate. *Id.* at 285-87 (stating that reinstatement would appropriately be granted on remand in that case if the government were to fail to demonstrate that the plaintiff would have been fired for non-speech-related reasons).

Churchill is, accordingly, entitled to receive an adequate remedy to right this legal wrong. It is a fundamental premise of our judicial system that a plaintiff who establishes, as here, that a legal wrong has been committed against him or her is entitled to a remedy for that wrong. That is especially the case when an individual's constitutional rights have been violated. *See, e.g., Marbury*, 5 U.S. at 163; *Wood*, 420 U.S. at 319-20 (rejecting a claim for judicial immunity by school board members, citing the need for a "remedy for students subjected to intentional or otherwise inexcusable deprivations" of their constitutional rights).

Because "it is the historic purpose of equity to 'secur(e) complete justice,'" *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (citing *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836) and *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-398 (1946)), "'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief,'" *id.* (quoting *Bell v. Hood*, 327 U.S.

678, 684 (1946)). Rather than granting the complete and necessary relief of reinstatement for the violation of Churchill's constitutional rights, the trial court concluded that reinstatement was not appropriate. The trial court abused its discretion in doing so.

A. Reinstatement Is The Presumptive Remedy When An Employee Has Been Unconstitutionally Terminated.

When an employee has been wrongfully discharged, reinstatement is the preferred and presumptive remedy. *See, e.g.*, *Squires v. Bonser*, 54 F.3d 168, 173 (3d Cir. 1995) ("[R]einstatement is the preferred remedy in the absence of special circumstances militating against it"); *Bingman v. Natkin & Co.*, 937 F.2d 553, 558 (10th Cir. 1991) ("This circuit has frequently held that reinstatement is the preferred remedy for discrimination in employment matters in all but special instances of unusual work place hostility or other aggravating circumstances which may make reinstatement impossible.").

That is especially true in First Amendment cases, where reinstatement is to be awarded absent exceptional circumstances. *See, e.g., Squires*, 54 F.3d at 173 (reversing denial of reinstatement in First Amendment case because "special" circumstances necessary for denial were not present); *Prof'l Ass'n of College Educators v. El Paso County Cmty. College Dist.*, 730 F.2d 258, 269 (5th Cir.1984) ("[T]he court should deny reinstatement in a first amendment wrongful

discharge case on the basis of equity only in exceptional circumstances."), *cert. denied*, 469 U.S. 881 (1984); *Banks v. Burkich*, 788 F.2d 1161, 1165 (6th Cir. 1986) (reversing district court's denial of reinstatement in a § 1983 action where record did "not ... establish this as one of those 'exceptional cases in which reinstatement is inappropriate'") (citation omitted).

Reinstatement is the presumptive remedy because only reinstatement can truly make a wronged employee "whole." *Blim v. W. Elec. Co.*, 731 F.2d 1473, 1479 (10th Cir. 1984), *cert. denied*, 469 U.S. 874 (1984); *see generally Albemarle*, 422 U.S. at 418-19 ("'The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.'") (quoting *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867)). As explained by the Eleventh Circuit: "This rule of presumptive reinstatement is justified by reason as well as precedent. When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored." *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1306 (11th Cir. 1982).

"Section 1983 was designed to provide a comprehensive remedy for the deprivation of federal constitutional and statutory rights." *Gurmankin v. Costanzo*, 626 F.2d 1115, 1122 (3d Cir.1980), *cert. denied*, 450 U.S. 923 (1981). Its

overarching goal is to make victims of illegal discrimination whole. *Squires*, 54 F.3d at 171. For that reason, the make-whole standard of relief should be the touchstone of relief fashioned by the courts for § 1983 claims. *See, e.g.*, *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 763-64 (1976) (discussing Title VII claims).[7]

Reinstatement is also the presumptive remedy because a denial of reinstatement to a prevailing plaintiff essentially rewards an employer for its wrongful and unconstitutional conduct, as it enables the employer to accomplish exactly what the Constitution forbids – terminating an employee for unconstitutional reasons. *See, e.g.*, *Jackson v. City of Albuquerque*, 890 F.2d 225, 235 (10th Cir. 1989) (reversing denial of reinstatement, in part, because if the plaintiff were "denied reinstatement, they will have accomplished their purpose"); *Allen,* 685 F.2d at 1306 ("[R]einstatement is an effective deterrent in preventing employer retaliation against employees who exercise their constitutional rights. If an employer's best efforts to remove an employee for unconstitutional reasons are presumptively unlikely to succeed, there is, of course, less incentive to use employment decisions to chill the exercise of constitutional rights.").

[7] Courts generally apply the same principles to remedies under § 1983 and Title VII. *See, e.g.*, *Squires*, 54 F.3d at 172.

Without explanation, the trial court fails to even mention these fundamental principles of equity and wrongful discharge cases. Its failure to do so and to adhere to this presumption establishes that the court abused its discretion in denying reinstatement.

B. The Trial Court's Reasons For Denying Reinstatement Are Insufficient To Overcome The Presumption That Reinstatement Is The Appropriate Remedy.

Despite this clear presumption that reinstatement should be awarded to make Churchill whole, the trial court held that reinstatement was not appropriate in this case. None of the reasons provided by the trial court are sufficient to overcome this presumption.

1. The Jury's Award Of Only Nominal Damages Does Not Establish That Reinstatement Is Inappropriate.

The trial court's denial of reinstatement is principally based on its belief that because the jury awarded only nominal damages to Churchill instead of significant monetary damages, reinstating him to his faculty position would be contrary to the jury's findings and contrary to the caselaw. There is no support for that assertion.

Even though the jury did not award Churchill monetary relief, that does not mean that the jury found that Churchill's rights were not significantly violated or that Churchill did not, as the trial court believed, suffer any harm deserving of a remedy. To the contrary, the jury's findings establish that Churchill's

constitutional rights were violated by the University as a matter of law under *Mt. Healthy*. Instead of recognizing this controlling authority, the trial court's legal analysis erroneously focuses on the fact that the jury awarded Churchill only nominal damages, which, in the court's view, meant that Churchill was not actually wronged by the University's actions and therefore need not be reinstated to make him whole. That holding is inconsistent with *Mt. Healthy*. Under *Mt. Healthy*, whether the jury awarded Churchill any monetary damages is irrelevant to whether the jury decided that Churchill had been legally wronged.

Consistent with the principle that all legal wrongs deserve a remedy, the trial court should have awarded – not denied – a remedy for this legal wrong if it truly wanted to comply with the jury's verdict that Churchill's First Amendment rights were violated. The jury's decision not to award monetary relief simply means that the jury decided – for whatever reason – that they did not want to award him significant monetary relief; it does not mean that they believed that he was not harmed or wronged by the University's decision to terminate him for his protected speech, or that he should not be reinstated.

The trial court's decision improperly diminishes the value of nominal damages awards to civil rights plaintiffs. Nominal damages awards are significant. They are the equivalent of a judicial declaration that a legal wrong was committed.

See, e.g., *U.A.R.C. v. Salt Lake City Corp.*, 371 F.3d 1248, 1265 (10th Cir. 2002) (McConnell, J., concurring) ("Nominal damage awards serve essentially the same function as declaratory judgments."); 13A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3533.3, at 266 ("The very determination that nominal damages are an appropriate remedy for a particular wrong implies a ruling that the wrong is worthy of vindication by an essentially declaratory judgment."). In other words, contrary to the trial court's assertion, the jury's award of nominal damages establishes that the jury believed Churchill had actually been wronged, even if he had not sufficiently proven that he was entitled to recover monetary damages.

The trial court erroneously held that *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), establishes that equitable remedies such as reinstatement cannot be awarded where a plaintiff has not demonstrated an entitlement to actual monetary damages. Order at 29-30, ¶¶ 81-82. That is not what that case says. *Stachura* and *Carey v. Piphus*, 435 U.S. 247 (1978), which the *Stachura* court was discussing, simply hold that where a § 1983 plaintiff does not establish actual injury caused by the deprivation of constitutional rights, the plaintiff cannot recover *monetary* damages for that deprivation other than nominal damages. *Carey*, 435 U.S. at 264-66 (holding that monetary damages for a deprivation of constitutional rights cannot be recovered absent proof of actual

injury, but that nominal damages can be awarded absent such proof); *Stachura*, 477 U.S. at 309-10 (holding that monetary damages cannot be awarded under § 1983 based on the "abstract" value of a constitutional right and that, under *Carey*, damages are available only where actual injury caused by a deprivation of rights is proven). Those cases do not say – and should not be interpreted to mean – that *equitable* relief, such as reinstatement, is not available if entitlement to compensatory – i.e., monetary – damages is not proven. Indeed, those cases do not even address the availability of equitable remedies – they are focused solely on when monetary damages can be awarded under § 1983. *Stachura*, 477 U.S. at 299 ("This case requires us to decide whether 42 U.S.C. 1983 authorizes an award of compensatory damages based on the factfinder's assessment of the value or importance of a substantive constitutional right."); *Carey*, 435 U.S. at 253 (stating that certiorari was granted to consider whether "a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial 'nonpunitive' damages").

By focusing solely on the amount of damages awarded to Churchill, the trial court overlooked the critical role played by equitable remedies in our judicial system, especially where constitutional violations have occurred. *See, e.g., Reiter v. MTA New York City Transit Authority*, 457 F.3d 224, 229 (2d Cir. 2006)

(holding that the lower court's decision was clearly erroneous because, in part, it "fails to appreciate the significance of equitable relief in civil rights litigation"). As in Title VII cases, "equitable relief is not incidental to monetary relief" in § 1983 actions. *See id.* at 230. For that reason, courts have "repeatedly emphasized the importance of equitable relief in employment cases." *Id.* (citing numerous cases). Indeed, where constitutional violations have occurred, many plaintiffs often seek to vindicate their constitutional rights solely by obtaining equitable relief to ensure that government officials are prevented from continuing to commit similar constitutional violations. The trial court's failure to apply these settled legal principles was an abuse of discretion. *Id.* at 229-30.[8]

2. The Faculty Committee's Determination That Churchill Engaged In Academic Misconduct Should Not Have Played A Role In The Trial Court's Decision To Deny Reinstatement.

The trial court also cites the faculty committee's decision that Churchill engaged in academic misconduct as grounds for denying reinstatement. Order at 31-36. That determination, however, is irrelevant here, given the jury verdict finding that Churchill would not have been terminated for academic misconduct.

[8] That the jury did not award Churchill monetary damages actually strengthens his claim for reinstatement, as reinstatement is all that more necessary to make him whole.

The jury in this case rejected the claim that Churchill's scholarship led to his termination. Jury Verdict Form – Question 3. The trial court was required to abide by this factual finding when later ruling on Churchill's claims for equitable relief. *See, e.g.*, *Marquardt v. Perry*, 200 P.3d 1126, 1130 (Colo. Ct. App. 2008) (perceiving no conflict between the generally applicable state standards and the federal standard that a jury's findings on a factual issue are binding on the trial court when it rules on equitable claims); *Bouchet v. Nat'l Urban League, Inc.*, 730 F.2d 799, 803 (D.C. Cir. 1984) ("[W]hen a case contains claims triable to a jury and claims triable to the court that involve common issues of fact, the jury's resolution of those issues governs the entire case."). Accordingly, because the jury rejected the University's claim that Churchill was fired for his academic misconduct, it was improper for the trial court subsequently to conclude that reinstatement should nevertheless be denied for that very reason. That conclusion enables the University effectively to dismiss Churchill for the academic misconduct even though the jury had already decided he was not terminated for that.

It was therefore improper for the trial court to consider the rejected academic misconduct issue in determining whether reinstatement was appropriate. *See, e.g., Squires*, 54 F.3d at 173-174 ("Once the 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."); *Price v. Marshall Erdman & Associates, Inc.*, 966 F.2d 320, 324 (7th Cir. 1992) (jury's implicit rejection of defendant's claimed reason for termination is binding on district court judge considering whether to reinstate employee); *U.S. EEOC v. Century Broad. Corp.*, 957 F.2d 1446, 1462 (7th Cir. 1992) (district court erred when it based its denial of reinstatement in part upon a reason the jury rejected); *Griffin v. Wash. Convention Ctr.*, 2000 WL 1174977 at *3 (D.D.C. July 6, 2000) ("The case law on this issue, in this Circuit and others, points to but one conclusion – once the jury has found that an employer impermissibly terminated an employee because of her gender, the Court cannot consider the employer's rejected reason in making the equitable determination about reinstatement.").

The trial court's focus on the faculty committee's scholarship determination was based on the court's attempt to defer to the University and to avoid interfering with the "academic process." Order at 31-36. Where, as here, a plaintiff has prevailed on an unconstitutional termination claim, however, courts are not hesitant to take steps to make the plaintiff whole. *See, e.g., Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 358, 361 (1st Cir. 1989), *cert. denied*, 496 U.S. 937

(1990) (reinstating a professor and ordering a grant of tenure because, "once a university has been found to have impermissibly discriminated in making a tenure decision, as here, the University's prerogative to make tenure decisions must be subordinated to the goals embodied in Title VII").

Indeed, the faculty committee's determination actually reinforces the conclusion that reinstatement should have been granted. The faculty committee that held the academic misconduct hearing decided that Churchill should not be dismissed. Order at 33, ¶ 97. If the trial court wanted to defer to the committee's academic judgment rather than disagree with it, therefore, the court should have reinstated Churchill, not denied reinstatement.[9]

As the United States Supreme Court has unanimously observed, "When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). *See also* J. Peter Byrne, *Constitutional Academic Freedom After* Grutter: *Getting Real About the "Four Freedoms" of a University*, 77 U. Colo. L. Rev. 929, 946 (2006) ("[A]cademic freedom protects the autonomy of decision making on academic values by the

[9] If Churchill is reinstated and there is a legitimate, non-retaliatory basis to believe that he has engaged in research misconduct after reinstatement, he would be subject to the same ethical strictures as all other faculty members.

appropriate academics."). This court has similarly reaffirmed the importance of tenure for faculty, noting that tenure "is designed to eliminate the chilling effect that the threat of discretionary dismissal casts over academic pursuits." *Saxe v. Bd. of Trs. of Metro. State College of Denver*, 179 P.3d 67, 78 (Colo. Ct. App. 2007) (citing *Browzin v. Catholic Univ.*, 527 F.2d 843, 847 (D.C. Cir. 1975)). Consistent with these principles, reinstatement is appropriate not only under constitutional doctrine, but also under principles of deference to legitimate faculty decision-making in the academic sphere.

3. The Animosity Between Churchill And The University Is Not Grounds For Denying Reinstatement.

The trial court's denial of reinstatement was also based on its belief that the relationship between Churchill and the University was too fractured by the litigation for him to be reinstated to his faculty position. Although damaged relationships can be grounds for denying reinstatement in certain circumstances, that principle does not apply in the context of a university setting where a professor has been unconstitutionally terminated, absent extraordinary circumstances not present in this case.

Unlike most working environments, universities are places where conflict, debate, differences, disagreement and, sometimes, discord are expected and even encouraged. As the former President of Yale College has stated, "If a university is

alive and productive, it is a place where colleagues are in constant dispute; defending their latest intellectual enthusiasm, attacking the contrary views of others." Kingman Brewster, *On Tenure*, 58 American Association of University Professors Bulletin (1972). Thus, "[O]f all the types of institutions which gather people together in a common effort, the university remains the least inhibiting to variety in ideas, convictions, styles, and tastes." *Id.*; *see also* J. Victor Baldridge, *Power and Conflict in the University: Research in the Sociology of Complex Organizations* 107 (1971) ("Rather than a holistic enterprise, the university is a pluralistic system, often fractured by conflicts along the lines of disciplines, faculty subgroups, student subcultures, splits between administrators and faculties, and rifts between professional schools.")[10]

Courts have recognized this fundamental nature of universities, observing that "conflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy." *Hulen v. Yates***,** 322 F.3d 1229, 1239 (10th Cir. 2003) (citing *Sweezy*, 354 U.S. at 250 (plurality

[10] *See also* Robert Birnbaum, *How Colleges Work: The Cybernetics of Academic Organization and Leadership* 136-37 (1988) ("The existence of a large number of small cross-cutting disagreements provides checks and balances against major disruptions, so that the agitation of political processes can ironically lead to a system of stability… political conflict may increase the cohesiveness [of the university]… Finally, disruptive conflict is inhibited because power in higher education tends to be issue specific.")

opinion); *id.* at 262 (Frankfurter, J., concurring in result); American Ass'n of Univ. Professors, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, *available at* http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm); *see also Landrum v. E. Kentucky Univ.*, 578 F. Supp. 241, 246 (E.D. Ky. 1984) ("This court recognizes that there must be more room for divergent views in a university situation than in a prosecutor's office, and that frequently the working relationship between a university and members of the faculty is not as close as that which existed in *Connick* [*v. Myers*, 461 U.S. 138 (1983)].").

This unique feature of universities is an inherent byproduct of the freedom that is essential to universities and the professors who work there. *See supra* at Part I. As a result, while disagreements or conflict might be sufficient grounds for denying reinstatement in certain workplaces where everyone is supposed to get along, follow orders and march to the same beat, that is not at all the case in the university setting. *See Rampey v. Allen*, 501 F.2d 1090, 1098 (10th Cir. 1974) ("While a college president is entitled to respect and authority within his sphere, this does not extend to the exercise of absolute control over the associations and expressions of the faculty members. Whether they demonstrate loyalty to him personally, whether they relate to him personally and whether they have a similar

philosophy is not, as we view it, a requisite and he cannot demand such attitudes at the expense of the individual rights of the faculty members and there can be little question but that such demands infringe the rights of the faculty members to express legitimate views in the course of formulating ideas in an academic atmosphere."); *Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3d Cir. 1980) ("Only when students and faculty are free to examine all options, no matter how unpopular or unorthodox, without concern that their careers will be indelibly marred by daring to think along nonconformist pathways, can we hope to insure an atmosphere in which intellectual pioneers will develop.").

The trial court similarly failed to recognize that the relationship between Churchill and the President of the University and the Regents is very different from the typical workplace situation where hostility between co-workers or between a worker and a supervisor can actually disrupt the workplace. A professor like Churchill does not have regular – if any – contact with the Board of Regents or the President of the University. Nor is a professor like Churchill a close confidant of the Regents or the President, or a spokesperson for the University, whose personal loyalty and trust would be required. Animosity between Churchill and the University administrators, accordingly, will not impair the daily operations of the University or their ability to do their jobs, as they likely will not ever even see or

interact with each other, and there is no evidence establishing that Churchill's presence on campus would prevent the Regents or the President of the University from performing their regular duties. *Rampey*, 501 F.2d at 1098 ("There is not the slightest suggestion in the evidence that the plaintiffs in exercising their rights constituted any threat to the valid authority of [college] President Carter in the conduct of his duties. Nor does it appear that these plaintiffs were in a relationship with Dr. Carter which required personal loyalty or devotion."). Of critical importance, the record makes clear that there is no animosity between Churchill and his actual supervisor, the Chair of his department. In fact, his Chair testified on Churchill's behalf in support of his request for reinstatement. Order at 34, ¶ 100. Given these circumstances, it was an abuse of discretion for the trial court to conclude that the animosity between Churchill and the University was sufficient to justify a denial of reinstatement. *See, e.g., Jackson*, 890 F.2d at 235 (rejecting hostility as ground for denial of reinstatement because there was "no evidence that plaintiff's position as an Assistant Superintendent in the Adult Sports Department of the Parks and Recreation Division of the city of Albuquerque would require any special or sensitive type of personal confidence or a personal loyalty and mutual trust between plaintiff and his superiors, the absence of which might jeopardize the conduct of the city's affairs").

In addition to failing to recognize the unique nature of universities and the relationship of a professor to the university administrators, the trial court also erred in ruling that the to-be-expected conflict created by the unconstitutional termination itself and the resulting litigation are sufficient to deny reinstatement.[11] If that were the case, a university would always be able to fire its professors with impunity and with no risk that the professor might be reinstated, no matter how unconstitutional its actions might be, simply by creating conflict and hard feelings through unconstitutional terminations of faculty members. That cannot and should not be permitted. Indeed, absent extraordinary circumstances, conflict engendered by a wrongful termination or the resulting litigation is not sufficient to deny reinstatement to plaintiffs who have prevailed on their claims. *See, e.g.*, *Allen*, 685 F.2d at 1306 ("[T]here is a high probability that reinstatement will engender personal friction of one sort or another in almost every case in which a public

[11] The trial court cites several statements made by Churchill as evidence of this hostility. Order at 37-38, ¶ 107. Statements from a party about the validity (or invalidity) of a jury's verdict and how the verdict shows that the other side was wrong are to be expected and far from the sort of exceptional circumstances necessary to justify a denial of reinstatement. *See, e.g., Jackson,* 890 F.2d at 232 (noting that a party's post-verdict expression of its opinions regarding a jury's verdict are "not surprising"). The trial court's focus on the post-verdict statement by Churchill's attorney, Order at 34-35, ¶ 101, is similarly erroneous and misplaced, as whether a party's attorney exhibits hostility toward the other side is legally irrelevant.

employee is discharged for a constitutionally infirm reason. Unless we are willing to withhold full relief from all or most successful plaintiffs in discharge cases, and we are not, we cannot allow actual or expected ill-feeling alone to justify nonreinstatement."); *Sterzing v. Fort Bend Indep. Sch. Dist.*, 496 F.2d 92, 93 (5th Cir. 1974) ("In declining to grant reinstatement on the basis that it would be too antagonistic, the Court used an impermissible ground. . . . Enforcement of constitutional rights frequently has disturbing consequences. Relief is not restricted to that which will be pleasing and free of irritation."); *Hayes v. Shalala***,** 933 F. Supp. 21, 25 (D.D.C. 1996) ("[D]efendant may not justify denying plaintiff the promotion based on hostility engendered by the employer's own acts of discrimination or by this litigation itself.") (citation omitted). Indeed, if mere animosity engendered by a termination were sufficient to deny reinstatement, that would enable the employer to get away with exactly what it was unconstitutionally trying to do. *See, e.g.*, *Jackson*, 890 F.2d at 235 (awarding reinstatement, in spite of hostility, because "Our review of the evidence reveals that certain parties, including the named defendants within the city administration, were determined to run plaintiff Carl Jackson off the job. If he is denied reinstatement, they will have accomplished their purpose.").

The trial court's failure to abide by these principles was an abuse of discretion.

CONCLUSION

For the foregoing reasons, the trial court's Order should be reversed, and Churchill should be reinstated to his position as a professor at the University.

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CERTIFICATE OF SERVICE

I certify that on February 18, 2010, I served a copy of the foregoing document to the following by:

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