

COURT OF APPEALS, STATE OF COLORADO

2 E. 14th Avenue, 3rd Floor
Denver, CO 80203

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 OPENING 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 8,828 words.
2. The brief complies with C.A.R. 28(k). 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, not to an entire document, where the issue was raised and ruled on.

s/ Antony M. Noble

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STATEMENT OF THE ISSUES

I. Whether the trial court erred by granting the University's motion for a directed verdict as to the first claim for relief considering that 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.

II. Whether the trial court erred in granting the University's motion for judgment as a matter of law based on quasi-judicial immunity considering that the Regents did not act in a judicial capacity as they pre-judged the case based on their own political viewpoints and political pressure.

III. Whether the trial court erred by denying Professor Churchill's motion for reinstatement of his employment considering that reinstatement, which is the preferred remedy, is supported by the jury's verdict and would have alleviated the chilling effect of the University's First Amendment violation.

STATEMENT OF THE CASE AND FACTS

On April 2, 2009, after a month of trial, a jury returned its verdict in favor of Plaintiff Churchill and against the University of Colorado and the Regents of the University of Colorado (collectively referred to as the University) on Professor Churchill's claim of retaliatory termination in violation of the First Amendment. After a hearing addressing reinstatement as the appropriate remedy, the trial judge vacated the jury verdict on grounds of quasi-judicial immunity, and entered judgment

in favor of the University. [[Order, 7/7/09](#)].

Prior to this action, Professor Churchill was a full professor at the University of Colorado with the rights and privileges of a tenured faculty member. He was also the Chair of the Ethnic Studies Department. He had been employed by the University for nearly thirty years, during which time he had written or edited more than twenty books and 120 articles. Professor Churchill's claims stem from the response by the University to media reports of an essay he wrote in the immediate aftermath of the attacks occurring on September 11, 2001. Even though Professor Churchill's essay had been published for over three years, the media storm and resulting political pressure did not begin until January 2005, when Professor Churchill was to speak at Hamilton College in New York. [[Trial Transcript, 3/10/09, p. 469:16-22](#)]. The criticism of Professor Churchill went well beyond the University and included efforts by then Governor Bill Owens and the Colorado General Assembly to pressure the University to remove Professor Churchill as a result of the content of his essay. [[Trial Transcript, 3/10/09, p. 440:14-18](#) and [Exhibit 45](#)].

In the wake of criticism of Professor Churchill and his essay, the Regents of the University called an emergency meeting on February 3, 2005, to discuss Professor Churchill's future at the University. [[Trial Transcript, 3/10/09, p. 454:9-12](#)]. During that meeting, the Regents condemned Professor Churchill and his essay and

unanimously voted for a resolution to investigate every word ever published or spoken publicly by him to determine whether to discharge him from his faculty position at the University. [[Trial Transcript, 3/10/09, p. 453:21-454:1](#)].

Chancellor DiStefano then formed an ad hoc committee with two deans to investigate Professor Churchill's speech. [[Trial Transcript, 3/10/09, pp. 463:12-465:17](#)]. Professor Churchill was never formally notified of this investigation, nor consulted by the committee. In late March 2005, DiStefano confirmed that all of Professor Churchill's writings and public speeches, including his essays concerning the events of September 11, 2001, constituted speech protected by the First Amendment. [[Trial Transcript, 3/10/09, p. 466:6-9](#)]. DiStefano, however, did not stop there. Instead, he lodged a series of complaints against Professor Churchill for alleged academic misconduct. [[Trial Transcript, 3/10/09, p. 491:2-9](#)]

Over the next two years, Professor Churchill was required to defend numerous aspects of his scholarship against charges brought by DiStefano to an internal faculty body, the Standing Committee on Research Misconduct (SCRM). The SCRM's findings and recommendations were reviewed by a panel of a faculty Privilege and Tenure (P&T) Committee. The P&T Committee dismissed some of the SCRM's findings, agreed with others, and sent a recommendation to the University president, Hank Brown. The P&T Committee did not recommend terminating Professor

Churchill's employment. [[Exhibit 21f](#)]. President Brown reinstated charges dismissed by the P&T Committee and overrode their recommendations in advising the Regents to fire Professor Churchill. On July 24, 2007, the Regents voted 8-to-1 to fire Professor Churchill from his position as a tenured full professor of Ethnic Studies. [[Trial Transcript, 3/10/09, pp. 453:21-454:1](#)].

Professor Churchill initiated this action under [42 U.S.C. § 1983](#), challenging the actions of the University and the Regents on constitutional grounds. Prior to trial, Professor Churchill dismissed his claims against the Regents in their individual capacities, and the University agreed to waive its Eleventh Amendment defense to the lawsuit. At trial, Professor Churchill presented two claims for equitable and other relief. These were (i) that the University had violated his First Amendment rights by launching an investigation into the content of all of his public speech and writings; and (ii) that the University fired him not because of the alleged research misconduct, but in retaliation for his protected speech and in violation of the First Amendment.

At the conclusion of evidence, the trial court granted a directed verdict on Professor Churchill's first claim for relief and refused to allow the unlawful investigation claim to be decided by the jury. The court instructed the jury on the retaliatory dismissal claim and submitted special interrogatories which the jury unanimously answered in favor of Professor Churchill. The jury awarded nominal

damages to Professor Churchill, leaving the issue of reinstatement to be decided by the judge.

The University then filed for post-trial relief, claiming immunity from suit. The University also contested Professor Churchill's right to reinstatement despite the jury's verdict finding that the University violated the First Amendment by firing Professor Churchill.

The trial court granted the post-trial relief requested by the University concluding that, notwithstanding the jury's findings, judgment should enter for the University and the Regents because they had quasi-judicial immunity from suit, regardless of any otherwise illegal or unconstitutional conduct in this matter. The trial court went further and, despite having dismissed the case, entered an order containing numerous pages of dicta disapproving of the jury's verdict. [[Order, 7/7/09](#)].

In this appeal, Professor Churchill seeks (i) reversal of the trial court's directed verdict holding that the ad hoc investigation of all of his public speech and publications, conducted with the express intent to find grounds for termination, did not violate the First Amendment, and (ii) reversal of the trial court's order vacating the verdict on grounds of absolute immunity, with directions to reinstate the jury's verdict and reinstate him in his position as a tenured professor at the University.

SUMMARY OF ARGUMENT

The trial court entered a directed verdict on the first claim for relief, ruling that the ad hoc investigation in this case did not amount to an adverse employment action that gives rise to a claim of First Amendment retaliation. An adverse employment action is an action by an employer that would deter a reasonable person from exercising his First Amendment rights. The trial court erred by entering a directed verdict on this claim because the evidence, when viewed in the light most favorable to Professor Churchill, was sufficient for the jury to determine that the investigation in this case would have deterred a reasonable person from exercising his First Amendment rights. The directed verdict should therefore be reversed, and this case should be remanded for a new trial on the first claim for relief.

The trial court entered judgment as a matter of law on the second claim for relief, ruling that the University was entitled to quasi-judicial immunity. The University was not entitled to quasi-judicial immunity because the Regents were not acting in a judicial capacity when they terminated Professor Churchill. They had pre-judged the case based on their own political viewpoints and political pressure. The judgment as a matter of law on the second claim for relief should therefore be reversed, and this case should be remanded with instructions to reinstate the jury's verdict and reinstate Professor Churchill to his position at the University.

The trial court denied Professor Churchill's motion for reinstatement, ruling that reinstatement would be inconsistent with the jury's award of nominal damages, and that reinstatement would not be appropriate in this case. Reinstatement is not inconsistent with the jury's verdict, because the jury found that the University violated Professor Churchill's First Amendment rights by terminating him, and that Professor Churchill was harmed by the termination. Reinstatement is appropriate in this case because it is the preferred remedy for a First Amendment violation. The trial court erred by denying reinstatement, or awarding front pay in lieu of reinstatement. The order denying reinstatement should therefore be vacated, and this case should be remanded with instructions for entry of an order reinstating Professor Churchill to his position at the University.

ARGUMENT

- 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.**

- A. Issue raised and ruled on.**

At the close of evidence, the University moved for a directed verdict as to the first claim for relief, arguing that the investigation alone was not an adverse employment action for the purposes of a First Amendment retaliation claim. [[Trial Transcript, 3/31/09, pp. 4009:3-19](#)]. In response, Professor Churchill argued that the

question of whether the investigation in this case was an adverse employment action was for the jury to decide. [[Trial Transcript, 3/31/09, pp. 4015:25-4016:6 and pp. 4016:13-4017:19](#)]. The trial court entered a directed verdict as to the first claim for relief, ruling “the claim that the investigation alone is actionable is not supported by the evidence.” [[Trial Transcript, 3/31/09, p. 4025:8-19](#)].

B. Standard of review.

An appellate court reviews a directed verdict de novo. [Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.](#), 186 P.3d 80, 82 (Colo. App. 2008). In evaluating a directed verdict, the court must view the evidence in the light most favorable to the nonmoving party and determine whether a reasonable jury could have found in favor of the nonmoving party. *Id.*

C. Discussion.

A trial court may only grant a directed verdict if the evidence, considered in the light most favorable to the nonmoving party, compels the conclusion that reasonable people could not disagree and that no evidence, or legitimate inference from the evidence, has been presented upon which a jury verdict against the moving party could be sustained. [Palmer v. Diaz](#), 214 P.3d 546, 551–52 (Colo. App. 2009). Only in the clearest cases may a trial judge invade the fact-finding province of the jury. [Romero v. Demer & Rio Grande W. Ry. Co.](#), 183 Colo. 32, 37, 514 P.2d 626, 628 (1973).

When analyzing a First Amendment claim based on retaliation by an employer,

a court 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 \(2006\)](#). [*Dixon v. Kirkpatrick*, 553 F.3d 1294, 1301-02 \(10th Cir. 2009\)](#). The *Pickering/Garcetti* test is comprised of five prongs: (1) whether the speech was made pursuant to an employee’s official duties; (2) whether the speech was on a matter of public concern; (3) whether the government’s interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff’s free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct. [*Dixon*, 553 F.3d at 1301-1302](#). The first three prongs are issues of law to be decided by the court, whereas the last two prongs are factual issues to be decided by the jury. *Id.*

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 an action 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 question of whether a retaliatory act is an adverse employment action is a question of fact for the jury.

Washington v. County of Rockland, 373 F.3d 310, 320 (2nd Cir. 2004).

Here, the trial court entered a directed verdict on the first claim for relief, ruling that the investigation in this case did not amount to “an adverse employment action that gives rise to a claim of First Amendment retaliation.” [Trial Transcript, 3/31/09, p. 4025:4-7]. In support of this conclusion, the trial court found that Professor Churchill did not lose his job and did not lose his pay, and that the investigation alone was not actionable. [Trial Transcript, 3/31/09, p. 4025:8-15].

Contrary to the trial court’s ruling, there was ample evidence presented at trial for the jury to determine that the University’s investigation into Professor Churchill’s writings and public speeches was an adverse employment action. The evidence presented at trial, when viewed in the light most favorable to Professor Churchill, showed that the purpose of the investigation was to review all of Professor Churchill’s writings and public speeches to find grounds for dismissing him, and that the purpose of the investigation was made public. The evidence also shows that the investigation injured Professor Churchill’s professional reputation, affected his personal life, and had a chilling effect on other members of the faculty. The jury could have inferred from this evidence that the investigation would deter a reasonable person from exercising his First Amendment rights, and that it was therefore an adverse employment action.

1. The evidence showed that the purpose of the investigation was to find grounds for dismissing Professor Churchill.

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](#)]. He further testified that the Regents unanimously approved the purpose of the ad hoc committee. [[Trial Transcript, 3/10/09, p. 461:8-15](#) and Plaintiff's Exhibit 320]. Regent Patricia Hayes admitted during cross-examination that she voted in favor of launching the investigation to look at everything that Professor Churchill has ever written to see if there were grounds for dismissal. [[Trial Transcript, 3/30/09, p. 3651:11-17](#)].

The evidence showed that the purpose of the investigation was made public. On February 1, 2005, 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](#)]. On February 2, 2005, Regent Carrigan told a New York Times reporter that, "We can fire Churchill. We just can't fire him tomorrow." [[Trial Transcript, 3/27/09, pp. 3281:3-3283:8](#)]. The P&T Committee

subsequently found that the existence of the ad hoc committee and its task were publicly known. [[Exhibit 21f, p. 5](#)].

This evidence about the purpose of the investigation was sufficient for the jury to determine that the investigation would deter a reasonable person from exercising his First Amendment rights. *See, e.g., Levin v. Harleston, 966 F.2d 85, 89 (2nd Cir. 1992)* (“the threat of discipline implicit in President Harleston’s actions was sufficient to create a judicially cognizable chilling effect on Professor Levin’s First Amendment rights.”). The fact that the investigation was initiated for the purpose of examining the content of Professor Churchill’s speech and finding cause for dismissal is all that was required to prove an adverse employment action. *See Williams v. Hansen, 326 F.3d 569, 585 n.1 (4th Cir. 2003)* (King, dissenting) (listing cases in which courts have held that an investigation initiated for an illegal purpose is actionable).

2. The evidence showed that the investigation injured Professor Churchill’s professional reputation and affected his personal life.

The evidence showed that that in early February 2005, Regent Bosley publicly characterized Professor Churchill as being “part of a group trying to poison the campuses with anti-American and anti-capitalist rhetoric.” [[Trial Transcript, 3/31/09, pp. 3841:22-3842:6](#)]. Around the same time, Regent Steinhauer described Professor Churchill as “the poster boy for abolishing tenure.” [[Trial Transcript, 3/30/09, p.](#)

[3715:13-15](#)].

Professor Churchill's testimony at trial showed that the investigation triggered a series of adverse consequences. He missed deadlines and he defaulted on book contracts. [[Trial Transcript, 3/24/09, p. 2628:8-25](#) and [3/25/09, pp. 2880:18-2881:1](#)]. Speaking engagements were canceled. [[Trial Transcript, 3/25/09, p. 2881:2-7](#)]. Also, he was denied sabbatical, he was prevented from "unbanking" courses, and the University withheld a teaching award from him. [[Defendants' Exhibit 14-1](#)].

Shortly after the announcement of the ad hoc committee, Professor LaVelle called Dean Getches and reminded him of allegations of research misconduct that he had previously made against Professor Churchill. The P&T Committee concluded that "but for his exercise of his First Amendment rights [and the investigation that followed], Professor Churchill would not have been subjected to the Research Misconduct and Enforcement Process or have received the Notice of Intent to Dismiss." [[Exhibit 21f, p. 6](#)].

The investigation also had an emotional toll on Professor Churchill. [[Trial Transcript, 3/25/09, pp. 2881:8-2882:2](#)].

This evidence about the consequences of the investigation would have been sufficient for the jury to determine that the investigation would deter a reasonable person from exercising his First Amendment rights. *See, e.g., Ulrich v. City & San*

[Francisco](#), 308 F.3d 968, 977 (9th Cir. 2002) (“Dr. Ulrich was subjected to more than trivial adverse employment actions. The hospital subjected him to an investigation that threatened to revoke his clinical privileges.”).

3. The evidence showed that the investigation had a chilling effect on other members of the faculty.

Professor Churchill testified about the chilling effect that his case had on junior faculty members. Commenting on the investigation and the University’s attempt to “seal off a whole line of thinking and critical inquiry,” Professor Churchill testified:

Well, whether they succeeded in that or not, it’s too early really to say, but they definitely chilled it. They’ve scared a number of junior scholars saying, “If I’m going to have a career, I can’t say things like this. I can’t do things like this.”

[\[Trial Transcript, 3/24/09, p. 2632:16-20\]](#).

Professor Natsu Saito, a former member of the faculty, also testified about the chilling effect that the investigation had on members of the faculty. She explained that people who had known Professor Churchill for thirty years were abandoning him because they were afraid of the allegations that were being made. [\[Trial Transcript, 3/25/09, pp. 2875:9-2876:5\]](#).

The evidence showed that the investigation and subsequent proceedings had a chilling effect on Professor Saito. She testified:

I had gone to CU because I really was excited about ethnic studies and I was really excited about what the department

could be doing, but that there was no way I was staying there because if Ward was vulnerable to attack, I was also equally vulnerable to attack.

[[Trial Transcript, 3/25/09, p. 2878:1-6](#)]. She subsequently resigned from the University. [[Trial Transcript, 3/25/09, p. 2878:18-22](#)].

There was substantial evidence presented at trial from which the jury could have inferred that the investigation had a chilling effect on the exercise of free speech. The trial court erred by entering a directed verdict on the first claim for relief because the question of whether the investigation would deter a reasonable person from exercising his First Amendment rights was a question for the jury. *See, e.g., Levin, 966 F.2d at 90* (“Whether an implicit threat is sufficient to create a chill is substantially a fact-based inquiry.”). The record is replete with evidence of the chilling effect of the investigation.

The trial court failed to view the evidence in the light most favorable to Professor Churchill and it resolved a question of fact that should have been submitted to the jury. 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 act in a judicial capacity as they pre-judged the case based on their own political viewpoints and political pressure.

A. Issue raised and ruled on.

After the jury returned its verdict in favor of Professor Churchill, the University moved for judgment as a matter of law, claiming that it had quasi-judicial immunity when it terminated Professor Churchill’s employment. [[Defendant’s Motion for Judgment as a Matter of Law, p. 20](#)]. After the parties briefed the issue of quasi-judicial immunity, the trial court entered an order vacating the jury’s verdict on the second claim for relief. [[Order, 7/7/09, p. 26](#)].

B. Standard of review.

Because a motion for judgment as a matter of law presents purely legal arguments, an appellate court reviews a trial court’s disposition of such a motion de novo. [Manzanares v. Higdon, 575 F.3d 1135, 1142 \(10th Cir. 2009\)](#).

C. Discussion.

1. The law of judicial immunity

The common law established absolute immunity against suits for damages for judges acting within the scope of their duties. [Pierson v. Ray, 386 U.S. 547, 553-554 \(1967\)](#). A grant of absolute immunity depends on an analysis of the “nature of the

responsibilities of the individual official.” [Cleavinger v. Saxner, 474 U.S. 193, 201 \(1985\).](#)

Courts have strictly limited absolute immunity to those officials whose “special functions or constitutional status requires complete protection from suit.” [Harlow v. Fitzgerald, 457 U.S. 800, 807 \(1978\).](#) It is the exception rather than the norm. [Higgs v. District Court, 713 P.2d 840, 852 \(Colo. 1985\).](#)

Courts presume that qualified rather than absolute immunity suffices to shield most government officials in the exercise of their duties. [Burns v. Reed, 500 U.S. 478, 486-87 \(1991\).](#) Under this form of immunity, government officials do not face damages liability for the performance of their discretionary functions when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” [Harlow, 457 U.S. at 818.](#) The *Cleavinger* court identified the following factors, among others that courts should analyze in determining whether a government official should receive absolute or qualified immunity: (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.

Quasi-judicial immunity applies only to individuals, not to entities. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). State entities may assert Eleventh Amendment immunity, but they may not assert quasi-judicial immunity. *Id.*

2. The Regents did not act in a judicial capacity, but rather they imposed their political viewpoints and succumbed to political pressure in violation of Professor Churchill's First Amendment rights.

As discussed above, the Supreme Court has developed a non-exclusive list of factors to determine whether a person should receive quasi-judicial immunity.

Cleavinger, 474 U.S. at 202. The trial court erred in granting quasi-judicial immunity because it simply ignored the deficiencies in the process utilized by the Regents and the political nature of the entire process of removing Professor Churchill. The trial court ignored the fact that the Regents were not insulated from political influence, and that if judges behaved as did the Regents prior to making their decision, the judges would have to remove themselves from the case. The trial court's analysis disregarded most of the *Cleavinger* factors identified above, ignoring, among other things, the fact that the University relied on no precedent for its actions, failed to provide adequate avenues for appeal, and utilized a process lacking the safeguards of an adversarial proceeding.

The trial court did not make any findings of fact on the issue of whether the

Regents dismissed Professor Churchill because of impermissible, politically motivated grounds in violation of his First Amendment rights. Instead, the trial court reasoned that because actors, including governors and judges, who face political pressures such as elections may be granted immunity, political pressure did not matter. [[Order, 7/7/09, pp. 19-20](#)].

This finding “ignored reality.” See [Cleavinger, 474 U.S. at 203](#). The process that removed Professor Churchill from his tenured faculty position differed qualitatively from the cases cited in the order. It did not assure that the Regents could perform their functions without harassment or intimidation, [Cleavinger, 474 U.S. at 202](#), but rather it proceeded from the presumption of firing Professor Churchill and searching for morsels of evidence to satisfy that presumption.

In contrast to the trial court’s order, the jury made precise findings of fact that negate the trial court’s finding that the Regents acted in a judicial capacity. The jury verdicts show that the Regents put politics over principle and dismissed Professor Churchill because he exercised his First Amendment Rights. Jury question one asked: “When it terminated Professor Churchill’s employment, did a majority of the Board of Regents of the University of Colorado use Plaintiff’s protected speech activity as a substantial or motivating factor in the decision to discharge the Plaintiff from employment?” The jury answered, “Yes.” [[Trial Transcript, 4/2/09, pp. 4160:23-](#)

[4161:5](#)]. The second question asked: “Did the termination harm Plaintiff Churchill?” The jury answered, “Yes.” [[Trial Transcript, 4/2/09, p. 4161:7-12](#)]. The third question asked: “Have the Defendants shown by a preponderance of the evidence that the Plaintiff would have been dismissed for other reasons, even in the absence of the protected speech activity?” The jury answered, “No.” [[Trial Transcript, 4/2/09, p. 4161:13-19](#)]. In reviewing a judgment as a matter of law, appellate courts will not challenge the factual conclusions of the jury. [Manzanares, 575 P.2d at 1142](#).

At trial, Professor Churchill presented vast amounts of evidence that the University removed him because of his exercise of his First Amendment rights. A media frenzy erupted in January 2005 over Professor Churchill’s essay. [[Trial Transcript, 3/10/09, p. 469:7-9](#)]. To try to forestall media criticism, on January 28, 2005, law school dean Getches e-mailed Chancellor DiStefano and demanded that DiStefano remove Professor Churchill as Chair of the Ethnic Studies Department. [[Trial Transcript, 3/10/09, p. 470:3-19](#) and Plaintiff’s Exhibit 41]. Getches told DiStefano he wanted Professor Churchill suspended “with pay pending review by committee of his competence and fitness to continue as a faculty member at CU.” [[Trial Transcript, 3/10/09, pp. 475:23-476:3](#) and [Plaintiff’s Exhibit 41](#)]. Getches wrote, “Moreover, his inaccurate and irresponsible comments cast serious doubt on his competence and integrity as a scholar.” [[Plaintiff’s Exhibit 41](#)]. These January 28,

2005, comments foreshadowed the University's future conduct. Three days later, on January 31, 2005, Professor Churchill stepped down as Chair of the Ethnic Studies Department. [\[Plaintiff's Exhibit 22\]](#). On February 18, 2005, at the demand of the University, Professor Churchill signed a loyalty oath. [\[Plaintiff's Exhibit 23\]](#).

In the wake of criticism of Professor Churchill and his essay, the Regents of the University called an emergency meeting on February 3, 2005, to discuss Professor Churchill's future at the University. At that meeting Regent Lucero demanded the University fire Professor Churchill. [\[Trial Transcript, 3/10/09, p. 453:3-11\]](#). Regent Rutledge made the same demand. [\[Trial Transcript, 3/10/09, p. 454:2-8\]](#). DiStefano described the tenor and tone of the meeting as "explosive." [\[Trial Transcript, 3/10/09, p. 454:19-22\]](#). DiStefano condemned Professor Churchill's essay at the meeting. [\[Trial Transcript, 3/10/09, p. 456:9-20\]](#). DiStefano stated, he would "launch and oversee a thorough examination of Professor Churchill's writings, speeches, tape recordings and other works. The purpose of this internal review is to determine whether Professor Churchill may have overstepped his bounds as a faculty member, showing cause for dismissal as outlined in the Laws of the Regents." [\[Trial Transcript, 3/10/09, p. 458:7-18\]](#). The Regents unanimously adopted a resolution in favor of DiStefano's proposal. [\[Trial Transcript, 3/10/09, p. 461:8-11\]](#) and [Plaintiff's Exhibit 320\]](#).

Had actual trial judges made the comments of Lucero, Rutledge, Hayes, Carrigan, or DiStefano, or had they voted for DiStefano's resolution to fire Professor Churchill, the judges would have had to recuse themselves because the comments and vote violated one or more of the Canons of Judicial Conduct. *See, e.g.*, Canon 1 "A judge should uphold the integrity and independence of the judiciary;" Canon 2 "A judge should avoid impropriety and the appearance of impropriety in all the judge's activities;" Canon 3 "A judge should perform the duties of his or her office impartially and diligently." Structural error occurs if a biased judge presides over a trial. [*Tumey v. Ohio*, 273 U.S. 510, 523 \(1927\)](#).

Chancellor DiStefano lodged a series of complaints against Churchill for alleged academic misconduct. [[Trial Transcript, 3/10/09, p. 491:2-9](#)]. Over the next two years, Professor Churchill had to defend numerous aspects of his scholarship against charges brought by the acting chancellor to an internal faculty body, the Standing Committee on Research Misconduct (SCRM). Law school professor Mimi Wesson, a colleague of Getches for decades, became the Chair of the SCRM investigative committee. [[Trial Transcript, 3/10/09, pp. 477:9-478:8](#)].

Wesson had prejudged the case. On February 28, 2005, long before the SCRM hearings and Wesson's appointment as Chair, Wesson sent an email condemning Professor Churchill. [[Plaintiff's Exhibit 52](#)]. She asked what would happen "if the

claims about Churchill's fabricated research and fraudulent claims to Indian ethnicity are borne out by the evidence." She wrote, "I can't see a workable moral principle in the idea that any discovery of academic misconduct is immune from punishment if we can discern something discriminatory or punitive in the motives of the ones who went looking. If a cop takes offense at my bumper sticker and decides to follow me around until he sees me engage in a drug transaction in a public place. I can still be convicted, can't I?" She continued, "But the rallying around Churchill reminds me unhappily of the rallying around OJ Simpson and Bill Clinton and now Michael Jackson and other charismatic male celebrity wrongdoers . . ." She referred to Professor Churchill as "this unpleasant (to say the least) individual." [\[Plaintiff's Exhibit 52\]](#). Again, if a judge had acted in this manner and harbored such a bias against Professor Churchill, the judge could not have remained on the case without causing structural error.

[Tumey, 273 U.S. at 523.](#)

Like the disciplinary committee members in *Cleavinger*, the majority of those responsible for the Churchill investigation worked for the University as administrators and employees, ultimately subordinate to the Regents, and therefore "under obvious pressure to resolve a dispute in favor of the institution." [Cleavinger, 474 U.S. at 204.](#)

As the Court observed in *Cleavinger*, "It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive

to a truly adjudicatory performance.” [Id.](#) at 204; *see also Moore v. Gunnison Valley Hospital*, 310 F.3d 1315, 1318 (10th Cir. 2002) (when the members of the review committee all work for the same institution as the appellee in a relatively small community of peers, such “a situation lacks the kind of independence typical of judicial bodies.”).

Contrary to the order, C.R.C.P. 106 does not provide an adequate appellate remedy as contemplated by the *Cleavinger* test. [[Order, 7/7/09, p. 17](#)]. Rule 106 grants procedural rights, but no substantive method for challenging immunity or seeking damages. *In re People ex rel. B.C.*, 981 P.2d 145, 149 n.4 (Colo. 1999). To hold that Rule 106 provides appellate rights in a First Amendment claim “turns the right of appeal on its head.” [Moore, 310 F.3d at 1319](#).

In conclusion, from beginning to end the University acted as a prosecutor, not as a judge. The Regents demanded Professor Churchill’s dismissal in February 2005, and then began the investigation. “No, no!” said the Queen. “Sentence first – verdict afterward.” Lewis Carroll, [Alice’s Adventures in Wonderland](#) (1832).

3. The trial court erred by ruling that quasi-judicial immunity applies to the equitable remedies of reinstatement and front pay.

Having found that the University was entitled to quasi-judicial immunity, the trial court ruled that it was unable to grant prospective relief to Professor Churchill.

[[Order, 7/7/09, p. 25](#)]. In reaching this conclusion, the trial court held that the 1996 amendment to 42 U.S.C. § 1983, limiting the availability of equitable relief against judicial officers, applies to quasi-judicial officers “such as Regents, acting in a quasi-judicial capacity.” [[Order, 7/7/09, p. 24](#)]. Neither the Supreme Court nor the Tenth Circuit has addressed whether section 1983 protects quasi-judicial actors from actions for injunctive relief, but there is authority that quasi-judicial actors are not immune from such actions. In [Simmons v. Fabian, 743 N.W.2d 281 \(Minn. App. 2007\)](#), for instance, the Minnesota Court of Appeals concluded that the 1996 amendment to section 1983 does not protect quasi-judicial officers from lawsuits seeking injunctive relief. [Id. at 285](#). Although the trial court relied on authority from other jurisdictions finding that the 1996 amendment to section 1983 protects quasi-judicial officers from lawsuits seeking injunction relief, the definition of “judicial officer” should not be so broadly construed. [Id. at 291](#). The trial court therefore erred by ruling that quasi-judicial immunity applied to Professor Churchill’s claim for reinstatement.

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 would have alleviated the chilling effect of the University’s First Amendment violation.

A. Issue raised and ruled on.

After the jury returned its verdict in favor of Professor Churchill and awarded him nominal damages, Professor Churchill filed a motion for reinstatement of his

employment in which he asserted, in part, that reinstatement is the preferred remedy when a plaintiff prevails in a wrongful discharge case brought under Section 1983 and that reinstatement would undo the chilling effect to free speech caused by his wrongful termination. [Motion for Reinstatement of Employment, p. 3 and p. 5]. The University filed a brief in opposition to the motion for reinstatement. [Brief in Opposition to Motion for Reinstatement].

After an evidentiary hearing, the trial court denied the motion, ruling that reinstatement was not an appropriate remedy because (1) the jury determined that Professor Churchill suffered no actual damages; (2) reinstatement would likely result in undue interference in the academic process; (3) the relationship between the parties was irreparably damaged; and (4) reinstatement would impose harm upon others. [[Order, 7/7/09, p. 28, p. 31, p. 37, and p. 38](#)]. The trial court further ruled that front pay was not an appropriate alternative remedy in this case. [[Order, 7/7/09, p. 41](#)].

B. Standard of review.

The decision to order reinstatement or award front pay as the appropriate remedy in a wrongful discharge case is a matter for the discretion of the trial court. [[James v. Sears, Roebuck & Co., 21 F.3d 989, 997 \(10th Cir. 1994\)](#)]. An appellate court reviews that decision for an abuse of discretion. *Id.*

C. Discussion.

The Tenth Circuit has recognized that “reinstatement usually will be granted

when a plaintiff prevails in a wrongful discharge case brought under Section 1983.”

[*Jackson v. City of Albuquerque*, 890 F.2d 225, 233 \(10th Cir. 1989\)](#). Although reinstatement is the preferred remedy, a plaintiff will be entitled to front pay where reinstatement is not feasible. [*Acrey v. American Sheep Industry Assoc.*, 981 F.2d 1569, 1576 \(10th Cir. 1992\)](#).

Here, the trial court ruled that the jury’s award of nominal damages precluded an order of reinstatement, and further ruled that, even if the jury had awarded actual damages, an order of reinstatement would not be appropriate. [[Order, pp. 28-31](#) and [pp. 31-40](#)]. The trial court further ruled that front pay was not an appropriate alternative to reinstatement. [[Order, pp. 41-42](#)]. The trial court abused its discretion by denying reinstatement, or front pay as an alternative to reinstatement, for the University’s violation of the First Amendment.

1. Reinstatement can be ordered where nominal damages are awarded.

Once a plaintiff establishes that his discharge resulted from constitutionally impermissible motives, he is presumed to be entitled to reinstatement. [*Jackson*, 890 F.2d at 233](#). Reinstatement is a basic element of the appropriate remedy in wrongful discharge cases and, except in extraordinary cases, is required. *Id.* Reinstatement is generally recognized to be an appropriate remedy for wrongful discharge because it serves the general purpose of making the plaintiff whole. *See, e.g.*, [*Standley v. Chilhowee*](#)

[R-IV School District](#), 5 F.3d 319, 322 (8th Cir. 1993). Reinstatement can be ordered in addition to an award of nominal damages. See, e.g., [Eyre v. Curlee](#), 902 F.2d 401, 406 (5th Cir. 1990).

In deciding whether to order reinstatement, a court may take into account facts that were not determined by the jury, but it may not base its decision on factual findings that conflict with the jury’s findings. [Salitros v. Chrysler Corp.](#), 306 F.3d 562, 573 (8th Cir. 2002). When reviewing a jury’s verdict, a court must “give [the prevailing] party the benefit of all reasonable inferences to be drawn from the evidence.” [Whittington v. Nordam Group Inc.](#), 429 F.3d 986, 989 (10th Cir. 2005) (quoting [Abuan v. Level 3 Communications, Inc.](#), 353 F.3d 1158, 1164 (10th Cir. 2003)).

Here, the trial court denied Professor Churchill’s motion for reinstatement, ruling that it could not “order a remedy that ‘disregard[s] the jury’s implicit finding’ that Professor Churchill has suffered no actual damages that an award of reinstatement would prospectively remedy.” [Order, 7/7/09, p. 31]. The trial court based its ruling on the jury’s award of nominal damages after the jury was instructed that it could award nominal damages if it found in favor of Professor Churchill but did not find any actual damages. [Order, 7/7/09, p. 27]. The trial court considered that it was “bound by the jury’s implicit finding that Professor Churchill has suffered ‘no actual damages’ as a result of the constitutional violation.” [Order, 7/7/09, p. 29].

The trial court's ruling is in conflict with the jury's explicit findings in the verdict form and the findings that can be inferred from the jury instructions. The jury was given the following instruction on damages:

Plaintiff Churchill has the burden of proving, by a preponderance of the evidence, the extent of his damages. If you find in favor of Plaintiff Churchill on his claim that Defendant University retaliated against him, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the retaliation.

In determining such damages, you shall consider the following: (1) Any noneconomic losses or injuries which Plaintiff Churchill has had to the present time, including physical and mental pain and suffering, inconvenience, emotional distress, loss of reputation, and impairment of the quality of life; and (2) any economic losses or injuries which plaintiff has had to the present time.

[\[Motion for Reinstatement, Exhibit One, Jury Instruction No. 8\]](#). During closing argument, Professor Churchill's attorney explained that Professor Churchill was not seeking monetary damages – he just wanted his job back. [\[Trial Transcript, 4/1/09, p. 45:16-19\]](#). In response to a question about damages, the trial court instructed the jury as follows: “If you find in favor of the plaintiff, but do not find any actual damages, you shall nonetheless award him nominal damages in the sum of one dollar.” [\[Order, 7/7/09, p. 27\]](#). Shortly after being given this instruction, the jury returned a verdict in favor of Professor Churchill and awarded zero dollars for past noneconomic damages and one dollar for past economic damages. [\[Order, 7/7/09, p. 27\]](#).

In returning its verdict in favor of Professor Churchill, the jury made the following findings of fact:

1. When it terminated Professor Churchill's employment, a majority of the Board of Regents of the University of Colorado used his protected speech activity as a substantial or motivating factor in the decision to discharge him from employment.
2. The termination harmed Professor Churchill.
3. The Defendants did not show by a preponderance of the evidence that Professor Churchill would have been dismissed for other reasons even in the absence of the protected speech activity.

[\[Motion for Reinstatement, Exhibit One, Verdict Form and Trial Transcript 4/2/09, pp. 4160:23-4161:19\]](#).

When reviewing the jury's verdict, and giving Professor Churchill the benefit of all reasonable inferences to be drawn from the evidence, the jury's award of nominal damages did not preclude an order of reinstatement.

The jury found that the University violated the First Amendment by terminating Professor Churchill and that Professor Churchill was harmed by the termination. [\[Motion for Reinstatement, Exhibit One, Verdict Form\]](#). The trial court disregarded these explicit findings and ruled that the jury implicitly found that Professor Churchill suffered no actual damages. [\[Order, 7/7/09, p. 31\]](#). The trial court's ruling was based on the response to the jury question in which the trial court

instructed the jury to award nominal damages if it found in favor of Professor Churchill but did not find any actual damages. [[Order, 7/7/09, p. 27](#)]. The trial court erred by making an implicit finding that Professor Churchill did not suffer any actual damages considering that the explicit finding of the jury was that Professor Churchill was harmed by the termination.

In denying the motion for reinstatement, the trial court relied heavily on the jury's award of nominal damages, interpreting this to mean that Professor Churchill did not suffer any actual damages. By giving so much weight to the implicit finding that Professor Churchill suffered no actual damages, the trial court demonstrated that it did not understand the purpose of reinstatement after an unconstitutional termination.

Reinstatement is a remedy for future loss of earnings, not past damages. *See [Feldman v. Phila. Hous. Auth.](#), 43 F.3d 823, 831 (3rd Cir. 1994)*. The jury was not asked to determine future loss of earnings, because this was a decision for the court and not the jury. *See [Bingman v. Natkin & Co.](#), 937 F.2d 553, 558 (10th Cir. 1991)*. (reinstatement is a matter left to the court's discretion and is not a jury question). The jury was only asked to consider damages that Professor Churchill "has had to the present time." [[Motion for Reinstatement, Exhibit One, Jury Instruction No. 8](#)]. The jury's finding on past damages did not preclude the trial court from ordering

reinstatement for future loss of earnings. The trial court therefore erred by considering itself “bound by the jury’s implicit finding that Professor Churchill has suffered ‘no actual damages’ as a result of the constitutional violation”. [[Order, 7/7/09, p. 29](#)].

By concluding that the jury’s award of nominal damages precluded reinstatement, the trial court failed to acknowledge that reinstatement is an element of the remedy for wrongful discharge and serves the general purpose of making the plaintiff whole. The trial court also failed to acknowledge that Professor Churchill was not asking for damages. He wanted to be reinstated, but this was not a question for the jury. The federal courts have recognized that money damages alone cannot make a plaintiff whole and that the psychological benefits of work cannot be ignored. [Jackson, 890 F.2d at 234 \(citing *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1306 \(11th Cir. 1982\)\)](#). By relying so heavily on the jury’s award of nominal damages, the trial court failed to address the purposes of reinstatement, failed to recognize the distinction between reinstatement for future losses and damages for past losses, and failed to acknowledge that the jury’s verdict was consistent with Professor’s Churchill’s desire to be reinstated rather than receive damages.

In conclusion, the trial court abused its discretion in denying the motion for reinstatement because it (1) failed to apply the presumption that Professor Churchill

was entitled to reinstatement; (2) limited its discretion to award future damages with the jury's decision on past damages; and (3) failed to review the jury's verdict and the evidence in favor of Professor Churchill. The order denying reinstatement should therefore be reversed.

2. Reinstatement is an appropriate remedy in this case.

The trial court ruled that, even if the jury had determined that Professor Churchill had suffered actual damages, reinstatement was not appropriate. [[Order, 7/7/09, p. 31](#)]. The Tenth Circuit has recognized that certain circumstances may weigh against granting reinstatement. *See, Jackson, 890 F.2d at 233*; *see also, Starrett v. Wadley, 876 F.2d 808 (10th Cir.1989)*. These circumstances include when reinstatement may be detrimental to the health of the discharged employee, or when the work environment presents an atmosphere of hostility. *Jackson, 890 F.2d at 233*. The Tenth Circuit recognizes that reinstatement may sometimes be undesirable for the employee because it could place him into a hostile work environment. *Id. at 235*.

Here, the trial court, focusing on the difficulties of reinstatement for the University rather than attempting to make Professor Churchill whole, ruled that reinstatement would not be appropriate because (1) it would likely result in undue interference in the academic process, (2) the relationship between the parties was irreparably damaged, and (3) reinstatement would impose harm upon others. [[Order,](#)

[7/7/09, p. 28, p. 31, p. 37, and p. 38](#)].

The trial court ruled that reinstatement would be problematic to the University because the P&T Committee determined that Professor Churchill engaged in “conduct that falls below minimum standards of professional integrity” and that Professor Churchill “could not accept [the] P&T Committee’s judgment defining the appropriate standards of scholarship or its unanimous conclusions that Professor Churchill had repeatedly violated them.” [[Order, 7/7/09, pp. 33-34](#)]. The trial court ruled that if it ordered reinstatement there would be a substantial likelihood of future disputes about the propriety of Professor Churchill’s academic conduct. [[Order, 7/7/09, p. 34](#)]. The trial court therefore denied reinstatement, concluding that “reinstating Professor Churchill would entangle the judiciary excessively in matters that are more appropriate for academic professionals.” [[Order, 7/7/09, p. 36](#)]. Professor Churchill testified, however, that if he was reinstated and the University did not retaliate against him there would be no reason for legal intervention. [[Transcript of Reinstatement Hearing, 7/1/09, p. 163:8-10](#)].

The trial court’s ruling is inconsistent with the jury’s findings that the University used Professor Churchill’s protected speech activity as a substantial or motivating factor in the decision to discharge him from employment and that the University did not show by a preponderance of the evidence that Professor Churchill

would have been dismissed for other reasons. [[Motion for Reinstatement, Exhibit One, Jury Verdict](#)]. These findings support the conclusion that if there was any research misconduct, it would not have resulted in Professor Churchill's termination. Accordingly, if the alleged research misconduct was not sufficient to terminate Professor Churchill, it should not be sufficient to prevent his reinstatement.

The trial court's finding that Professor Churchill could not accept the P&T Committee's judgment is also not sufficient to deny his reinstatement because the incoming Chair of the Ethnic Studies Department testified that she does not accept the judgment either. [[Transcript of Reinstatement Hearing, 7/1/09, pp. 28:21-29:21](#)]. Moreover, Dean Gleeson admitted that he had never seen a negative evaluation of Professor Churchill in the thirty years that he has been employed at the University, and he testified at the reinstatement hearing that Professor Churchill has always been a collegial faculty member and that he has never received any complaints that he was not collegial. [[Transcript of Reinstatement Hearing, 7/1/09, pp. 200:10-14](#) and [pp. 200:21-25](#)].

The trial court also ruled that reinstatement would not be appropriate for the University because the relationship between the parties was irreparably damaged. [[Order, 7/7/09, p. 37](#)]. If this was a legitimate ground to deny reinstatement, however, the court would be required to award equitable relief in the form of front

pay to Professor Churchill. See [Whittlesey v. Union Carbide Corp.](#), 742 F.2d 724, 728 (2nd Cir. 1984). The trial court erred by denying relief on a finding that the relationship between the parties had broken down. [Jackson](#), 890 F.2d at 235 (“Actual or expected ill-feeling cannot justify denial of reinstatement.”). In declining to grant reinstatement on the basis that the relationship between the parties was irreparably damaged, the trial court used an impermissible ground. See [id.](#) at 234 (quoting [Sterzing v. Fort Bend Ind. Schol Dist.](#), 496 F.2d 92, 93 (5th Cir. 1974)).

The trial court further ruled that reinstatement would not be appropriate for the University because it would impose harm to others. [[Order, 7/7/09, p. 38](#)]. The trial court weighed the benefits of reinstatement with the potential harm of reinstatement, and concluded that denying reinstatement would not prevent Professor Churchill from exercising his First Amendment rights. [[Order, 7/7/09, pp. 39-40](#)]. This is an incorrect application of the law because reinstatement is a remedy for the chilling effect that the termination could have on anyone, not just the person terminated. See [Jackson](#), 890 F.2d at 234.

Also, contrary to the trial court’s ruling, any evidence of harm is outweighed by the benefits of reinstating Professor Churchill. For instance, Professor Perez testified at the reinstatement hearing that the return of Professor Churchill would bring esteem to the Department of Ethnic Studies. [[Transcript of Reinstatement Hearing, p. 17:22-](#)

[18:10](#) and [p. 23:21-23](#)]. She testified that if Professor Churchill returned to the department, his classes would fill up and that would increase the number of students attending classes in the department. [[Transcript of Reinstatement Hearing, p. 20:4-13](#)].

The trial court abused its discretion by denying reinstatement on its findings, because enforcement of constitutional rights “frequently has disturbing consequences” and relief should not be “restricted to that which will be pleasing and free of irritation.” [Jackson, 890 F.2d at 234](#) (quoting [Sterzing 496 F.2d at 93](#)).

By denying reinstatement, the trial court failed to remedy the chilling effect of the University’s First Amendment violation. *Id.* Because reinstatement was denied, the University accomplished its purpose of terminating Professor Churchill for his protected speech activity. See [Bingman, 937 F.2d at 558](#). Dean Gleeson acknowledged that denial of reinstatement would accomplish the mission of the University to fire Professor Churchill for his protected speech. [[Transcript of Reinstatement Hearing, 7/1/09, pp. 218:23-219:4](#)].

The order denying reinstatement should therefore be reversed.

3. In lieu of reinstatement, the court should have awarded front pay.

Although reinstatement is the preferred remedy, a plaintiff is entitled to front pay where reinstatement is not feasible. [Acrey, 981 F.2d at 1576](#). Front pay is simply

money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement to make the plaintiff whole. [*McInnis v. Fairfield Cmtys., Inc.*, 458 F.3d 1129, 1145 \(10th Cir. 2006\)](#). Front pay is an equitable remedy awarded by the court (not the jury). [*Whittington*, 429 F.3d at 1000](#). In deciding whether to award front pay, a trial court is not “free to reject or contradict findings by the jury on issues that were properly submitted to the jury.” [*Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 \(8th Cir. 1997\)](#).

Here, the trial court ruled that front pay was not an appropriate remedy because of the “absence of any actual damages that an award of front pay would remedy.” [[Order, 7/7/09, p. 41](#)]. In reaching this decision, the trial court again interpreted the jury’s verdict and award of nominal damages to mean that Professor Churchill did not suffer any actual damages.

The trial court erred by relying on the jury’s award of nominal damages to deny an award of front pay because in awarding nominal damages the jury only considered damages to the date of judgment whereas the award of front pay would be for damages from the date of judgment to reinstatement or in lieu of reinstatement. [*McInnis*, 458 F.3d at 1145](#). The jury did not consider Professor Churchill’s loss of future earnings, and therefore its award of nominal damages cannot form the basis for a denial of front pay.

Even though the trial court denied front pay on the basis of the jury's verdict for nominal damages, the trial court also ruled that front pay was not appropriate because Professor Churchill had not "seriously pursued any efforts to gain comparable employment, but has instead has (sic) chosen to give lectures and other presentations as a means of supplementing his income." [[Order, 7/7/09, p. 41](#)].

This finding is not supported by the record. At trial, Professor Churchill specifically testified about the problems he had finding another position after the University had labeled him as "a fraud, a plagiarist, a fabricator, whose scholarly work is not worth a bucket of [warm] spit." [[Trial Transcript, 3/24/09, p. 2807:6-8](#)].

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,

s/ Antony M. Noble

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CERTIFICATE OF MAILING

I hereby certify that on the 18th day of February 2010, a true and correct copy of the foregoing **APPELLANT'S OPENING 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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