

SUPREME COURT, STATE OF COLORADO

101 W. Colfax Avenue, Suite 800  
Denver, CO 80202

Court of Appeals No. 09CA1713  
District Court for the City and County of Denver  
Case No. 06CV11473  
Honorable Larry J. Naves, Judge

**PETITIONER:** WARD CHURCHILL

**RESPONDENT:** THE UNIVERSITY OF  
COLORADO AND THE REGENTS OF THE  
UNIVERSITY OF COLORADO, a Colorado  
body corporate.

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Case Number: 11SC25

JUDGMENT AFFIRMED

Opinion by: JUDGE GRAHAM  
Terry and Booras, JJ., concur

November 24, 2010

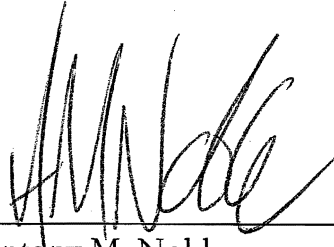
PUBLISHED OPINION

**PETITION FOR WRIT OF CERTIORARI**

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this petition complies with the requirements of C.A.R. 32.

The petition contains 3,800 words.



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Antony M. Noble

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## **ADVISORY LISTING OF THE ISSUES**

I. Whether a public university's investigation of a tenured professor's writings and public speeches, undertaken in search of grounds for termination, can constitute an adverse employment action for the purposes of a First Amendment claim brought under 42 U.S.C. § 1983.

II. Whether the granting of quasi-judicial immunity to the Regents of the University of Colorado for their termination of a tenured professor comports with federal law for actions brought under 42 U.S.C. § 1983.

III. Whether the denial of equitable remedies for termination in violation of the First Amendment undermines the purposes of 42 U.S.C. § 1983.

## **BASIS OF JURISDICTION**

The court of appeals issued its published opinion in this case on November 24, 2010. Churchill did not file a petition for rehearing. This petition for writ of certiorari is timely because it is filed within forty-six days of the issuance of the opinion below. C.A.R. 52(b)(3). This Court should review the opinion on a writ of certiorari because the court has decided a question of substance in a way probably not in accord with applicable decisions of this Court. C.A.R. 49(a)(2).

## **STATEMENT OF THE CASE**

After a four-week trial, the jury returned its verdict in favor of Professor Churchill on his claim of retaliatory termination in violation of the First Amendment.

After a hearing addressing reinstatement as the appropriate remedy, the trial court vacated the jury verdict on grounds of quasi-judicial immunity, and entered judgment in favor of the University.

Prior to this action, Churchill was a tenured professor at the University of Colorado, where he had been employed for nearly thirty years. His claims stem from the University's response to media reports concerning an essay he wrote shortly after September 11, 2001. Although this essay had been published for over three years, it only garnered media attention in January 2005. Shortly thereafter, the Governor, the General Assembly, and others pressured the University to fire Churchill because of his essay.

In response, the Regents of the University held a meeting, condemned Churchill, and unanimously voted to investigate every word he had published or spoken publicly to determine if they could discharge him.

Chancellor DiStefano then formed an ad hoc committee to investigate Churchill's speech. Churchill was never formally notified of this investigation, nor consulted by the committee. Subsequently, DiStefano confirmed that all of Churchill's writings and public speeches, including the controversial essay, were protected by the First Amendment. DiStefano then initiated a second type of investigation by lodging a series of complaints against Churchill for alleged academic

misconduct.

Over the next two years, Churchill was required to defend his scholarship against numerous charges DiStefano brought to an internal faculty Standing Committee on Research Misconduct (SCRM). The SCRM's findings and recommendations were reviewed by the Privilege and Tenure (P&T) Committee, which dismissed some of the SCRM's findings. Its recommendations to University President Brown did not include termination. Brown reinstated charges dismissed by the P&T Committee, overrode its recommendations, and advised the Regents to fire Churchill. The Regents subsequently did so.

Churchill then initiated this action under 42 U.S.C. § 1983. In a stipulation prior to trial, he dismissed his claims against the Regents in their individual capacities, and the University waived its Eleventh Amendment defense to the lawsuit. At trial, Churchill presented two claims for relief: (i) that the University violated the First Amendment by investigating all of his public speech and writings; and (ii) that the University fired him not because of alleged research misconduct, but in retaliation for speech protected by the First Amendment.

At the conclusion of evidence, the trial court entered a directed verdict that precluded the jury from deciding the investigation claim. On the dismissal claim, the court submitted special interrogatories that the jury unanimously answered in favor of

Churchill. The jury awarded nominal damages, leaving the issue of reinstatement to the judge.

The University filed for post-trial relief, claiming immunity from suit and contesting Churchill's right to reinstatement despite the jury's verdict that the University violated the First Amendment by firing him. The trial court agreed that judgment should enter for the University and its Regents because they had quasi-judicial immunity from suit, regardless of any unconstitutional conduct. Despite having dismissed the case, the judge then entered an order containing numerous pages of dicta disapproving of the jury's verdict.

On appeal, Churchill sought (i) reversal of the directed verdict holding that the ad hoc investigation of his speech and publications, conducted with express intent to find grounds for termination, did not violate the First Amendment, and (ii) reversal of the order vacating the verdict on grounds of absolute immunity, with directions to restore the jury's verdict and reinstate him as a tenured professor.

The court of appeals affirmed the trial court.

## REASONS FOR GRANTING THE WRIT

- I. **A public university's investigation of a tenured professor's writings and public speeches, undertaken in search of grounds for termination, can constitute an adverse employment action for purposes of a First Amendment claim brought under 42 U.S.C. § 1983.**

First Amendment claims based on retaliation by an employer are analyzed under the test articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), as modified by *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Couch v. Bd. of Trs. of the Mem. Hosp.*, 587 F.3d 1223, 1235 (10th Cir. 2009). Implicit in this test is “a requirement that the public employer have taken some adverse employment action against the employee.” *Couch*, 587 F.3d at 1235-36.

Here, the court of appeals ruled, “Before an employment action can be considered adverse, it must materially alter the terms or conditions of employment.” *Slip Op.* at 46. Applying this standard, it concluded that the investigation into Churchill's writings and public speeches was not an adverse employment action, and therefore the trial court did not err by entering a directed verdict on his first claim for relief. *Slip Op.* at 50-56.

- A. **The court of appeals erred by applying a standard more restrictive than the standard applied by federal courts.**

The United States Supreme Court has held that an adverse employment action

need not relate to the terms or conditions of employment. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 70 (2006). In *Burlington*, the Court stated, “An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.” *Id.* at 63. It held that conduct that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination” constitutes an adverse employment action in Title VII retaliation cases. *Id.* at 68.

In First Amendment retaliation cases, federal courts apply a standard analogous to the *Burlington* standard. *See, e.g., Couch*, 587 F.3d at 1238 (action that would “deter a reasonable person from exercising his ... First Amendment rights” is adverse); *Dillon v. Morano*, 497 F.3d 247, 254 (2nd Cir. 2007) (test is whether alleged acts “would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights”); *Nair v. Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 478 (6th Cir. 2006) (adverse action means “an injury that would likely chill a person of ordinary firmness from continuing to engage in [the protected] activity”); *Matrisciano v. Randle*, 569 F.3d 723, 730 n.2 (7th Cir. 2009) (“any deprivation likely to deter free speech is sufficient”).

In requiring action that materially alters the terms or conditions of employment, the court of appeals relied on two Eighth Circuit opinions, *Altonen v.*

*City of Minneapolis*, 487 F.3d 554, 560 (8th Cir. 2007) and *Bechtel v. City of Belton*, 250 F.3d 1157, 1162 (8th Cir. 2001). *Bechtel* was issued prior to the Supreme Court's opinion in *Burlington*, and the *Altonen* opinion relied on *Bechtel* without referencing *Burlington*. The Eighth Circuit now acknowledges that *Burlington* "altered the analysis we use when evaluating claims of adverse employment actions in retaliation cases." *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 928 (8th Cir. 2007).

Prior to *Burlington*, the Eighth and Fifth Circuits had the most restrictive standard for adverse employment actions. *Burlington*, 548 U.S. at 60. Although neither circuit has decided whether *Burlington* applies in First Amendment retaliation cases, both now apply it in Title VII retaliation cases. See *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 331 (5th Cir. 2009); *Jackson v. UPS*, 548 F.3d 1137, 1142 (8th Cir. 2008). Further, the Eighth Circuit recognizes that "First Amendment retaliation claims are analyzed under the same framework as claims of retaliation under Title VII." *Tyler v. Univ. of Ark. Bd. of Trs.*, \_\_\_ F.3d \_\_\_, No. 10-1251 (8th Cir. Jan. 6, 2011).

Because of the court of appeals' opinion in this case, Colorado may be the only jurisdiction that, post-*Burlington*, limits adverse employment actions in First Amendment retaliation cases to actions materially altering the terms or conditions of employment.

**B. The court of appeals erred in concluding that the University's investigation into Professor Churchill's writings and public speeches was not an adverse employment action.**

The court of appeals stated, "Whether an investigation alone is sufficient to constitute an adverse employment action has not been resolved by the United States Supreme Court, and there does not appear to be a definitive consensus on the matter among federal courts." *Slip Op.* at 50.

This question, as framed by the court of appeals, is unresolved because "[c]ontext matters." *Burlington*, 548 U.S. at 69. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* What constitutes adverse employment action is a "heavily fact-specific, contextual determination." *N.Y. State Law Officers Union v. Andreucci*, 433 F.3d 320, 328 (2nd Cir. 2006).

Post-*Burlington*, federal courts cannot definitively determine whether all investigations are adverse employment actions because the standard is now whether the employer's conduct would deter a reasonable person from exercising his rights. *Couch*, 587 F.3d at 1237-38. Some investigations may deter a reasonable person while others may not. Each investigation must be considered in context.

In concluding that the investigation of Churchill's speech was not an adverse employment action, the court of appeals cited *Couch* for its result, but not for its application of *Burlington*. *Slip Op.* at 52-53. Otherwise it relied on decisions that applied a pre-*Burlington* standard. *Slip Op.* at 53-54.

Additionally, the court of appeals did not address the fact that the investigation at issue was accompanied by threats of discipline and termination. DiStefano admitted that the ad hoc committee charged with examining the content of Churchill's speech was trying to find "cause for dismissal." [Transcript, 3/10/09, pp. 459:5-460:9]. Regent Hayes admitted during cross-examination that she voted for the investigation to see if there were grounds for dismissal. [Transcript, 3/30/09, p. 3651:11-17]. Regent Lucero said publicly, "We, the Board of Regents, have called this special meeting ... to hear from the ... chancellor and to hear what his course of disciplinary action is." [Transcript, 3/31/09, p. 3942:15-21]. Regent Carrigan told the New York Times, "We can fire Churchill. We just can't fire him tomorrow." [Transcript, 3/27/09, pp. 3281:3-3283:8].

Post-*Burlington*, federal courts have held that similar investigations could constitute adverse employment action. *See, e.g., Billings v. Town of Grafton*, 515 F.3d 39, 54-55 (1st Cir. 2008) (formal investigation and reprimand including threat of discipline could constitute adverse employment action); *Mullins v. City of New York*, 626 F.3d 47,

55 (2nd Cir. 2010)(internal investigation with possibility of termination could constitute adverse employment action). Because the court of appeals applied a more restrictive standard than the federal courts, it erred in concluding that the investigation in this case was not an adverse employment action.

**II. The granting of quasi-judicial immunity to the Regents of the University of Colorado for termination of a tenured professor does not comport with federal law governing actions under 42 U.S.C. § 1983.**

By using an inappropriate standard to assess immunity, the court of appeals has precluded legal redress for violations of constitutional rights, undermining the purpose of section 1983.

**A. The court of appeals failed to assess quasi-judicial immunity in accordance with federal precedent.**

According to the court of appeals, the indicia of quasi-judicial action identified by the Supreme Court in *Butz v. Economou*, 438 U.S. 478, 512 (1978) and *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985) need not be strictly applied. *Slip Op.* at 17. Instead, the court of appeals relies on the fact that this Court “has used other factors in determining whether the actions of government officials are functionally equivalent to a judge’s role and therefore should be cloaked with absolute immunity.” *Slip Op.* at 17, citing *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622, 627-628

(Colo. 1988).

In *Cherry Hills*, however, the issue was jurisdiction under C.R.C.P. 106(a)(4), not section 1983. *Id.* at 623. *Cherry Hills* identified three factors relevant to granting a zoning board quasi-judicial immunity: (a) adequate notice prior to action, (b) a public hearing where citizens may present evidence, and (c) a decision based on application of legal criteria to the facts. These factors were not met in this case because citizen input was not allowed at the University's public meetings and legal criteria were not applied to the facts.

More significantly, *Cherry Hills* involved a city council resolution on land use. Its test does not apply to wrongful discharge cases, and does not incorporate the factors identified in *Butz* and *Cleavinger*. "A construction of [section 1983] which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced." *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980).

*Cleavinger* is particularly relevant because the Supreme Court related the prison review board in that case to the school board denied quasi-judicial immunity in *Wood v. Strickland*, 420 U.S. 308 (1975). See *Cleavinger*, 474 U.S. at 204-205. The *Cleavinger* formulation has been "follow[ed] carefully" by federal courts in assessing claims for

absolute immunity. See *Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315, 1317 (10th Cir. 2002); *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 224 (5th Cir. 1999)(overturning grant of immunity to school trustees because district court “analyzed the procedure using different factors from the federal rule” and parties failed to apply the *Cleavinger* factors); *Mee v. Ortega*, 967 F.2d 423, 428 (10th Cir. 1992)(“consideration of the factors outlined in *Cleavinger* necessarily informs our decision”); *Darnell v. Ford*, 903 F.2d 556, 560 (8th Cir. 1990)(“[w]hether state ... officials receive absolute immunity ... is controlled by *Cleavinger*”).

The court of appeals failed to consider federal precedent relevant to determinations of quasi-judicial immunity in educational contexts. The importance of academic freedom has been emphasized by the Supreme Court. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)(without academic freedom “our civilization will stagnate and die”); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967)(academic freedom is “of transcendent value” and “a special concern of the First Amendment”).

In *Wood*, the Supreme Court denied quasi-judicial immunity to school officials because increasing their discretion did not “warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.” *Wood*, 420 U.S. 308, 320 (1975); see also *Harris*, 168 F.3d at 224-225 (denying quasi-judicial

immunity to school trustees); *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499, 1508 (11th Cir. 1990)(denying quasi-judicial immunity to school board members).

This reasoning applies equally to universities. See *Osteen v. Henley*, 13 F.3d 221, 224 (7th Cir. 1993)(university officers “unlikely” to have absolute immunity “given the Supreme Court’s refusal to grant such immunity to members of school boards that adjudicate violations of school disciplinary regulations”).

The only education-related cases the court of appeals cited are *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518 (Colo. 2004), which involved no federal constitutional issues, *Slip Op.* at 14, and *Gressley v. Deutsch*, 890 F.Supp. 1474 (D. Wyo. 1994), never previously cited in a published opinion for its holding on quasi-judicial immunity. *Slip Op.* at 20-21.

Local zoning boards are not functionally equivalent to university regents, and the notice and public input requirements appropriate to regulatory decisions do not adequately protect the First Amendment in universities. When a tenured professor has been fired in retaliation for protected speech—or any other reason that violates the Constitution of the United States—C.R.C.P. 106(a)(4) does not provide a remedy consistent with the intent of section 1983.

**B. The court of appeals' application of factors relevant to assessing quasi-judicial immunity was incomplete and inconsistent with federal precedent.**

In *Butz* and *Cleavinger*, the Supreme Court identified six factors “characteristic of the judicial process” relevant to quasi-judicial functions:

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

*Cleavinger*, 474 U.S. at 202 (citing *Butz*, 438 U.S. at 512). To the extent the court of appeals did address some of these factors, *see Slip Op.* at 18-38, it did so in a manner inconsistent with standards established by federal courts.

Thus, for example, the court of appeals cited the existence of internal investigative processes as evidence that the Regents were sufficiently independent, *Slip Op.* at 22-29, but without acknowledging that these were carried out primarily by faculty members who failed to meet established standards for independent review. *See Moore*, 310 F.3d at 1318 (review committee composed of employees of the same institution “lack[ed] the kind of independence typical of judicial bodies.”); *see also Purisch v. Tennessee Technological University*, 76 F.3d 1414, 1421-22 (6th Cir.

1996)(university officials on grievance committee lacked sufficient independence).

The court of appeals also recites University procedures as evidence of “procedural safeguards,” *Slip Op.* at 25-29, disregarding that these “safeguards” were not implemented by disinterested, independent parties. It concludes from its own reading of the record that there was no reasonable basis on which a jury could have found evidence of bias, *Slip Op.* at 29-36, when in fact the jury—examining the same record—did find bias and improper motivation.

The court of appeals ruled that the Regents’ action constituted appellate review, *Slip Op.* at 21, but the Regents were acting on a non-binding recommendation of the University President who had considered—but did not follow—faculty committee recommendations. The Regents were the sole decision-makers, not a reviewing body.

The court of appeals also opines that C.R.C.P. 106(a)(4) provides adequate judicial review, *Slip Op.* at 36-38, when, in fact, C.R.C.P. 106 constricts the remedy provided by section 1983. This Court has recognized that “an action challenging a quasi-judicial decision of a governmental body and requesting money damages under § 1983” cannot be constrained by the limits on Rule 106 actions because “claims under § 1983 exist as a ‘uniquely federal remedy’ that ‘is to be accorded a sweep as broad as its language.’” *Board of County Comm’rs of Douglas County v. Sundheim*, 926 P.2d 545, 547-48 (Colo. 1996); *see also DiBlasio v. Novello*, 344 F.3d 292, 299 (2nd Cir.

2003)(New York civil practice rule providing similar relief inadequate in section 1983 case).

Finally, the court of appeals erred in granting quasi-judicial immunity to the University and its Regents in their official capacities. Such immunity is intended to shield officials from personal liability and, thus, is available to defendants only in their individual capacities. *See Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 677n (1996). The court of appeals mischaracterizes the parties' stipulation. *Slip Op.* at 39. Churchill stipulated that the University retained such defenses as were available to the Regents. Because absolute immunity was not available to the Regents in their official capacities, it could not be transferred to the University by this stipulation.

For these reasons, granting the University and its Regents absolute immunity for the termination of a tenured professor in violation of the First Amendment fails to comport with federal law and undermines the purpose of section 1983.

### **III. The denial of equitable remedies for termination in violation of the First Amendment undermines the purpose of 42 U.S.C. § 1983.**

Congress intended section 1983 "to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 700-701 (1978). Denying

equitable relief in this case undermines that purpose.

**A. Even when quasi-judicial immunity protects state officials from personal liability, equitable remedies under section 1983 are not foreclosed.**

The 1996 amendments to section 1983 preclude injunctive relief “in any action brought against a judicial officer.” There is disagreement about whether this extends to those acting in a quasi-judicial capacity. *See, e.g., Simmons v. Fabian*, 743 N.W.2d 281 (Minn. App. 2007); *Roth v. King*, 449 F.3d 1272 (D.C. Cir. 2006). Without clear guidance from Congress or the United States Supreme Court, this provision should not be extended beyond its plain language.

**B. Allowing employers to create conditions precluding the reinstatement of wrongfully terminated employees undermines the purpose of section 1983 and is an abuse of discretion.**

“Under the *Mt. Healthy* analysis, once the plaintiff establishes that his discharge resulted from constitutionally impermissible motives, he is presumed to be entitled to reinstatement.” *Professional Assoc. of College Educators v. El Paso County Community College District*, 730 F.2d 258, 269 (5th Cir. 1984)(referencing *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977)). “[A] denial of reinstatement is unwarranted unless grounded in a rationale which is harmonious with the legislative goals of providing plaintiffs make-whole relief and deterring employers from unconstitutional

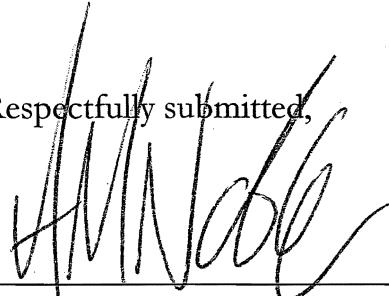
conduct.” *Squires v. Bonser*, 54 F.3d 168, 172 (3rd Cir. 1995). This presumption can be overcome only by “special” or “exceptional” circumstances, *see id.* at 173, which were not established in this case.

“Meaningful appellate review of the exercise of discretion” requires consideration of “the policy underlying the substantive right” and whether the weight given various factors was “consistent with that necessary to effectuate that policy.” *Gurmankin v. Costanzo*, 626 F.2d 1115, 1119-20 (3rd Cir. 1980). Allowing employers who terminate employees in violation of the Constitution to preclude reinstatement compounds the violation, *see Jackson v. City of Albuquerque*, 890 F.2d 225, 235 (10th Cir. 1989), and is therefore inconsistent with the purpose of section 1983.

## CONCLUSION

Petitioner, Ward Churchill, respectfully requests this Court to review the opinion of the court of appeals on a writ of certiorari to resolve these important issues of law.

Respectfully submitted,



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I hereby certify that on the 10th day of January 2011, a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI** was placed in the U.S.

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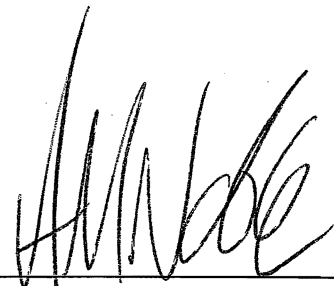
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