DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 BANNOCK STREET DENVER, CO 80202	
Plaintiff(s): WARD CHURCHILL, an individual v. **Defendant(s):** UNIVERSITY OF COLORADO; THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate	▲ COURT USE ONLY ▲
	Case Number: 06CV11473 Courtroom: 6

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW AND DENYING PLAINTIFF'S MOTION FOR REINSTATEMENT OF EMPLOYMENT

1. The Plaintiff in this matter is Professor Ward Churchill, and the Defendants are the University of Colorado and the Regents of the University of Colorado. This matter comes before the court on Defendants' Motion for Judgment as a Matter of Law and Plaintiff's Motion for Reinstatement of Employment. This Court, having heard testimony, received exhibits, and heard argument of counsel and being otherwise fully apprised in the premises, does find and order as follows:

2. On April 2, 2009 following a four-week jury trial, the jury in this matter found in favor of Professor Churchill on his Second Claim for Relief-First Amendment Retaliation in Terminating Professor Churchill's Employment.

3. The Defendants move this Court to enter judgment as a matter of law in their favor on Professor Churchill's Second Claim for Relief on the ground that it is barred by the doctrine of quasi-judicial immunity.

4. Professor Churchill requests the Court order his reinstatement of employment to his former position of fully tenured professor at the University of Colorado, and to provide such further equitable relief as is necessary to vindicate his rights under the First Amendment to the United States Constitution.

5. For the following reasons I grant Defendants' Motion for Judgment as a Matter of Law and deny Professor Churchill's Motion for Reinstatement of Employment.

I. Motion for Judgment as a Matter of Law

Background

6. As specified in the pleadings and Trial Management Order, the University preserved the defense that it was immune from liability. The parties agreed that the University would present its immunity arguments after the jury's verdict because judicial immunities are a legal issue to be determined by a court, not a jury. *See Miller v. Davis*, 521 F.3d 1142, 1145 (9th Cir. 2008) (stating that "whether a public official is entitled to absolute immunity is a question of law.) *Crooks v. Maynard*, 913 F.2d 699, 700 (9th Cir. 1990) (stating "judicial immunity is a question of law"); *Brewer v. Blackwell*, 692 F.2d 387, 390 (5th Cir. 1982) (stating that "whether an official is

protected by judicial immunity is a question of law and the facts found by the district judge in making that determination are to be reviewed under the 'clearly erroneous' standard").

7. Early in the lawsuit, Professor Churchill brought claims not only against the University and the Board of Regents, but also against each of the individual Regents who served in 2005 (when the University examined whether his speech was constitutionally protected) and in 2007 (when the Board of Regents dismissed him). Litigants normally file claims in this manner because public officials sued in their individual capacities cannot claim Eleventh Amendment immunity. *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985).

8. Under the Colorado Governmental Immunity Act, however, the University is required to defend and indemnify the Regents for claims arising within the scope of their service. C.R.S. §24-10-103(4)(a) (stating that a "public employee" means "an officer, employee, servant, or authorized volunteer of the public entity, whether or not compensated, elected, or appointed"); C.R.S. §24-10-110(1)(a-b) (stating that a public entity shall be responsible for the defense and payment of claims arising against public employees). Under these circumstances, allowing the case to proceed against each individual Regent would only increase the cost of the case (because each Regent could hire separate counsel) and add to the complexity of the case (because any judgment could be entered only against an individual Regent subject to reimbursement by the University). In an already complicated case, asserting Eleventh Amendment immunity would not change the parties' ultimate position, but would delay Professor Churchill's ability to have his claims resolved in a timely and efficient manner.

9. To avoid this unnecessary cost and complexity, the University agreed to waive its Eleventh Amendment immunity, thus allowing direct claims to be brought against the University and the Board of Regents. In return for the ability to bring direct claims, however, Professor Churchill agreed that the University acquired the ability to assert any defenses that would be available to individual Regents. The parties' Stipulation provides:

> The University agrees and stipulates that it shall waive its immunity to claims for damages under the Eleventh Amendment to the United States Constitution to permit the same recovery from the University that might otherwise be had against any of its officials or employees acting in their official or individual capacities, reserving to the University the ability to present the same defenses that would have been applicable to any of its officials or employees acting in their official or individual capacities.

10. Therefore, because quasi-judicial immunity was a "defense that would have been applicable to any of its officials or employees" it is a defense available to the University and the Board of Regents.

Findings of Fact

11. *Article VIII* of the Colorado Constitution creates a number of state institutions and states, "Educational, reformatory, and penal institutions as the public good may require, shall be established and supported by the state, in such manner as may be prescribed by law." *Colo. Const. Article VIII*, §1. Within this broad grant of authority, the Colorado Constitution created the University of Colorado as a state institution of higher education. *Colo. Const. Article VIII*, §V. For governance of the University of Colorado, the Constitution provides, "There shall be nine regents of the University of Colorado who shall be elected in the manner prescribed by law for terms of six years

each." *Colo. Const Article IX*, §12. The Board of Regents, as a constitutional body that is not part of the legislative or executive branches, occupies a unique position in Colorado's governmental structure. *Subryan v. Regents of the University of Colorado*, 698 P.2d 1383, (Colo. App. 1984).

12. Among the Constitutional powers vested in the Board of Regents is the power "to enact laws for the government of the University." *Subryan*, 698 P.2d at 1383. Acting pursuant to this authority, the Board of Regents enacted *Laws of the Regents*. These laws define both the grounds and the process for dismissing a tenured member of the of the University's faculty. Specifically *Article 5.C.1* of the *Laws of the Regents* states:

> A faculty member may be dismissed when, in the judgment of the Board of Regents and subject to the Board of Regents' constitutional and statutory authority, the good of the University requires such action. The grounds for dismissal shall be demonstrable professional incompetence, neglect of duty, insubordination, conviction of a felony or any offense involving moral turpitude upon a plea or verdict of guilty or following a plea of nolo contendere, or sexual harassment or other conduct which falls below minimum standards of professional integrity.

13. *Article 5.C.2.(A)(1)* of the *Laws of the Regents* specifies that "no member of the faculty shall be dismissed except for cause and after being given an opportunity to be heard…" If the University's administration contemplates that it will dismiss a faculty member, the faculty member may request a hearing before the Faculty Senate Committee on Privilege and Tenure. *Laws of the Regents, Article 5.C.2.(B).* At any such hearing, the faculty member "shall be permitted to have counsel and the opportunity to question witnesses . . . [and] the burden of proof shall be on the University

administration." *Laws of the Regents, Article 5.C.2.(B).* After the Faculty Senate Committee on Privilege and Tenure makes its findings, the President of the University issues a recommendation and transmits it to the Board of Regents for final action. *Laws of the Regents, Article 5.C.2.(C).*

14. To implement the Laws of the Regents' requirement that no faculty member be dismissed "except for cause and after being given and an opportunity to be heard," as well as the faculty member's right to a hearing before the Faculty Senate Committee on Privilege and Tenure, the Regents enacted *Regent Policy 5-I*. The University followed *Regent Policy 5-I* in the weeks and months preceding its dismissal of Professor Churchill.

15. *Regent Policy 5-I, §III(A)(a)* allows the Chancellor of University of Colorado at Boulder to initiate the dismissal for cause process by issuing a written notice of intent to dismiss. On June 26, 2006, Interim Chancellor Philip DiStefano issued a Notice of Intent to Dismiss informing Professor Churchill that the University intended to dismiss him as a tenured faculty member. The Notice of Intent to Dismiss occurred after the University of Colorado at Boulder's Standing Committee on Research Misconduct concluded that Professor Churchill violated the University's Administrative Policy Statement on Misconduct in Research and Authorship. Chancellor DiStefano informed Professor Churchill that his "pattern of serious, repeated and deliberate research misconduct fall below minimum standards of professional integrity expected of University faculty and warrants your dismissal from the University of Colorado."

16. As permitted by *Regent Policy 5-I*, Professor Churchill requested a formal hearing before a five-member panel of the Faculty Senate Committee on Privilege and Tenure. *Regent Policy 5-I, §III(B)(2)(b)* allowed Professor Churchill to object to any of the panel members, but he did not do so. Although *5-I, §III(B)(2)(f-g)* normally contemplates that a dismissal hearing will last no more than two days, Professor Churchill had months to prepare for his hearing, which began on January 8, 2007, and lasted for seven full days. Pursuant to *Regent Policy 5-I*, *§III(B)(2)(l)*, a professional court reporter, as well as a professional videographer, made a complete record of the proceedings.

17. At the hearing, *Regent Policy 5-I, §III(B)(2)(k)* requires the administration to establish grounds for dismissal by clear and convincing evidence. *Regent Policy 5-I, §III(B)(1)(b)(2)(i)* allowed Professor Churchill to be represented by counsel. *Regent Policy 5-I, §III(B)(2)(o)* allowed Professor Churchill and his counsel the right to examine each of the University administration's witnesses and the right to present his own witnesses. *Regent Policy 5-I, §III(B)(2)(r)* allowed Professor Churchill and his counsel to present opening statements. *Regent Policy 5-I*, *§III(B)(2)(r)* also allowed Professor Churchill to make both oral and written closing arguments to the panel. Professor Churchill availed himself of each of these opportunities during the seven-day hearing.

18. After the conclusion of the hearing, the panel members reached a determination. The panel was "unanimous in finding that Professor Churchill has demonstrated conduct which falls below minimum standards of professional integrity, and that this conduct requires severe sanctions." The panel split on what sanction it

would recommend - - two members recommended dismissal, while three panel members recommended a suspension coupled with demotion. *Regent Policy 5-I, §III(C)(2)* allowed Professor Churchill to respond in writing to the panel's report.

19. The panel transmitted its report to the President of the University. President Brown, upon his review of the record, concurred with the panel's finding that Professor Churchill had engaged in conduct that served as grounds for dismissal under *Article 5.C.1* of the *Laws of the Regents* - - conduct falling below minimum standards of professional integrity. Because President Brown believed that this misconduct warranted dismissal, rather than some other sanction, President Brown returned the case to the panel for reconsideration pursuant to *Regent Policy 5-I, §III(C)(7)*. The panel did not modify its report, so President Brown transmitted his recommendation and the panel to the Board of Regents for final action.

20. After President Brown made his recommendation, *Regent Policy 5-I, §IV* allowed Professor Churchill to request a hearing before the Board of Regents. Before the hearing, *Regent Policy 5-I, §IV* allowed Professor Churchill to submit extensive written arguments to the Board of Regents.

21. *Regent Policy 5-I, §IV* allowed the University administration and Professor Churchill to make presentations to the Board of Regents "based upon the record of the case, including the transcript of the proceedings before the [faculty committee]." After the parties' presentation and "after consideration of all of the information provided to it," the Board of Regents determined that Professor Churchill engaged in conduct that fell below minimum standards of professional integrity and dismissed him from his tenured faculty position.

Conclusions of Law

22. The United States Supreme Court has recognized that there are "some officials whose special functions require a full exemption from liability." *Butz v. Economou*, 438 U.S. 478, 508 (1978). In particular, judicial officers are immune from suit because "the protection essential to judicial independence would be entirely swept away" if a lawsuit against judges could proceed upon the premise "that the acts of the judge were done with partiality, or maliciously, or corruptly…" *Bradley v. Fisher*, 80 U.S. 335, 348 (1871). The court reasoned that a judge's errors "may be corrected on appeal, but he should not have to fear that unsatisfied litigants will hound him with litigation charging malice or corruption. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Stated more directly, judicial immunity prevents judges from being subject to intimidation as they perform their functions. *Pierson*, 386 U.S. at 554.

23. Judicial immunity is not limited to judges, however, and has been extended to other participants in judicial processes, such as prosecutors and grand jurors. *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976). These people perform functions that are necessary for the functioning of the judicial system, and they receive what has been termed "quasi judicial immunity." *Butz*, 438 U.S. at 512. When government officials make judgments that are "functionally comparable" to those of judges, quasi-judicial immunity creates an absolute bar to liability. *Butz*, 438 U.S. at 513. Quasi-judicial immunity exists "not because of an official's particular location within the Government but because of the special nature of [his] responsibilities." *Butz,* 438 U.S. at 511.

24. In its leading case, the United States Supreme Court conferred quasi-judicial immunity upon administrative agency officials who participated in a hearing to exclude a commodity company from registration. *Butz,* 438 U.S. at 514-15. In conferring immunity, the Court took note that "the discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity arising form that decision was less than complete." *Butz*, 438 U.S. at 515.

25. After *Butz,* the Tenth Circuit Court of Appeals has extended quasi-judicial immunity to officials serving on panels to determine whether to terminate a government employee or revoke a professional license, even when those officials allegedly violated the Plaintiff's constitutional rights. *Saavedra v. City of Albuquerque*, 73F.3d 1525, 1529-1530 (10th Cir. 1996); *Horwitz v. Colorado State Board of Medical Examiners*, 822 F.2d 1508, 1513-14 (10th Cir. 1987). In a case that is analogous to Professor Churchill's, the Tenth Circuit found that no liability could stem from a career service council's decision to discharge an employee, even though she claimed that the council "improperly discharged [her] in retaliation for her exercise of her right to free speech." *Atiya v. Salt Lake County*, 988 F.2d 1013, 1016-17 (10th Cir. 1993).

26. Just as the Tenth Circuit has extended quasi-judicial immunity, the Colorado Supreme Court has also determined that a school district's termination of an employee after a contested hearing is a quasi-judicial function. *Widder v. Durango School DistrictNo. 9-R*, 85 P.3d 518, 527-28 (Colo. 2004). It explained its analysis:

> Thus, in determining whether a school board is performing a quasi-judicial function, our inquiry must focus on the nature of the governmental decision and the process by which that decision is reached. Quasi-judicial decision making, as it name connotes, bears similarities to the adjudicatory function performed by courts.

Widder, 85 P.3d at 527 (internal citations omitted).

27. Specifically, where an official applies "preexisting legal standards or policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi judicial capacity . . . " *Widder*, 85 P.3d at 527. This type of decision occurs when a school district decides whether it should terminate an employee who violates the district's code of conduct:

> A school district's decision about whether to terminate an employee who claims that he acted in good faith and in compliance with a conduct and discipline code certainly involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of presently existing standards . . . to past or present facts.

Widder, 85 P.3d at 527.

28. In its decisions in both *Hulen v. State Board of Agriculture,* and *Gressley v. Deutsch*, the Tenth Circuit determined that University officials enjoy quasi-judicial immunity from claims brought after disciplinary proceedings.

29. Professor Myron Hulen was a tenured professor at Colorado State University. After he provided evidence in an investigation, Professor Hulen alleged that CSU involuntarily transferred him to another department where he would be unable to attract research funds, publish scholarship, or receive salary increases. Professor Hulen filed suit alleging that the transfer was in retaliation for his exercise of protected speech. *Hulen v. State Board of Agriculture*, 98-B-2170, Pages 1-3 (D. Colo. 2001). CSU's faculty manual allowed Professor Hulen to challenge the transfer through a faculty

grievance process, at which time CSU bore the burden of proving the propriety of the transfer. *Hulen* at Page 13. The grievance committee found that CSU's administration improperly transferred Professor Hulen, but CSU's provost reversed the grievance committee's decision. CSU's president and governing board upheld the transfer decision. *Hulen* at Page 13.

30. Professor Hulen sued CSU's provost and president in their individual capacities for their alleged violations of his constitutional rights. The United States District Court for the District of Colorado granted them quasi-judicial immunity from Professor Hulen's claims on the grounds that their judgments were "functionally comparable" to those of judges. *Hulen* at Page 19. Judge Babcock explained:

> Here, the Faculty Manual provides that review of the grievance committee decision may be appealed through the administrative ranks, first to the Provost, then to the President, and finally to the State Board of Agriculture. Each of these entities is provided by the Manual with the appropriate standard of review. Each is functionally comparable to judges, as each is required to exercise a discretionary judgment. In Dr. Hulen's case, Provost Crabtree and President Yates involvement in the process was limited to this appellate function. I therefore conclude that Defendants Crabtree and Yates' involvement with the process was as quasi-judicial officers and grant them immunity on that basis.

Hulen at Page 20.

31. In *Gressley*, Professor Gene Gressley was a tenured professor at the University of Wyoming. After the University of Wyoming's President transferred Professor Gressley to another department, he publicly complained. *Gressley v. Deutsch*, 890 F.Supp. 1474, 1480 (D.Wyo. 1994). A dispute then arose as to whether Professor

Gressley had been insubordinate and had misused his position. *Gressley*, 890 F.Supp. at 1481.

32. The University of Wyoming's president initiated proceedings to terminate Professor Gressley. Under the University's procedures, a Faculty Hearing Committee heard two weeks of testimony before sustaining the charges against Professor Gressley. *Gressley*, 890 F.Supp. at 1481. Professor Gressley appealed the recommendation to the University of Wyoming Board of Trustee's, which "after hearing oral arguments, reviewing the record before and findings of the Faculty Hearing Committee . . .sustained the Faculty Hearing Committee's recommendation that Dr. Gressley's employment be terminated for cause." *Gressley*, 890 F.Supp. at 1481.

33. Professor Gressley brought individual capacity claims against each of the Trustees alleging that they unconstitutionally discharged him in retaliation for his exercise of free speech. The United States District Court for the District of Wyoming granted the Trustees quasi-judicial immunity from suit on the grounds that they were serving in an adjudicatory capacity. *Gressley*, 890 F.Supp. at 1490.

34. In doing so, Judge Downes construed the United States Supreme Court's and Tenth Circuit's precedents and applied the following test:

> The *Butz* decision granted absolute immunity to administrative officials performing functions analogous to those of judges and prosecutors if the following formula is satisfied: (a) the officials' functions must be similar to those involved in the judicial process; (b) the officials actions must be likely to result in lawsuits by disappointed parties; and (c) there must be sufficient safeguards in the regulatory framework to control unconstitutional conduct.

Gressley, 890 F.Supp. at 1490-91.

35. In this case, it is clear that the Board of Regents performed a quasi-judicial function and acted in a quasi-judicial capacity when it heard Professor Churchill's case and terminated his employment.

36. When a governmental body applies "preexisting legal standards or policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity…." *Widder*, 85 P.3d at 527. The Board of Regents determined whether grounds for dismissal existed under the *Laws of the Regents*. In doing so, The Regents "applied preexisting legal standards or policy considerations to past or present facts."

37. Just as a judge must apply the applicable legal standards to determine "the rights, duties, or obligations of specific individuals," the *Laws of the Regents* allow the dismissal of a tenured faculty member only for very limited reasons. Specifically, "the grounds for dismissal shall be demonstrable professional incompetence, neglect of duty, insubordination, conviction of a felony or any offense involving moral turpitude upon a plea or verdict of guilty or following a plea of nolo contendere, or sexual harassment or other conduct which falls below minimum standards of professional integrity."

38. "The existence of a statute or ordinance mandating notice and a hearing is evidence that the governmental decision is to be regarded as quasi-judicial." *State Farm Mutual Automobile Insurance Company v. City of Lakewood*, 788 P.2d 808, 813 (Colo. 1990). The *Laws of the Regents* fulfill this requirement as they require "no

member of the faculty shall be dismissed except for cause and after being given an opportunity to be heard as provided in this section."

39. One of the safeguards available in the judicial system is that "the proceedings are adversary in nature." *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. Under the *Laws of the Regents*, "the individual concerned shall be permitted to have counsel and the opportunity to question witnesses as provided in the rules of procedure governing faculty dismissal proceedings."

40. Quasi-judicial immunity applies when proceedings are "conducted by a trier of facts insulated by political influence." *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. In this case, the Privilege and Tenure Hearings Panel of the Faculty Senate was the "trier of fact" that determined whether the grounds for dismissal had been demonstrated against Professor Churchill. That "trier of fact" unanimously determined that Professor Churchill engaged in "conduct below the minimum standards of professional integrity," which is one of the permissible grounds for dismissal.

41. In civil judicial proceedings, the party seeking relief must bear a burden of proof. *Kaiser Foundational Health Plan of Colorado v. Sharp*, 741 P.2d 714, 719 (Colo. 1987). Under the *Laws of the Regents*, "the burden of proof shall be on the university administration" in dismissal proceedings.

42. In civil proceedings, the burden of proof is normally only by a preponderance of the evidence. Under *Regent Policy 5-I*, the burden of proof on the university administration is to demonstrate grounds for dismissal by clear and convincing evidence. This higher burden of proof supports a finding of quasi-judicial immunity.

43. Quasi-judicial immunity is appropriate where "a party is entitled to present his case by oral or documentary evidence." *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. Under the *Laws of the Regents*, the faculty member has the "opportunity to question witnesses" and present evidence. The Hearings Panel heard Professor Churchill's witnesses, received any exhibits he wished to introduce, and he had the opportunity to submit whatever written arguments he wanted.

44. Quasi-judicial immunity is appropriate where "the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision." *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. Under *Regent Policy 5-I*, "the hearing officer shall appoint a registered professional reporter to record the hearing" and "all presentations shall be based on the record in the case, including the transcript of the proceedings before the Panel." At the hearing, "the members of the Board shall have an opportunity to ask questions of the faculty member, the administration, and the hearing officer, but, ordinarily, the Board will not receive additional evidence."

45. In quasi-judicial proceedings, "the parties are entitled to know the findings and conclusions on all issues of fact, law or discretion presented on the record." *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. Under *Regent Policy 5-I*, the dismissal for cause panel first issues a written report containing "findings of fact, conclusions, and recommendations consistent with the policies of the Board of Regents."

46. In quasi-judicial proceedings, the decision is subject to further judicial review. *Miller,* 521 F.3d at 1145; *Butz*, 438 U.S. at 513. *Horwitz*, 822 F.2d at 1514. The purpose of such a review is to determine whether the factual basis of the decision is supported by some evidence in the record…" *Miller*, 521 F.3d at 1145.

47. Although Professor Churchill asserts that quasi-judicial immunity would leave him without a remedy, he is mistaken. The remedy available to him is the same remedy available to every litigant subject to a quasi-judicial decision. C.R.C.P. 106(a)(4)(I) allows a district court to overturn a quasi-judicial action that constitutes an "abuse of discretion." Under this standard, a district court might set aside any decision that is "clearly erroneous, without evidentiary support in the record, or contrary to law." *Leichliter v. State Liquor Licensing Authority*, 9 P.3d 1153, 1154 (Colo. App. 2000).

48. Further, this court agrees with the University that it is beyond dispute that the Board of Regents' decision would likely lead to litigation. Dismissal proceedings involve not only pecuniary interests, but also professional reputation. *Butz*, 438 U.S. at 509. This is exactly the type of quasi-judicial decision that the United States Supreme Court had in mind when it observed that "the loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus." *Butz*, 438 U.S. at 512.

49. As described above, the Board of Regents' decision occurred with sufficient procedural protections for the Court to grant quasi-judicial immunity, including: (1) the right to notice of charges; (2) the right to request a hearing before a faculty committee; (3) the right to challenge the participation of a member of the faculty committee; (4) the requirement that the University prove that grounds for dismissal exist by clear and convincing evidence; (5) the requirement that the University transcribe the hearing; (6) the right to representation by counsel; (7) the right to examine each University witness; (8) the right to present witnesses; (9) the right to present oral and

written closing arguments; (10) the right to respond to the faculty committee's findings; (11) the right to request a hearing before the Board of Regents; (12) the requirement that the Board of Regents consider only the evidence in the record; (13) the requirement that the Board of Regents take final action in a public meeting; and (14) the right of judicial review of the Board of Regents' decision under C.R.C.P. 106. Professor Churchill received the full panoply of rights available in judicial proceedings.

50. Professor Churchill argues that the University is not entitled to quasi-judicial immunity because the University waived its Eleventh Amendment immunity, but Professor Churchill's response mistakenly assumes that Eleventh Amendment immunity is the same thing as quasi-judicial immunity. They are separate immunities.

51. At its core, the Eleventh Amendment proscribes who may be sued in federal court or subjected to federal claims, the answer being that "arms of the state" may claim Eleventh Amendment immunity. The entity that is the University of Colorado would generally be afforded such immunity, while suits against individual officials would be permitted. However, in the pre trial agreement the University agreed to waive its Eleventh Amendment immunity.

52. In contrast, quasi-judicial immunity examines the type of action giving rise to the claim. If the government official performs a judicial action, he is immune from liability, even if he cannot claim Eleventh Amendment immunity. *See e.g. Williams v. Valencia Count Sheriff's Office* 33 Fed. Appx. 929, 2002 WL 532426, *3 (10thCir. 2002) (determining that a county court clerk was entitled to quasi-judicial immunity for carrying out duties of office); *Harrison v. Gilbert*, 148 Fed. Appx. 718,

2005 WL 2284266. *2 (10th Cir. 2005) (determining that a county attorney was entitled to claim judicial immunity); *Boyce v. County of Maricopa*, 144 Fed. Appx. 653, 2005 WL 1939919, *1(9th Cir. 2005) (determining that county probation officers preparing pretrial reports were entitled to judicial immunity).

53. Professor Churchill next argues that quasi-judicial immunity should not apply because the Regents are elected into office and subject to political pressure. In doing so, he disregards the cases extending quasi-judicial immunity to elected officials, such as *Miller v. Davis*, 521 F.3d. 1142, 1145 (9th Cir. 2008). In *Miller*, the Ninth Circuit Court of Appeals determined that the Governor of California was entitled to quasi-judicial immunity in reviewing parole decisions of inmates convicted of murder. Following the United States Supreme Court's guidance that quasi-judicial immunity "flows not from rank or title ... but from the nature of the responsibilities of the individual official," the Ninth Circuit granted the governor immunity because that function of his office was "functionally comparable" to that of a judge. *Miller,* 521 F.3d at 1145 (*citing Cleavinger v. Saxner*, 474 U.S. 192, 201 (1985)).

54. The Ninth Circuit recognized that there were some factors that potentially weighed against granting the governor quasi-judicial immunity, such as that "the Governor's review is not adversarial in nature, there is no requirement that the Governor consider precedent in making his determination, and the Governor is, by definition as an elected official, not insulated from political influence." *Miller*, 521 F.3d at 1145. Yet, notwithstanding the governor's "almost uniform denials of parole," quasi-judicial immunity was proper because the governor's review of parole decisions "shares enough of the characteristics of the judicial process" to be considered judicial in nature.

Miller, 521 F.3d at 1145 (*citing Butz*, 438 U.S. at 513). The proper focus is upon the function that the governmental official performs, not the means by which he acquired his office.

55. Further, judges are elected in many states. Those judges must campaign for office and must subsequently make decisions in high profile cases, but are nonetheless entitled to judicial immunity. *See Brown v. Greisenauer*, 970 F.2d 431, 439 (8th Cir. 1992) (stating that "for purposes of immunity analysis, the insulation-from-political-influence factor does not refer to the independence of the governmental official from the political or electoral process.") Indeed, even judges in the State of Colorado are subject to retention elections, but these elections do not cause them to lose judicial immunity. Further, the Regents function in several capacities, including interacting with their constituents. Mr. Churchill's dismissal was a function that was judicial in nature.

56. Professor Churchill cites *Tonkovich v. Kansas Board of Regents*, 1996 U.S. Dist. Lexis 18323 (D. Kan. 1996), for the proposition that Boards of Regents should not enjoy quasi-judicial immunity.

57. Professor Churchill correctly notes that *Tonkovich* denied quasi-judicial immunity to the University of Kansas' Board of Regents because the Kansas legislature had not "specifically delegated [its] quasi-judicial role by statute" and "the Kansas Legislature did not provide the Kansas Board of Regents with "the same explicit delegation of quasi-judicial functions [that it afforded administrative agencies]." *Tonkovich*, 1996 U.S. Dist. Lexis 18323 at *40-41. In its two-page discussion of the Kansas Regents beginning on Page *39, *Tonkovich* denied quasi-judicial immunity solely because the Kansas legislature had not statutorily conferred quasi-judicial powers upon

the Regents. *Tonkovich* never analyzed whether the Kansas Regents engaged in a form of judicial activity.

58. Professor Churchill suggests that "there is absolutely no meaningful distinction between the Kansas Regents and the University of Colorado's Board of Regents," but he is mistaken. The Kansas Board of Regents receives its powers only through express legislative delegations. *Article 2, §6* of the Kansas Constitution provides:

> The legislature shall provide for a state board of regents and for its control and supervision of public institutions of higher education. Public institutions of higher education shall include universities and colleges granting baccalaureate or postbaccalaureate degrees and such other institutions and educational interests as may be provided by law. The state board of regents shall perform such other duties as may be prescribed by law.

59. The University of Colorado's Board of Regents is not limited to "such other duties as may be prescribed by law" and does not depend upon Colorado's General Assembly to grant it quasi-judicial authority. *Article IX, §13* of the Colorado Constitution first created the Board of Regents without any further legislative action. Not only does the Colorado Constitution create the Board of Regents independently of any legislative action, the Constitution also grants the Regents broad constitutional authority to manage the University's affairs. In contrast to the Kansas Constitution, which limits its Board of Regents to "such other duties as may be prescribed by law," Colorado's Constitution affirmatively states that the Board of Regents "shall have the general supervision of their respective institutions . . . unless otherwise provided by law." The difference is significant because the Kansas Regents can act only where the legislature

has expressly conferred a certain power, but the Colorado Regents possess constitutional authority to act unless the General Assembly has properly acted to remove its exclusive powers to govern the University.

60. Further, C.R.S. §23-20-112 states that the Board of Regents "shall remove any officer connected with the university when in its judgment the good of the institution requires it." Therefore, the University of Colorado's Board of Regents actually possesses both constitutional and statutory powers that Kansas Board of Regents lacked. As a result *Tonkovich* sheds no light on the issues before this Court.

61. Professor Churchill argues that the Board of Regents did not act in a quasi-judicial capacity because it did not reach the same result as the faculty panel. However, the faculty panel found unanimously that Professor Churchill engaged in conduct that met the grounds for dismissal. Moreover, the faculty panel split 3-2 as to whether dismissal was the appropriate remedy. Under those circumstances, the Board of Regents engaged in an entirely judicial function when it reviewed the record and applied "discretionary judgment." *Hulen*, 98-B-2170 at Page 20.

62. Professor Churchill argues that the Board of Regents did not act as an appellate body. However, the Board of Regents acted in a nearly identical procedural manner as the university administrators or trustees in *Hulen* and *Gressley* when it reviewed the reports and recommendations generated during weeks of adversarial hearings without taking additional evidence. Further, there is nothing that limits quasi-judicial immunity to officials acting in a purely appellate role. *See Horwitz*, 822 F.2d at 1511; *Butz*, 438 U.S. at 513.

63. Finally, Professor Churchill argues that the 1996 Amendment to 42 U.S.C. §1983, limiting the availability of equitable relief against judicial officers, does not apply to quasi-judicial officers, such as Regents acting in a quasi-judicial capacity. I disagree.

64. The substantive right to seek remedial measures for a state official's past constitutional violation exists only pursuant to the federal statute under which Professor Churchill asserted his claims, 42 U.S.C. §1983. *See Arpin v. Santa Clara Valley Transportation Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (stating that "a litigant complaining of a violation of constitutional right does not have a direct cause of action under the United States Constitution but must use 42 U.S.C. §1983") As it existed before 1996, §1983 stated:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

Interpreting this language, the United States Supreme Court determined that "Congress plainly authorized the federal courts to issue injunctions in §1983 actions, by expressly authorizing a 'suit in equity.' *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). The Supreme Court later determined that judicial officers could not raise judicial immunity as a means of avoiding prospective relief awarded under §1983, even if judges were immune from claims for monetary damages. *Pulliam v. Allen*, 466 U.S. 522, 538-540 (1984). In doing so, the Supreme Court determined that "nothing in the legislative history of §1983 or in

this Court's subsequent interpretations of that statute supports a conclusion that Congress intended to insulate judges from prospective collateral injunctive relief." *Pulliam*, 466 U.S. at 540.

65. However, Congress amended 42 U.S.C. §1983 in 1996 to modify the availability of prospective relief available to successful litigants. As amended, the statute now reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . .

66. The 1996 amendment to 42 U.S.C. §1983 applies to "actions against a judicial officer," which includes officers, such as Regents, acting in a quasi-judicial capacity:

> Although neither the Supreme Court nor the First Circuit have addressed whether the statute protects quasi-judicial actors . . .performing tasks functionally equivalent to judges from actions for injunctive relief, circuit and district courts in the Second, Sixth, Seventh, Ninth, and District of Columbia have answered in the affirmative.

Pelletier v. Rhode Island, 2008 WL 5062162, *5-*6 (D. R.I. 2008). *See also Montero v. Travis*, 171 F.3d 757, 761 (2nd Cir. 1999) (applying the 1996 amendments when dismissing claims for prospective relief against quasi-judicial officers); *Roth v. King*, 449

F.3d 1272, 1286-87 (D.C. Cir. 2006) (stating that attorneys acting on administrative panels are entitled to immunity because "there is no reason to believe that the Federal Courts Improvement Act of 1996 is restricted to 'judges'") In *Pelletier*, Judge Smith surveyed all of the cases applying the 1996 amendment to quasi-judicial officers and found only one, *Simmons v. Fabian*, 743 N.W. 2d. 281 (Minn.App.2007), did not grant immunity for prospective relief, but observed that the court in Simmons: (1) failed to acknowledge the legislative history demonstrating that the amendment was intended to apply to quasi-judicial officers; and (2) was contrary to the existing body of law on the subject. *Pelletier*, 2008 WL 5062162 at *6.

67. Consequently, this Court is unable to grant prospective relief of the type that Professor Churchill seeks unless either: (1) the University violated a declaratory decree; or (2) declaratory relief was unavailable. Professor Churchill has never claimed that the University violated a declaratory decree, so that argument is unavailable to him. He also cannot demonstrate that declaratory relief was unavailable to him. C.R.C.P. 57 states that "district and superior courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."

68. Moreover, C.R.C.P. 106 allows an action in the district court "where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law." Where these avenues were available to him, the plain language of 42 U.S.C. §1983 now prohibits the form of relief that Professor Churchill seeks to obtain from the University.

69 Based on the foregoing, it is hereby ORDERED that Defendants are GRANTED quasi-judicial immunity as a matter of law from Professor Churchill's Second Claim for Relief. As a result, the jury's verdict in this matter is hereby VACATED, and judgment is hereby entered in favor of Defendants on Professor Churchill's Second Claim for Relief.

II. Motion for Reinstatement of Employment[1]

70. I have received extensive briefs from the parties related to this issue, carefully reviewed the exhibits submitted with the briefs, and held a one-day evidentiary hearing on July 1, 2009. I have carefully considered the applicable law and facts before making this ruling.

Procedural Background and Jury's Verdict

71. This lawsuit arose from Professor Churchill's former employment at the University of Colorado. In his Second Claim for Relief, filed under *42 U.S.C. §1983*, Professor Churchill alleged that his former employer, the University of Colorado and its Board of Regents, terminated him in retaliation for engaging in speech protected by the First Amendment to the United States Constitution. The University denied liability and asserted that it terminated Professor Churchill for research misconduct.

72. After a four-week trial, the jury returned a verdict, in which it determined that a majority of the members of the Board used Professor Churchill's protected speech as a motivating factor in their decision to terminate his employment. *Verdict Form – Question 1.* I would note, however, that I instructed the jury that it did

[1] The ruling and order on Defendants' MOTION FOR JUDGMENT AS A MATTER OF LAW, issued this same date, may render this Order concerning reinstatement moot.

not have to find that "the protected speech activities were the only reason Defendants acted against the Plaintiff." *Jury Instruction 7*. The jury also determined that the University failed to demonstrate that Professor Churchill would have been terminated in the absence of his protected speech. *Verdict Form –Question 3.*

73. The jury was instructed that it could award damages for "any noneconomic losses or injuries that Plaintiff Churchill has had to the present time, including physical and mental pain and suffering, inconvenience, emotional distress, loss of reputation, and impairment of quality of life," as well as "any economic losses or injuries which plaintiff has had to the present time." *Jury Instruction 8*. I gave this jury instruction because it was clear from the nature of the testimony that Professor Churchill (and other witnesses) provided, as well as the argument of his counsel and his pre-trial pleadings, that Professor Churchill was seeking compensation for lost wages, loss of reputation, and emotional distress. I further instructed the jury that "difficulty or uncertainty in the precise amount of any damages does not prevent you from deciding an amount." *Jury Instruction 11.*

74. The jury asked during its deliberations if it could find in favor of Professor Churchill but award him no damages. *Jury Question 1.* Without objection from Professor Churchill's counsel, I instructed the jury, "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." *Court's Response to Jury Question 1*.

75. Less than an hour after I provided this instruction, the jury returned a verdict and awarded Professor Churchill economic damages in the amount of one dollar, and noneconomic damages in the amount of zero (0) dollars. *Verdict Form –*

Question 4. I find the jury followed its instructions and understood my answers to its questions. *Weeks v. Angelone,* 528 U.S. 225, 234 (2000).

76. Accordingly, I find that the jury necessarily determined that Professor Churchill did not incur "any actual damages."

77. Professor Churchill did not challenge the jury's award of nominal damages or ask me to consider an additur on the grounds that that the jury's verdict was inadequate or contrary to the facts established at trial. *See Madrid v. Safeway Stores,* 709 P.2d 950, 950 (Colo. App. 1985) (describing trial court's ability to provide additur when the jury's verdict was grossly inadequate).

Reinstatement is Not an Appropriate Remedy in Light of the Jury's Determination that Professor Churchill Suffered No Actual Damages

78. Because Professor Churchill's claim arises under a federal statute, *42 U.S.C. §1983,* I have applied federal law to the question of whether reinstatement is an appropriate remedy.

79. The Tenth Circuit Court of Appeals has found that a trial court has "considerable discretion" in formulating remedies, one of which is reinstatement. *Carter v. Sedgwick County*, 36 F.3d 952, 957 (10th Cir. 1994). Consequently, "the award of equitable relief by way of reinstatement rests in the discretion of the trial court." *Bingman v. Natkin & Co.,* 937 F.2d 553, 558 (10th Cir.1991).

80. That discretion is not unlimited, however, because the Tenth Circuit has also held that "in fashioning equitable relief, a district court is bound both by a jury's explicit findings of fact and those findings that are necessarily implicit in the jury's verdict." *Bartee v. Michelin North America, Inc.,* 374 F.3d 906, 910 (10th Cir. 2006). Where "the jury verdict by necessary implication reflects the resolution of a

common factual issue . . . the district court may not ignore that determination." *Ag Services of America, Inc. v. Nielsen,* 231 F.3d 726, 732 (10th Cir.2000). As a result, I determine that I am bound by the jury's implicit finding that Professor Churchill has suffered "no actual damages" as a result of the constitutional violation.

81. My determination necessarily affects whether reinstatement is an appropriate remedy in this case. As the United States Supreme Court has determined, "[N]ominal damages, and not damages based upon some indefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Memphis Community School District v. Stachura,* 477 U.S. 299, 308 n11 (1986). The Tenth Circuit has followed this principle and determined that "nominal damages are a mere token, signifying that the plaintiff's rights were technically invaded even though he could not prove any loss or damage." *Griffith v. State of Colorado Division of Youth Services,* 17 F.3d 1323, 1327 (10th Cir. 1994).

82. Because of the jury's finding that nominal damages were the appropriate remedy, Professor Churchill's case is different than any other authority that he cites in his Motion for Reinstatement of Employment. In each of those cases, the jury (or the trial court in bench trials) found economic or non-economic losses stemming from the adverse employment action. *See e.g. Jackson v. City of Albuquerque,* 890 F.2d 225, 226 (10th Cir. 1989) (jury assessed $70,000 in compensatory damages and punitive damages of $70,000); *Starrett v. Wadley*, 876 F.2d 808, 824 (10th Cir. 1989) (jury assessed $75,0000 in damages); *James v. Sears, Roebuck & Company*, 21 F.3d 989, 995 n4 (10th Cir. 1994)(jury assessments per plaintiff ranged between $54,074 and $84,728). Professor Churchill has not cited any case contradicting the United States Supreme

Court's clear statement that an award of nominal damages, rather than any other form of relief, constitutes "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Stachura,* 477 U.S. at 308 n11.

83. I determine that *Fyfe v. Curlee*, 902 F.2d 401, 406 (5th Cir. 1990), a case that Professor Churchill cited in his reply brief, does not change my determination that I am bound by the jury's finding when determining whether reinstatement is an appropriate remedy. In *Fyfe*, the Fifth Circuit Court of Appeals overturned a jury's verdict in favor of an employer, determined that the plaintiff had proven a constitution violation as a matter of law, and *sua sponte* ordered an award of nominal damages.

84. The Fifth Circuit did not determine that the award of nominal damages automatically or presumptively entitled the plaintiff to any further remedy. Nor did the Fifth Circuit enter an award of reinstatement as a matter of law.

85. Instead it remanded the case to the trial court for further proceedings and commented that the plaintiff was entitled only "to pursue her case in the district court for reinstatement to her original position, damages for mental anguish and for constructive discharge." *Fyfe,* 902 F.2d at 406.

86. In other words, the Fifth Circuit determined only that the plaintiff deserved an opportunity to present evidence that she was damaged in a manner that an award of reinstatement might remedy. The jury in this case already rejected Professor Churchill's evidence and did not find any such damages.

87. The most analogous case in the Tenth Circuit is *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 965 (10th Cir. 2002). In *Smith,* a jury determined that an employer unlawfully terminated the plaintiff. The jury awarded

damages from the date of termination to the date of the verdict. The trial court refused to award the employee any front pay or other post-verdict relief. The Tenth Circuit overturned the trial court and stated that it "disregarded the jury's implicit finding that [the plaintiff] would have been employed at least until the date of trial." It ordered that "on remand, the district judge should make new findings for a front pay award consistent with the jury's findings." *Smith*, 298 F.3d at 965.

88. This case presents the same legal issue, with the only distinction being that Professor Churchill's jury determined that he had not proven any losses or injuries through the date of trial. Following *Smith*, if I am required to enter an order that is "consistent with the jury's findings," I cannot order a remedy that "disregard the jury's implicit finding" that Professor Churchill has suffered no actual damages that an award of reinstatement would prospectively remedy.

89. I therefore deny Professor Churchill's Motion for Reinstatement of Employment and follow the United States Supreme Court's guidance that "[N]ominal damages . . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury." *Stachura,* 477 U.S. at 308 n11.

Reinstatement is Not an Appropriate Remedy Where it Will Likely Result in Undue Interference in the Academic Process

90. Even if the jury's verdict had determined that Professor Churchill had suffered actual damages, I would nonetheless remain obligated to determine whether reinstatement would constitute an appropriate remedy.

91. As I approach this decision, I must discuss the issue of research misconduct and the processes that the University of Colorado employs for determining

whether a professor's conduct has fallen below minimum standards of professional integrity.

92. The University of Colorado has adopted rules of ethics that govern research. These rules, known as the *Administrative Policy Statement on Misconduct in Research and Authorship*, prohibit "fabrication, falsification, plagiarism, and other forms of misappropriation of ideas, or additional practices that seriously deviate from those that are commonly accepted in the research community for proposing, conducting or reporting research." *Trial Exhibit 3(B).*

93. Initially, a faculty body known as the Standing Committee on Research Misconduct: (1) authorized an investigation of the allegations of research misconduct against Professor Churchill; (2) reviewed the results of the investigation; (3) determined that he engaged in multiple acts of research misconduct, including plagiarism, fabrication, and falsification; and (4) recommended his dismissal to the Chancellor. *Trial Exhibit 1(K).*

94. The University of Colorado (and universities in general) operates somewhat differently than most workplaces. In particular, the *Laws of the Regents*, create a system of "shared governance" where "the faculty takes the lead in decisions concerning selection of faculty, educational policy related to teaching, curriculum, research, academic ethics, and other academic matters." *Trial Exhibit 3(A).*

95. For this reason, when Professor Churchill wished to challenge the initial findings of research misconduct and the Chancellor's adoption of the dismissal recommendation, he requested a hearing before the Faculty Senate Committee on Privilege & Tenure. The testimony at trial was undisputed that the P&T Committee is a

standing committee of the University, elected by the faculty members, and not appointed by the University's administration. The P&T Committee operates under rules that the faculty have approved. *Trial Exhibit 21(I).*

96. Professor Churchill received a full hearing, which lasted seven days, before the P&T Committee. He was represented by counsel during portions of the proceedings, was allowed to call witnesses, and was allowed to cross-examine the witnesses against him. Even Professor Churchill's expert on academic tenure processes testified: (1) that the P&T Committee on Privilege & Tenure employed appropriate rules; and (2) that there was no evidence that the deliberations of the committee members were affected by improper political considerations. *Trial Testimony of Philo Hutcheson*.

97. At the conclusion of this hearing, the five tenured faculty members of the P&T Committee unanimously determined by clear and convincing evidence that "Professor Churchill has engaged in conduct that falls below minimum standards of professional integrity and that this conduct requires severe sanctions." The members disagreed on the appropriate sanction, with three members recommending suspension and two members recommending dismissal. *Trial Exhibit 21(F).* Ultimately, the University's Board of Regents adopted the minority recommendation and dismissed Professor Churchill.

98. Professor Churchill contends that the jury's verdict constitutes the jury's rejection of the P&T Committee's decision that he engaged in research misconduct, but there was no such finding by the jury. The jury determined only that the University did not prove that a majority of the Regents would have voted to dismiss Professor Churchill in the absence of his political speech. That is a very different

question than whether Professor Churchill engaged in research misconduct, which remains the province of the University's faculty.

99. The P&T Committee's determination goes to the heart of why reinstatement is so problematic in this case. The United States Supreme Court has determined that "the four essential freedoms" of a university are "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Regents of the Univ. of Calif. v. Bakke,* 438 U.S. 265, 312 (1978) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)(Frankfurter, J. concurring).

100. At the evidentiary hearing on the Motion for Reinstatement of Employment, Professor Churchill and the incoming Chair of the Ethnic Studies Department (who would be Professor Churchill's direct supervisor) both testified to the effect that they could not accept P&T Committee's judgment defining the appropriate standards of scholarship or its unanimous conclusions that Professor Churchill had repeatedly violated them.

101. Because of this fundamental disagreement, I would be forced to reinstate Professor Churchill under circumstances where the normal scholarly processes, such as annual reviews and post-tenure reviews, become unreliable. If I granted reinstatement I believe there is a substantial likelihood that there would be future disputes about the propriety of Professor Churchill's academic conduct, as well as the Department of Ethnic Studies' ability to evaluate the probity and veracity of his scholarship. Those disputes would necessarily raise the question of whether the University has retaliated against Professor Churchill, especially given Professor Churchill's counsel's post-verdict

statements, such as, "Anything that is deemed retaliatory is another lawsuit. If they look at him cross-eyed, they could very well end up back in court." *Exhibit F to Brief in Opposition to Motion for Reinstatement of Employment.*

102. Although Professor Churchill may disagree, the University of Colorado's ability to define the standards of academic conduct is a decision that properly resides in bodies like the Standing Committee on Research Misconduct and the P&T Committee, not in the courts. I fully understand the concern, expressed in the statement of the present and former Chairs of the Arts and Sciences Council, that "an order restoring Churchill to full standing as a faculty member . . . will effectively negate the principle of autonomous faculty control over standards of performance and membership." *Reinstatement Hearing Exhibit GGG.*

103. Under these circumstances and recognizing that the University's faculty must have the ability to define the standards of scholarship, I am persuaded that reinstatement is not an appropriate remedy in this case based upon the Tenth Circuit's reasoning in *Acrey v. American Sheep Industry Association,* 981 F.2d 1569, 1576 (10th Cir. 1992), in which it affirmed a trial court's denial of reinstatement of a dismissed employee on the following grounds:

> The record contains examples of sharply conflicting evidence about specific incidents reflecting on plaintiff's job performance and treatment. At best, these illustrate a poor working relationship between the parties; at worst, an absence of mutual trust. The district court's decision that a productive and amicable working relationship between the parties was not feasible is supported by the record and hence not an abuse of discretion.

The same "sharply conflicting evidence" about Professor Churchill's job performance and the fundamental disagreements between the parties lead me to conclude that "an absence of mutual trust" makes reinstatement unfeasible.

104. *Thornton v. Kaplan*, 961 F.Supp. 1433, 1435-36 (D. Colo. 1996) also serves as guidance in my determination that reinstatement is not appropriate. In that case, a college professor prevailed in a lawsuit against his employer. The question was whether the trial court should reinstate the professor to a tenured faculty position. Instead of evaluating the potential for successful reinstatement in the vacuum of the professor's post-judgment statements, the trial court looked at the history of interactions between the parties and the realities of the higher education workplace, from which he concluded:

> In this case, there appears to be a complete absence of mutual trust which would foster collegial relationships and the ability to participate in collaborative projects that are typical in the academic community. Furthermore, this Court believes that the actual remedy sought by plaintiff, reinstatement with tenure, would entangle this Court excessively in matters that are left best to academic professionals.

Thornton, 961 F.Supp. at 1439-40. I conclude that reinstating Professor Churchill would entangle the judiciary excessively in matters that are more appropriate for academic professionals. In making this decision, I give considerable weight to the United States Supreme Court's recognition that "considerations of profound importance counsel restrained judicial review of the substance of academic decisions." *Regents of University of Michigan. v. Ewing,* 474 U.S. 214, 225 (1985).

Reinstatement is Not Appropriate Where the Relationship Between the Parties is Irreparably Damaged

105. The Tenth Circuit also instructs that trial courts may deny reinstatement when, as "a practical matter, a productive and amicable working relationship would be impossible" or "the employer-employee relationship has been irreparably damaged by animosity caused by the lawsuit." *Anderson v. Phillips Petroleum Company*, 861 F.2d 631, 638 (10th Cir. 1988); *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003).

106. I recognize that an employer's unilateral hostility to an employee, by itself, should not normally serve as a basis to deny reinstatement. *Jackson v. City of Albuquerque,* 890 F.2d 225, 226 (10th Cir. 1989). Consequently, I rely upon Professor Churchill's statements demonstrating his hostility to the University. His statements illustrate that reinstatement, as a practical matter, is not likely to create productive and amicable working relationships. *Anderson*, 861 F.2d at 638.

107. These reported statements include: (1) Professor Churchill's post-verdict reference to the University as having "degenerated to a not very glorified vo-tec, a trade school." *Exhibit H to Brief in Opposition to Motion for Reinstatement of Employment;* (2) Professor Churchill's reported post-verdict reference to the University's administration and witnesses as "the string of unprincipled liars the university called to the stand…" *Exhibit F to Brief in Opposition to Motion for Reinstatement of Employment;* (3) Professor Churchill's statement that "A random group of homeless people under a bridge would be far more intellectually sound and principled than anything I've encountered at the university so far." *Exhibit AA to Brief in Opposition to Motion for Reinstatement of Employment;* and (4) Professor Churchill's reference to the

faculty as the "ostrich factory," presumably with their heads buried in the sand. *Exhibit V to Brief in Opposition to Motion for Reinstatement of Employment*.

108. I am also concerned by Professor Churchill's filing and support of retaliatory complaints against members of the committee that investigated him, particularly after the P&T Committee had validated the findings of research misconduct. Professor Churchill had an opportunity to contest these findings, but chose to file retaliatory complaints when he was unsuccessful. *Trial Exhibits 16(D), 16(C), 16(F)*. Professor Churchill acknowledged at the evidentiary hearing that he also filed a research misconduct complaint against a professor at the law school for strategic reasons related to this lawsuit. *Trial Exhibit 25-229*. While Professor Churchill was within his rights to file and support these complaints, his actions further demonstrate his level of hostility. There is only a miniscule possibility that his return to the University will be amicable and productive.

Reinstatement Will Impose Harm Upon Others

109. Because reinstatement is an equitable remedy, I must also consider potential harms to innocent third parties. *See Ford Motor Company, v. EEOC,* 458 U.S. 219, 239 (1982) (stating that trial courts may consider the rights of "innocent third parties" when considering equitable remedies); *Lander v. Lujan,* 888 F.2d 153, 157 (D.C.Cir.1989) (stating that "[i]t may well be appropriate, perhaps even required," that a district court consider the impact of reinstatement upon other employees).

110. The University's P&T Committee, using processes that Professor Churchill's expert deemed appropriate and without any evidence of improper political

considerations, determined that Professor Churchill engaged in repeated and deliberate acts of research misconduct, including acts of plagiarism, fabrication and falsification.

111. The evidence was credible that Professor Churchill will not only be the most visible member of the Department of Ethnic Studies if reinstated, but that reinstatement will create the perception in the broader academic community that the Department of Ethnic Studies tolerates research misconduct. The evidence was also credible that this perception will make it more difficult for the Department of Ethnic Studies to attract and retain new faculty members. In addition, this negative perception has great potential to hinder students graduating from the Department of Ethnic Studies in their efforts to obtain placement in graduate programs.

112. In addition to these harms, I also fully understand the concern, expressed in the statements of the present and former Chairs of the Arts and Sciences Council, that "any external action to return Churchill to the faculty will inevitably weaken the capacity of University of Colorado faculty to hold errant or dishonest colleagues to account in future cases of academic misconduct" and "make it far more difficult to hold students to high standards of honesty in research and writing." *Reinstatement Hearing Exhibit GGG*. The Chair of the Arts & Sciences Council represents more than 750 faculty members of the College of Arts & Sciences. I find this a compelling argument against reinstatement.

113. In weighing the potential harms of reinstatement against the potential benefits of reinstatement, I must consider whether denying reinstatement will effectively prevent Professor Churchill from exercising his First Amendment rights. The evidence at hearing was uncontested that Professor Churchill continues to engage in a

broad range of scholarly activities. Professor Churchill testified that his website accurately described his activities since leaving the University of Colorado:

> Ward Churchill continues to teach, speak, and write books. In 2007, at student request, he taught a voluntary class at CU, much to the administration's dismay. Since the "controversy" began, he has given over 50 well-attended and highly praised public lectures. He has written several articles on academic freedom, and is in the process of finishing several books.

In short, Professor Churchill continues to publish articles, write books, give paid invited lectures at other institutions, and even give lectures on the University of Colorado campus. He described that "there are lots of venues in which you can teach and interact." *Exhibit V to Brief in Opposition to Motion for Reinstatement of Employment.*

114. I also do not find that reinstatement is necessary to prevent a "chilling effect" on the University of Colorado's campus. There was no credible evidence that any faculty member at the University of Colorado has refrained from academic or professional activities as a result of the events related to Professor Churchill. Professor Churchill's witnesses at the evidentiary hearing, including his most visible and consistent supporters, could not identify any specific retaliation against them or any other controversial faculty members.

115. On balance, I conclude that the potential harms require me to deny reinstatement, particularly when it has the potential to harm students and faculty who played no role in the decision to terminate Professor Churchill's employment. The benefits of reinstatement are not sufficient to outweigh these harms.

Front Pay is Not an Appropriate Alternative Remedy

116. Having determined that reinstatement is not an appropriate remedy, I will consider whether front pay is an appropriate alternative. "Although front pay sometimes is appropriate when reinstatement is not possible, it is not a mandatory remedy." *Starrett v. Wadley***,** 876 F.2d 808, 824 (10th Cir. 1989).

117. In considering front pay, I continue to follow the Tenth Circuit's guidance that "in fashioning equitable relief, a district court is bound both by a jury's explicit findings of fact and those findings that are necessarily implicit in the jury's verdict." *Bartee*, 374 F.3d at 910. In the absence of any actual damages that an award of front pay would remedy, I determine that front pay is not appropriate.

118. Even if there were evidence of actual damages, however, I would determine that front pay is not an appropriate remedy. In considering front pay, I may consider the discharged employee's duty to mitigate. *Thornton*, 961 F.Supp. at 1438-39.

119. Professor Churchill's own statements during the trial established that he has not seriously pursued any efforts to gain comparable employment, but has instead has chosen to give lectures and other presentations as a means of supplementing his income. Reportedly, he even "received a few job offers" that he declined to pursue. *Exhibit V to Brief in Opposition to Motion for Reinstatement of Employment.* Under these circumstances, I do not believe an award of front pay is appropriate. *See Denesha v. Farmers Ins. Exch.,* 161 F.3d 491, 502 (8th Cir.1998) (affirming denial of front pay where plaintiff attempted without success for six months to find comparable employment and then took a lower-paying job, during which he applied only once for employment in his area of expertise, and holding that "a plaintiff must make some sustained minimal

attempt to obtain comparable employment"); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 394 (5th Cir. 2003) (reversing award where "apart from obtaining comparatively low-paying work with two companies, [the plaintiff] did not seek any other employment and did not attempt to find substantially equivalent employment").

120. Based on the foregoing, it is hereby ORDERED that Professor Churchill's Motion for Reinstatement of Employment is DENIED. Further, I find that front pay is not an appropriate remedy in this case.

SO ORDERED this 7th day of July, 2009.

BY THE COURT:

Larry J. Naves
District Court Judge