

District Court City and County of Denver, Colorado 1437 Bannock Street Denver, Colorado 80202	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiff: Ward Churchill , an individual, v. Defendant(s): University of Colorado, Regents of the University of Colorado, a Colorado body corporate	
Attorneys for Plaintiff: David A. Lane, Atty. Reg. No. 16422 Darold Killmer, Atty. Reg. No. 16056 Qusair Mohamedbhai, Atty. Reg. No. 35390 KILLMER, LANE & NEWMAN, L.L.P. 1543 Champa Street, Suite 400 The Odd Fellows’ Hall Denver, CO 80202 Phone Number: (303) 571-1000 Fax Number: (303) 571-1001 E-mail: dlane@killmerlane.com Robert J. Bruce, Atty. Reg. No. 17742 LAWLIS & BRUCE, L.L.C. 1875 Lawrence Street, Suite 750 Denver, CO 80202 Phone Number: (303) 573-5498 Fax Number: (303) 573-5537 E-mail: robertbruce@lawlisbruce.com	Case Number: 06 CV 11473 Division: 6
PLAINTIFF’S MOTION FOR REINSTATEMENT OF EMPLOYMENT	

Plaintiff Ward Churchill (“Professor Churchill”), by and through counsel, David A. Lane, Darold W. Killmer and Qusair Mohamedbhai of KILLMER, LANE & NEWMAN, LLP, and Robert J. Bruce of LAWLIS & BRUCE, LLC hereby submits his Motion for Reinstatement of

Employment and other appropriate equitable relief appropriate to ensure the vindication of Professor Churchill's rights protected by the First Amendment to the United States Constitution.

I. INTRODUCTION

"The purpose behind the Bill of Rights, and of the First Amendment in particular, is to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). First Amendment rights are most strongly protected in university settings, due to the importance of academic freedom. "[A]cademic freedom ... is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Regents of the Univ. of the State of New York*, 385 U.S. 589, 603 (1967).

On April 2, 2009, a jury of Professor Ward Churchill's peers unanimously declared that the University of Colorado and its Board of Regents retaliated against Professor Churchill for his political speech, and thereby violated his federally protected constitutional rights under the First Amendment to the United States Constitution.¹ This Motion for Reinstatement respectfully requests that this Court abate the chilling effect caused by Defendants' unlawful punishment of political speech, and reinforce the importance of academic freedom in our country, by reinstating Professor Churchill to his fully tenured position at the University of Colorado. Only by doing so can Professor Churchill be returned to the status he had earned before Defendants inflicted their unconstitutional retaliation upon him.

¹ *Jury Instructions and Verdict Form* herein attached as Exhibit 1.

II. ARGUMENT – PROFESSOR CHURCHILL SHOULD BE FULLY REINSTATED

A. Reinstatement is the preferred remedy when a plaintiff prevails in a wrongful discharge case brought under Section 1983.

Section 1983 of Title 42 of the United States Code, authorizing both legal and equitable relief, provides in pertinent part:

“[e]very person who, under color of 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.

42 U.S.C. § 1983. "The very purpose of 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

A public employee terminated from his employment in violation of his constitutional rights must be reinstated to that employment. The Tenth Circuit Court of Appeals has recognized that "reinstatement usually will be granted when a plaintiff prevails in a wrongful discharge case brought under Section 1983." *Jackson v. City of Albuquerque*, 890 F.2d 225, 233 (10th Cir. 1989).² Courts favor reinstatement, and although not automatic, entitlement to reinstatement is presumed. *Starrett v. Wadley*, 876 F.2d 808, 824 (10th Cir. 1989); *see also James v. Sears, Roebuck & Co.*, 21 F.3d 989, 996-97 (10th Cir. 1994) (holding no abuse of

² The court in *Jackson* reviewed numerous cases in which reinstatement was denied. *Jackson*, 890 F.2d at 233-234. Not once was reinstatement denied where the plaintiff requested reinstatement. *See, generally, id.* citing *E.E.O.C. v. General Lines, Inc.*, 865 F.2d 1555 (10th Cir. 1989)(holding that relief by reinstatement of two store clerks was denied because at trial both clerks were residing outside the state and neither gave any testimony that they wished to be reinstated to their jobs); *Starrett*, 876 F.2d at 824 (denying reinstatement because plaintiff's own expert submitted an affidavit suggesting that reinstatement would be detrimental to plaintiff's health); *Fitzgerald v. Sirloin Stockade*, 624 F.2d 945, 957 (10th Cir. 1980) (Title VII case in which plaintiff did not request reinstatement).

discretion in ordering reinstatement instead of front pay, absent a showing that hostility would make it unworkable; plaintiffs' refusal to accept reinstatement precludes front pay); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 257-58 (5th Cir. 1996) (holding that the trial court did not abuse its discretion in ordering reinstatement, even though plaintiff's previous position had been eliminated, because evidence indicated she was qualified to maintain variety of jobs); *Phillipp v. ANR Freight Sys., Inc.*, 61 F.3d 669, 674 (8th Cir. 1995) (holding that there was no abuse of discretion in trial court's determination that reinstatement rather than front pay was appropriate absent showing that reinstatement was either impracticable or impossible); *Brunnemann v. Terra Int'l, Inc.*, 975 F.2d 175, 180 (5th Cir. 1992) (holding that absent evidence of animosity or hostility, court did not abuse its discretion in reinstating plaintiff, even though his position has been filled by someone else); *Farber v. Massillon Bd. of Educ.*, 908 F.2d 65, 70-71, corrected at 917 F.2d 1391, 1396-97 (6th Cir. 1990) (holding that reinstatement is clearly preferred and, absent exceptional circumstances carefully articulated in the record, should be ordered instead of front pay; workplace tensions insufficient unless they manifest themselves in public functions of employer).

Reinstatement is the preferred remedy, unless the employer has demonstrated such hostility that there is little or no hope that a working relationship would be possible. *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1157 (10th Cir. 1990). In such rare and narrow circumstances, front pay is an appropriate remedy in lieu of reinstatement. *Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 637 (10th Cir. 1988). Because reinstatement is the rule, and front pay the exception, courts often award reinstatement even if the individual has not requested it as a remedy. *EEOC v. General Lines, Inc.*, 865 F.2d 1555, 1560 (10th Cir. 1989) ("The trial court may restore the

plaintiff to the position he would have held but for the discrimination, even though such relief was not sought in the pleadings.").

Courts are not reluctant to reinstate a terminated employee where there has been retaliation based on political speech. *See Barnes v. Bosley*, 568 F. Supp. 1406, 1413 (E.D. Mo. 1983) (reinstating employees with full back benefits), *rev'd on other grounds*, 745 F.2d 501 (8th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Goodwin v. LaPolla*, 589 F. Supp. 1423, 1435 (N.D.N.Y. 1984) (ordering reinstatement of discharged carpentry inspector with retroactive salary, benefits, and no loss of seniority); *Parker v. Wallace*, 596 F. Supp. 739, 746 (M.D. Ala. 1984) (requiring defendants to offer plaintiff another job at comparable salary, if available, and to offer plaintiff prior job when available).

B. Reinstating Professor Churchill undoes the chilling effect to free speech caused by his unlawful termination.

Reinstatement most effectively abates the chilling effect on free speech. The university of Colorado fired Professor Churchill because it virulently disagreed with the content of his constitutionally protected speech. Denying Professor Churchill's request for reinstatement allows the University to circumvent the constitution, the law, and the jury's verdict to accomplish its illegal objective: to remove him from campus, once and for all. Merely substituting front pay for reinstatement simply allows the University to expend taxpayer monies to buy its illegal result.

The Supreme Court has recognized that dismissal from public employment is a potent means of inhibiting speech. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968). Employees are likely to limit their behavior to that which is unquestionably safe, for "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) quoting *Pickering*, 391 U.S., at 574. The dismissal standard hangs over

their heads like a sword of Damocles, threatening them with dismissal for any speech that might impair the employer. *Id.* This chilling effect suppresses the speech of all teachers if allowed to succeed – those that see the University successfully ridding itself of an outspoken professor like Churchill (even after he secures a jury verdict declaring his ouster as unconstitutional) will almost certainly be deterred from engaging in speech that offends the university administration.

Reinstating Professor Churchill is a critical part of the remedy for the violation of his First Amendment protected speech. Indeed, the court in *Jackson v. City of Albuquerque*, 890 F.2d 225, 233 (10th Cir. 1989) cited with approval the case of *Reeves v. Claiborne County Board of Education*, 828 F.2d 1096, 1101 (5th Cir. 1987), which stands for the proposition that “reinstatement is normally an integral part of the remedy for a constitutionally impermissible employment action.” *Id.* In its discussion of the *Reeves* case, the court in *Jackson* noted that “although reinstatement is not ‘absolute and automatic,’ it is clear that ‘once the plaintiff establishes that his discharge resulted from constitutionally impermissible motives, he is *presumed* to be entitled to reinstatement.” *Jackson*, 890 F.2d at 233 (quoting *Reeves*, 828 F.2d at 1102).³

The *Jackson* court also cited *Allen v. Autauga County Board of Education*, 685 F.2d 1302, 1305 (11th Cir.1982), for the proposition that “reinstatement is a basic element of the appropriate remedy in wrongful employee discharge cases and, except in extraordinary cases, is **required**.” *Jackson*, 890 F.2d at 233 (emphasis added). Reinstatement is especially appropriate in cases when a judgment is entered against the employer, as opposed to a judgment only against an official or other employee. *See, Swanson v. Martwick*, 726 F. Supp. 210, 210 (N.D. Ill. 1989).

³ Reinstatement in a Section 1983 case is even more compelled than in a Title VII discrimination case. Unlike Title VII cases, the decision to reinstate in a Section 1983 case is not “entirely discretionary,” and reviewing appellate courts will review the record to see if denial of reinstatement is supported. *Jackson*, 890 at 232, n.10 (reversing the decision to not reinstate by finding error in the court’s reliance of Title VII reinstatement standards).

Professors, educational administrators and the public have watched very closely the events as they unfolded in this trial. Core values of academic freedom and freedom of expression are fundamentally implicated, and educators understand implicitly the crucial importance of reinstating Professor Churchill to protect those values. The importance of academic freedom and deterring the chilling effect of First Amendment expression is compellingly outlined in a Letter, attached hereto as Exhibit 2, sent to this Court from hundreds of members of academia from across North America:

In sum, we believe that the chilling effect of the actions of the University of Colorado can only be effectively deterred by granting reinstatement to Professor Churchill, and hope that you will reinforce the importance of the First Amendment in academia by so ordering.

Letter to the Court Supported by Hundreds of Members of Academia, attached as Exhibit 2.

Similarly, the highly-respected Society of American Law Teachers (“SALT”) reminds this Court that “[n]ot only is reinstatement essential in order to assure American academics that they can freely express unpopular views, it is also essential to make clear to universities that they cannot coercively ‘buy out’ the tenure contracts of controversial professors by firing them and then paying damages.” *SALT Letter* herein attached as Exhibit 3. Reinstatement is the integral remedy for Professor Churchill’s First Amendment violation, and as supported by hundreds of members of the academia and by SALT, this Court should do everything it can to prevent the chilling effect of protected expression. This Court should fully reinstate Professor Churchill.

C. Defendants’ possible irritation caused by Professor Churchill’s reinstatement is expected and is not a legitimate basis to deny reinstatement.

The Tenth Circuit Court of Appeals has recognized, in both *Jackson, supra* and *Starrett v. Wadley*, 876 F.2d 808 (10th Cir.1989), that certain circumstances may weigh against granting reinstatement. These circumstances include when reinstatement may be detrimental to the health

of the discharged employee, or when the work environment presents an atmosphere of hostility. *Jackson*, 890 F.2d at 233. The focus of the court's inquiry on these topics, however, is on hostility *to the detriment of the employee*, not discomfort or angst of the employer because of the reinstatement. The University, it has been found, illegally fired Professor Churchill. It should come as no surprise that the University may feel upset if he is returned to his job. No level of employer upset, however, can be used to justify preventing reinstatement.⁴

Any argument by the University that reinstatement of Professor Churchill's employment would be disruptive or cause legally cognizable hostility lacks merit. The University of Colorado is Colorado's largest school, with several tens of thousands of students and over twelve hundred faculty members. In his day-to-day activities, Professor Churchill would not interact, physically or otherwise, with the Regents or any members of the University's administration. Indeed, the unbroken record of actual history demonstrates conclusively that Professor Churchill successfully taught for years at the University, receiving accolades from students, peers and the administration. There is no reason to believe that Professor Churchill will behave any differently once reinstated, and the prospect of the University officials acting differently toward him (not to mention any sheer speculation that other third parties might act disruptively) is far from a sufficient basis to deprive Professor Churchill of his constitutionally mandated remedy.

If the Court reinstates Professor Churchill, he will be reinstated to the Department of Ethnic Studies. The members of the Department of Ethnic Studies are fully prepared to welcome Professor Churchill back to campus with open arms. Professor Emma Pérez, the incoming Chair

⁴ An exact analogy would be to a racist employer arguing that although it had been determined by the jury that an employee had been illegally fired because of her race, that employee should not be reinstated to the job she previously held, because the racist employer's workplace would be disrupted by the return of a non-white employee. No court could accept this argument, which would credit the employer's illegal motives as a basis for depriving a person of the job he deserves.

of the Department of Ethnic Studies, testified at trial that Professor Churchill is valuable member of the Department. She still fully endorses and eagerly awaits Professor Churchill's reinstatement. In addition to her endorsement of reinstatement at trial, in a letter to the Court, Professor Pérez (on behalf of herself and with the explicit concurrence of the other Departmental faculty members) states:

We look forward to his contributions once again. In the next couple of years, we will be launching a Ph.D. program that would benefit immensely from his expertise in American Indian Studies as well as his experience in working with the bureaucratic channels at the university. Indeed, the department has suffered in the last two years without his presence. Students, past and present, continue to search for him particularly because he is an excellent teacher and mentor. His expertise on American Indian Studies is unrivaled. Students from around the nation come to CU Boulder to work under his tutelage. His classes are almost always filled to capacity with waiting lists and he remains popular, not only among Ethnic Studies majors but across a broad range of students at the University.

Letter Supporting Professor Churchill's Reinstatement Authored by Professor Emma Pérez, Incoming Chair of the Department of Ethnic Studies, CU Boulder, Elisa Facio, Associate Professor, Department of Ethnic Studies, CU Boulder, and Arturo Aldama, Associate Professor, Department of Ethnic Studies, CU Boulder herein attached as Exhibit 4.

To consider denying Professor Churchill's request for reinstatement, Defendants must conclusively establish (rather than speculatively assert) that Professor Churchill's reinstatement would create far more than an expected amount of friction caused by reinstatement. Importantly, the court in *Jackson* found that enforcement of a constitutional right and reinstatement expectedly "has disturbing consequences" and "[r]elief is not restricted to that which will be pleasing and free of irritation." *Jackson*, 890 F.2d at 234 citing *Sterzing v. Fort Bend Independent School District*, 496 F.2d 92, 94 (5th Cir. 1974) (holding that trial court used

impermissible grounds in its decision to not reinstate employee). The court in *Jackson* correctly noted that:

[T]here is a high probability that reinstatement will engender personal friction of one sort or another in almost every case in which a public employee is discharged for a constitutionally infirm reason. Unless we are willing to withhold full relief from all or most successful plaintiffs in discharge cases, and we are not, we cannot allow actual or expected ill-feeling alone to justify nonreinstatement. Reinstatement is an effective deterrent in preventing employer retaliation against employees who exercise their constitutional rights.

Jackson, 890 F.2d at 234, quoting *Allen v. Autauga County Bd. of Education*, 685 F.2d 1302, 1306 (11th Cir. 1982)(holding that rule of presumptive reinstatement is justified by reason as well as precedent because when “a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole”).

As would be the case with Professor Churchill, the court in *Jackson* found that all hostility against reinstatement was one-sided, and on the part of the defendant. *Jackson*, 890 F.2d at 234-235. Moreover, the Tenth Circuit in *Jackson* detected, and rejected, defendant-created hostility as a reason to deny reinstatement as “[a]ctual or expected ill-feeling cannot justify denial of reinstatement.” *Id.* at 235. For his part, Professor Churchill does not harbor any animus or ill-will which would interfere with his continuing to teach at the University as he always has and always will: professionally and without disruption. See Exhibit 5, Affidavit of Ward Churchill, ¶ 7.

As stated by the Society of American Law Teachers (SALT) in 2006, the Court should be mindful that “if the University succeeds in its quest to fire Professor Churchill, any other university professor tempted to...engage in controversial, constitutionally-protected speech about current affairs will think twice before doing so in the future.” Exhibit 3. SALT goes on to state:

...this case is much larger than the individual actors involved. It is a highly visible test of the courts' ability to protect our society both from those who would compromise academic freedom in order to purge critical thinkers from our educational institutions, and from universities that are more committed to bowing to political and financial pressure than to preserving the Constitution.

Exhibit 3. Defendants' continued retaliation towards Professor Churchill for his 9/11 essay and hostility toward the jury's unanimous finding that Defendants intentionally violated his constitutionally protected rights is no basis to deny reinstatement. Other courts have already recognized that reinstatement *will* expectedly engender personal friction, but abating the potential chilling effect of free speech resulting from politically motivated firings is of paramount importance, and is exactly why reinstatement is the preferred remedy. Defendants have a very high burden to credibly demonstrate that Professor Churchill's reinstatement will cause more than an expected and therefore permissible degree of hostility in the workplace. Defendants' burden is nearly impossible given that the Ethnic Studies Department is relatively isolated and independent, found on a large campus, with Professor Churchill's departmental colleagues fully endorsing his return.

D. Defendants cannot credibly argue that Professor Churchill's reinstatement will cause undue hostility in the workplace when there has been virtually zero acrimony in workplace prior to the unlawful investigation and termination.

Professor Churchill has been fully tenured professor at the University of Colorado since 1991, and employed as a professor since 1978. In his nearly thirty years of distinguished service to the University of Colorado, Professor Churchill received numerous awards for both teaching and academic distinction. There is no evidence that Professor Churchill was anything but an exemplary professor, completely respected and fully supported by the University of Colorado, up until he wrote his controversial 9/11 essay. Even when that essay resurfaced in 2005 and the

University's unconstitutional retaliation against him commenced, Professor Churchill continued to teach at the height of the controversy and media scrutiny surrounding his 9/11 essay, and at the students' request, he successfully taught a voluntary class in 2007-2008 school year without incident. There is not a scintilla of evidence that Professor Churchill ever conducted himself in any way other than professionally and appropriately in the classroom, and there is not a scintilla of evidence that he would misbehave if he were reinstated. Indeed, the only evidence is flatly to the contrary. See, e.g., See Exhibit 5, Affidavit of Ward Churchill, ¶ 7.

Defendants argued – or at least implied – at trial (at times) that the controversy surrounding Professor Churchill's 9/11 essay did disrupt the University, but conceded that Professor Churchill was not terminated for that reason, asserting instead that he was fired wholly for purported academic misconduct. At the trial, key witnesses for Defendants admitted there was very little actual disruption caused by Professor Churchill and his 9/11 essay, except for an increase of emails and phone calls to some Regents and some members of the administration.

On April 7, 2009, the American Association of University Professor's ("AAUP") National Council approved the following resolution seeking to reinstate Professor Churchill:

We believe the disputes over Ward Churchill's publications should have been allowed to work themselves out in traditional scholarly venues, not referred to disciplinary hearings. We believe Churchill should be reinstated to his faculty position at the University of Colorado.

American Association of University Professor's National Council Resolution herein attached as Exhibit 6. The AAUP's concerns over the legitimacy of the investigations into Professor Churchill's scholarship were echoed by the jury's verdict, which rejected Defendants' *Mount Healthy* affirmative defense. Importantly, the jury found that Defendants intentionally violated Professor Churchill's federally protected constitutional rights, despite the instruction from the Court that Professor Churchill "has a right to practice freedom of speech only to the extent that it

does not unduly interfere with the duties and responsibilities of the plaintiff's employment or the operations of the public employer." See, Exhibit 1, Jury Instruction 7. Thus, the jury's finding has already accounted for – and rejected – the possibility that Professor Churchill's conduct was unduly disruptive to the operation of the University. That finding collaterally estops the University from arguing (or this Court from holding) that Professor Churchill's conduct has been unduly disruptive. The jury found that but for the unlawful termination, motivated by Professor Churchill's *protected* (i.e., not unduly disruptive) speech, he would still be employed at the University as a fully tenured professor. Therefore, any argument that Professor Churchill's reinstatement will cause more than expected friction is purely speculative, goes against the findings of the jury, and is contrary to the historical relationship between Professor Churchill and the University of Colorado.

E. The jury's damage award supports reinstating Professor Churchill.

The primary goal for Professor Churchill's litigation against the University of Colorado has always been a jury determination supporting his contention that his constitutional rights were violated by the University's unlawful termination, and the Court's reinstatement of his employment as a professor at the University. *Ward Churchill's Affidavit*, herein attached as Exhibit 5. This main goal of the litigation was never compensation for financial loss. *Id.* Professor Churchill wished to protect his reputation and the legacy of his thirty years of academic scholarship. *Id.* The jury has spoken, unanimously declaring that the University's firing of Professor Churchill was illegal and unconstitutional. Reinstatement of his employment will critically contribute to the additional restoration of the public's confidence in the integrity of Professor Churchill's scholarship. *Id.* It will also breathe life into the constitutional protection and guarantee of free speech.

While Defendants may argue that Professor Churchill is not entitled to reinstatement because the jury awarded him only nominal damages,⁵ this argument is without merit. Given the testimony and other evidence in this case, there can be no doubt but that Professor Churchill is the “prevailing party” in this case. The jury did *exactly* what it was asked to do – declare the termination illegal.

The Court should be mindful that “[p]ublic employees can *never* be fired in violation of their First Amendment rights.” *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 111, n5 (1st Cir. 2003) (citations omitted). Based upon post-verdict statements, the jurors apparently struggled with how much money to award to Professor Churchill, with five out of the six of the jurors believing that they ought to award significant financial damages. Exhibit 5. In the end, however, the jury relied on Professor Churchill’s testimony and awarded him precisely what he asked for – the vindication of his constitutional rights and the chance for reinstatement of his employment. *Id.*

As the Court knows, Professor Churchill at trial did not ask the jury to award him monetary damages. Professor Churchill only sought reinstatement, and thereby an acknowledgement that he was unlawfully terminated. Professor Churchill stated on direct examination:

Q. (BY MR. LANE) Are you sitting here asking this jury to give you money?

A. No.

Q. What are you asking for?

⁵Courts often reinstate an employee after a jury verdict of nominal damages. *See, Robinson v. City of Edmond*, 68 F.3d 1226, 1233 (10th Cir. 1995)(court granting an injunction, attorney fees and costs to plaintiffs after award of nominal damages); *See, Ways v. City of Lincoln*, 274 F.3d 514, 517 (8th Cir. 2001) (court granting a nominal damages award, permanent injunction, and attorney fees and costs after finding that city ordinance violated First Amendment).

A. Well, my job. I want restitution, basically, acknowledgment that the entire process by which I was terminated from the university was fraudulent.

Q. Okay.

A. While a number of these points can be debatable, the assertion that they are conclusive findings that I did engage in research misconduct on any of these points is itself false. And if it were not false, they would open it up to scholarly scrutiny. It can either be defended or not. It cannot be defended is the position that the university has taken, but they've acted on it anyway.

Professor Churchill's Direct Testimony Trial Transcript Excerpt herein attached as Exhibit 4. Professor Churchill received from the jury exactly what he asked for.

F. Defendants' post-trial hostility towards Professor Churchill evidences ongoing discriminatory behavior.

As noted in the Title VII case of *Price v. Marshall Erdman & Assoc.*, 966 F.2d 320, 325 (7th Cir. 1992):

An employer's dislike of the employee's returning is a...problematic ground for declining to order reinstatement. This would be obvious in a case of racial discrimination in which the employer pleaded hostility to the entire group (blacks, or women, or whomever) to which the plaintiff belonged, as a ground for refusing to order reinstatement. To decline to order reinstatement in such a case would reward the employer for the very attitudes that precipitated his violation of the law, by giving him a choice of remedies.

Id.; see also *Bingman v. Natkin & Co.*, 937 F.2d 553, 558 (10th Cir. 1991) ("[i]f reinstatement were denied, then the defendants would have accomplished their purpose."); *McKnight I*, 908 F.2d 104, 116 (7th Cir. 1990) ("[m]ere hostility by the employer or its supervisory employees is of course no ground for denying reinstatement. That would arm the employer to defeat the court's remedial order.") (citations omitted), *cert. denied*, 499 U.S. 919 (1991); *Jackson*, 890 F.2d at 235 ("our review of the evidence reveals that certain parties, including the named defendants within the city administration, were determined to run plaintiff Carl Jackson off the job. If he is denied reinstatement, they will have accomplished their purpose."); see also, *Taylor*

v. Teletype Corp., 648 F.2d 1129, 1139 (8th Cir. 1981); *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1473 (11th Cir. 1985); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 602 (11th Cir. 1986) (all cases holding that “mere hostility by the employer or its supervisory employees is of course no ground for denying reinstatement”).

Since the trial, the University of Colorado, on its official website and in the media, has thumbed its nose at the jury’s finding that Defendants intentionally violated Professor Churchill’s constitutional rights.

University of Colorado spokesman Ken McConnellogue defended the process used in the Churchill investigation. “We did the right thing, in the right way, for the right reasons, and we would act the same way again...” University of Colorado President Bruce Benson said “[w]hile we respect the jury’s decision, we strongly disagree...”⁶

Arguably, there may have been an *increase* in hostility by the Defendants against Professor Churchill after the jury’s verdict. However, this hostility resulting from disagreement with the jury’s verdict cannot be interpreted as relevant hostility in the workplace if the Court reinstates Professor Churchill. At this point, Defendants are *creating* hostility, purely because they are angry that Professor Churchill prevailed at trial. Rather than respect the jury’s verdict and work toward a situation that would reinstate Professor Churchill with the least amount of workplace acrimony, Defendants’ strong disagreement with jury’s verdict appears to fuel resentment. This is their problem, though, and not a basis to deny Professor Churchill the remedy of reinstatement.

Like their demonstrated retaliatory decision to investigate and terminate Professor Churchill, Defendants are again unlawfully politically motivated in their decision to oppose his reinstatement. Defendants’ opposition to reinstatement has nothing to do with relevant hostility at the workplace, but instead, Defendants continue to cower to political and economic pressures.

⁶ <https://www.cu.edu/sg/messages/6749.html> (last visited April 29, 2009).

Without any history of acrimony in the workplace (and certainly none emanating from Professor Churchill) prior to Defendants' discriminatory decision to investigate Professor Churchill's entire scholarship, Defendants' opposition to reinstatement amounts to nothing more than one final effort to appease the University of Colorado's conservative alumni and donor base. Such political or social motivations do not provide legitimacy to Defendants' otherwise unconstitutional intentions.

Reinstatement has an important "deterrent effect" of preventing future unlawful conduct. *Jackson*, 890 F.2d at 233. Arguably, Defendants have learned nothing from the jury's verdict, as their ongoing opposition to reinstatement is fueled by the same unlawful thinking which led to the discriminatory decision to terminate Professor Churchill. Therefore, this Court's denial of reinstatement would accomplish Defendants' unlawful purpose, and would improperly reward Defendants' ongoing discrimination against Professor Churchill for his exercise of protected political speech. Defendants' post-trial conduct and statements demonstrate that given the same choices, they again would violate Professor Churchill's First Amendment protected speech. If there was ever a case in which a deterrent effect was needed to prevent future unlawful government conduct – this is it. Not even the jury's unequivocal pronouncement of discrimination curtails Defendants' rampant unlawful behavior. Defendants deserve no sympathy from this Court.

IV. CONCLUSION

For the foregoing reasons, 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 Professor Churchill's rights under the First Amendment to the United States Constitution.

Professor Churchill should be reinstated immediately, in time for adequate preparations to be made to teach the Fall 2009 semester at the University of Colorado. Accordingly, Professor Churchill requests a forthwith evidentiary hearing on this matter.

Respectfully submitted this 1st day of May 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION FOR REINSTATEMENT was filed with the Court and served via *LexisNexis File and Serve* on May 1, 2009 to the following:

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