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Burton v. Cascade School District: Failure to Recognize the Need for a Right to Reinstatement Following an Unconstitutional Teacher Dismissal

COMMENTS

BURTON v. CASCADE SCHOOL DISTRICT: FAILURE TO RECOGNIZE THE NEED FOR A RIGHT TO REINSTATEMENT FOLLOWING AN UNCONSTITUTIONAL TEACHER DISMISSAL

INTRODUCTION

The right of a public school teacher not to be dismissed for constitutionally impermissible reasons has been established,[1] but the appropriate remedy for violation of that right has not been determined conclusively. In *Burton v. Cascade School District Union High School No. 5*,[2] a non-tenured high school teacher who had admitted being a practicing homosexual was discharged pursuant to an Oregon statute allowing mid-term dismissals for "immorality."[3] In a subsequent civil rights action, the district court found the statute to be unconstitutionally vague[4] and awarded damages, but declined to order reinstatement.[5] The Court of Appeals for the Ninth Circuit affirmed on the ground that the trial judge had acted within his discretion in striking a balance between the interest of the teacher in completing her contract and the interest of the State in avoiding disruption of the school system.[6]

The *Burton* decision illustrates the inherent difficulty in seeking an accommodation between the competing interests of a public em-

1. In Perry v. Sindermann, 408 U.S. 593 (1972), the Court stated:

> For at least a quarter century this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .

Id. at 597. This principle frequently has been applied to public employment. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Public Inst., 368 U.S. 278, 288 (1961); Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 894 (1961); Torasco v. Watkins, 367 U.S. 488, 495-96 (1960); Shelton v. Tucker, 364 U.S. 479, 485-87 (1960); Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

2. 512 F.2d 850 (9th Cir. 1975) (per curiam), *cert. denied*, 96 S. Ct. 69 (1975).

3. ORE. REV. STAT. § 342.530(1)(b) (repealed 1973).

4. Burton v. Cascade School Dist., 353 F. Supp. 254, 255 (D. Ore. 1973).

5. 512 F.2d at 851-52.

6. *Id.* at 852-53.

ployer and an employee once a constitutional violation is found. Because the hiring and firing of teachers is essentially a matter of local law and policy, federal courts must accord school board discretion great weight.[7] The Supreme Court has recognized consistently, however, that a public employer may not act in derogation of constitutional mandates in dismissing an employee.[8] The implications of this restraint are particularly significant in public education in which "[t]he vigilant protection of constitutional freedoms is nowhere more vital . . . ." [9]

Burton implied that a teacher's right not to be unconstitutionally dismissed can be protected by a remedy short of reinstatement, and that reinstatement is an extraordinary remedy which need not be granted as a matter of course.[10] This Comment demonstrates that neither proposition is valid.

Courts traditionally have been reluctant specifically to enforce personal service contracts even though termination was unlawful,[11] especially where a probationary public employee was concerned.[12] Thus, the *Burton* court considered reinstatement of a wrongfully dismissed teacher to be an "extraordinary equitable remedy" usually reserved for cases of either racial discrimination or impermissible restriction of free speech.[13] Many federal courts, however, acting under section 1983 of Title 42,[14] have ordered reinstatement of a public employee discharged

7. In Epperson v. Arkansas, 393 U.S. 97 (1968), the Court stated: "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Id.* at 104 (footnote omitted). School board discretion is discussed in Griffis & Wilson, *Constitutional Rights and Remedies in the Non-Renewal of a Public School Teacher's Employment Contract*, 25 BAYLOR L. REV. 549, 550-58 (1973).

8. *See* cases cited in note 1 *supra*.

9. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

10. 512 F.2d at 853.

11. Money damages are usually considered adequate and are preferred to avoid personal conflicts. It would also be difficult for a court to enforce performance. This rationale is less applicable to a dismissal challenged on constitutional grounds, because anticipated conflicts, if severe, would be strong evidence that the state action in dismissing the employee is justified and therefore not in violation of the Constitution. Furthermore, monetary damages are frequently considered inadequate for the enforcement of constitutional rights. *See generally*, D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 929 (1973).

12. *See* Sampson v. Murray, 415 U.S. 61, 93 n.68 (1974).

13. 512 F.2d at 853.

14. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation,

in violation of his constitutional rights whether or not the employee had tenure.[15] Moreover, reinstatement has not been limited to racial discrimination and impairment of free speech cases, but frequently has been granted to redress dismissals violating procedural[16] and substantive due process[17] and other fundamental rights.[18]

CONSTITUTIONAL RIGHTS AND REMEDIES IN PUBLIC EMPLOYMENT

Public employment may not be conditioned upon a waiver of constitutional rights.[19] Some restrictions are permissible, however, if a

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custom, or usage, of any State or Territory, subjects . . . any citizen of the United States . . . 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.

In City of Kenosha v. Bruno, 412 U.S. 507, 515 (1973), the Court held that a municipality was not a "person" under Section 1983 and hence a federal court had no jurisdiction over such an entity in a civil rights suit for damages or equitable relief. However, courts have held that injunctive relief can be obtained against public officials sued in their official capacities because of the legal fiction formulated by the Supreme Court in Ex Parte Young, 209 U.S. 123 (1908), that unconstitutional acts done by a public official "are stripped of [their] official . . . character," and that the official may be ordered to perform his duties in a manner consonant with the Constitution. *Id.* at 160. *See* Hogge v. Hedrick, 391 F. Supp. 91, 96 (E.D. Va. 1975); Harkless v. Sweeney Indep. School Dist., 388 F. Supp. 738, 748-49 (S.D. Tex. 1975); Adamian v. University of Nevada, 359 F. Supp. 825, 831 (D. Nev. 1973). For a general discussion of the jurisdictional problems accompanying a suit for reinstatement and back pay under Section 1983, see Rendleman, *The New Due Process: Rights and Remedies,* 63 KY. L.J. 531, 615-24 (1975) [hereinafter cited as Rendleman].

15. Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973) (non-tenured teacher reinstated after dismissal violating due process); Gieringer v. Central School Dist. No. 58, 477 F.2d 1164 (8th Cir. 1973), *cert. denied,* 414 U.S. 832 (1973) (first amendment); Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973) (fourteenth amendment due process); Stolberg v. Members of the Bd. of Trustees, 474 F.2d 485 (2d Cir. 1973) (first amendment); Ramsey v. Hopkins, 447 F.2d 128 (5th Cir. 1971), *aff'g* 320 F. Supp. 477 (N.D. Ala. 1970) (fifth amendment equal protection and fourteenth amendment due process); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968) (fourteenth amendment due process); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966) (en banc), *cert. denied,* 385 U.S. 1003 (1967) (fourteenth amendment due process).

16. *See* notes 26-27 *infra* & accompanying text.

17. *See* note 43 *infra* & accompanying text.

18. *See* notes 33-44 *infra* & accompanying text.

19. "[C]onstitutional doctrine which has emerged since [Adler v. Board of Educ., 342 U.S. 485 (1952)] has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." Keyishian v. Board of Regents, 385 U.S. 589, 605 (1967). In Pickering v. Board of Educ., 391 U.S. 563 (1968), the Court specifically rejected the concept that acceptance

sufficient state interest can be demonstrated.[20] The balancing necessitated by these conflicting interests goes to the question of whether a permissible infringement of rights has been undertaken, and has little relevance to the question of redress once an impermissible encroachment is found.[21]

Procedural Due Process

The right of a teacher to challenge dismissal for lack of procedural due process is contingent upon his demonstrating that he had a liberty or property interest in his continued employment.[22] Given the existence of such an interest, the nature and extent of the protection required depend upon a balancing of that interest and the opposing interest of the state furthered by dismissal.[23] If the employment was terminated pursuant to a procedure that did not afford sufficient protection to the employee's interest after taking into account the competing state interest, the dismissal was unconstitutional.

The appropriate remedy for denial of procedural due process may depend upon the nature of the employee's interest involved. Some courts have deemed a post-dismissal hearing, where an employee can vindicate his professional reputation, sufficient to rectify an unconstitutional deprivation of his liberty interest.[24] This approach also has

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of government employment includes waiver of fundamental rights, a concept implicit in the state court decision under review. "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens . . ., it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court." *Id.* at 568. *See also* cases cited in note 1 *supra.*

20. Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); Smith v. Losee, 485 F.2d 334, 338 (10th Cir. 1973), *cert. denied,* 417 U.S. 908 (1974). *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 365 U.S. 589, 602 (1967). *See also* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564 (1973).

21. *See* notes 69-71 *infra* & accompanying text.

22. A teacher's right to procedural due process was clarified by the Supreme Court in the companion cases of Perry v. Sindermann, 408 U.S. 593 (1972) and Board of Regents v. Roth, 408 U.S. 564 (1972). In *Roth,* the Court explained that an interest in liberty might be implicated when the state brings against the teacher a charge that "might seriously damage his standing and associations in his community" or impose a stigma on him foreclosing future employment opportunities. 408 U.S. at 573. A property interest must involve a "legitimate claim of entitlement" to reemployment, and may be conferred by statute, contract, or policy. *Id.* at 577-78.

23. *See* Board of Regents v. Roth, 408 U.S. 564, 570 (1972); Goldberg v. Kelly, 397 U.S. 254, 265-66 (1970).

24. *See* Garcia v. Daniel, 490 F.2d 290 (7th Cir. 1973) (probationary caseworker

been utilized where a property right was concerned,[25] but reinstatement has been the more common remedy.[26] Arguably, a constitutionally defective dismissal should be given no effect, a position adopted by courts which have viewed reinstatement as an entitlement of the employee.[27]

Substantive Constitutional Rights

In contrast to procedural due process protection, which is contingent only upon a deprivation of a liberty or property interest,[28] no such showing is required to make a claim based upon denial of substantive constitutional rights,[29] with the possible exception of substantive

denied reinstatement, but hearing ordered); Wellner v. Minnesota State Jr. College Bd., 487 F.2d 153, 156-57 (8th Cir. 1973) (non-tenured teacher entitled to hearing). *See also* Ferris v. Special School Dist. No. 1, 367 F. Supp. 459, 462-65 (D. Minn. 1973) (non-tenured teacher entitled to hearing if liberty interest implicated); Rendleman, *supra* note 14, at 612.

25. *See* Garcia v. Daniel, 490 F.2d 290 (7th Cir. 1974) (caseworker); Wellner v. Minnesota State Jr. College Bd., 487 F.2d 153, 156-57 (8th Cir. 1973) (teacher); Lucas v. Chapman, 430 F.2d 945, 948 (5th Cir. 1970) (teacher).

26. *See* Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973); Cooley v. Board of Educ., 453 F.2d 282 (8th Cir. 1972); Sigmone v. Poe, 381 F. Supp. 387 (W.D.N.C. 1974), *order dissolved after hearing*, 391 F. Supp. 430 (W.D.N.C. 1975); Parker v. Letson, 380 F. Supp. 280 (N.D. Ga. 1974); King v. Conservatorio de Musica, 378 F. Supp. 746 (D.P.R. 1974); Wagner v. Little Rock School Dist., 373 F. Supp. 876 (E.D. Ark. 1973); Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969); *cf.* Vega v. Civil Serv. Comm'n., 385 F. Supp. 1376 (S.D.N.Y. 1974) (corrections officer); Gonzalez v. Gonzalez, 385 F. Supp. 1226 (D.P.R. 1974) (civil service employee); Young v. Hutchins, 383 F. Supp. 1167 (M.D. Fla. 1974) (city employees); Dahlinger v. Town Bd., 381 F. Supp. 474 (E.D. Wis. 1974) (police chief). For cases denying reinstatement because of no expectancy of reemployment, see Bhargave v. Cloer, 355 F. Supp. 1143 (N.D. Ga. 1972); Bates v. Hinds, 334 F. Supp. 528 (N.D. Tex. 1971).

27. *See, e.g.*, Wagner v. Little Rock School Dist., 373 F. Supp. 876 (E.D. Ark. 1973). Although the unconstitutional termination is considered void, the school board subsequently can dismiss the teacher if such is done legally. "The law is clear in this circuit . . . that an unconstitutional termination is a nullity and that a teacher is *entitled* to reinstatement with back pay until the contract finally expires or school authorities terminate a teacher's employment in a constitutional manner." *Id.* at 883 (emphasis supplied). In Lucia v. Duggan, 303 F. Supp. 112 (D. Mass. 1969), the court stated that an unconstitutionally dismissed teacher is "*entitled* to the benefits of his position . . . until he is lawfully separated from that position." *Id.* at 119 (emphasis supplied).

For purposes of procedural due process, however, an interest in continued employment may be required before reinstatement is granted. Thus, if the judicial determination that a dismissal was unconstitutional is not made before the expiration of a contract term, the teacher may be entitled only to a post-termination hearing and damages. *See* Perry v. Sindermann, 408 U.S. 593, 603 (1972).

28. *See* note 22 *supra* & accompanying text.

29. That fundamental rights are treated separately from procedural rights was made

due process.[30] Neither teachers nor other public employees have absolute rights; however, a compelling state interest may warrant some circumscription of personal freedoms. Again, a weighing of interests determines whether there has been an impermissible violation of constitutional rights.[31] A teacher's claim of discharge for the exercise of a constitutionally protected right legitimately may be countered by a showing that his conduct "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school." [32] If no such overriding state interest can be demonstrated, the dismissal is constitutionally invalid.

Reinstatement as a remedy for deprivation of substantive constitutional rights commonly has been awarded, as noted in *Burton*,[33] in cases of racially discriminatory dismissal or dismissal in derogation of free speech rights. Discrimination charges often have arisen when the implementation of desegregation plans has resulted in an unjustified disproportionate release of black teachers. Upon finding unwarranted discrimination, courts uniformly have ordered either reinstatement or placement in the first available position in the school system for which the employee is qualified.[34]

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clear in Perry v. Sindermann, 408 U.S. 593 (1972). The Court held that the broad principle against the government denying benefits for reasons violating "constitutionally protected interests" applied whether or not a teacher had a property interest in reemployment. *Id.* at 596-98. *See* Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973); Stolberg v. Members of the Bd. of Trustees, 474 F.2d 485 (2d Cir. 1973); Rauls v. Baker Cy., 445 F.2d 825 (5th Cir. 1971); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966) (en banc), *cert. denied*, 385 U.S. 1003 (1967); Wright v. Houston, 393 F. Supp. 1149, 1163 (S.D. Tex. 1975); Stout v. Whiteaker, 379 F. Supp. 218, 222 (M.D. Tenn. 1974); Hanover Tp. Fed'n of Teachers v. Hanover Commun. School Corp., 318 F. Supp. 757, 761 (N.D. Ind. 1970), *aff'd*, 457 F.2d 456 (7th Cir. 1972); McGee v. Richmond Unified School Dist., 306 F. Supp. 1052, 1056 (N.D. Cal. 1969).

30. *See* Buhr v. Buffalo Public School Dist. No. 38, 509 F.2d 1196, 1200-03 (8th Cir. 1974); Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1, 4 (7th Cir. 1974).

31. *See* note 20 *supra* & accompanying text.

32. Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1969), *quoting* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). Although *Tinker* involved the suspension of students, the "material and substantial" interference test has generally been followed in teacher dismissal situations. *See* Pickering v. Board of Educ., 391 U.S. 563, 571 (1968); Note, *Teachers and the First Amendment: Academic Freedom and Exhaustion of Administrative Remedies Under 42 U.S.C. Section 1983*, 39 ALBANY L. REV. 661, 671-76 (1975).

33. 512 F.2d at 853 n.3.

34. *See* Cornist v. Richland Parish School Bd., 495 F.2d 189, 191 (5th Cir. 1974) (reinstatement); Adams v. Rankin Cy. Bd. of Educ., 485 F.2d 324, 327 (5th Cir. 1973) (reinstatement); United States v. Chesterfield Cy. School Dist., 484 F.2d 70, 72-73 (4th Cir. 1973) (reinstatement); United States v. Cotton Plant School Dist. No. 1,

Reinstatement for discrimination has been applied beyond the desegregation context, and has been granted as a matter of course whenever unjustifiable discrimination has been demonstrated.[35] The Court of Appeals for the Fourth Circuit, in *Smith v. Hampton Training School*,[36] recognized the efficacy of reinstatement as a remedy for discriminatory discharges. Holding that section 1983 of Title 42 was "designed to provide a *comprehensive* remedy for the deprivation of constitutional rights," the court required reinstatement because "[o]therwise [the aggrieved employees] would not be made whole, and similar discriminatory discharges would be encouraged." [37]

Infringement of the right of free speech is subjected to particular scrutiny by federal tribunals, and reinstatement has been granted routinely to teachers impermissibly released for exercising that right.[38] The use of reinstatement has not been limited to cases of abrogation of free speech and unlawful discrimination, however. The recognition that a public employee's fundamental first and fourteenth amendment rights may not be abridged by dismissal[39] has led to the granting of reinstatement for dismissals in contravention of the rights of free association,[40]

479 F.2d 671, 673 (8th Cir. 1973) (reinstatement); Lee v. Roanoke City Bd. of Educ., 466 F.2d 1378, 1383 (5th Cir. 1972) (reinstatement); Lee v. Macon Cy. Bd. of Educ., 453 F.2d 1104, 1114 (5th Cir. 1971) (reinstatement); Rauls v. Baker Cy., 445 F.2d 825, 826 (5th Cir. 1971) (reinstatement); Moore v. Board of Educ., 448 F.2d 709, 712-14 (8th Cir. 1971) (first available job); Rolfe v. County Bd. of Educ., 391 F.2d 77 (6th Cir. 1968) (reinstatement); Smith v. Board of Educ., 365 F.2d 770, 784 (8th Cir. 1966) (first available job); Franklin v. County School Bd., 360 F.2d 325, 327 (4th Cir. 1966) (reinstatement); Wright v. Houston Indep. School Dist., 393 F. Supp. 1149, 1163 (S.D. Tex. 1975) (reinstatement); McCurdy v. Board of Public Inst., 388 F. Supp. 599, 603 (D.C. Fla. 1974), *aff'd*, 509 F.2d 540 (5th Cir. 1975) (reinstatement).

35. *See, e.g.*, Johnson v. Branch, 364 F.2d 177, 182 (4th Cir. 1966) (en banc), *cert. denied*, 385 U.S. 1003 (1967); Smith v. Hampton Training School, 360 F.2d 577, 581 (4th Cir. 1966).

36. 360 F.2d 577 (4th Cir. 1966).

37. *Id.* at 581 (emphasis supplied).

38. *See, e.g.*, Gieringer v. Central School Dist. No. 58, 477 F.2d 1164 (8th Cir. 1973); Stolberg v. Members of the Bd. of Trustees, 474 F.2d 485 (2d Cir. 1973); Moore v. Gaston Cy. Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973); Starsky v. Williams, 353 F. Supp. 900 (D. Ariz. 1972), *modified*, 512 F.2d 109 (9th Cir. 1975). *See also* Cole v. Choctaw, 471 F.2d 777, 779 (5th Cir. 1973), *cert. denied*, 411 U.S. 948 (1973) (bus driver).

39. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (teacher's dismissal from public employment may not be based on his exercise of his right to speak on issues of public importance); Shelton v. Tucker, 364 U.S. 479 (1960) (legitimate government purpose cannot be pursued by overbroad regulations). *See also* cases cited in note 1 *supra*.

40. *See, e.g.*, Hanover Tp. Fed'n of Teachers v. Hanover Commun. School Corp., 318 F.Supp. 757 (N.D. Ind. 1970), *aff'd*, 457 F.2d 456 (7th Cir. 1972) (teacher's contract

equal protection,[41] privacy,[42] substantive due process,[43] and other first amendment protections.[44]

An additional consideration favoring reinstatement as an appropriate response to a constitutionally impermissible discharge of a teacher is the solicitude toward academic freedom evinced by the Supreme Court. In *Keyishian v. Board of Regents*,[45] the Court noted:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. 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.[46]

Refusal to order the reinstatement of a teacher dismissed unconstitutionally arguably tends to inhibit other educators in their exercise of individual rights and restricts the free inquiry that is essential to a viable educational system, a result the Supreme Court repeatedly has sought to prevent.[47]

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not renewed because of union activities); *cf.* Doherty v. Wilson, 356 F. Supp. 35 (M.D. Ga. 1973) (teacher refused employment because of associations).

41. *See, e.g.*, Ramsey v. Hopkins, 447 F.2d 128 (5th Cir. 1971), *aff'g* 320 F. Supp. 477 (N.D. Ala. 1970) (teacher dismissed for wearing moustache).

42. *See, e.g.*, Drake v. Covington Cy. Bd. of Educ., 371 F. Supp. 974 (M.D. Ala. 1974) (dismissal for immorality).

43. *See, e.g.*, Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973) (unsupported conclusion of misconduct); Ramsey v. Hopkins, 447 F.2d 128 (5th Cir. 1971) (arbitrary and capricious regulation against moustaches); Bradley v. Cothern, 384 F. Supp. 1216 (E.D. Tex. 1974) (arbitrary and capricious dismissal of teacher because of pregnancy); Adamian v. University of Nevada, 359 F. Supp. 825 (D. Nev. 1973) (vague statute); Conard v. Goolsby, 350 F. Supp. 713 (N.D. Miss. 1972) (arbitrary and capricious regulation regarding appearance); Webb v. Lake Mills Commun. School Dist., 344 F. Supp. 791 (N.D. Iowa 1972) (arbitrary and capricious application of regulation against profanity); Chase v. Fall Mountain Regional School Dist., 330 F. Supp. 388 (D.N.H. 1971) (dismissal based on unverified complaints and rumors).

44. *See, e.g.*, Downs v. Conway School Dist., 328 F. Supp. 338 (E.D. Ark. 1971) (non-renewal based on teacher's allowing student to write letter to cafeteria head); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) (teacher dismissed for assigning controversial book). *See also* McGee v. Richmond Unified School Dist., 306 F. Supp. 1052 (N.D. Cal. 1969) (community service workers dismissed for signing petition and participating in tax election).

45. 385 U.S. 589 (1967). For a thorough discussion of the development of the right to academic freedom, see Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. REV. 1176 (1973).

46. 385 U.S. at 603.

47. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

The frequent application of reinstatement to remedy unconstitutional dismissals of public employees and the singular effectiveness of this remedy for enforcing constitutional protections belies the proposition that it is an extraordinary remedy in the area of public employment. Many courts have characterized reinstatement or an alternative guaranteed opportunity of future employment as an entitlement[48] of the dismissed employee. Absent extraordinary circumstances, it should be granted as a matter of course.

Burton Decision

In *Burton* an admitted homosexual was dismissed from her teaching position pursuant to a statute authorizing such action upon a finding of "immorality." She brought a civil rights suit seeking damages and reinstatement.[49] The trial judge determined that the statute was unconstitutionally vague, invalidated the dismissal, ordered the school board to expunge all records of the termination proceedings, and awarded damages and attorney's fees, but refused to order reinstatement.[50] No further justification was advanced for dismissal relative to the plaintiff's teaching ability or her disruptive impact upon the functioning of the school.

Appellate Decision

The sole issue on appeal was the refusal of the trial court to grant reinstatement; the unconstitutionality of the dismissal was conceded. Noting the right of a public employee not to be discharged unconstitutionally,[51] the circuit court nonetheless found no abuse of discretion in the trial court's action. The balance struck between the interest of the teacher, which the court noted was not of a nature "such as to compel reinstatement," [52] and the interest of the state in avoiding disruption of its school system was found to justify limiting relief to expungement of the records and damages.[53]

48. "[W]here there is no lawful basis for the discharge, the plaintiff is *entitled* to be restored to the position he occupied . . . ." Janetta v. Cole, 493 F.2d 1334, 1338 (4th Cir. 1974) (emphasis supplied). "Even if he had no right to compensation nor to permanent tenure he nevertheless had the right *not to be relieved of his teaching opportunity for unconstitutional reasons* . . . ." Moore v. Gaston Cy. Bd. of Educ., 357 F. Supp. 1037, 1041 (W.D.N.C. 1973) (emphasis in original).

49. Burton v. Cascade School Dist., 353 F. Supp. 254 (D. Ore. 1973).

50. 512 F.2d at 851-52.

51. *Id.* at 852 n.1.

52. *Id.* at 853 n.3.

53. *Id.* at 852-53.

The appellate decision reflected several questionable premises bearing on the significance and nature of the interests infringed, the proper role of the balancing test, and the efficacy of any remedy short of reinstatement.

The Nature of the Rights Violated in Burton

As noted above,[54] the *Burton* perception that the use of reinstatement has been limited to cases involving racial discrimination and free speech[55] is unduly narrow. The remedy commonly has been granted where substantive constitutional rights have been abrogated. The unconstitutionally vague statute under which the school board in *Burton* acted effectively infringed substantive first amendment rights by inhibiting conduct that otherwise was protected. "The threat of sanctions may deter [the exercise of first amendment rights] almost as potently as the actual application of sanctions." [56]

The chilling effect of such overbroad laws was noted and condemned by the Supreme Court in *Keyishian v. Board of Regents*.[57] There, sections of New York laws and regulations requiring dismissal of public employees for broadly-defined subversive activities were held unconstitutional,[58] repugnant to the first amendment,[59] and incompatible with academic freedom.[60] The Court specifically recognized "the legitimacy of [the state's] interest in protecting its education system from subversion," but emphasized that even a "legitimate and substantial" governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." [61] An impermissibly vague statute such as that involved in

54. *See* notes 33-44 *supra* & accompanying text.

55. 512 F.2d at 853.

56. NAACP v. Button, 371 U.S. 415, 433 (1963).

57. 385 U.S. 589 (1967).

58. *Id.* at 604.

59. "'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity' . . . . New York's . . . scheme plainly violates that standard." *Id.*, *quoting* NAACP v. Button, 371 U.S. 415, 432-33 (1963).

60. 385 U.S. at 603-04. *See* note 45 *supra* & accompanying text.

61. *Id.* at 602, *quoting* Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See* NAACP v. Button, 371 U.S. 415, 432-33 (1963); Baggett v. Bullitt, 377 U.S. 360, 372 (1962); Cramp v. Board of Public Inst., 368 U.S. 278, 287-88 (1961). In *NAACP v. Button*, the Court stated that "[t]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and

Burton implicitly violates first amendment rights.[62] The fundamental importance of those rights, especially in education, demands their vigorous protection when abrogated.[63]

Although the teacher in *Burton* was not deterred by the statute from engaging in homosexual activity, she nonetheless was deprived of substantive due process by being dismissed in accordance with a law that failed "to give fair warning of what conduct [was] prohibited" and permitted "erratic and prejudiced exercises of authority." [64] That her activity could have formed proper grounds for dismissal, assuming that the school board's discretion was not limited to the statutory grounds and that procedural due process was afforded, was irrelevant to the question of whether her dismissal violated substantive due process. In *Adamian v. University of Nevada*,[65] a university professor's employment was terminated for disrupting R.O.T.C. activities. The district court held that the university regulation on which the dismissal was based was void for vagueness[66] and ordered reinstatement, although the professor's conduct might have been sufficiently disruptive to support dismissal under a valid ordinance. The court reasoned that "[b]ecause the section upon which the Regents relied [was] substantively unconstitutional, the Regents could not rely on it and the plaintiff must be reinstated and compensated for loss of earnings." [67]

The teacher in *Burton* was dismissed for her admitted homosexuality, although she could not have known from the pertinent statute that this

improper application." 371 U.S. at 432-33 (footnote omitted). For a discussion of vagueness and the first amendment, see Note, *Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts*, 26 STAN. L. REV. 855, 858-63 (1974).

62. *See* Adamian v. University of Nevada, 359 F. Supp. 825, 830 (D. Nev. 1973).

63. In recognizing that reinstatement was used commonly to rectify infringement of free speech, *Burton* indicated an understanding of the fundamental nature of first amendment rights, but the court failed to perceive the first amendment implications of the statute before it, *see* note 62 *supra* & accompanying text. The substantive due process violation, upon which the invalidation of the dismissal was based, *see* note 64 *infra* & accompanying text, obscured the coincident infringement of associational rights. Hence the court, in reviewing the remedy, discerned only a right that it did not consider fundamental, 512 F.2d at 853 n.3, and failed to comprehend the first amendment problem. This approach invariably would preclude recognition that an unconstitutionally vague or overbroad statute impinges rights other than that of substantive due process.

64. 353 F. Supp. at 255 (footnote omitted). *Cf.* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

65. 359 F. Supp. 825 (D. Nev. 1973).

66. *Id.* at 830-31.

67. *Id.* at 831.

conduct would justify termination of her employment. Even if the state could show a legitimate and sufficient interest in proscribing homosexuality among teachers to justify discharge, action taken before adequate notice of the prohibition was given would nonetheless have violated substantive due process because the person charged would have had no opportunity to avoid the sanction.[68]

Balancing of Interests

The court of appeals in *Burton* approved the trial court's weighing of employee and state interests to determine that reinstatement was not compelled. To justify the discretion inherent in that process, *Burton* found supportive language in the Fifth Circuit decision of *Pred v. Board of Public Instruction.*[69] *Pred* determined that "the remedy . . . might well . . . depend" on the comparative importance of employee and state interests.[70] But the balancing process in *Pred* controlled only the question of whether an impermissible abrogation had occurred. If a legitimate state interest outweighed that of the dismissed employee, then the infringement was allowable and no remedy was necessary.[71] The impermissibility of the constitutional violation was conceded in *Burton,* rendering inapposite the use of a balancing test to determine the remedy.

Nor could the denial of reinstatement be brought within the broad equitable discretion traditionally vested in federal courts to redress violations of federally protected rights.[72] A judge may not refuse to "apply well-settled principles of law to a conceded state of facts." [73] Thus, discretion alone cannot support foreclosure of reinstatement to remedy a dismissal in contravention of a substantive constitutional right,

68. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972).

69. 415 F.2d 851 (5th Cir. 1969).

70. *Id.* at 859. In *Pred,* two teachers allegedly had been dismissed because of their participation in a teacher association. The court held that a cause of action had been stated sufficiently because first amendment rights were involved, even though the teachers had no property interest in reemployment. The case was remanded for a determination on the merits, and the lower court was instructed to consider all the evidence when considering both the possible violation and the remedy. 415 F.2d 851 (5th Cir. 1969).

71. *See* note 20 *supra* & accompanying text.

72. *See* Bell v. Hood, 327 U.S. 678, 684 (1946). The discretion, however, is usually applied to remedy the wrong adequately. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* (footnote omitted).

73. Union Tool Co. v. Wilson, 259 U.S. 107, 112 (1922).

as that alternative has become a generally accepted means of redress in such cases.[74]

Finally, potential disruption, even if shown, should not preclude reinstatement. This proposition demonstrates the impropriety of balancing interests to determine a remedy.[75] In *Sterzing v. Fort Bend Independent School District*,[76] a teacher was discharged for making statements critical of the school board. After finding violations of both first and fourteenth amendment rights, the trial court awarded damages to the teacher but refused to order reinstatement, believing the monetary damages adequate and desiring to avoid revival of antagonisms.[77] The Court of Appeals for the Fifth Circuit reversed and remanded on the ground that such disruption was not a legitimate reason to deny reinstatement. "Enforcement of constitutional rights frequently has disturbing consequences. Relief is not restricted to that which will be pleasing and free of irritation."[78]

The Adequacy of a Remedy Short of Reinstatement

Reinstatement in a *Burton*-type situation serves the dual purposes of compensating an employee for the deprivation of his constitutional rights and deterring the employer from violating those rights in dismissing an undesirable employee.[79] As the Supreme Court has evidenced particular concern for individual freedoms in education,[80] the impact of an unconstitutional dismissal should be minimized. "Academic freedom is not preserved by compulsory retirement, even at full pay."[81]

74. *See* notes 33-44 *supra* & accompanying text.

75. *Cf.* notes 69-71 *supra* & accompanying text.

76. 496 F.2d 92 (5th Cir. 1974).

77. 376 F. Supp. 657 (S.D. Tex. 1972), *vacated*, 496 F.2d 92 (1973).

78. 496 F.2d at 93. The court held that the trial court erred by awarding the plaintiff damages for his expectancy of reemployment in lieu of reinstatement. *Id.* In Langford v. City of Texarkana, 478 F.2d 262 (8th Cir. 1973), the court observed that the Supreme Court had "rejected the proposition that interference with constitutional rights can be justified on the grounds that the community is hostile to their exercise and vigorously displays its feelings." *Id.* at 267. *See* Watson v. Memphis, 373 U.S. 526, 535 (1963); Taylor v. Louisiana, 370 U.S. 154, 156 n.2 (1962); Cooper v. Aaron, 358 U.S. 1, 16 (1958); Buchanan v. Warley, 245 U.S. 60, 80-81 (1917).

79. *See* Burton v. Cascade School Dist., 572 F.2d 850, 854 (9th Cir. 1975).

80. *See* notes 45-47 *supra* & accompanying text.

81. Keefe v. Geanakos, 418 F.2d 359, 363 (1st Cir. 1969). There may be a more compelling reason vitiating the adequacy of damages in a section 1983 suit, though it went undiscussed in *Burton*. As the Supreme Court has held that a municipality is not a "person" under section 1983 for the purpose of obtaining damages, Moor v. County of Alameda, 411 U.S. 693, 698-710 (1973), some courts have held that damages

The ramifications of a failure to reinstate an unconstitutionally dismissed teacher extend beyond the individual case. A successful removal of one "undesirable" teacher, even if at a price, will tend to inhibit others in the exercise of their constitutional rights, depending upon their desire to continue working in the same school system. Thus, the interests of both individual and community academic freedom strongly suggest that reinstatement should be granted as a matter of course to an unconstitutionally dismissed teacher.

Some discretion in the implementation of the remedy is appropriate, however. A mid-term reinstatement may be difficult for the students, or a replacement may have been hired. Hence, immediate reinstatement has not been applied without regard for the needs of the school system. Courts accordingly have ordered reinstatement at the beginning of a term,[82] or have ordered that the teacher be offered the first available position for which he is qualified.[83]

Conclusion

The court in *Burton* misconceived the nature of the rights violated, and consequently failed to examine the remedy closely to test its adequacy. A presumably competent teacher was dismissed pursuant to

cannot be obtained against school board members in their official capacities. Harkless v. Sweeny Indep. School Dist., 388 F. Supp. 738, 746-47 (S.D. Tex. 1975); Patton v. Conrad Area School Dist., 388 F. Supp. 410, 417 (D. Del. 1975); O'Brien v. Galloway, 362 F. Supp. 901, 905 (D. Del. 1975); Sigmon v. Poe, 381 F. Supp. 387, 393 (W.D.N.C. 1974), *dissolved*, 391 F. Supp. 430 (1973). Damages then would have to be sought against school officials in their individual capacities with attaching qualified immunity; thus the plaintiff would have the additional burden of showing bad faith. *See* Wood v. Strickland, 95 S. Ct. 992, 1000-01 (1975). *Contra*, Muzquiz v. City of San Antonio, 520 F.2d 993, 999 (5th Cir. 1975) (policeman can sue officials for damages even though "felt by the City"); Hogge v. Hedrick, 391 F. Supp. 91, 96 (E.D. Va. 1975) (county officials may be sued for damages); Seaman v. Spring Lake Indep. School Dist. No. 16, 387 F. Supp. 1168, 1170-71 (D. Minn. 1974) (individual board members liable even though money would come from county).

82. *See* Smith v. Board of Educ., 365 F.2d 770, 783 (8th Cir. 1966).

83. *See, e.g.*, Lee v. Macon Cy. Bd. of Educ., 453 F.2d 1104, 1112 (5th Cir. 1971). The court said: "The fact that the school board has already hired another to fill that vacancy obviously cannot prevent appropriate relief by a court of equity in vindication of the law and the Constitution." *Id.*

There may be room in this area of the law for the development of a doctrine allowing the state, in extraordinary cases, to show that reinstatement would have such a deleterious effect upon the educational process as to mandate some alternative remedy. Such a doctrine should place a heavy burden of proof upon the state subject to rebuttal by the teacher, and should be countenanced only in extreme circumstances. This concept would give additional flexibility to the court and its infrequent applicability would minimize any adverse impact upon academic freedom.

an unconstitutionally vague statute, thus violating her right to substantive due process. Failure to grant her reinstatement gave effect to the illegal action of the state. The award of monetary damages did not restore the right of the teacher not to be unconstitutionally dismissed. Further, the wider implications of the result in *Burton* run counter to the strong protection traditionally accorded academic freedom.

Broad and equitable discretion is indispensable to the selection and award of adequate relief. That discretion, however, should not preclude a vigorous remedy for the deprivation of a substantive constitutional right. That a public school teacher cannot be dismissed in violation of the constitution is beyond dispute; that reinstatement is the appropriate remedy for an unconstitutional dismissal should be the established rule.