UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 87-2497

Carl Jackson,
Plaintiff-Appellant,

v.

City of Albuquerque, et al.,
Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT
FOR NEW MEXICO

BRIEF FOR THE APPELLANT

Respectfully Submitted:

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CARL JACKSON,

Plaintiff-Appellant,

v.

City of Albuquerque, et al.,

Defendants-Appellees.

CERTIFICATE AS TO PRIOR PARTIES AND COUNSEL REQUIRED BY 10th CIRCUIT RULE 28.2(a)

The undersigned certifies that the following parties or attorneys are now, or have been interested in this litigation or any related proceedings. These representations are made to enable judges of the Court to evaluate the possible need for disqualification or recusal.

1. As to the named parties or others not identified by the caption, or in this brief who are now, or have been related to this matter, Appellant knows only of:

A. Mr. Orlando Sedillo, Defendant

B. Mr. Henry "Kiki" Saavedra, Defendant

C. Ms. Linda Misanko, Defendant (Dismissed on Directed Verdict)

D. The City of Albuquerque, New Mexico

E. Carl Jackson, Plaintiff

Appellant knows of no other parties at any level of the proceedings.

2. As to the prior counsel:

A. Ms. Ann Yalman, Plaintiff's counsel at administrative level

B. Mr. Frank Dickson, Plaintiff's counsel at personnel hearings

C. Mr. Paul Ruskin, Plaintiff's co-counsel

D. Mr. Carl Hartmann, III, Chief Counsel for the Plaintiff

D. Mr. Judd Conway, Plaintiff's counsel during post-trial motions

E. Mr. Manny Aragon, for the Defendants, at trial

F. Mr. John Pope, for the Defendants, at trial

E. Ms. Paula Forney, Chief Counsel for the Defendants

Appellant knows of no other counsel who have appeared in this matter.

3. Other appeals pending:

A. This action is a cross-appeal to the appeal filed by all remaining defendants herein, filed with this court as Jackson v. City of Albuquerque et al., 87-2403, Docketed September 29, 1987. No other appeals or actions are pending.

RESPECTFULLY SUBMITTED,

HARTMANN & RUSKIN, P.A.

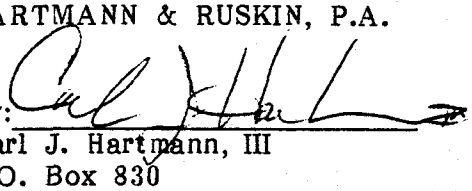
By: 

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TABLE OF CONTENTS

CERTIFICATE AS TO PRIOR PARTIES AND COUNSEL i

TABLE OF AUTHORITIES CITED iv

STATEMENT OF ISSUES PRESENTED FOR REVIEW vii

REFERENCES TO PARTIES AND RULINGS ix

STATEMENT OF FACTS x

STATEMENT OF THE CASE xv

ARGUMENT 1

The trial court erred, as a matter of law, when it refused to award Plaintiff-Appellant reinstatement to his former position, awarding "front pay" in lieu of that reinstatement.

A. The trial court applied the incorrect standard when it followed decisions under Title VII of the 1964 Civil Rights Act regarding reinstatement instead of decisions which dealt with 42 U.S.C §§ 1981 and 1983 which apply a stricter standard, reflecting constitutional considerations.

B. Even assuming, arguendo, that the trial court applied the correct standard, it abused its discretion in considering improper factors in reaching its decision to deny reinstatement.

C. If this Court orders reinstatement, Appellant must receive a pro-rata portion of the front pay from the date of judgment to the time of the mandate.

CONCLUSION 21

STATEMENT AS TO ORAL ARGUMENT 22

CERTIFICATE OF SERVICE 23

ATTACHMENT (MEMORANDUM OPINION) 24

TABLE OF AUTHORITIES

Cases

Abbott v. Thetford, 529 F.2d 695 (5th Cir. 1976), rev'd on other grnds., ... 12, 13

Agosto v. Aponte Roque, 631 F.Supp. 1082 (D.P.R. 1986); Reversed on other grounds. 6

Allen v. Autauga County Bd. of Education, 685 F.2d 1302 (11th Cir. 1982) 3-5

Banks v. Burkich, 788 F.2d 1161 (6th Cir. 1986) 2, 11, 12

Blim v. Western Electric Company, Inc., 731 F.2d 1473 (10th Cir. 1984) 9

Blonda v. Bailer, 548 F.2d 301 (10th Cir.1977) 1

Bueno v. City of Donna, 714 F.2d 484, 495 (5th Cir. 1983) 6

Burton v. Cascade School District Union High School No. 5, 512 F.2d 850 (9th Cir. 1975) 3, 8

Chicano Police Officers Ass'n v. Stover, 526 F.2d 431 (10th Cir. 1975);vacated and remanded, 425 U.S. 944 (1976) 4

EEOC v. Prudential Federal Savings and Loan, 763 F.2d 1166 (10th Cir. 1985) 7, 8

Fitzgerald v. Sirloin Stockade, 624 F.2d 945 (10th Cir. 1980) 8, 10

Harkless v. Sweeney Ind. School Dist., cert. denied, 400 U.S. 991, 91 S.Ct 451, 27 L.Ed.2d 439 (1971) 6

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 4

Kingsville Ind. Sch. Dist. v. Cooper, 611 F.2d 1109, 1114 (5th Cir. 1980) 6

Lee v. Macon Co. Board of Ed., 453 F.2d 1104, 1114 (5th Cir. 1971) 6

Madrid v. Mine Safety Appliance Co., 486 F.2d 856 (10th Cir. 1973) 1

Mid-America Food Service, Inc., 578 F.2d 694 (7th Cir. 1978) 2

Monell v. Department of Social Services, 436 U.S. 658, 690 (1978) 5

Moore v. Tangipahoa Parish School Board, 594 F.2d 489, 494-5 (5th Cir. 1979) 6

NLRB v. King Louie Bowling Corp. of Missouri, 472 F.2d 1192 (8th Cir. 1973) 8

Owens v. City of Independence, 445 U.S. 622 (1980) 5

Paxton v. Union Nation Bank, et al., 688 F.2d 552 (8th Cir. 1982) 19

Professional Association of College Educators (PACE), TSTA/NEA v. El Paso County Community College District, 730 F.2d 258 (5th Cir. 1984) 4, 13

Roemer v. Board of Public Works of Maryland, 96 S.Ct. 2337, 426 U.S. 736, 49 L.Ed.2d 179 (1976) 1

Schultz & Lindsey Const. Co. v. Erikson, 352 F.2d 425 (7th Cir. 1965) 1

United States v. Coffeeville Consolidated School Dist, 513 F.2d 244, 249 (5th Cir. 1975) 6

Van Ooteghem v. Gray, 774 F.2d 1332 (5th Cir. 1985) 6

Statutes and Rules

42 U.S.C. § 1981 . . . . . 4, 5, 8, 10, 12, 21

42 U.S.C. § 1982 4

42 U.S.C. § 1983 . . . . . 3-5, 8, 10, 12, 21

42 U.S.C. § 1985 4

Age Discrimination in Employment Act, (ADEA), 29 U.S.C. §§ 626(b) et seq. 8

Civil Rights Act of 1866, (42 U.S.C. §§ 1981, 1982) 4, 8

Civil Rights Act of 1871, (42 U.S.C. §§ 1983, 1985) 8, 11

Klu Klux Klan Act 4

National Labor Relations Act (NLRA), (as amended by 29 U.S.C. 158a) 8

Rule 28.2(d), Rules of the United States Court of Appeals for the Tenth Circuit 1

Rule 28.2(f), Rules of the United States Court of Appeals for the Tenth Circuit 22

Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000(e) et seq. 7, 8, 14, 19, 21

U.S. Constitution, Fourteenth Amendment 4

U.S. Constitution, Thirteenth Amendment 4

STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to Rule 28.2(b), Rules of the United States Court of Appeals for the Tenth Circuit, the Appellant states that the following appeals are pending which deal with this matter, or related matters:

1. This brief is a cross-appeal to the appeal from the verdict herein. Defendants filed said the Notice of Appeal with the District Court on September 22, 1987, and the matter was entered on this Court's docket as number 87-2403. Appellant knows of no other appeals in this matter.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

STATEMENT OF JURISDICTION. Pursuant to Rule 28.2(c), Appellant asserts the following as to jurisdiction. The United States District Court for New Mexico had jurisdiction to hear this matter pursuant to 42 U.S.C. §§ 1331, 1343(3), 1343(4) and 28 U.S.C. §§ 2001 and 2202.

Jurisdiction for the Court of Appeals exists pursuant to 28 U.S.C. § 1291, and this matter is brought in this Circuit Court under provisions of 28 U.S.C. § 1294(1), and those Rules of Appellate Procedure which provide for this appeal, Rules 1, 3(a), and 4.

As to timeliness, The Verdict in this matter was entered on the docket on June 19, 1987. The judgment pursuant to that Verdict was docketed on June 22, 1987. Following post-trial motions, a subsequent memorandum opinion was filed by the court on August 28, 1987. Defendants thereupon filed a Notice of Appeal on September 22, 1987 within the time limits set by Rule 4(a). That appeal was docketed as 87-2403. They thereupon requested preparation of the transcript of the proceedings.

Plaintiff-Appellant filed a timely Notice of Appeal as to the Cross-Appeal pursuant to Rule 11—this was docketed on October 14, 1987 within the time limits set forth in Rule 4(a)(3). This Brief was served on Defendants on November 25th, 1987, within the 40 days required by Rule 31(a).

I. Did the trial court err, as a matter of law, when it refused to award Plaintiff-Appellant reinstatement to his former position, awarding "front pay" in lieu of that reinstatement?

A. Did the trial court apply the incorrect standard when it followed decisions under Title VII of the 1964 Civil Rights Act regarding reinstatement instead of decisions which dealt with 42 U.S.C §§ 1981 and 1983 which apply a stricter standard, reflecting constitutional considerations?

B. Even assuming, arguendo, that the trial court applied the correct standard, did it abuse its discretion in considering improper factors in reaching its decision to deny reinstatement?

C. If this Court orders reinstatement, should Appellant receive a pro-rata portion of the front pay from the date of judgment to the time of the mandate?

STATEMENT AS TO POINT AT WHICH ISSUES WERE RAISED IN RECORD

The sole issue raised by Plaintiff-Appellant arises out of the Memorandum Opinion and Order, August 28, 1987. In that opinion, the trial court denies the requested equitable relief of reinstatement.

REFERENCES TO PARTIES AND RULINGS

Carl Jackson was the original plaintiff in this cause. The original defendants below were: The City of Albuquerque, New Mexico and three of its officials. The officials were sued in their individual capacities. These officials were: Orlando Sedillo, Henry "Kiki" Saavedra, and Linda Misanko. The action against Ms. Misanko was dismissed upon a directed verdict. Both the municipal defendant and the individuals were represented by the legal department of the City of Albuquerque, and a unitary defense was presented. Thus, in this brief, Appellant will refer to them collectively as the "defendant".

After the Plaintiff prevailed in a jury trial below, the trial court issued a written decision regarding such post-trial issues as defendants' Motion for a Judgment N.O.V., and plaintiff's Motions for Attorneys' Fees, and Reinstatement of the Plaintiff. This decision will be referred to as the Memorandum Opinion and Order, August 28, 1987.

The trial court referred to is the United States District Court for New Mexico, Mecham, Senior Judge, sitting.

Original defendants filed an appeal of the jury verdict. Plaintiff then filed a Cross-Appeal as to the denial of reinstatement. Due to the Rules of this Court, Plaintiff will be referred to as the Appellant, defendant will be referred to as the Appellee.

The Transcript of the Proceedings is contained in five volumes and will be referred to as follows: (Tr. at).

STATEMENT OF FACTS

Plaintiff-Appellant, Carl Jackson, was an employee of the defendant-appellee, City of Albuquerque. At the time of this action, he was the Assistant Superintendent of Adult Sports. (Tr. at 5). Individual defendant Saavedra was Jackson's superior. Individual defendant Sedillo was Jackson's ultimate superior, and the head of the City of Albuquerque department in which they worked, Parks and Recreation.

Jackson had obtained his undergraduate degree from the University of New Mexico in 1968 (Tr. at 6), and his M.S. degree in Counseling Psychology from the same school in 1971. He went to work for the City in 1974. In 1977 he was asked to take the position of Assistant Athletic Director, and to fix the Sports Program which was in a state of chaos. (Tr. at 9). During his attempts to revive the program he was a strict and rigid manager. (Tr. at 10 and 29). He instituted written procedures for such things as treatment of clients, leave and dress codes. (Tr. at 11 and 24).

As a result of Jackson's activities, by 1981 the Sports Program was nationally recognized as being superior. (Tr. at 12 and 13). Jackson's superiors were happy with his performance, and acknowledged the national distinction. (Tr. at 13). (Memo from Sedillo recognizing national stature). As a result of his efforts, Jackson received numerous letters of commendation and appreciation from civic groups and the mayor—right up to the time of his termination. (Tr. at 16-17). Not only were there no negative letters or comments in his personnel file (Tr. at 17-18), but in evaluations by his immediate supervisor, Toby Espinosa, he was applauded for his quality of work, integrity, and willingness to put in long hours. (Tr. at 22).

In 1980 Jackson was told by Sedillo that he would not be advanced up the

"ladder" because of "political circumstances". The "political circumstance" turned out to be that Jackson "was Black, and that politically and socially, it wasn't feasible for [Jackson] to become a superintendent." (Tr. at 19 and 63). He was told this by Sedillo.

Although he was disheartened, Jackson redoubled his efforts. He established an open door policy (Tr. at 30), dealt with the fair treatment of women on his staff (Tr. at 34), and generally tried to keep improving the department. Unfortunately, the situation became worse rather than better as he was subjected to unusual audits (Tr. at 40, 43, and 45), "anonymous" complaints from unidentified "concerned citizens" (Tr. at 46-7), and the non-merit promotion of other non-Blacks where no effort was made to hide the irregularities. (Tr. at 55).

Finally, when Jackson realized that cooperation would lead only to more discrimination and harassment, he filed a memo complaining of discrimination, with a copy to the City's Affirmative Action Officer, Leon Boyden. (Tr. at 52, 58, 59-60,). He immediately was subjected to three types of activity: First, previously approved activities such as an arrangement to work with a marketer of sports equipment, previously approved by another supervisor under Sedillo's command, (Mr. Valdez), were inexplicably cancelled. (Tr. at 56 and 57). To add insult to injury, allegations were made against Jackson for "outside conflicts" although the concept had been correctly approved. (Tr. at 56). The second type of response came in the direct statements and acts of Sedillo and Saavedra. Sedillo confronted the Affirmative Action Officer regarding Jackson's complaint (Tr. at 59-60), and then wrote a memo to Jackson accusing him of sexual harassment—referencing virtually ancient allegations. (Tr. at 79-80). The City never investigated the incidents in that memo, and it was withdrawn by the City Manager after Jackson protested. (Tr. at 82-85).

Unbeknownst to Mr. Jackson, the third and most ominous response to the memo was a series of, efforts by Sedillo to have Jackson investigated on a personal basis by the police department. (Tr. at 100). This intensive and covert effort yielded virtually nothing, but was repeated at least three times—to the point the police finally refused to cooperate in the illegal espionage. (Tr. at 101). The subject was not work related—rather, it focused on Mr. Jackson's intimate personal life. (Tr. at 101-102).

When it again became clear that the defendants would not act to modify discriminatory and retaliatory behavior (Tr. at 86-88), Jackson filed a complaint with the Equal Employment Opportunity Commission. (Tr. at 89). It was immediately after the filing of this external second complaint with the EEOC that the discrimination and harassment reached new peaks. Within days of that filing, there was constant nit-picking (Tr. at 90) and untrue accusatory memos from Saavedra regarding Jackson's being away from the job (Tr. at 35 and 3). Also within days, Jackson was told to "stop complaining" in a staff meeting. (Tr. at 94-96). There was no assertion all through this period that work performance decreased. In fact, Jackson voluntarily attended, on his own initiative, a sexual harassment prevention training seminar just a month after the December 5th, 1984 staff meeting where he was told not to complain. (Tr. at 98).

After attending the sexual harassment seminar with two female secretaries from his Program, Jackson discussed the matter with his staff in a January 17, 1985 meeting. (Tr. at 99). It was also at this time that Jackson learned of, and began to look into, the covert police investigations into his personal life which had been initiated by Sedillo. (Tr. at 100-102). But this is also the time that Jackson was excluded from policy meetings (Tr. at 103), and when he was

informed that total outsiders would be in command during his superior's absence, rather than him. (Tr. at 104).

The final chapter of his employment was written when Jackson's male secretary was switched, against his will, with Martha Marquez. (Tr. at 105-106). Jackson was not happy with her performance. (Tr. at 106-108). Rick Giron, Jackson's subordinate, kept notes on her poor performance (Tr. at 110), and ultimately Jackson wrote a memo recommending termination. During the week of June 17th, 1985, three things happened in quick succession: An EEOC investigator was on-site examining City officials regarding Jackson's discrimination complaint. Mr. Valdez was the principal City contact for those meetings. (Tr. at 112). Within a day after the after the EEOC investigation, Mr. Valdez told Martha Marquez that Jackson was trying to fire her (Tr. at 113-114), but that City officials were on her side. Third, Marquez alleged two extremely minor incidents of supposed sexual harassment—that Jackson hit her on the rear-end with a garbage bag months previously, and that once, when she bumped into him backwards, he apologized in a way that she later alleged sounded suggestive. (Tr. at 115, 118) (She did admit, however, that she had never spoken to Jackson about this, or raised any official complaint previously.) (Tr. at 115).

Messrs. Sedillo, Saavedra and Valdez acted quickly. They first suspended Jackson with pay. (Tr. at 117-118). Next, they set up an investigative group headed by Valdez. The other members of that group did not know where the witnesses came from or how they obtained information shown them by Valdez. They were given information such as the Sedillo memo from the previous year regarding harassment, which was supposedly removed from the files. They were not told the history; that Jackson had protested and met with City officials, and the reasons for the removal of the memo. This task force violated City procedure for handling this type of case. (Tr. at 120-121). This process

had never been utilized before—or since. It was the position of Jackson that it was a sham; a mockery of a due process procedure intended to give the appearance of a "fair hearing", but where the outcome, witnesses, and evidence were intentionally rigged. (Tr. at 124, 136-139). In addition, the group was intentionally not told about similar, but much more serious allegations against an identically situated Hispanic male, Toby Espinosa. (Tr. at 142-143) No disciplinary action was taken with regard to Espinosa despite multiple reported allegations involving physical attacks of a sexually harassing nature. (Tr. at 143).

Based on the lies, selected witnesses, phony evidence and perjured testimony put before them by Sedillo and Saavedra, through Valdez, this group decided to terminate Jackson. Three grounds were stated (Tr. at 126), and the City's Personnel Board, relying on the "evidence" gathered, was evenly split as to whether Jackson should be terminated. Jackson was then terminated.

STATEMENT OF THE CASE

Plaintiff's Complaint in this matter was filed on October 15, 1987, as CIV-86-1252M in the United States District Court for the District of New Mexico. In a jury trial which began June 15, 1987 before Senior Judge Mecham, plaintiff pursued theories under 42 U.S.C §§ 1981 (discrimination and retaliation), 1983 (violation of due process), and 1985 (conspiracy). Allegations were made against Linda Misanko, Orlando Sedillo, and Henry "Kiki" Saavedra individually, as well as against the City of Albuquerque, New Mexico.

In response to the defense's motion for a directed verdict, Linda Misanko was removed as a defendant. The court also dismissed the section 1985 allegations. At the close of the five day trial, the jury was instructed utilizing instructions developed from submissions by both counsel. There were no objections to any of the instructions. The jury was also informed of the determinations which were available to it.

Following several hours of deliberation, the jury sent a note to the judge asking whether they could award reinstatement of the plaintiff to his job.

The jury returned a verdict for the plaintiff on all counts against all defendants. It awarded $70,000.00 in compensatory damages against the City of Albuquerque, and $70,000 in punitive damages against the two remaining individual defendants.

Following a motion by the defendants for Judgment N.O.V. or in the Alternative for a New Trial; and Motions by plaintiff for Attorneys' Fees, Costs, and Reinstatement, the Court entered its Memorandum Opinion and Order of August 28, 1987. This dealt collectively with all the post trial motions.

Defendants filed an appeal from the verdict of the jury, and from portions of the Memorandum Opinion and Order. Plaintiff then filed the instant appeal

from the portion of the Memorandum Opinion and Order in which the Court refused to reinstate plaintiff, instead awarding an additional $100,000 in front pay—an amount equaling two years of non-employment.

Due to the Rules of this Court, Plaintiff appears as the Appellant herein, defendant as the Appellee.

ARGUMENT

Three permutations of the central issue are before this Court. Under the general heading of the improper substitution of "front pay" in lieu of reinstatement by the trial court, Appellant will argue:

1. The Court applied the incorrect standard when it denied reinstatement, awarding instead "front pay".

2. Even assuming, arguendo, that the Court applied the correct standard, it abused its discretion in considering improper factors in reaching its reinstatement determination.

3. If this Court orders reinstatement, Appellant is entitled to receive a pro-rata portion of the front pay from the date of judgment to the time of payment.

STATEMENT AS TO STANDARD OF REVIEW

Pursuant to Rule 28.2(d), Rules of the United States Court of Appeals for the Tenth Circuit, Appellant submits that the following standard of review exists in the instant matter. The issue presented is one which concerns a simple error of law. Appellant submits that the trial court applied an incorrect legal standard in assessing the facts presented.

On appeal, facts are to be viewed in a light most favorable to the prevailing party—in this action, the Plaintiff-Appellant, Carl Jackson. This requires drawing from the successful party's evidence the strongest probative force of which it will admit, and drawing therefrom such inferences and conclusions favorable to the verdict as reasonable consideration will permit. Schultz & Lindsey Const. Co. v. Erikson, 352 F.2d 425 (7th Cir. 1965); Madrid v. Mine Safety Appliance Co., 486 F.2d 856 (10th Cir. 1973). It is not the place of the appellate court to reappraise the facts unless it is clear they plainly fail to support the findings of the trier of facts. Roemer v. Board of Public Works of Maryland, 96 S.Ct. 2337, 426 U.S. 736, 49 L.Ed.2d 179 (1976). Where, however, a valid relief was requested below, Blonda v. Bailer, 548 F.2d 301 (10th

Cir.1977), but refused, this Court must correct clear errors as to the law which was applied. Mid-America Food Service, Inc., 578 F.2d 694 (7th Cir. 1978).

Introduction. Appellant places a significant part of a one-hundred thousand dollar "front pay" award in jeopardy by requesting reinstatement. He is motivated by two considerations—he strongly believes in the principles involved, and because he would rather have the position and his career than have the money. His desire for the job is simple to understand, he wishes to work at his chosen profession—and as the Court noted in the Memorandum Decision, because of the unique nature of the work, if this decision stands, it is unlikely that he can do so without leaving his home and friends.[1] The principle for which he is fighting (and for which he is willing to risk the front pay), is more complex. Without reinstatement, there is no public display judicially condemning the discrimination; there is no appearance that the violation of civil rights was clearly redressed.

> If an employer is allowed to redress his violation. . .through mere money damages, the message to other employees is that they may lose their jobs if they speak out against their employer.

Banks v. Burkich, 788 F.2d 1161 (6th Cir. 1986)(§1983 action cited by the lower court in this matter with regard to reinstatement. Memorandum Opinion, at 6).

Perhaps this is the very problem the jury sought to address when it asked if it could award reinstatement. Even the trial Court noted the flurry of newspaper rhetoric and denials that the defendants undertook after the judgment in this matter in the face of a verdict. Memorandum Opinion and Order, at 8. Should an employer be free to state that he will not "take [the plaintiff]

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[1] The trial court noted, "defendants' conduct has made it very difficult for the plaintiff to find employment in this region. . . ." Memorandum Opinion and Order, August 28, 1987, at 9.

back," in the face of a verdict of racial discrimination under sections 1981 and 1983? Can a defendant shown to have such a degree of racial animus as existed in this action have the right to buy the appearance of success, and then to trot that appearance before the citizenry like a tawdry battle prize—false though it may be? Appellant submits that this is the core of the matter.[2]

It is, perhaps, a policy consideration best enunciated by the Court in Burton v. Cascade School District Union High School No. 5, 512 F.2d 850 (9th Cir. 1975):

> This extraordinary equitable remedy has commonly been imposed in factual situations involving racial discrimination, the special target of federal and state legislation (and of three Constitutional Amendments.)
>
> * * * *
>
> The common thread running through the cases in which reinstatement was directed after appellate review seems to be that such relief is necessary, not only to redress injury to the complainant but also to discourage school systems from taking similar actions against other teachers in the future.

Id at 512 F.2d 853, 854 (Emphasis added).

Appellant seeks to impress upon this Court a critical distinction in the standard for assessing reinstatement. It exists between instances of racial discrimination under 42 U.S.C. Sections 1981, and 1983, and similar assessments under Title VII, or in cases dealing with non-racial classifications. At the same time, he will also argue that the instant case is analogous to Allen v. Autauga County Board of Education, 685 F.2d 1302 (11th Cir. 1982), and a host of virtually identical decisions under §§ 1981 and 1983. In that case, a teacher's First Amendment rights were found to have been violated in an action under 42

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[2] See, Brewer v. Muscle Shoals Bd. of Education, 790 F.2d 1515 (11th Cir. 1986)(Footnote 9).

U.S.C. § 1983. The employer sought to block reinstatement based on a lack of mutual trust, and the possibility of future hostility. The court simply refused to accept this as being sufficient to deny "a basic element of the appropriate remedy in wrongful employee discharge cases." Id. at 1305; See also, Professional Association of College Educators (PACE), TSTA/NEA v. El Paso County Community College District, 730 F.2d 258 (5th Cir. 1984)("We emphasize however, that the court should deny reinstatement in a [Constitutional §1983 action] wrongful discharge case on the basis of equity only in exceptional circumstances. . . .)

Historical Overview. Immediately after the ratification of the Thirteenth Amendment abolished slavery, Congress passed the Civil Rights Act of 1866. After the subsequent ratification of the Fourteenth Amendment, Congress re-enacted the legislation to make it clear that it had the authority and the intent to eradicate discrimination on the basis of race. The major sections of this Act are codified as 42 U.S.C. 1981 and 1982. Similarly, the Klu Klux Klan Act was enacted in 1871—creating sections 1983, 1985, and 1986. Although Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), dispensed with the "state action" requirement under section 1981, thus allowing Appellant to prevail under that theory, Section 1983 was also implicated due to state involvement.

Section 1983 reaches actions which are done "under the color of state law". Chicano Police Officers Ass'n v. Stover, 526 F.2d 431 (10th Cir. 1975); vacated and remanded, 425 U.S. 944 (1976). In its 1978 landmark decision, the U.S. Supreme Court provided an extensive analysis of the legislative history of Section 1983 in extending its protection to local government—holding that "the touchstone of the '1983' action against a government body is an allegation that an official policy is responsible for a deprivation of rights protected by the

Constitution." Monell v. Department of Social Services, 436 U.S. 658, 690 (1978). Subsequent interpretations held that municipalities are not entitled to immunity by asserting the good faith of its officials, but were not subject to punitive damages. Owens v. City of Independence, 445 U.S. 622 (1980; City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

A central factor which unites the analyses in the cases above is: The deep and powerful realization that a deprivation of civil rights under "color of law" is more critical because of the message it sends a large segment of the populous. Most critical is the "special" place that racially motivated discrimination has occupied in the judicial treatment of Sections 1981 and 1983. THis historical context has led to employment discrimination decisions which have considered the remedy of reinstatement as opposed to "front pay" given under Sections 1981 and 1983 make direct and specific note of this special status. In each of these critical areas racial discrimination and actions under color of state law, the Court identifies a much higher standard, and enunciates the need to use reinstatement to make a public point—even if, in some cases, there is resistant hostility in the workplace.

It is a well settled matter that denial of reinstatement in §§1981-83 actions differs from the reinstatement issue when it is addressed under other laws. Appellant will argue that the court below erred when it did not apply the §§1981-83 standard. Turning once again to Allen v.Autauga County Board of Education,

> The district court found that reinstatement would "breed difficult working conditions" for Allen [Plaintiff] and that there was "a lack of mutual trust between Ziegler [her boss] and Allen which is essential in the operation". . . .the court concluded that reinstatement would be inequitable in light of the circumstances of the case.
>
> Although the district court's concerns are understandable, we

> agree with [Plaintiff] that they do not justify the court's holding on this point. Indeed the use of these considerations as the basis for denying reinstatement is in direct conflict with existing Fifth Circuit precedent. In Sterzing v. Fort Bend Ind. School Dist., 496 F.2d 92 (5th Cir. 1974), the former Fifth Circuit held that the existence of an antagonistic relationship could not justify the refusal to reinstate a teacher who had been discharged for exercising his first amendment rights [under §1983]. In reaching this conclusion, the court stated that "[e]nforcement of Constitutional rights frequently has disturbing consequences. Relief is not restricted to that which will be pleasing and free of irritation Id. at 93. Many other cases which bind us have reached the same conclusion: reinstatement is a basic element of the appropriate remedy in wrongful employee discharge cases and, except in extraordinary cases is required.

Id. at 1305. (Emphasis added.); Citing, Kingsville Ind. Sch. Dist. v. Cooper, 611 F.2d 1109, 1114 (5th Cir. 1980); Moore v. Tangipahoa Parish School Board, 594 F.2d 489, 494-5 (5th Cir. 1979); United States v. Coffeeville Consolidated School Dist, 513 F.2d 244, 249 (5th Cir. 1975); Lee v. Macon Co. Board of Ed., 453 F.2d 1104, 1114 (5th Cir. 1971); Harkless v. Sweeney Ind. School Dist., cert. denied, 400 U.S. 991, 91 S.Ct 451, 27 L.Ed.2d 439 (1971). It should be noted in passing that more than one employer has sought to limit this strict standard regarding reinstatement to cases involving schools and teachers. This tactic met with no success—the court finding that violation of constitutional rights, particularly those involving race or free speech, warranted equally strict treatment in general employment actions.

> While the equitable relief of reinstatement of state employees discharged in violation of their constitutional rights has been primarily used in teacher dismissals, the Courts have established the principle that reinstatement is a necessary element of an appropriate remedy in wrongful employee discharge cases. (Citations omitted).

Bueno v. City of Donna, 714 F.2d 484, 495 (5th Cir. 1983); Abbott v. Thetford, 529 F.2d 695 (5th Cir. 1976); Reversed on other grounds; Agosto v. Aponte Roque, 631 F.Supp. 1082 (D.P.R. 1986);See also, Van Ooteghem v. Gray, 774 F.2d

1332 (5th Cir. 1985).

I. Did the Court apply the incorrect standard when it denied reinstatement, awarding instead "front pay"?

In its decision, the District Court correctly enunciated the Title VII standard for granting "front pay" in lieu of granting a prevailing plaintiff's request for reinstatement. Memorandum Opinion and Order, at 6. The Court also correctly stated that under Title VII "[r]einstatement may not be appropriate, however, when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible." Id. at 6; citing, EEOC v. Prudential Federal Savings and Loan Ass'n, 763 F.2d 1166, (10th Cir. 1986); cert. denied, 106 S.Ct 312 (1985).

In keeping with the standards set forth, the Court then found that four specific factors demonstrated sufficient hostility under Prudential to justify a denial of reinstatement—substituting a "front pay" award of one hundred thousand dollars:

> 1. "[H]ostility was evident in the courtroom, in the unprofessional and derogatory language used by Defendants' expert toward the plaintiff."
>
> 2. "[A]nd the burglary of plaintiff's file from his attorney's office. . . .I do not suggest by this that the defendants' themselves are responsible for this burglary, there is obviously great hostility towards the plaintiff on the part of someone who aligned himself, herself, or themselves with the defendants which likely would effect the plaintiff's ability to work were he reinstated."
>
> 3. "It is also evident in the comments made by defendants' in the newspapers after the trial and recently in their threatened prosecution of parties unknown in relationship to settlement negotiations."
>
> 4. "[I]t is not just with his subordinates that Mr. Jackson would have to associate, but with other agencies and with the public as well."

Memorandum Opinion and Order, at 7-8. The Court then concluded that the "hostility remain[ed] impossibly high", and awarded the front pay in lieu of reinstatement. Appellant will address the validity of this conclusion below, but would first argue that the application of the Prudential standard to this matter was a clear error of law.

Section 1981, 1983 Remedy Distinguished From Title VII. This trial was similar to an action under 42 U.S.C. §§ 2000(e) et seq., Title VII of the 1964 Civil Rights Act. It was, however, brought only pursuant to the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981, 1983, and 1985. This is a critical distinction—particularly as this case involves acts done on the basis of race. Unfortunately, the District Court relied completely on Title VII and ADEA decisions as to the reinstatement issue. In most situations involving employment discrimination which is addressed under the Civil Rights Acts rather than Title VII, this differentiation is not dispositive. In the instant case, the Court's reliance on Title VII precedent led to a grave error in the standard applied.

It is clear that reinstatement can be denied upon a mere finding of "hostility" under Title VII, the ADEA (29 U.S.C. 626b), or the NLRA (as amended by 29 U.S.C. 158a). EEOC v. Prudential, supra. at 1172 (ADEA); Fitzgerald v. Sirloin Stockade, 624 F.2d 945 (10th Cir. 1980)(Title VII); NLRB v. King Louie Bowling Corp. of Missouri, 472 F.2d 1192 (8th Cir. 1973)(NLRA). It is also clear that different considerations are present in racial actions under the Civil Rights Acts. Burton v. Cascade, 512 F.2d 850 (9th Cir. 1975). A move to a similar recognition of public policy objectives has been found within this Circuit in recent Title VII front pay decisions where it was noted that the reinstatement should be treated as more than an individual remedy:

> In EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980), we found that the trial court did not abuse its discretion by ordering offers of reinstatement even though some plaintiffs previously stated that they would not accept reemployment with the defendant. We pointed out that reinstatement has the dual purpose of protecting the discharged employee and demonstrating the employer's good faith to the other employees.

Blim v. Western Electric Company, Inc., 731 F.2d 1473 (10th Cir. 1984)(Emphasis added).

It is apparent that the trial court relied on the incorrect standard—and Appellant would now digress for a brief analysis of the authority cited by that court as to reinstatement. The Court relied on eight decisions in the two and one-half pages of its Opinion pertaining to this issue. A simplistic view is that six out of the eight cases deal with Title VII rather than §§ 1981-83, and the two that are based on constitutional actions directly contradict the court's disposition of this matter, although one was reversed later on the issue of liability. This glaringly illustrates the Appellant's argument: Reliance on Title VII decisions as to reinstatement and front pay led to the incorrect result.

A more sophisticated approach to fathoming the decision below rests in dissecting the six basic assertions by the court,

> 1. While reinstatement is the preferred remedy, it is not an absolute right.[3]
>
> 2. Reinstatement may not be appropriate, however, when the employer has exhibited such hostility that. . .a[4] productive and amicable working relationship would be impossible.
>
> 3. Front pay [is then] an alternative remedy. . .where there is

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[3] Banks v. Burich, supra.

[4] Citing, EEOC v. Prudential, supra.

such a hostile relationship.[5]

> 4. Trial court has broad discretion in fashioning relief to achieve the broad purpose of eliminating the efforts [sic] of discriminatory practices.[6]
>
> 5. Cases where front pay as opposed to reinstatement has been ordered often include allegations of retaliatory discharge such as the Fitzgerald case.[7]
>
> 6. (Referring to Kallir) In that case, there was a close working relationship required and without complete trust and understanding. . ."to order reinstatement on the facts of this case would merely be to sow the seeds of future litigation. . . ." I find the Kallir case persuasive here.

Memorandum Opinion and Order, August 28, 1987, at 6-7. One reaction to this tautology is that reliance is on Title VII decisions alone. The second is that points numbered two and four are dispositive—if one accepts those propositions as the state of the law, the conclusions regarding front pay and retaliatory terminations are correct. What makes the courts reasoning incorrect is that, mere employer hostility, as set out in point two, is insufficient as a basis for denial of reinstatement under §§1981-83. Once such a thesis is removed from the argument, the discretion referred to in point four is not only subject to a different standard, but the discretion is also limited.

It is, therefore, critical to concentrate on point two of the trial court's analysis:

> 2. Reinstatement may not be appropriate, however, when the employer has exhibited such hostility that. . .a productive and amicable working relationship would be impossible.

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[5] Citing, Cassino, supra.

[6] Citing, Fitzgerald, supra., and Franks, supra.

[7] Citing, Fitzgerald, supra. and EEOC v. Kallir, supra.

Simply put: What is the correct standard for denying reinstatement where it is the employer who has created a hostile situation? (It is important to keep in mind that the court below found that all of the "hostility" emanated from the Defendants. Memorandum Opinion and Order, August 28, 1987, at 7-8). The answer can be found in passages of two opinions the Court cites which did deal with reinstatement under the Civil Rights Acts. The first of these cases was Banks, supra., where the court stated,

> once the Plaintiff establishes that his discharge resulted from constitutionally impermissible motives, he is presumed to be entitled to reinstatement.
>
> * * * *
>
> The prospect of money damages will not be sufficient for many employees to overcome the otherwise chilling effect that accompanies the threat of termination.
>
> * * * *
>
> the fact that reinstatement might have "disturbing consequences," "revive old antagonisms," or "breed difficult working conditions," usually is not enough to "outweigh the important [constitutional] policies that reinstatement serves [absent] probable averse consequences [that] weigh so heavily that they counsel the court against imposing this preferred remedy. . . . "Enforcement of constitutional rights frequently has disturbing consequences." Relief is not restricted to that which will be pleasing and free of irritation.

Banks v. Burkich, supra., at 788 F.2d 1164-65. Before moving to the second case the trial court cited but did not follow, Appellant would make one observation regarding a critical fact in Banks. As was true in the instant case, that court found that the alleged "hostility" flowed from "the self-serving statements by the defendant. . . ." In this case, although there is more than adequate evidence that Plaintiff-Appellant was subject to degradation, harassment, lies, and humiliation, there is nothing in the record to suggest that he responded in kind. Indeed, each of the incidents the trial court relates indi-

cates a similar self-serving motivation underlying the "hostile acts" of these defendants. Consider the acts as delineated by the Court: Unprofessional behavior by the defense expert; unprofessional remarks to the news media following the trial, and a generally "hostile" attitude by Jackson's ex-supervisors. If we are to deny reinstatement each time the defendants or their counsel make hostile self-serving statements at trial, or conduct a vindictive media circus, no plaintiff will ever achieve reinstatement—this is the central point in Banks.

The Banks decision clearly says that "hostility" is not the correct basis for a decision regarding reinstatement in a Sections 1981 or 1983 case. Rather, the court must look to "probable adverse consequences [that] weigh so heavily that they counsel the court against this preferred remedy." Id. at 1165. Even then, the court must be mindful that the plaintiff "is presumed to be entitled to reinstatement". Id. at 1164.

We must now turn to the other decision cited by the trial court—the only other decision, along with Banks, which actually reflected a decision under §§1981 or 1983. In Abbott v. Thetford, 529 F.2d 695 (5th Cir. 1976), a chief probation officer filed a complaint in federal court on behalf of three black children, charging racially discriminatory practices by an Alabama state agency. However, the case deals not with that action, but with the termination of that probation officer's employment by the Judge of the Juvenile Court. When Mr. Abbott, the Probation Officer, brought an action against Judge Thetford and prevailed, the Judge asserted that Abbott should not be reinstated. In a situation involving a far greater "trust relationship" between the parties than the one which was presented in the case followed by the trial court (Kallir) or the instant case, the original decision stated,

> Judge Thetford can require much in the loyalty of his Chief Probation Officer and other functionaries. But the price cannot be an outright prohibition of constitutionally based suits. . . .antagonisms to further association must be attributed to feelings generated by the purposeful refusal to obey an order which is constitutionally unsupportable, reinstatement is equitably required. (emphasis added).

Abbott v. Thetford, Id. at 529 F.2d 701. There, as was true here, the court noted that the defendant argued that reinstatement would "revive old antagonisms". Id. at 710. The full court, sitting en banc, reversed the action on the issue of whether there had been a constitutional violation, but the standard identified has continued, and been recognized in other actions. Nor are these two cases the only ones which hold the right to reinstatement to be presumptive in such cases—one is hard put, regardless of the degree of hostility alleged by defendants, to find a denial to reinstate in a racial/constitutional setting. One such case is PACE, discussed above. After ennunciating the stricter standard, the court went on to say that ther could be a "point [where] the probable adverse consequences of reinstatement can weigh so heavily that they counsel the court against imposing this preffered remedy." Appellant has derived the "standard" from these decisions only because they are as representative as any others, and because of the citation to them by the trial court on this issue.

When, then, may a court deny reinstatement and substitute front pay?

1. Once the plaintiff establishes his discharge resulted from constitutionally impermissible motives, he is presumed to be entitled to reinstatement.[8]

2. Mere "hostility", concern that "old antagonisms might be

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[8] Banks, supra., at 788 F.2d 1164

revived", "disturbing consequences", or the fear of "difficult working conditions" is insufficient"[9], rather, the court must find "probable adverse consequences [that] weigh so heavily that they counsel the court against imposing the preferred remedy."[10]

3. Self serving statements [or actions] by the defendant should not be allowed to deny reinstatement, nor should the types of antagonisms which every case of such discrimination, or involving such reinstatement is almost certain to elicit.[11]

As stated in the introduction, and briefed below, Appellant does not believe that sufficient evidence existed to deny reinstatement even under the more lenient Title VII standard. In any case, it seems inconceivable that under the correct, constitutional standard, any evidence exists on the record sufficient under the standard which is outlined above. No hint of future hostility exists in the record—assuming that defendants simply stop the discriminatory and retaliatory activity. As the Court noted in its Opinion, most of the upper level people involved in the case, as well as most of the hostile witnesses, are now gone. Memorandum Opinion and Order, August 28, 1987, at 8.

When a balancing test is applied to this situation, weighing the "probable

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[9] Abbott, supra., and Banks, supra.

[10] Banks, supra., at 1165

[11] Abbott, and Banks, supra.

adverse consequences" to the workplace, it is a small measure in comparison to the damage to the public, other employees in the workplace, and to the appellant. The court itself took note of the off-the-record antics of the defendants in the newspapers during and following this case when it noted, "[i]t [hostility] is also evident in the comments made by defendants in the newspapers after the trial, and recently in their threatened prosecution of parties unknown in relationship to settlement negotiations." Memorandum Opinion and Order, August 28, 1987, at 8. This has the precise effect of tacitly claiming "righteousness" in the face of a direct and opposite jury verdict and judicial decision. Such behavior has the exact result warned about repeatedly in the cases cited above--failure to reinstate allows the defendant to strut about with impunity saying, in effect, "we really won".

Next we have the effect on the employees. If, three years after suffering racial discrimination, the wronged employee wins only to be told "we're sorry, but the spiteful behavior of the defendants means you can't have your job back", what does that teach the rest of the work force? It is the same old lesson—always follow the golden rule. . .he who has the most gold rules. One can imagine no setting in which the phrase "chilling effect" has more meaning than in a workforce—particularly a state or city government. To deny reinstatement here, where the matter has been so highly politicized by the defendants, and where they alone have generated the "blocking" hostility, would be the same as allowing this defendant to put up a huge sign in the municipal offices saying "you can sue us, and maybe you'll get some money—but we'll smear you, and run you out of town. You'll never work in this area again." Even the trial court noted that they had done this to the Appellant. Memorandum Opinion and Order, August 28, 1987, at 9.

Finally, we have the effect on plaintiff. This is not a close question—the question of the injustice done to him, or the effects on him. Not only did the jury decide for him, against each defendant on every count, but it also sent a note to the Judge stating that it wanted to know if it could give him his job back. He has endured countless personal attacks, illegal covert investigations, public degradation, and been placed on the edge of personal financial ruin in the pursuit of this matter. Now, upon his victory, after vindication, he confronts a Pyrrhic victory, for as the Court noted "the Defendants" have "made it very difficult for him to find employment in this Region". Denial of reinstatement would, as the court stated, be tantamount to being told get out of this entire region before sundown. Appellant submits that when the correct standard is applied, this cannot happen.

It is, therefore, clear that the District Court's application of the incorrect standard led it to erroneously determining that the level of hostility was dispositive. The correct standard of analysis requires a court to heavily factor in two items unto this equation which it appears were not considered—the factor of race, and the factor of the higher need to demonstrate to all concerned that racial discrimination by governmental entities and their officials will not be tolerated. In short, the trial court should have applied the §§ 1981 and 1983 standard, and in so doing, ordered reinstatement.

II. Even assuming, arguendo, that the trial court applied the correct standard, it abused its discretion in considering improper factors in reaching its reinstatement determination

Appellant does not dispute that a high degree of hostility exists between himself and the defendant's expert witness—he knows this because of some of the inane, pedantic, and hostile things she said. Memorandum Opinion and Order, August 28, 1987, at 7 ("The hostility was evident in the courtroom, in

the unprofessional and derogatory language used by defendant's expert toward the plaintiff. . . .) He notes that not only did he not say anything to her, he didn't say anything about her—to her face, to the newspapers, or to anyone else. Certainly she did not return that courtesy. He would, however, point out that to the best of his knowledge she has taken many thousands of the defendants dollars, returned to California, and will probably never return to New Mexico. Certainly defendants are unlikely to contact her again, because after being informed, on the last day of trial, of certain evidence the defense had apparently neglected to show her, she said,

> Q: (Mr. Hartmann) Do you have any reason now — can you explain to the Court, why you don't know these incidences occurring with Toby Espinosa that I have just read to you?
>
> A: (Ms. Brinkman) I cannot comment to the Court why I do not have that information.

Transcript of the Proceedings, Vol. V at 911. Thus, any hostility that he feels toward her, or visa versa, is largely irrelevant.

The next finding of the Court deals with hostility by "someone who aligned himself, herself, or themselves with the defendants" (the someone responsible for the burglaries). Memorandum Opinion and Order, August 28, 1987, at 8. It is difficult to respond to this "finding" for two reasons. First, this finding is based on supposition outside of the record—there is absolutely nothing in the record to suggest in any way that the burglary was related to this case, or that the person committing it was not motivated by a personal animosity toward Appellant. The Affidavit referred to by the Court was submitted to explain the lack of certain records for billing, and there is absolutely no indication of malice as to the burglary. The court itself notes the absence of any proof that these actions can definitely be traced to defendants. Memorandum Opinion and Order, August 28, 1987, at 8 ("While I do not suggest by this that defendants

themselves are responsible for this burglary, ...")

As for the statements of defendants, these were, without exception, both off the record, and ill-advised. Memorandum Opinion and Order, August 28, 1987, at 8). Frankly, if every ill-advised muttering by losing counsel were grounds for a finding of hostility, the remedy of reinstatement would be as extinct as a dinosaur. What is shown on the record is that Appellant does not work anywhere near the attorneys who made the comments—conceptually or physically, there is no indication on the record that the legal department ever was involved in any of the retaliatory behavior—that was limited to individuals who have gone. As the transcript demonstrates, Appellant and defense counsel enjoyed civil exchanges during the trial despite the newspaper rhetoric. One final parenthetical remark—regarding items outside of the record only because they were raised by the Court—the tiring routine of whining and character assassination by the City is virtually routine in certin types of lost civil rights cases—and certainly shouldn't be read as being either unique to this action, or particularly meaningful.

Finally, there is the Court's cryptic remark in response to the Appellant's assertion that he gets along with the people at work who are his subordinates, and that the upper level "bad guys" have gone—the Court states,

> Plaintiff's point that most of the defendants and witnesses no longer work in the Parks and Recreation Department is well taken. However, it is not just with his subordinates that Mr. Jackson would have to associate, but with other agencies and with the public as well.

Somehow, one has the feeling that the next cite should be to Alice In Wonderland. Since there is absolutely nothing in the record to suggest anything about this assertion. What the Court seems to be saying is that while it is true that Appellant will get along well with the people in the workplace (amply

demonstrated in the record), he will have problems with some unnamed agencies or individuals in the public. The only testimony about his relationships with the public was that (with minor, incidental exceptions) he was active in the community, generally well-liked, and highly thought of in a number of prestigious organizations—ones in which he is still active. As for problems with internal agencies, all allegations of spying, dirty trick and the like were tied to individuals who are gone, and to an administration which is only a faint memory.

In summary, when one removes the items which were just blatantly not before the Court (which Appellant believes are not probative), you are left with nothing. Remaining employees identified themselves as either being friends or ambivalent, a community in which he is a welcome and prestigious member, and a slightly rabid, but mostly overworked legal department which tends look more foolish than hostile. Even if one applies the Title VII standard of "hostility" it seems clear that reinstatement is clearly warranted. Appellant would offer one final thought. The jury specifically asked if they could reinstate Appellant. Although their assessment is certainly not binding, perhaps they correctly evaluated the degree of hostility—a poorly manufactured animosity without much conviction.

III. Should the Court order reinstatement, should Appellant receive a pro-rata portion of the front pay from the date of judgment to the time of payment?

This issue can be dealt with in one of two manners. The first, and simplest is to recognized that back pay must be awarded from the point of wrongdoing to the date of payment. This method of dealing with the problem is illustrated by Paxton v. Union Nation Bank, et al., 688 F.2d 552 (8th Cir. 1982).

> Phyllis Mosley is entitled to be reinstated. . . .the calculation

> would include back pay from the date of discharge to the present.

Id., at 688 F.2d 575. In this view, the award of the pro rata share of the front pay is merely a measure of the on-going back pay lost.

The second view is that the trial court granted relief to run from the day of judgment. It was in lieu of payment Jackson would not receive for working because of the remedy which was fashioned. To award reinstatement a year later, but not compensate Jackson for the year of lost wages, would be to leave that year unaccounted for. In effect, a reversal of the front pay award would reinstate Jackson as of that day of judgment—the front pay would merely be a payment for that time he was unable to work because of the appeal. The rate of the pay is at a rate found by the court to be a correct measure of the amount Jackson would have been paid. Had he been reinstated, and awaiting the ability to work pending the appeal, he would clearly receive wages for the appeal period.

Therefore, it is clear that if the trial court is reversed as to front pay, and reinstatement awarded, the pro rata portion of the two year award of front pay must be granted to Appellant.

CONCLUSION

Plaintiff-Appellant Jackson prevailed in an action alleging violations of constitutional rights. He sought remedy under 42 U.S.C. §§ 1981 and 1983. A jury, following a five day trial, awarded Jackson amounts which reflected a verdict on all issues as to all remaining defendants. During deliberation, that jury asked if it was empowered to reinstate Jackson.

When the trial court was asked to return Jackson to his position, he refused. The basis of this refusal was that "the general hostility remains impossibly high." Memorandum Opinion and Order, August 28, 1987, at 8. In concluding that he had the discretion to refuse Jackson's request, the trial court relied on six cases, none of which were decided under the relevant law. Only two cases which the court considered as to corollary points actually dealt with the reinstatement issue under §§ 1981 and 1983. Both of those cases, and a host of others which have addressed this issue support Jackson's position: The trial court utilized a more lenient standard, and had it used the correct one, reinstatement would have been mandated.

Even under the incorrect, Title VII, standard, the court erred in considering matters outside of the record to its determination of "hostility". All of the examples cited as the basis of the determination were either not before the court, or not proper items for consideration. The record, the testimony, and all indications at trial were that the persons acting against Jackson had, for the most part, left the employment. The persons making allegations against him had similarly left or transferred to other, distant areas. Thus, even under the Title VII standard, the court erred in refusing reinstatement.

Finally, Appellant asks this court to reverse the determination of the trial

Court as to reinstatement, and to award attorney's fees, expenses and costs on appeal. Also, Appellant would ask that the Court award either back pay, or a pro rata portion of the front pay granted by the trial court, for a period from the date of the judgment to the date of this court's mandate.

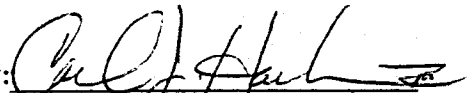
STATEMENT AS TO ORAL ARGUMENT

Pursuant to Rule 28.2(f), Rules of the United States Court of Appeals for the Tenth Circuit, Appellant state the following regarding oral argument:

1. Appellant requests that oral argument not be granted.
2. All issues presented herein are strictly of a legal nature.
3. The appeal arises out of a civil rights action, one in which maximum speed in resolution furthers public policy in both disseminating the results, and in making Appellant whole.

RESPECTFULLY SUBMITTED,

HARTMANN & RUSKIN, P.A.

By: 

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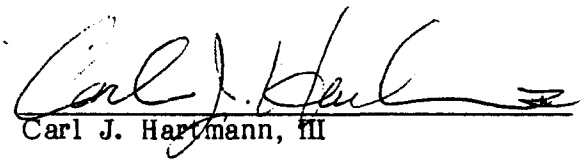
CERTIFICATE OF SERVICE

I, the undersigned, being counsel of record for the Plaintiff-Appellant herein, Carl Jackson, do hereby swear and attest, upon my sworn oath, that I did deliver two true and accurate copies of this document to opposing counsel of record at their business premises, this 25th day of November, 1987. I did so during business hours, and delivered them to a person who identified themself as being empowered to accept such service.



Carl J. Hartmann, III

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

CARL JACKSON,

Plaintiff,

v.

CITY OF ALBUQUERQUE, ORLANDO SEDILLO, and KIKI SAAVEDRA,

Defendants.

No. 86-1252-M Civil

MEMORANDUM OPINION AND ORDER

This matter came on for consideration on motions of the plaintiff for attorney fees and for reinstatement and on motions of the defendants for judgments notwithstanding the verdict (n.o.v.), a new trial and remittitur. Having considered the motions and memoranda presented by the parties, I find that plaintiff's motions are well taken in part and will be granted in part and defendants' motions are not well taken and they will be denied.

Judgment n.o.v., New Trial and Remittitur

Defendants move for judgment n.o.v. or a new trial or remittitur pursuant to Fed.R.Civ.P. 50(b), 59(a) and 59(e). There are different standards for granting or denying motions for judgment n.o.v. and motions for a new trial address different matters.

> The motion for judgment [n.o.v.] cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court insofar as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.

Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). There is little discretion allowed a court in considering a motion for judgment n.o.v. "The motion for judgment n.o.v. may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment." 5A Moore's Federal Practice, ¶ 50.07[2] (1986). Further, the evidence is to be viewed in the light most favorable to the party opposing the motion for judgment n.o.v. Sandoval v. U.S. Smelting, Refining & Mining Co., 544 F.2d 463, 463 (10th Cir. 1976). "Only when the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position against whom the motion is made is j.n.o.v. appropriate." EEOC v. University of Oklahoma, 774 F.2d 999, 1001 (10th Cir. 1985), cert. denied, 106 S.Ct. 1637 (19986) citing EEOC v. Prudential Federal Savings & Loan Ass'n, 763 F.2d 1166, 1171 (10th Cir.) cert. denied 106 S.Ct. 312 (1985). There was substantial evidence in this case to support the jury's verdict and I will not disturb it.

Neither would an award of a new trial or remittitur be appropriate in this case. I shall address the issue of remittitur first. As plaintiff's counsel aptly pointed out, the uncontradicted evidence at trial was that plaintiff Carl Jackson earned $28,000.00 plus fringe benefits at the time he was discharged. The uncontradicted evidence was that the fringe benefits brought his income up to close to $50,000.00. Thus a strict mathematical calculation of plaintiff's economic injury would yield a damage figure slightly higher than the jury's verdict. Defendants cite **Memphis Community Sch. Dist. v. Stachura, 106 S.Ct. 2537 (1986)** for reasons which are unclear to me. The jury was not instructed that it was to award damages for the abstract value of a constitutional right. It was instructed on the proper elements of damage for the case, no objection was made to the instructions, and its verdict is amply supported by the evidence. Nor was a doubling the actual damages by means of punitive damages grossly excessive or apparently the result of passion, prejudice or improper sympathy as would be prohibited by **White v. Conoco, 710 F.2d 1442 (10th Cir. 1983)**. The motion for remittitur is denied.

Defendants also move for a new trial on the same grounds that they move for judgment n.o.v. **Defts.' Brief at 7.** A new trial is appropriate where the jury verdict is against the weight of the evidence, the damages are excessive or the trial was not fair to the moving party. **Montgomery Ward & Co., supra at 251.** The standard required for a new trial is lesser than that for judgment n.o.v. the judge must find that the jury verdict was against the weight of

the evidence. Brown v. McGraw-Edison Co., 736 F.2d 609 (10th Cir. 1984). However, this does not mean that a judge can substitute his judgment for that of the jury. It must be clear that an erroneous result was reached, Frank v. Bloom, 634 F.2d 1245, 1254 (10th Cir. 1980), and that the verdict was clearly or overwhelmingly against the weight of the evidence. Prebble v. Brodrick, 535 F.2d 605, 617 (10th Cir. 1976). It would be an invasion of the province of the jury to grant a new trial merely because there was a sharp conflict in evidence. 6A Moore's Federal Practice ¶ 59.80[5] (1986). Such is exactly the case here. The evidence was sharply conflicting regarding all the issues defendants address in their motion. It was not clearly or overwhelmingly in favor of either plaintiff or defendants and I will not disturb the jury's verdict. The motion for a new trial is denied.

Attorney Fees

42 U.S.C. § 1988 is not a spreading fruit tree under which anyone who has represented the prevailing party at any time may seek shelter and sustenance. The affidavit from Ann Yalman indicates that her representation of Carl Jackson was on issues related to, but not prerequisite to, nor in preparation for, this trial. This is likewise apparently the case for Houston Ross since his representation of Carl Jackson predated Ms. Yalman's. The fact that their work was helpful to Mr. Hartmann is insufficient. Their representation of Carl Jackson is not representation in an action to enforce § 1983. Webb v. Dyer County Bd. of Ed., 471 U.S. 234, 241 (1985). I will not order defendants to pay the fees of these attorneys.

Regarding the remaining attorneys, Carl Hartmann, Paul Ruskin and Judd Conway, I have considered the factors set out in Hensley v. Eckerhart, 461 U.S. 424 (1983) and Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983). Considering their backgrounds, skill levels, training, experience, the customary rates charged by attorneys for these cases, the degree of success achieved and the complexity of the case, I find that $125 per hour for Carl Hartmann and $90 per hour for Paul Ruskin and Judd Conway are reasonable hourly rates. Since the above-mentioned factors are all taken into account in establishing the rate, no enhancement to this rate will be made. Pennsylvania v. Delaware Citizens Council, 478 U.S. ___, 106 S.Ct. 3088 (1986), rev'd in part 107 S.Ct. 3078 (1987).[1] Having established a reasonable hourly rate for each of the attorneys, the next step is to multiply that rate by the reasonable number of hours spent by each attorney Hensley, supra; Ramos, supra. I have taken defendants' objections to the number of hours into account and have made certain reductions. Mr. Hartmann will be compensated for 327.5 hours for a total of $40,937.50; Mr. Conway will be compensated for 34.6 hours for a total of $3,114.00; and Mr. Ruskin will be compensated for 14 hours for a total of $1,260.00. The total attorney fees awarded against the City are thus $45,311.50.

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[1] Pursuant to the Supreme Court's reversal on the issue of risk of loss, 107 S.Ct. at 3087-88, I have not taken risk of loss into consideration in ariving at the hourly rates.

Costs

I do not address the parties' motions regarding taxation of costs, as that is customarily handled by and has already been handled by the Clerk of Court.

Equitable Relief--Reinstatement

Plaintiff has requested to be reinstated to his prior position or to an equivalent position or in the alternative to receive front pay until such time as he can be reinstated. Defendants counter plaintiff's motion with an offer of front pay of six months. Reinstatement is an element of the remedy for violation of a plaintiff's civil rights. EEOC v. Prudential, supra at 1166; Banks v. Burkich, 788 F.2d 1161, 1164 (6th Cir. 1986); Abbott v. Thetford, 529 F.2d 695, 701 (5th Cir. 1976). While reinstatement is the preferred remedy, it is not an absolute right. Banks, supra at 1164. "Reinstatement may not be appropriate, however, when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible." EEOC v. Prudential, supra at 1172.

Front pay is an alternative remedy where there is no job available or where there is a hostile relationship. Cassino v. Reichhold, 817 F.2d 1338, 1346 (9th Cir. 1987); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984). I would also note that this decision is a discretionary one: "the trial court has a broad discretion in fashioning relief to achieve the broad purpose of eliminating the efforts [sic] of discriminatory practices and

restoring the plaintiff to the position that she would have likely enjoyed had it not been for the discrimination." Fitzgerald v. Sirloin Stockade, 624 F.2d 945, 957 (10th Cir. 1980) citing Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

Cases where front pay as opposed to reinstatement has been ordered often include allegations of retaliatory discharge such as the Fitzgerald case. In EEO v. Kallir, Philips, Ross, Inc., 420 F.Supp. 919 (S.D.N.Y. 1976), aff'd 559 F.2d 1203 (2d Cir.) cert. denied 434 U.S. 920 (1977), the allegation was likewise one of retaliatory discharge. The court noted that the litigation was marked by more than the usual hostility involved in litigation. The purpose of the remedies to make the plaintiff whole, but in that case there was a close working relationship required and without complete trust and understanding between plaintiff and her supervisor "to order reinstatement on the facts of this case would merely be to sow the seeds of future litigation." Kallir at 927.

I find the Kallir case persuasive here. This case was also marked by far more than the usual amount of hostility between parties. The Prudential case, supra, requires the trial court to explain its reasons for refusing reinstatement if it does not intend to order reinstatement. I recognize that a refusal to reinstate is not to be lightly made and that special circumstances must exist in order to refuse reinstatement, but I believe these special circumstances exist in this case. The hostility was evident in the courtroom, in the unprofessional and derogatory language used by defendants' expert

toward the plaintiff and the burglary of plaintiff's file from his attorney's office, as referred to in Mr. Hartmann's affidavit of July 24, 1987. (While I do not suggest by this that defendants themselves are responsible for this burglary, there is obviously great hostility towards the plaintiff on the part of someone who aligned himself, herself or themselves with the defendants which likely would effect plaintiff's ability to work were he reinstated.) It is also evident in the comments made by defendants in the newspapers after the trial and recently in their threatened prosecution of parties unknown in relationship to settlement negotiations. All these factors point to hostility far too high to make reinstatement a feasible remedy in this case. Plaintiff's point that most of the defendants and witnesses no longer work in the Parks and Recreation Department is well taken. However, it is not just with his subordinates that Mr. Jackson would have to associate, but with other agencies and with the public as well. The general hostility remains impossibly high. Accordingly, I will order an award of front pay.

The only remaining question, therefore, is the amount of front pay. Front pay is to be calculated in the same manner as back pay. Schlei & Grossman, Employment Discrimination Law, Chapter 38 III C (2d Ed. 1983-84 Cum. Supp.), Chapter 38 V A (2d Ed. 1976). This includes fringe benefits such as bonuses, profit sharing, cost of living increases, insurance, overtime, sick pay and business vacations. Id. Plaintiff's uncontradicted testimony was that these amounted to roughly $50,000.00 per year.

While many courts have awarded six months of front pay, e.g., EEOC v. Pacific Press Publishing Ass'n, 482 F.Supp. 1291 (N.D.Cal. 1979) Aff'd 676 F.2d 1272 (9th Cir. 1982), other courts have awarded substantially more. See e.g. Fitzgerald v. Sirloin, supra (five years); and Sterzling v. Ft. Bend Independent Sch. Dist., Ft. Bend, Texas, 496 F.2d 92 (5th Cir. 1974) (unspecified number of "several" years). As plaintiff points out in his motion for reinstatement, his line of work is fairly specialized. Additionally, defendants' conduct has made it very difficult for plaintiff to find employment in this region with the few alternative employers that may exist. His testimony at trial that he was attempting to find positions with various colleges and universities, could additionally delay his job search since many of those potential employers work on an academic year and may not have employment available at any given moment. Based on the foregoing, I award plaintiff two years front pay at the rate of $50,000.00 per year in lieu of reinstatement.

IT IS SO ORDERED.

SENIOR UNITED STATES DISTRICT JUDGE