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A teacher employed by the State of Montana receives tenure when he accepts a contract for the fourth consecutive year within a particular school district.[1] Upon termination, any tenured teacher has the right to obtain a written statement delineating the specific reasons for his release, the right to a hearing before his local school board, and the right to appeal to the county superintendent and the Superintendent of Public Instruction.[2] A nontenured teacher has never enjoyed any of these rights. The 1975 legislature, however, enacted a new statute giving every nontenured teacher the right to receive a statement of reasons for the non-renewal of his contract.[3] About the time this law was being considered, a rather unique case was being litigated in federal district court. In *Morrison v. Cascade County School District,*[4] a school board gratuitously gave a nontenured teacher the reasons for her release, but her release for those reasons was found to be in derogation of her First Amendment rights.[5] The case serves not only as a warning to school boards regarding their employment practices, but also as a hint of the future, since school boards will now be required to present every nontenured teacher with a statement of the grounds for his or her release.

I. Synopsis of the Case

The plaintiff taught at a combination grade school and high school in the small Montana town of Centerville. Following her second year of teaching there, she was notified that her contract would not be renewed. The following is a summary of the District School Board's enumerated reasons for her release and the court's findings concerning them:

1. The board stated that she was the subject of "constant parental complaints".[6] It was found that she did not maintain good relationships with students and parents during her first year, and

1. Revised Codes of Montana, 1947 [hereinafter cited as R.C.M. 1947], § 75-6103.
2. R.C.M. 1947, § 75-6104.
3. R.C.M. 1947, § 75-6105.1(2): When the trustees notify a nontenure teacher of termination, the teacher may within ten (10) days after receipt of such notice make written request of the trustees for a statement in writing of the reasons for termination of employment. Within ten (10) days after receipt of the request the trustees shall furnish such statement to the teacher. (Effective March 19, 1975).
4. Morrison v. Cascade County School District, 32 St. Rptr. 467 (D. Mont. 1975). Note that this case will apparently not be reported in the Federal Supplement.
5. U.S. Const. amend. I.
6. Morrison v. Cascade County School District, *supra* note 4 at 468.

in one incident slapped both a student and the student's protesting parent. Because of this, the board voted not to renew her contract, but was persuaded by the superintendent to change its vote and rehire her for a second year. There was some evidence of parental complaints during the second year, but it was determined that she generally maintained pleasant relationships with the students and most of the other teachers.[7]

2. She was charged with uttering "crude and offensive remarks", causing dissension and ill feeling among teachers and administrators.[8] In this context, the court found that she insulted the superintendent at a Montana Education Association meeting. In disgust, she remarked, "The Lord hath spoken", referring to the superintendent.[9] The superintendent was also angered by the plaintiff's discussions in and out of staff meetings concerning the issues of a free preparation period and duty-free lunch periods for the teachers. Both of these proposals were opposed by the superintendent.

3. She was also charged with thwarting efforts to seal an existing division between the elementary and high school staff, but no evidence was found to support this contention.[10]

In addition to the formal reasons given for their decision, the court found that the board members were influenced by the plaintiff's activities as a member of the district negotiating team. There was a long and unpleasant series of contract negotiations that year. However, the crucial factor in the board's decision to release her was said to be the superintendent's adverse recommendation.[11]

In summary, the court held that the plaintiff was not rehired because of the unpleasant relationship between her and the superintendent which was caused by her legitimate discussions of issues of concern to teachers.[12] The court was not prepared, however, to order reinstatement of the plaintiff. A balancing of the conduct of all the parties, including the plaintiff's past difficulties with students and parents, and the fact that a nontenured teacher in Montana had "no entitlements", led the court to conclude that damages equivalent to one year's salary plus attorney's fees would be sufficient.[13]

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7. *Id.* at 467.
8. *Id.* at 468.
9. *Id.* at 469.
10. *Id.* at 468, n. 1.
11. *Id.* at 470. There were four teachers involved in the negotiations. Three of them, all nontenured teachers, were denied renewal of their contracts for the next year. This is certainly a good argument for the common policy of electing only tenured teachers as negotiators.
12. *Id.*
13. *Id.* at 470, 471.

II. Discussion

The theory that public employment may be conditioned upon the relinquishment of constitutional rights has been unequivocally and universally rejected.[14] The exercise of First Amendment rights may not be the basis for the denial of an employment contract to any teacher.[15] Before a teacher can find relief in the courts, at least three distinct determinations must be made:

A. Was the teacher's activity protected by the First Amendment?

B. Was that protected activity the cause of the teacher's release?

C. If the above are answered affirmatively, what remedy is appropriate? It will become clear that these considerations are sometimes related but they will be examined separately to facilitate analysis.

A. First Amendment Protection

The Supreme Court set forth the general test regarding protected communications by a teacher in *Pickering v. Board of Education.*[16] In this case a nontenured high school teacher wrote a letter to the editor of a newspaper accusing the board of wasting the taxpayers' money and accusing the superintendent of attempting to conceal that fact. Pickering was released for causing what was claimed to be irreparable damage to the reputations of the administrators and to faculty discipline. Pickering protested that the letter was a valid exercise of his First Amendment rights. The Supreme Court said:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[17]

Pickering gave some important indications of how such a balancing test should be applied. The Court emphasized the absence in that case of a close working relationship between the teachers and the board or the superintendent.[18] Thus the board could not claim that "personal loyalty and confidence are necessary to their proper

14. Keyishan v. Board of Regents, 385 U.S. 589, 605-6 (1967). For a discussion of the demise of this theory in the context of rights of teachers see Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 Duke L.J. 841.

15. Perry v. Sindermann, 408 U.S. 593, 598 (1972).

16. Pickering v. Board of Education, 391 U.S. 563 (1968).

17. *Id.* at 568.

18. *Id.* at 569-70.

functioning."[19] As long as this impersonal relationship exists, the extent of the criticism is irrelevant:

> [T]o the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct. . .may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.[20]

Despite the fact that some of Pickering's statements were shown to be false, the Court emphasized that there was no showing of harm to the operation of the school.[21] In light of the balancing test enumerated above, it seems that this should be a prime consideration.

Some interesting problems arise when the holding in *Pickering* is related to the facts of *Morrison.* It could at least be argued that the plaintiff's insult of the superintendent might not fall under First Amendment protection. A district superintendent in a small rural school often works very closely with the teachers. Assuming the existence of this intimate relationship, public insults of the superintendent may create an atmosphere harmful to efficient school operations. Insults "add very little to the world of ideas"[22] and have been outweighed by the school's interest in discipline in more aggravated instances.[23] Further, Mrs. Morrison's remarks appeared to cause some dissension and ill feeling among teachers and supervisors.[24] This, however, is a tenuous argument and probably would have been foreclosed by the court's characterization of the unpleasant relationship between her and the superintendent as "caused by plaintiff's occasionally abrasive manner and Superintendent Kinna's overreaction to it".[25]

The board was standing on even thinner ice regarding the meetings between the plaintiff and other teachers to discuss the duty-free lunch period and free preparation period. These were clearly acceptable communications involving matters of public concern and no evidence of harm to school operations could be shown other than the superintendent's description of the meetings as "disruptive".[26]

In addition, it was not disputed that the union activities of the plaintiff were protected; the board attempted only to refute the

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19. *Id.* at 570.
20. *Id.*
21. *Id.* at 571.
22. Starsky v. Williams, 353 F. Supp. 900, 917 (D. Ariz. 1972), *modified,* 512 F.2d 109 (9th Cir. 1975).
23. *Id.* at 917 (insults in the form of profanities); Amburgey v. Cassady, 507 F.2d 728 (6th Cir. 1974) (insulted another teacher in front of students).
24. Morrison v. Cascade County School District, *supra* note 4 at 468.
25. *Id.* at 470.
26. *Id.* at 469.

charges that such activities had anything to do with her dismissal.[27]

The court did not purport to undertake any *Pickering* type of balancing approach, perhaps because the plaintiff's communications were so obviously within the realm of First Amendment protection. Clearly the application of this test supports the court's findings that constitutionally protected activities were involved.

B. Cause of Release

Once a teacher has shown that his words were constitutionally protected, he must prove that the protected statements motivated the board to dismiss him. In some cases, the board only contests the issue of whether the words were protected.[28] In such cases, a finding of First Amendment protection resolves the issue. Often, however, there are numerous ostensible reasons for dismissal, many of which are perfectly legitimate. In these cases, difficult factual problems may be encountered in the determination of the true motivation of the school board for releasing the teacher.

There are at least two possible standards for finding that a dismissal was wrongful. According to one standard, if the decision not to rehire was even in partial retaliation for the protected activity, then it was wrongful.[29] This affords the maximum protection to the teacher but it also involves inherent dangers. A notoriously incompetent teacher should not be able to gain redress in the courts because his superiors also wanted to be rid of him for some minor public criticism or other protected activity.

The second, more accepted standard is that relief will be granted if "the primary or substantial cause of the discipline is an impermissible restraint on the plaintiff's constitutional rights".[30] This is an attempt to avoid injustice on both ends of the spectrum. An incompetent teacher is not allowed relief on the basis of some protected activity that had very little to do with his dismissal; and where the primary motivation for dismissal is the exercise of protected rights, a school board may not rely upon some minor incident that was not protected.

Under this standard the factual determination must be made of the "primary or substantial" cause of the teacher's release. Obviously, the court can first look to the veracity of the board's constitutionally acceptable charges. If they are found to be untrue the court may well infer that the teacher was dismissed for activities under constitutional protection. This process was utilized in

27. *Id.*
28. Pickering v. Board of Education, *supra* note 16.
29. Lusk v. Estes, 361 F. Supp. 653, 660 (N.D. Tex. 1973).
30. Starsky v. Williams, *supra* note 22 at 916.

Morrison. An examination of the charges against the plaintiff was made, not because a reason was necessary at that time, but because "it bears upon the states of mind involved".[31] Conversely, the board may defeat this inference by showing that its members were not aware of the teacher's asserted exercise of free speech.[32]

If legitimate charges are supported by the evidence, their gravity must be weighed against the significance of the charges referring to protected conduct. The words "substantial" and "primary" become critical. Clearly, when the only charges that do not involve constitutionally protected activities are insignificant and arbitrary, a court should not believe that the board dismissed the teacher for those reasons.[33] The teacher's overall competence in relation to the gravity of the charges may also be considered. For example, in *Johnson v. Branch,*[34] an admittedly excellent teacher who was extensively involved in civil rights activities was terminated for trivial reasons such as arriving late to supervise an athletic event, and failing to stand in the hall when the students changed classes.[35] She was ordered reinstated.[36] In *Irby v. McGowan,*[37] by contrast, a teacher who had severely criticized the way the school was operated was denied relief after it was shown that she had consistently failed to do assigned work and missed deadlines.[38] The free speech issue was said to be a "ploy".[39] A court may consider the cumulative effect of a number of seemingly trivial offenses, however, and find an overall picture of incompetence.[40]

Selective enforcement is a useful test when the charges and the protected speech seem relatively equal in weight.[41] To apply this test, the court must determine whether another teacher who engages in the same unprotected activity as the plaintiff, but who does not engage in the protected activity, would also be released by the board. Evidence that other teachers have broken the same rules and received only a mild reprimand is significant.[42] The selective enforcement test is particularly helpful because it can be used either

31. Morrison v. Cascade County School District, *supra* note 4 at 468, n. 1.
32. Shields v. Watrel, 333 F. Supp. 260, 263 (W.D. Penn. 1971).
33. Hanover Township Federation of Teachers v. Hanover Community School, 318 F. Supp. 757 (N.D. Ind. 1970), *aff'd* 457 F.2d 456 (7th Cir. 1972); Chase v. Fall Mountain Regional School District, 330 F. Supp. 388 (D. N.H. 1971).
34. Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967).
35. *Id.* at 182.
36. *Id.*
37. Irby v. McGowan, 380 F. Supp. 1024 (S.D. Ala. 1974).
38. *Id.* at 1030.
39. *Id.*
40. *See,* Starsky v. Williams, *supra* note 22 at 926.
41. *See,* Note, *Civil Rights—Academic Freedom—Refusal to Rehire a Non-tenure Teacher for a Constitutionally Impermissable Reason,* 1970 WISC. L. REV. 162, 169.
42. *See,* Starsky v. Willimas, *supra* note 22 at 926.

affirmatively or negatively. Any available evidence of others being released or retained after performing essentially the same acts for which the plaintiff was said to have been released may be determinative.

In *Morrison,* there were both protected and unprotected types of conduct to consider, and there was some problem determining the board's true motivation. The plaintiff had experienced some difficulties with students and parents, and the slapping incidents were certainly legitimate bases for her dismissal.[43] Also, at the time of this case the board needed no reason at all to refuse to renew the contract of a nontenured teacher.[44] But all of the board's remaining charges that were found by the court to be true, involved Mrs. Morrison's First Amendment activities. The court engaged in very little analysis on this point. Again it was probably the overwhelming nature of the evidence that prompted the court simply to state: ". . .the refusal to renew was inextricably entwined in plaintiff's exercise of first amendment rights."[45]

C. *The Remedy*

The federal Civil Rights Statute allows a person deprived of his constitutional rights to receive either legal or equitable relief.[46] Thus, when a nontenured teacher has been dimissed in violation of the First Amendment, the court must decide whether monetary damages or injunctive relief in the form of reinstatement, or a combination of the two, is proper.

At least one case has adopted the theory that a nontenured teacher is not entitled to reinstatement because he lacks an expectancy of reemployment.[47] Admittedly, a nontenured teacher has no right to another year's contract. The more accepted view looks farther than a mere contractual determination:

> What is at stake is the vindication of constitutional rights—the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment rights.[48]

If the issue is one of vindication of rights, it appears that the most desirable remedy would entirely negate the board's attempted dep-

43. The argument was not suggested, but perhaps could be made that the board, by rehiring the plaintiff with knowledge that these incidents occurred, should not be allowed to use them after the next year. *See,* Starsky v. Williams, *supra* note 22 at 911.

44. Cookson v. Lewistown School District #1, 351 F. Supp. 983 (D. Mont. 1972).

45. Morrison v. Cascade County School District, *supra* note 4 at 470.

46. 42 U.S.C. § 1983 (1970).

47. Bhargave v. Cloer, 355 F. Supp. 1143, 1146 (N.D. Ga. 1972).

48. Pred v. Board of Public Instruction, 415 F.2d 851, 856 (5th Cir. 1969).

rivation of those rights. This, of course, would point to reinstatement. Indeed, the majority of courts, whether considering the First Amendment rights of tenured or nontenured teachers, have ordered reinstatement.[49]

The *Morrison* approach of granting monetary damages but refusing to order reinstatement is unusual, though not unprecedented. This holding was based upon a recent case, *Burton v. Cascade School District,*[50] which is highly questionable authority for the facts in *Morrison.* In *Burton,* a homosexual teacher was discharged pursuant to an unconstitutionally vague statute.[51] On appeal by the teacher, the district judge was found to have acted within his discretion in awarding monetary damages in lieu of reinstatement because of the potential for disruption in the school and the community due to the widespread and long standing nature of the controversy.[52] However, that case held reinstatement to be the usual remedy in cases involving racial discrimination and in cases in which "dismissal appears to have been in reprisal for the legal exercise of free expression in a manner critical of the public employer."[53] This is clearly doubtful authority for the denial of reinstatement in a case such as *Morrison.*

There are intimations, even in cases involving denial of First Amendment rights to teachers, that a selection of a remedy may depend upon all of the facts.[54] This seems preferable to a mechanical rule mandating reinstatement in every case. Accordingly, reinstatement may not be proper when a teacher was hired on an emergency basis and was not certified.[55] But it may not be denied on the basis that it would revive old antagonisms.[56]

In *Morrison,* two bases were emphasized for the denial of reinstatement. The first was the fact that "plaintiff had done things which would have provided the Board with a reason, and perhaps a just cause, had they needed one, for discharging her."[57] The second

49. Gieringer v. Center School District No. 58, 477 F.2d 1164, 1167 (8th Cir. 1973); Fisher v. Snyder, 476 F.2d 375, 377 (8th Cir. 1973); Cooley v. Board of Education of Forrest City School District, 453 F.2d 282, 287 (8th Cir. 1972); Ramsey v. Hopkins, 447 F.2d 128 (5th Cir. 1971); Lusk v. Estes, *supra* note 29 at 664; Starsky v. Williams, *supra* note 22 at 928; McGee v. Richmond Unified School District, 30 F. Supp. 1052, 1056 (N.D. Cal. 1969); *cf.* Doherty v. Wilson, 356 F. Supp. 35, 40 (M.D. Ga. 1973).

50. Burton v. Cascade School District, 512 F.2d 850 (9th Cir. 1975), *aff'g* 353 F. Supp. 254 (D. Oregon 1973).

51. Burton v. Cascade School District, 353 F. Supp. 254, 255 (D. Oregon 1973).

52. Burton v. Cascade School District, *supra* note 50 at 853.

53. *Id.*

54. Pred v. Board of Public Instruction, *supra* note 48 at 859; Sterzing v. Fort Bend Independent School District, 496 F.2d 92, 93 (5th Cir. 1974).

55. Bates v. Hinds, 334 F. Supp. 528, 533 (N.D. Tex. 1971).

56. Sterzing v. Fort Bend Independent School District, *supra* note 54 at 93.

57. Morrison v. Cascade County School District, *supra* note 4 at 470.

reason was that the plaintiff would qualify for tenure if she was awarded a contract the next year, and if the board wanted to release her then, she could bring another lawsuit charging infringement of her First Amendment rights.[58] It appears, however, that a logical extension of that second argument would apply to any nontenured teacher, because any nontenured teacher who is reinstated could be released at a later time, and could bring another lawsuit, and at some future date hope to attain the coveted tenure status. Of course, here the board had good reasons for releasing the plaintiff, but it is questionable why a future court could not make the same decision concerning the cause of release after another year. Obviously, practical considerations of avoiding future problems and possible litigation were found to be paramount over "vindication of rights".

In summary, *Morrison* points out that activities which could have been the basis for dismissal, even though they were not the board's motivation, may surface again in the determination of a remedy. Although reinstatement is the usual and preferable remedy for a teacher who has been released in violation of the First Amendment, it will not be granted without balancing all the facts and circumstances, including a teacher's nontenured status as well as his past conduct as a teacher.

III. Conclusion

From *Morrison* and the 1975 Amendment giving a nontenured teacher the right to a statement of reasons for his dismissal,[59] certain inferences may be drawn about the basic teacher-employer relationship in Montana. A school board may not rid itself of a teacher solely because the teacher speaks out in a manner critical of the board or other administrators. To dismiss a nontenured teacher who has expressed such public criticism, a board must be able to show a legitimate basis for the dismissal to rebut any First Amendment claims. In the absence of a constitutional claim by the teacher, *Morrison* does not say whether the court will examine the adequacy of the stated reasons for dismissal, because no statute required the board to give reasons at that time. In any case, First Amendment considerations have certainly become more important. First, more cases of violation of First Amendment rights are apt to be exposed, and secondly, there should be a deterrent effect due to the school boards' knowledge that they will have to state some reasons for the non-renewal of any teacher's contract.

This deterrent effect is limited to some extent by the remedy

58. *Id.* at 471.
59. R.C.M. 1947, § 75-6105.1(2).

awarded in *Morrison,* despite the following statement by the district judge:

> A judgment with attorney's fees will serve to notify this and other school boards of first amendment rights of non-tenured teachers and of the potential hazards involved in the abridgment of those rights.[60]

The contrary view was offered by another judge in the Ninth Circuit:

> It is questionable whether a monetary award is sufficient to deter the school board from taking similar unconstitutional action in the future. . . . If a similar situation arises in the future it might well conclude that it would be willing to pay a few thousand dollars in order to be rid of an unwanted teacher.[61]

There is no doubt that a warning has been issued to school boards, and that this warning and the new statute will have an effect on their employment practices within Montana. Only the extent of that effect remains to be ascertained.

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60. Morrison v. Cascade County School District, *supra* note 4 at 470.
61. Burton v. Cascade School District, *supra* note 50 at 856 (Lumbard, J., dissenting).