Order Number 9121479

Legal aspects of teacher dismissal for immorality on grounds of sexual misconduct

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The University of North Carolina at Greensboro, 1990

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LEGAL ASPECTS OF TEACHER DISMISSAL FOR IMMORALITY ON GROUNDS OF SEXUAL MISCONDUCT

by

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A Dissertation Submitted to
the Faculty of the Graduate School at
The University of North Carolina at Greensboro
in Partial Fulfillment
of the Requirements for the Degree
Doctor of Education

Greensboro
1990

Approved by

Dissertation Adviser

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of the Graduate School at The University of North Carolina at Greensboro.

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November 5 1990
Date of Acceptance by Committee

November 5, 1990
Date of Final Oral Examination

ALLEN, MARGARET KAREN, Ed.D. Legal Aspects of Teacher Dismissal for Immorality on Grounds of Sexual Misconduct. (1990) Directed by Dr. Joseph E. Bryson. 235 pp.

Throughout the history of American education, the character and conduct of public school teachers have been of great concern to parents and the general public. Because of their daily contact with impressionable young people, teachers are expected to abide by a strict moral code of conduct despite the liberalization of sexual mores that has occurred during the last two decades.

The purpose of this study was to provide current information for practicing school officials faced with the decision to dismiss teachers for immorality on grounds of sexual misconduct. The questions answered by this study involved the status of immorality as a cause for dismissal in both the state statutes and the judicial system; trends and patterns in judicial decisions; and guidelines for administrators and school board members to use in dismissal decisions.

Based on the analysis of the data, the following conclusions were drawn:

1. Teachers can be dismissed on charges of immorality in forty-two of the fifty states.
2. Private sexual conduct can lead to dismissal if the school board has successfully established a nexus between the conduct and the teacher's performance in the classroom.
3. Although there are contradictory opinions in dismissal cases involving homosexuality, dismissals based on private acts of homosexual conduct or on status as a homosexual are difficult to defend in court unless the school board has shown that the

teacher's life style has had an adverse impact on classroom performance. Dismissals for public homosexual acts have generally been upheld.

4. Teacher dismissals for heterosexual misconduct with other adults are not upheld by the judicial system unless the nexus requirement has been met by the school board.
5. Unwed pregnancy is no longer considered prima facie evidence of immorality; there must be a showing of adverse impact on teaching performance for the dismissal to be upheld.
6. Dismissal of a teacher for sexual misconduct with students generally results in a legally defensible dismissal if the teacher's constitutional rights are protected during the dismissal process.
7. The recent Stoneking decision may result in successful civil rights actions against school districts when teachers engage in sexual abuse or harassment of students and when there is a pattern of failure by school officials to address student complaints.

This dissertation is

dedicated to

Vernell Bass Allen

whose love, encouragement, and support made this possible

and

in memory of

Thomas Scott Allen, Sr.

who did not live to see our dream become a reality

ACKNOWLEDGMENTS

For their guidance and assistance, I am grateful to the members of my supervisory committee: Professors Joseph E. Bryson, Chairman; Charles M. Achilles; James A. Runkel; and Chiranji L. Sharma.

For his assistance with the LEXIS computer search, I wish to thank Mr. Kyle Woosley.

For her assistance with editing, I extend my love and gratitude to Mrs. Mary Frances Hazelman.

Finally, for their support and encouragement, I extend my sincere gratitude to my family and friends.

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CHAPTER I

INTRODUCTION

What constitutes immorality? Do teachers enjoy the right to privacy? Do school boards have the right to dismiss teachers for their conduct outside of the classroom? The answers to these and other questions will be revealed in this study of the legal aspects of the dismissal of teachers for immorality on grounds of sexual misconduct.

Since the beginning of public education in the United States, there has been an interest in the conduct of teachers. Perhaps as a reaction to the dubious moral character and conduct of the earliest public school teachers, modern teachers in many areas of America continue to be expected to serve as exemplars for the public school students. Richard Clay observed that

> A cornerstone of American public education has been the assumption that students, in order to become well-balanced human beings and stable members of the community, must be taught to discern moral values . . . the teacher must be sensitive to the morality of his own life because his behavior will be emulated by the students in his classroom.[1]

On the concept of teachers as exemplars, Todd DeMitchell stated:

> In a nutshell, teachers are cast in the role of exemplars. For that reason, their private lives can affect their job security. Like all the rest of us, of course, teachers want the freedom to fashion private lives of their own choosing, yet a community wants

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[1]Richard Clay, "The Dismissal of Public School Teachers for Aberrant Behavior," Kentucky Law Journal 64 (1976): 911.

> to protect its children by ensuring that teachers reflect prevailing views and mores. Both interests are legitimate, but at times, they're mutually exclusive.[2]

David Rubin summarized this issue with the following succinct statement: "Teachers have historically been held to a standard of conduct that might have suffocated Caesar's wife."[3]

The legislatures of more than half of the states have included immorality (or various causes such as "immoral conduct," "conduct unbecoming a teacher," "unprofessional conduct," "moral turpitude," or "good and just cause") as a cause for dismissal of teachers. Few have attempted to define the term. Alaska is one of the few states that has included a definition of immorality in its statutes as "the commission of an act which constitutes a crime involving moral turpitude."[4]

Since most legislatures were remiss in defining the specific behaviors that would lead to dismissal for immorality, this task has been left to the courts. The interpretation of immorality has not been consistent. However, a review of court decisions yields some consistency in definition of the term as applicable to teachers. The Supreme Court of Michigan made the following statement in a 1936 ruling:

> "Immorality" is not necessarily confined to matters sexual in their nature; it may be that which is contra bonos mores; or not moral, inconsistent with rectitude, purity, or good morals; contrary to conscience or moral law; wicked; vicious; licentious, as

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[2]Todd DeMitchell, "Matters of Morality: Back Seat Trysts are not School Problems," Executive Educator 6:1 (January 1981): 23.

[3]David Rubin, The Rights of Teachers: The Basic ACLU Handbook to a Teacher's Constitutional Rights (Toronto: Bantam Books, 1984), 140.

[4]Alaska Statutes. Sec. 14.10.170 (2).

> an immoral man or deed. Its synonyms are: Corrupt, indecent, depraved, dissolute; and its antonyms are: Decent, upright, good, right. That may be immoral which is not decent.[5]

One of the most widely quoted definitions appeared in a 1939 decision by the Supreme Court of Pennsylvania. In its opinion, immorality was defined as "a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and to elevate."[6]

In a 1960 case in California, the Appeals Court provided another judicial definition:

> The term "immoral" has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters but included conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinion of respectable members of the community, and as an inconsiderate attitude toward good order and public welfare.[7]

In a more recent case, the Court of Common Pleas of Ohio labored over the meaning of immorality and concluded:

> Whatever else the term "immorality" may mean to many, it is clear that when used in a statute it is inseparable from "conduct." Both counsel agree that this is so. But, it is not "immoral conduct" in the abstract. It must be considered in the context in which the Legislature considered it, as conduct which is hostile to the welfare of the general public; more specifically in this case, conduct which is hostile to the welfare of the school community.[8]

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[5]Schumann v. Pickert, 269 N.W. 152 (1936).

[6]Horosko v. School District of Mount Pleasant, 335 Pa. 369, 6 A.2d 866 (1939).

[7]Board of Education of San Francisco Unified School District v. Weiland, 4 Cal. Rptr. 286 (1960).

[8]Jarvella v. Willoughby-Eastlake City School District Board of Education, 233 N.E.(2d) 143 (1967).

Not only does review of the pertinent cases reveal some judicial consistency in definition, but it also reveals categories of conduct which may lead to dismissal. In their 1983 article, Landauer, Spangler, and Van Horn listed thirteen such categories:

1. Heterosexual conduct with students
2. Heterosexual conduct with nonstudents
3. Homosexuality
4. Nonsexual misconduct with students
5. Physical abuse of students
6. Classroom discussion or use of materials that are sexual in nature
7. Use of profanity
8. Misconduct involving drugs
9. Misconduct involving alcohol
10. Other criminal misconduct
11. Misappropriation of funds
12. Cheating
13. Lying[9]

Of these thirteen categories, this study focuses only on those that are sexual in nature because of the delicate matter of dismissing an employee for immorality based on grounds of sexual misconduct. As Thomas Fleming pointed out: "Without question, the most sensitive issue and the one most likely to generate intensive debate is teacher dismissal for moral cause and in particular for offense of a sex-related nature."[10] He simplified study of this issue with three broad categories of sex-related causes for dismissal of teachers: "teacher homosexuality; sexual misconduct of teachers with students; and sexual

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[9]W. Lance Landauer, John Spangler, and Benjamin Van Horn, "Good Cause Basis for Dismissal of Education Employees," in Legal Issues in Public Employment (Bloomington, Ind.: Phi Delta Kappan, 1983), 155.

[10]Thomas Fleming, "Teacher Dismissal for Cause: Public and Private Morality," Journal of Law and Education 7, no. 3 (July 1978): 423.

misconduct of teachers with other adults."[11] Edward C. Bolmeier shared the following:

> It is generally assumed that a school board has a legitimate interest in maintaining the integrity of the schools by protecting against potentially detrimental influences on impressionable pupils who may be affected by the conduct of their teachers outside the classroom. This assumption is shared by . . . the courts. Therefore, questionable sexual behavior of teachers is scrutinized by the judiciary more closely than it is for persons outside the teaching profession.[12]

For a number of years teachers who were charged with immorality by their school board either resigned their position quietly or were allowed to transfer to another school system with no publicity. With the increased emphasis on individuality and the reduced emphasis on conformity over the last two decades, teachers faced with these charges are increasingly turning to the courts for relief as evidenced in the increased number of immorality cases litigated in the 1970's and 1980's. Immorality is the most frequently litigated cause for dismissal which is probably due in part to the subjectivity allowed to school boards by the lack of definition in most state statutes.

Teachers have sought relief based on several constitutional issues: immorality is unconstitutionally vague; the First Amendment which, through extension, protects freedom of association; the Third Amendment which protects the privacy of the home; the Fifth Amendment which protects against self-incrimination; the Ninth Amendment which specifies that enumerated rights in the Constitution are not to be considered as

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[11] Ibid., 425.

[12] Edward C. Bolmeier, Sex Litigation and the Public Schools (Charlottesville, Va.: The Michie Company, 1975), 40.

denying the existence of other rights which are not enumerated; and the Fourteenth Amendment which makes all other amendments constitutional. Legal challenges have also invoked the Privacy Act of 1974 which refers to privacy as a personal and fundamental right that is protected by the Constitution. However, as Todd DeMitchell pointed out:

> Privacy, or as Justice Brandeis phrased it, "the right to be left alone," often is thought of as a freedom guaranteed by the U.S. Constitution. But fact is, it is not. Rather than a constitutional guarantee, the right to privacy has evolved through governmental action and judicial decisions.[13]

Again, the confusion inherent in this area which has led teachers, administrators, and school boards to the courts for clarification is obvious.

Statement of the Problem

The moral fabric of American society has changed greatly since the 1960's. Increased personal freedom has led many in the teaching profession to believe that their personal lives are private based on constitutional guarantees and are not subject to the scrutiny of their employer. This has resulted in an increase in litigation when teachers are dismissed for immorality based on sexual misconduct.

Given the subjectivity allowed school boards by the lack of specificity of state statutes concerning immorality as a cause for dismissal and the reliance in many judicial definitions on the standards of the community, it is easy to understand the problems facing many school boards who try to dismiss teachers for immoral conduct. This study will attempt to provide guidelines for both administrators and school board members who must wrestle with this dilemma.

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[13]DeMitchell, 23.

Purpose of the Study

The purpose of this study was (1) to determine from current literature the critical legal issues in the dismissal of teachers for immorality on grounds of sexual misconduct; (2) to review and analyze statutes from the fifty states to determine the status of immorality on grounds of sexual misconduct as a cause for dismissal; (3) to review and analyze case law related to these dismissals; and (4) to provide guidelines for practicing school administrators who must make the decision to dismiss teachers for immorality on grounds of sexual misconduct. This study was developed in a factual manner based on the legal issues involved and will not attempt to address the moral values inherent in charges of immorality.

Questions To Be Answered

This study will answer the following questions:

1. What is revealed in current literature concerning dismissal of teachers for immoral conduct?
2. What is the status of immorality as a cause for dismissal as outlined in state statutes of all fifty states?
3. What is the status of dismissal for immorality as revealed in analysis of case law?
4. Are there discernible patterns and trends that can be identified in judicial decisions?
5. What legal guidelines can be set forth as a result of this research to aid administrators and school board members?

Methodology

The methodology used for this study was that of legal research as defined by Hudgins and Vacca.[14] This involves an analysis of judicial decisions from which legal principles are derived. The study of case law was supplemented with an analysis of state statutory law.

Legal research begins with framing the problem as a legal issue: the legal aspects of teacher dismissal for immorality on grounds of sexual misconduct. State statutes that control this issue were investigated. Subsequently, a bibliography of court decisions was built. Each decision was read and analyzed around three major areas: the facts of the case; the decision and rationale; and implications of the decision.

Primary sources were state and federal court decisions and state statutes. Secondary sources such as legal encyclopedias, law reviews, education articles, and books were utilized to provide supplemental information. Included as resources were the Current Index to Journals in Education, Index to Legal Periodicals, Current Law Index, American Law Reports, and Resources in Education.

Legal cases focusing on teacher dismissal for immorality on grounds of sexual misconduct were located utilizing the LEXIS computer search system. The actual cases were examined as reported in the National Reporter System which includes decisions rendered by the following courts: the United States Supreme Court, the United States District Courts, the United States Courts of Appeals, and state appellate courts. Other lower state court decisions were included when higher level

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[14] H. C. Hudgins and Richard S. Vacca. Law and Education (Charlottesville, Va.: The Michie Company, 1985), 23-52.

decisions were not available for a given area of research. Cases were read and categorized according to the nature of the sexual misconduct involved.

Legal cases were "shepardized" utilizing Shepard's Citations which provides a history of reported court decisions and a treatment of that decision. This allowed the researcher to rely on the applicable court holding.

Limitations of the Study

This study was limited to analysis of state statutes and state and federal court cases based on those statutes as applied to the dismissal of teachers for immorality on grounds of sexual misconduct using the time frame 1970-1990. The most recent study of immorality as a cause for dismissal was completed by Leonard H. Simmons as his doctoral dissertation in 1976. Much has changed in both the attitudes of society and the courts since that time. This study was designed to analyze both the literature and the legal cases since the early 1970's for the purpose of determining the current trends in the legal aspects of teacher dismissal for immorality specifically on grounds of sexual misconduct.

Design of the Study

Chapter I includes an introduction, the statement of the problem, the purpose of the study, the questions to be answered, the methodology, the limitations of the study, the design of the study, and the definition of terms.

Chapter II examines current articles from legal and educational resources to determine the status of and thoughts concerning immorality

on grounds of sexual misconduct as a cause for dismissal of teachers. Beginning with the early years of public education, the development of policies to regulate teacher conduct was traced. Attention was then focused on current trends in dealing with teacher dismissal for immorality on grounds of sexual misconduct, both judicially and educationally, as revealed in the current literature.

Chapter III reviews the state statutes from all fifty states to determine which states include immorality or related terms as a cause for dismissal or revocation of teaching credentials. Attention was also given to definitions of immorality or limitations placed on its use as a cause for dismissal.

Chapter IV examines pertinent legal cases in which dismissal of teachers for immorality on the grounds of sexual misconduct was litigated. While the focus of this examination was the cases from the 1970's and 1980's, landmark rulings from previous years were included as appropriate. Many of these rulings were from higher level state courts since the United States Supreme Court has ruled on very few cases in this area. Therefore, state courts have often relied on decisions from their own or other states for guidance in this area of teacher dismissal.

Chapter V summarizes the findings of the research and provides guidelines for administrators and school board members to utilize when faced with a decision to dismiss for immoral conduct. Also included in this chapter are recommendations for further study.

Definition of Terms

The following words and phrases are key terms which will be utilized in this study. Unless noted otherwise, Black's Law Dictionary[15] was the source of these definitions.

Certiorari--A writ from a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein. It is most commonly used to refer to the Supreme Court of the United States, which uses the writ of certiorari as a discretionary device to choose the cases it wishes to hear.

Dismiss--To discharge; to cause to be removed temporarily or permanently; to relieve from duty.

Immoral--Contrary to good morals; inconsistent with the rules and principles of morality; inimical to public welfare according to the standards of a given community, as expressed in law or otherwise.

Immorality--That which is against good morals.

Indecent exposure--Exposure to sight of the private parts of the body in a lewd or indecent manner in a public place.

Indecent liberties--Taking such liberties as the common sense of society would regard as indecent and improper. According to some authorities, it involves an assault or attempt at sexual intercourse, but according to others, it is not necessary that the familiarities should have related to the private parts of the child.

Moral turpitude--Act or behavior that gravely violates moral sentiment or accepted moral standards of the community and is a morally

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[15]Black's Law Dictionary, 5th ed. (St. Paul, Minn.: West Publishing Co., 1979).

culpable quality held to be present in some criminal offenses as distinguished from others.

Plea of nolo contendere--A plea in a criminal case which has a similar legal effect as pleading guilty. The principal difference between a plea of guilty and a plea of nolo contendere is that the latter may not be used against the defendant in a civil action based upon the same acts.

Res judicata--Rule that a final judgment rendered by a court of competent jurisdiction constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.

Respondeat superior theory--Let the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. Under this doctrine master is responsible for want of care on servant's part toward those to whom master owes duty to use care, provided failure of servant to use such care occurred in course of his employment. As applied to education, this doctrine establishes the liability of the school district for the actions of its teachers.

Solicitation--For the crime of solicitation to be completed, it is only necessary that the actor, with intent that another person commit a crime, has enticed, advised, incited, ordered or otherwise encouraged that person to commit a crime. The crime solicited need not be committed.

Teacher--As used in this study, the term "teacher" encompasses all certified school employees below the rank of superintendent.

CHAPTER II

REVIEW OF LITERATURE

Historical Overview

Before reviewing current literature related to the issue of dismissal of teachers for immorality, it is important to review the issue of teacher conduct historically. Throughout America's public education history, teachers have had a somewhat checkered past.

Many of the earliest school teachers in America were indentured servants, convicted felons, or others of dubious character. Often they had little more education than their pupils. Frequently, servants were obtained to serve as teachers through advertisements much as skilled craftsmen were obtained at the time. It is interesting to note that teachers generally did not bring as high a price as did the skilled craftsmen. Edgar Knight describes the early teacher in his book History of Education in the United States as

> . . . shiftless, migratory, and itinerant, poorly paid and as poorly esteemed by the public. . . . Now and then, if the records are to be believed, he was given to loose living and was generally unwilling to assume social responsibilities. . . . He was generally poor in spirit except when he was in a state of inebriety, a not uncommon condition of the teacher in the early days.[1]

In 1791 Robert Coram observed that the teachers were "generally foreigners, shamefully deficient in every qualification necessary to convey instruction to youth, and not seldom addicted to gross vices."[2]

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[1]Edgar W. Knight, Education in the United States (Boston: Ginn and Company, 1929), 348.

[2]Ibid., 351.

In 1812, the concern about the moral character of teachers was obvious in an act which established common schools in New York. Each teacher was required by that act to hold a certificate signed by at least two local authorities to show that he was qualified to teach in a common school and was of good moral character.

New York was not the only state to require "good moral character" certificates. Knight shared an account of a man who applied for the position of teacher in a common school in North Carolina during the middle of the 1800's:

> It was necessary then, as it had been earlier and is now, for the teacher to give evidence of good moral character. But this man, who was notorious for his bad habits, had difficulty until he found a friend who gave him a "certificate of good moral character during school hours." This satisfied the local requirements, and the man was employed.[3]

In Public Education in the United States, Ellwood Cubberley described teachers in the early 1800's as "incompetent adventurers, migratory, odd in their ways, crude in their manners, and often questionable in their character."[4]

Joseph Caldwell, President of the University of North Carolina, noted in the early 1830's that

> . . . those who had wasted their property and had ended in debt through indiscretion or misconduct; those who had ruined themselves and corrupted others by dissipation, drinking, seduction, and a course of irregularities; those who had returned from prison, the destitute of character, the untrustworthy,--these and others as vulgar and ignorant conducted schools.[5]

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[3]Ibid., 358.

[4]Ellwood P. Cubberley, Public Education in the United States (Boston: Houghton Mifflin Company, 1934), 325.

[5]Knight, 353.

In 1843, a correspondent for a Virginia newspaper observed that many of the teachers were "invalids, some were slaves to drunkenness, some too lazy to work, most of them entirely ignorant of the art of teaching, and a terror to their pupils. There were a few . . . who possessed culture, intelligence, morality, ability."[6] The governor of South Carolina in the middle of the nineteenth century lamented: "With but few exceptions, they are very ignorant and possess a very easy morality."[7]

Cubberley also reported that contracts and rules in the 1840's often required that ". . . the teacher conduct himself properly and 'refrain from all spirituous liquors while engaged in this school, and not to enter the school house while intoxicated, nor to lose time through such intemperance.'"[8]

Having quickly reviewed the conduct of some of America's earliest teachers, it is clear that the public had reason to be concerned about the caliber of the individuals in the sensitive position of educating America's youth. A second factor which must have undoubtedly had an effect on the increase of regulations concerning teacher behavior was the increase in the number of women becoming teachers. As a result in the 1900's, clauses in teachers' contracts severely limited the freedoms of teachers.

In School Law: Cases and Concepts, Michael LaMorte included the following Rules of Conduct for Teachers published in 1915 by a local West Virginia board of education in his discussion of the teacher as exemplar:

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[6]Ibid., 352. [7]Ibid., 353. [8]Cubberley, 326.

1. You will not marry during the term of your contract.
2. You are not to keep company with men.
3. You must be home between the hours of 8:00 P.M. and 6:00 A.M. unless attending a school function.
4. You may not loiter downtown in ice cream stores.
5. You may not travel beyond the city limits unless you have the permission of the chairman of the board.
6. You may not ride in a carriage or automobile with any man unless he is your father or brother.
7. You may not smoke cigarettes.
8. You may not dress in bright colors.
9. You may under no circumstances dye your hair.
10. You must wear at least two petticoats.
11. Your dresses must not be any shorter than two inches above the ankle.
12. To keep the school room neat and clean, you must sweep the floor at least once daily; scrub the floor at least once a week with hot, soapy, water; clean the blackboards at least once a day; and start the fire at 7:00 A.M. so the room will be warm by 8:00 A.M.[9]

A teacher's contract from the Wilson City and County Public Schools in North Carolina in the 1920's included the following restrictions:

> I will take a vital interest in Church and Sunday School work, and other community activities: that I will not entertain company until late hours at night and thus render my school work the next day inefficient; that I will not attend sorry moving pictures and vaudeville shows; that I will not fall in love or become familiar with high school pupils; that I will not attend card and dancing parties; that I will not fail to use good sense and discretion in the company I keep; that I will use my best endeavor during the year to improve my work as a teacher; and that I will do nothing to bring disrepute on the home in which I live or to cause right thinking people to speak disparagingly of me and of my work.[10]

In his book Education in the United States written in 1929, Edgar Knight shared some of what he considered to be queer requirements of that time. He included the following regulations in use in one of the Southern states:

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[9]Michael W. LaMorte, School Law: Cases and Concepts (Englewood Cliffs, N.J.: Prentice-Hall, 1982), 216.

[10]Teacher's contract, Wilson City and County Public Schools, Wilson, N.C., 1920.

> I promise to take a vital interest in all phases of Sunday-school work, donating of my time, service, and money without stint for the uplift and benefit of the community. I promise to abstain from all dancing, immodest dressing, and any other conduct unbecoming a teacher and a lady. I promise not to go out with any young men except in so far as it may be necessary to stimulate Sunday-school work. I promise not to fall in love, to become engaged or secretly married. I promise to remain in the dormitory or on the school grounds when not actively engaged in school or church work elsewhere. I promise not to encourage or tolerate the least familiarity on the part of any of my boy pupils. I promise to sleep at least eight hours a night, to eat carefully, and to take every precaution to keep in the best of health and spirits in order that I may be better able to render efficient service to my pupils.[11]

Similar restraints continued even after the first World War. David Rubin reported that one Virginia contract signed in 1935 specified that teachers could not keep company with "sorry young men"; a Tennessee contract stipulated that the teacher was to refrain from all questionable pastimes; and an Alabama contract required the teacher to promise not to have company or go riding in an automobile on Monday through Thursday nights.[12]

In his 1936 book on teacher freedom, Howard Beale reported many restrictions on the conduct of teachers. Much of his research involved letters from and interviews with classroom teachers throughout the United States. He reported that the ban on attending the theater was almost a thing of the past. However, activities such as drinking and smoking continued to be taboo in most areas of the country (although school boards in the Northeast and in large cities seemed to have a more relaxed standard about drinking). In his discussion of sex relations, he observed that "Sex immorality seems almost universally to

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[11]Knight, 360. [12]Rubin, 141.

bring dismissal. . . . Where sex morality is involved, gossip is usually sufficient cause for dismissal of a teacher without any proof of the charges."[13]

Since Beale's book, much has changed in the dismissal of teachers for immorality. Unsubstantiated gossip alone is no longer sufficient cause for the dismissal of a teacher. However, the public continued to be concerned with the conduct of teachers. As Beale pointed out:

> Conduct is an important matter in a world gone topsy-turvy because of a sudden breakdown of former inhibitions and traditional codes of don'ts. Conduct is important, too because of the great influence of example with children and because children do not heed much what the teacher tells them but are affected by imitation of what the teacher does.[14]

This is perhaps even more true today than it was in 1936 as evidenced by the number of authors who have addressed this issue in the literature since 1970.

In his discussion of the teacher as exemplar in his 1982 book, Michael LaMorte commented that the teachers in the past knew what constituted improper conduct which would lead to their dismissal. It was obvious to all that improper dress and grooming, public drunkenness, extramarital affairs, improper conduct by single teachers, divorce by female teachers, and homosexuality would lead to a loss of their position. He also observed:

> Changing life-styles and frequent lack of agreement regarding not necessarily exemplary, but merely "proper" conduct may make it difficult for a teacher to know when a norm is transgressed and exceeds school authorities' or a community's zone of acceptance.

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[13]Howard K. Beale, Are American Teachers Free? (New York: Charles Scribner's Sons, 1936), 381.

[14]Ibid., 407.

> This problem is further heightened by the fact that teacher conduct which may be tolerated in a metropolitan area may not be in a small town with a homogeneous population that considers itself conservative.[15]

Thomas Fleming also made a similar observation in his article on teacher dismissal and the issue of public and private morality:

> Traditionally, American society has evidenced a firm conception of the teacher's role. It has been a consistently held conviction that the care of the young is as much a moral as an educational responsibility and, in this regard, teachers have been expected to function as exemplars in their professional and private lives. The educational history of the United States is replete with examples of stringent ordinances establishing high standards of conduct for those in charge of children. Since the formation of good character and citizenship have been historically the dominant goals of the schools, it has been a natural consequence to require moral excellence in those who staff them. . . . A symbiotic relationship now exists between the public concern for the professional and moral qualities of school staff and an increasing public apprehension regarding the dramatic growth in successful litigation by all segments of society. . . . Nowhere has this issue of public and private morality been reduced more clearly to a question of institutional responsibility versus individual freedom than in the nation's schools.[16]

Also on the subject of the teacher's influence on his pupils, John McCormick shared the following:

> The teacher cannot teach without conveying some of his or her attitudes on society, politics, and ethics. Because of this sensitive role, the teacher has always been subject to the closest scrutiny regarding his or her fitness to teach. Traditionally, this scrutiny has included an examination of the teacher's private life as well as his or her classroom competency.[17]

On the same topic, James H. Lowe pointed out a source of concern in retaining teachers whose lifestyle is nontraditional:

> When there has been no allegation of sexual misconduct directly involving students, the perceived harm to the educational

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[15]LaMorte, 216. [16]Fleming, 423-24.

[17]John G. McCormick, "'Immorality' as a Basis for Dismissing a Teacher," School Law Bulletin XVI, no. 3 (Summer 1985): 9.

> community results from the unique trust reposed in teachers, upon whom an elevated standard of behavior is imposed. Thus, teachers' nonconforming sexual practices may compromise their role as moral exemplars to their pupils or undermine their statutory duty to teach moral principles. The fear has been expressed that retention of such teachers might be construed as adult approval of the offending behavior, might provide the opportunity for a recurrence actually involving a student, or might impair relationships with parents, fellow teachers, and administrators.[18]

Finally, Samuel Francis and Charles Stacey stated that courts have traditionally dealt harshly with teachers who have been found guilty of acts of immoral conduct. They further stated that

> The rationale for insisting upon high standards of conduct in the school setting is simple. Teachers are constantly involved with young people whose minds are impressionable, and immoral acts on the part of the teacher might have traumatic and harmful effects upon the students in the school.[19]

E. Edmund Reutter pointed out the difficulty administrators face in balancing the rights of teachers as citizens with the expectations for exemplary behavior:

> A teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. [Ambach v. Norwick, 441 U.S. 68 (1979)] The courts over the years have been in agreement with this 1979 statement of the Supreme Court, and have expected a teacher's character and conduct to be above those of the average person not working in so sensitive a relationship as that of teacher and student. Nevertheless, there has been a discernible trend toward according teachers more freedom in their personal lives than was true in the more distant past. Obviously the line is difficult to draw between the rights of teachers as citizens, and the obligations imposed by the necessity for effective instructors of youth to be more than subject-matter and teaching-method specialists.[20]

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[18]James H. Lowe, "Homosexual Teacher Dismissal: A Deviant Decision," Washington Law Review 53, no. 499 (1978): 500.

[19]Samuel Francis and Charles Stacey, "Law and the Sensual Teacher," Phi Delta Kappan (October 1977): 98.

[20]E. Edmund Reutter, The Law of Public Education (Mineola, N.Y.: The Foundation Press, Inc., 1985), 593.

In determining whether to dismiss a teacher for sexual misconduct two issues surface that administrators must deal with: the right to individual privacy guaranteed through application of constitutional guarantees, and the due process rights guaranteed by both the Constitution and state statutes which provide tenure rights to teachers.

Right to Privacy

The first of these issues, which is an argument often utilized in a legal challenge of a dismissal for immorality, involves the right to privacy enjoyed by individual citizens in America. Since many behaviors which lead to dismissal occur in the privacy of one's home, many dismissed techers argue that the behaviors are protected by the United States Constitution. David Rubin pointed out that

> Although there is no provision in the Constitution expressly establishing a right of privacy, the Supreme Court has concluded that the Constitution nevertheless creates zones of protected privacy. . . . The constitutional right of privacy is far from fully defined. Some components of the right, however, have emerged from decisions of the Supreme Court. One, derived directly from the Fourth Amendment, is the freedom of an individual, in his private affairs, from governmental surveillance and intrusion. A second is the right of an individual not to have personal matters disclosed by the government. A third is an individual's right to think as he chooses, free from governmental compulsion.[21]

Merri Schneider-Vogel also addressed the right of privacy in her article on constitutional issues surrounding dismissal of gay teachers:

> The right of privacy is a fundmental right. Unlike the rights specifically enumerated in the Bill of Rights, however, privacy is a nebulous right with ill-defined parameters. The right has been said to have its source in various constitutional provisions including: the first amendment's freedoms of association and speech; the fourth amendment; the due process and equal protection

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[21]Rubin, 141.

> clauses of the fourteenth amendment; the penumbra surrounding specific guarantees enumerated in the Bill of Rights; and the unenumerated rights alluded to in the ninth amendment. Although the right to privacy has been recognized in respect to personal intimacies of the home, procreation, and marrige, whether it extends to private sexual conduct between consenting adults is an unsettled question.[22]

In his discussion of the rights of teachers, Thomas Flygare cautioned teachers against assuming that their private life was not a concern of their employers:

> [T]he days are surely gone when teacher contracts contained provisions requiring the teacher to attend church and prohibiting the smoking of cigarettes or the drinking of alcoholic beverages. But one should not assume from recent events that school boards are now powerless to act against teachers on the basis of behavior off the school grounds.[23]

In their book on teachers' rights, Stelzer and Banthin share the following definitions of the public vs. the private person. This is often an issue the courts must decide in dismissal cases.

> The public person is the individual as presented to others. The public person is the sum total of an individual's grooming, dress, style of dealing with others, public statements, and public actions. It is the manipulable self. The private person is the core person, with a unique combination of values, behavior, goals, relationships, and needs.[24]

They continue their discussion to point out: "Sexual behavior, marriage, procreation, family life, child rearing, and religion fall within a 'zone of privacy' . . . because they are the subject of intimate

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[22]Merri Schneider-Vogel, "Gay Teachers in the Classroom: A Continuing Constitutional Debate," Journal of Law and Education 15, no. 3 (Summer, 1986): 290.

[23]Thomas J. Flygare, The Legal Rights of Teachers (Bloomington, Ind.: Phi Delta Kappan Educational Foundation, 1976), 25.

[24]Leigh Stelzer and Joanna Banthin, Teachers Have Rights, Too (Boulder, Col.: ERIC Clearinghouse on Educational Management, 1980), 139.

decision making and because they do not affect others adversely."[25] The public person enjoys fewer protections. Because of the nature of the public person, it is more reasonable to expect conformity to the norms of society. Some aspects of the public person have little adverse effect on others so no effort is made to change them. However, as the authors pointed out: "a teacher's pattern of interaction with students, colleagues, and parents is both public and important. Similarly, public immorality and lawbreaking are both harmful and public and, therefore, are legitimate concerns of government."[26]

Stelzer and Banthin, as well as many other authors dealing with this subject, were quick to point out that when an individual goes public to crusade for his life style, flaunt a controversial life style, or focus attention on his private life through misbehavior or indiscretion, he forfeits the right to privacy and cannot claim it as a defense. In the words of Landauer and his associates:

> The constitutional right to privacy cannot be claimed as a defense against dismissal if the conduct was of a public, bizarre, or flagrant nature. When the private conduct of a teacher becomes public knowledge or when the claim of privacy is applied to conduct that, in fact, is not private, the courts generally have held that the conduct is not protected from school board scrutiny by a right to privacy.[27]

Richard Clay pointed out a problem that was inherent in the issue of privacy in his article in the Kentucky Law Review:

> The only safe statement that can be made as to whether the private sexual conduct of a teacher is protected against state regulation is that courts differ. Because privacy is still a hazy constitutional principle, judges have enormous room to "value sculpt." They have the power to determine whether certain conduct is

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[25]Ibid. [26]Ibid. [27]Landauer, 158.

> "fundamental" and "implicit in the concept of ordered liberty," and if they find that certain conduct is protected under those standards, they still have enormous discretion in designating state interests as "compelling."[28]

Todd DeMitchell referred to the use of the right to privacy as a defense in immorality cases as "a murky legal area" and provided the following list of factors which should be taken into account in these cases:

1. The right to privacy has been recognized by the judicial and legislative branches of government.
2. When viewing teachers' out-of-school behavior, a nexus (or connection) between the behavior and a resulting negative effect on the school system must be established.
3. Teachers have a right to privacy and a corresponding duty to keep their private behavior private.
4. The public nature of a teacher's act probably will remove it from the sphere of protection.
5. Sexual activity with a student and the destructive effect of notoriety both weigh heavily against a teacher.
6. Firing teachers for alleged sexual misconduct is unconstitutional.[29]

Finally, Thomas Fleming provided an excellent summary for this issue in his article on public and private morality:

> In summary, recent court rulings and social climate suggest that despite radically changing public attitudes and practices in a variety of areas, the community and their appointed and elected officials continue to expect and demand that public school teachers observe historically approved standards of social decorum, and, wherever necessary, that they maintain a strict separation between their public and private lives. Given that this division is maintained, whether through a "double-life" or not, the teacher like other citizens is free to exercise his individual rights to their limits.[30]

Due Process Rights

The second issue with which administrators must deal very carefully involves the due process rights of the dismissed teacher. The

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[28]Clay, 926. [29]DeMitchell, 24. [30]Fleming, 430.

following will serve as a summary and a reminder of the steps that must be followed for the dismissal to be upheld in court.

A teacher is entitled to due process of law prior to dismissal when a property or liberty interest exists. A property interest is created through tenure, implied tenure, or contract. A liberty interest may arise if the dismissal action imposes a stigma or damages the teacher's reputation.

At a minimum, due process requires that the teacher be provided with notice specifying reasons for the dismissal and an opportunity for a hearing at which he may present evidence and confront witnesses. In addition, all procedures specified by state statute or contract must be followed in the dismissal process.

Current Literature on Teacher Dismissal for Immorality on Grounds of Sexual Misconduct

This section of Chapter II reviews the current literature to determine the legal issues involved in the dismissal of teachers who are charged with immorality on grounds of sexual misconduct. The areas to be addressed in this dissertation are homosexuality, heterosexual misconduct with other adults, unwed pregnancy, sexual misconduct with students, and unorthodox behavior.

Little has been written that specifically addresses the legal issues involved with heterosexual misconduct with other adults and unorthodox conduct. However, there is case law which addresses these areas and which will be reviewed and discussed in Chapter IV of this study. One can assume from analysis of the general literature on dismissals for immorality that the courts would be reluctant to uphold the

dismissal of a teacher for private conduct with another consenting adult as discussed earlier based on the right to privacy. Also, a necessary factor for the dismissal to be upheld in the courts is the nexus issue. The school board would have to show that the behavior had an adverse impact on the teacher's performance.

Homosexuality

One of the most difficult issues that school boards have faced and will continue to face is the issue of homosexual teachers. Homosexuals employed in public education are turning to the courts for protection against discrimination with increasing frequency. As a result, administrators must be thoroughly familiar with the legal aspects of dismissing a teacher for immorality based on homosexuality. When a teacher is an admitted homosexual, is that prima facie evidence of immorality? Does the teacher have a right to live quietly the life he chooses? Does commission of an act of moral turpitude automatically lead to dismissal for immorality? An examination of the literature combined with an analysis of case law will provide answers for school boards and administrators who must answer these questions.

Joshua Dressler included the following in the introduction to his article on the likelihood of dismissal of homosexual teachers:

> A majority of Americans apparently believe that gay people should, as a class, be excluded from the teaching profession. Nonetheless, gay people do teach, and have presumably always taught, school children. Most such teachers even today, however, presumably hide their sexual orientation for fear that disclosure will jeopardize their status as teachers.[31]

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[31]Joshua Dressler, "Survey of School Principals Regarding Alleged Homosexual Teachers in the Classroom: How Likely (Really) Is Discharge?" University of Dayton Law Review 10, no. 3 (1985): 599.

In the past, teachers who preferred to keep their sexual preferences private had little difficulty. Generally, if the homosexuality became known, it was due to the actions of the individual. However, the new practice in the gay community in America referred to as "outing" is a recent development that has ramifications for the public schools. According to a recent television news program, "outing" is the practice of revealing gay individuals who are celebrities or famous in some respect in the hope that people will realize that there are gay and lesbian people who are famous and who are making positive contributions to society. It was referred to as "a tactic some gays are using to drag famous, successful supposed other gays out of the closet kicking and screaming if need be." Michelangelo Signorelli, a homosexual journalist, has been active in "outing" and predicted with certainty that the practice would gain momentum. In response to a question concerning the possibility of "outing" being expanded from celebrities to regular poeple who do not want to be brought out of the closet, he responded that that may very well happen.[32] If this practice does accelerate, homosexual teachers would be a natural target along with police officers, local politicians, and other high visibility individuals in the community. Therefore, school administrators must be ready to deal with the issue of homosexual teachers.

Kenneth Brooks, Charles Faber, and Glenn Smith also pointed out the necessity of examining the issue of homosexuals in public education in the introduction to their article:

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[32]Gay Bashing (New York: CBS Television, 1990).

> The pliable fabric of today's society is woven of fluid threads of every imaginable sort. Conflict, confrontation, and change must occur as these threads cross. Three aspects of our society increasingly coming together with dynamic results are homosexuality, the law, and public schooling. School administrators . . . need to understand homosexuality as a concept and as a legal issue in relation to public education.[33]

The issue of homosexuality is not unique to contemporary life in America. Brooks, Faber, and Smith shared the following historical information:

> The origins of writings on homosexuality can be traced rather directly to about the seventh century B.C. As part of an effort to distinguish themselves from surrounding nations, Jews first condemned homosexuality as a form of idolatry at about that time. Prior to the seventh century, homosexuality had been an accepted part of Jewish life and had been included in some forms of sexual worship. Within a fifty year period during and following the Babylonian Exile, conservative Jewish factions reformulated many beliefs and insisted upon an ascetic philosophy. In addition to homosexuality, other forms of sexual expression were also condemned. Sex was viewed as acceptable solely for procreation. The condemnation was recorded as part of Talmudic law. Eventually, Hebraic attitudes were adopted into Christian codes.[34]

Much of the current bias in America against homosexuals is rooted in the prohibition of homsexuality found in the Bible. In Leviticus, one finds the following in the ordinances that God gave Moses to deliver to the children of Israel: "Thou shalt not lie with mankind, as with womankind: it is abomination."[35] In The Epistle of Paul the Apostle to the Romans, Paul revealed the reasons for the wrath of God against the ungodliness and unrighteousness of men and included:

> And likewise also the men, leaving the natural use of the woman, burned in their lust toward another; men with men working that which is unseemly, and receiving in themselves that recompense

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[33]Kenneth W. Brooks, Charels F. Faber, and Glenn Smith, "Homosexuality, the Law, and Public Schools," in School Law Update (Topeka, Kan.: National Organization on Legal Problems in Education, 1977), 160.

[34]Ibic., 161. [35]Leviticus 18:22.

> of their error which was meet. . . . Who knowing the judgment of God, that they which commit such things are worthy of death, not only do the same, but have pleasure in them that do them.[36]

Further, in I Corinthians one finds: "Know ye not that the unrighteous shall not inherit the kingdom of God? Be not deceived: neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor abusers of themselves with mankind . . . shall inherit the kingdom of God."[37] Finally, in I Timothy, the Apostle Paul observed that the law is not made for the righteous but for those who act contrary to the gospel of God. He included in that number ". . . them that defile themselves with mankind."[38] LaMorte stated: "This Biblical prohibition has been given legal status in forty-two states and the District of Columbia, where homosexual behavior between consenting adults is a crime."[39]

Since the law reflects the moral values of the people, it is easy to understand the legal status of homosexuality in America. Joshua Dressler has observed that it was well documented that the law was no friend to gay people. Further, he stated:

> Legal rules mirror the deep anxiety felt by many persons in society, and even felt by judges who must interpret the law, toward homosexual people. At no time, perhaps is such anxiety more explosively expressed than when the question is raised whether gay people should be permitted to serve as teachers in elementary and secondary schools.[40]

Samuel Francis and Charles Stacey also addressed public concern about homosexuals in the classroom:

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[36]Romans 1:27, 32. [37]I Corinthians 6:9. [38]I Timothy 1:10.

[39]Michael W. LaMorte, "Legal Rights and Responsibilities of Homosexuals in Public Education," Journal of Law and Education 4, no. 3 (July 1975): 461.

[40]Dressler, 599.

> The controversy surrounding homosexuality pervades the public schools of the nation. Questions have been raised about the fitness of homosexuals to be certificated to teach. The question arises as to whether or not homosexual acts are by their nature indications of immorality. School officials are concerned that homosexuals will take advantage of their contacts with students to perform perverse sex acts with them, or that the teacher's "unusual" sexual orientation will be internalized by students and thus influence their subsequent sexual development.[41]

The last twenty-five years have been times of change in American values and attitudes brought about by the sexual revolution which began in the late 1960's. However, as Floyd Delon pointed out in 1982, the liberalized attitudes toward homosexuality in society have not carried over into the public school classrooms:

> Public attitude toward homosexuality is probably more tolerant today than it has ever been. Yet, those who would accept a homosexual teacher as an appropriate role-model for pupils probably represent a small minority in most communities. Objectivity toward homosexual conduct is diminished by a widely-held belief that homosexuals actually represent a threat to the welfare of children.[42]

With the recent public awareness of the AIDS epidemic which was first revealed in the homosexual community, this objectivity may diminish even further as the public perceives an actual threat to the health of children who are exposed to homosexual teachers. As a result, there has been an increase in what many in the news media have termed homophobia. This will undoubtedly have an effect on the public schools.

Michael LaMorte also discussed the fear of many, including judges, over the possible deleterious effect of homosexual teachers on the children in public schools. He stated:

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[41]Francis and Stanley, 101.

[42]Floyd G. Delon, "Teacher Dismissal for Immoral and Illegal Conduct," in School Law Update (Topeka, Kan.: National Organization on Legal Problems in Education, 1982), 155.

> Undoubtedly images of limp-wristed, effeminate, garishly-dressed men in makeup teaching school, or evil and sinister-looking men perpetrating evil deeds on unsuspecting and innocent children, lurk in the minds of many when the question of allowing a homosexual to teach in a public school is raised.[43]

He also included a reason that many administrators would fear disclosure of a homosexual teacher. "Others fear the possible disapproval of the school system by the public and parents, and the subsequent possibility of a rejection of bond and funding measures at election time."[44] With the current budget constraints and shortfalls, this is a valid concern. However, it cannot override the legal rights of the teacher involved.

There is no question that homosexuals in the classroom is an emotionally charged issue as evidenced by the following from a 1977 Phi Delta Kappan article. At the time, Max Rafferty wrote a weekly education column published in approximately one hundred newspapers in the United States and was Dean of the School of Education at Troy State University in Alabama. It was his opinion that

> It's a sorry commentary on contemporary manners and mores that we're even bothering to ask whether gays should teach school. Sodomy is against the law everywhere I've ever been or heard of, and its illegality alone should make the matter moot. . . .
>
> Try this syllogism on for size:
>
> Major premise: A criminal is one who commits an act that is forbidden by a public law.
>
> Minor premise: Sodomy is an act forbidden by a public law.
>
> Conclusion: Therefore, a sodomite is a criminal.
>
> And considering our declining and falling posture in all opinion polls, fellow educators, we simply can't afford the luxury of urging the hard-pressed taxpayers to pay criminals to teach their children.
>
> Oh, it's not that I want any American citizen denied his or her constitutional rights. But let's face it. Nobody has a constitutional right to be a schoolteacher.[45]

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[43]LaMorte, "Legal Rights and Responsibilities," 461. [44]Ibid.

[45]Max Rafferty, "Should Gays Teach School?" Phi Delta Kappan 59, no. 2 (October 1977): 91.

In the same issue, there was an article authored by a Florida school teacher who was a candidate for a Doctor of Education degree at a major Florida university. Citing the fear that he would lose his job if his sexual preferences were known, he preferred to remain anonymous. In his opinion:

> Homosexual teachers are not a danger to society any more than are heterosexual teachers. The vast majority lead useful, productive lives, practicing their personal sexual preference as privately as heterosexuals do theirs. The law should protect the gay teacher's privacy, just as it does that of the heterosexual. . . . Children should not grow up in a family where the word homosexual is whispered. They should not play on a playground and hear the words faggot and queer. They should not be forced, in church, to listen to bigoted preachers speak about the sin of sodomy. They are not gaining a useful education in colleges where they hear of homosexuality as an illness or in counseling centers that promise cures. All we gays ask is the right to choose our own life-style, with freedom from persecution and condemnation. . . . But for God's sake, if we're going to remove teachers from classrooms, let's remove the ineffective ones. . . . We need to fight to keep those teachers who, regardless of sexual preference, daily challenge their fortunate students to learn, to create, to explore, and to make decisions.[46]

Given the emotional nature of this issue, judicial involvement clarifying the legal aspects of dismissal was inevitable.

Michael LaMorte addressed the development of case law in this area which revealed lack of consistency on the part of the judiciary in addressing homosexual dismissal:

> A body of case law is developing as homosexuals in public education increasingly employ the judiciary in an attempt to secure what they consider to be their constitutional rights. The holdings in the reported cases dealing with homosexuals in public education to date do not reveal a clear direction. They do indicate, however, that arbitrary policies or practices which withhold employment from homosexuals, which result in a nonrenewal of

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[46]Anonymous, "A Homosexual Teacher's Argument and Plea," Phi Delta Kappan 59, no. 2 (October 1977): 93.

> contract or dismissal when their "deviance" is discovered, or which result in revocation of a teaching certificate may be subject to successful court attack.[47]

He continued his discussion of the rights and responsibilities of homosexuals in public education to point out a number of societal forces which may influence the direction of case law dealing with homosexuals in the classroom:

> These include: changing attitudes toward homosexuals by certain institutions; rapid changes in life-styles and mores, coupled with a greater willingness of homosexuals to surface; increased media attention toward the homosexual position which appears to be more sympathetic than hostile; related educational court cases where private but offensive actions of teachers, which historically have been grounds for dismissal and possible revocation of teaching certificates, have been upheld; and lastly, the increasing use of the judicial test of establishing a nexus between conduct and teaching performance.[48]

After his review of pertinent legal cases, Thomas Flygare came to the following conclusion:

> Many of the cases upholding the decertification or dismissal of homosexual teachers have involved open acts of sexual conduct. In such cases, the courts' agreement that the teacher is unfit for the classroom appears to stem as much from the brazenness of the acts as from their homosexual nature. More difficult issues arise where there is no evidence of overt sexual conduct but where a school board wishes to take adverse action against a teacher merely for expressing a homosexual preference. . . . U.S. Courts of Appeals . . . have not given us a clear statement of law on whether a school board can flatly refuse to hire or retain homosexual teachers.[49]

When can a homosexual teacher be fired? In his 1974 article on the law and teacher dismissal, H. C. Hudgins, Jr., provided an answer as one of the ten legal commandments administrators must not break:

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[47] LaMorte, "Legal Rights and Responsibilities," 449.

[48] Ibid., 462. [49] Flygare, 26.

> With greater openness about sex these days, this question is important, and the answer appears to depend in turn on two other questions.
>
> Has the teacher lost the ability to discipline children, i.e., is there a loss of respect which leads to a breakdown in discipline?
>
> Has the teacher's behavior resulted in a noticeable breakdown of the effectiveness of the educational program?
>
> If neither element is present, administrators will probably not win court sanction for removing the teacher.[50]

His commandment on dismissal of homosexual teachers was: "Don't fire a teacher solely for being a homosexual unless his sexual inclination adversely affects teaching performance."[51]

Joshua Dressler conducted a survey of school principals in 1982 to determine the likelihood of a homosexual teacher being dismissed in the United States. Utilizing a questionnaire format mailed to 200 secondary school principals, he sought to determine the opinions of these principals regarding the legal rights of homosexual teachers to practice their profession and the experiences principals had in dealing with teachers who they suspected or knew were homosexuals. The author selected principals from four schools in each state which could bias the study toward small states. Responses were received from 54% of the principals who were mailed questionnaires. After analysis of the data, Dressler drew the following conclusions: (1) a small, though significant minority of principals felt that a homosexual teacher should lose his license solely due to status; (2) principals seemed concerned about the criminality of homosexuality (more than one-half felt that

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[50]H. C. Hudgins, Jr., "The Law and Teacher Dismissals: Ten Commandments You Better Not Break," Nation's Schools 93, no. 3 (1974): 41.

[51]Ibid.

conviction should lead to dismissal); (3) a substantial minority favored loss of license for participation in gay rights activist groups or for disclosing sexual preferences to students; (4) actual treatment of teachers has been much more lenient than the assertions of principals regarding hypothetical cases would suggest; (5) principals typically conclude that a teacher is homosexual based on rumor, stereotypical thinking, or guilt by association; and (6) teachers with poor teaching records are more likely to be disciplined than those who were perceived to be good teachers, even in cases of apparent misconduct. Dressler also observed that "rarely does the retention of a teacher publicly accused of being homosexual cause long-term problems for the administration of school activities.[52]

These conclusions have implications both for the courts and for school officials. Principals seemed more concerned about retaining a teacher who had broken the law than they were about retaining a homosexual. Decriminalization of private homosexual acts would apparently lessen the inclination to dismiss these teachers regardless of their sexual persuasion. Also of interest is the finding that there was little long-term disruption involved in the retention of a known homosexual. Further, it must be disconcerting to those who fear sexual abuse of students by teachers to realize that even though allowed by educational statutes, discharge based on such misconduct is not usually a result. Rather, in some cases there was no attempt to even discipline the teacher.

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[52]Dressler, 618-19.

Nexus frequently arises in cases involving dismissal for immorality. After reviewing relevant legal cases, James Lowe concluded:

> . . . the nexus between sexual conduct and unfitness to teach may be inferred when at least one of three possible aggravating circumstances is identifiable in the fact pattern:
> 1) the sexual conduct occurred in public;
> 2) the behavior is criminal and has been judicially recorded in a proceeding separate from the dismissal action, although conviction is not required; or
> 3) the teacher has otherwise invited notoriety beyond the publicity which would reasonably attend such a dismissal.
>
> These situations have in common the fact that the activity has been flaunted sufficiently flagrantly to pierce the veil of privacy, exposing the deportment to the school board's rigid scrutiny. Conversely, when these aggravating circumstances have been absent, dismissals have been reversed.[53]

This represents a change from the past when the behavior alone was adequate for dismissal. However, in those cases in which the misconduct involves a minor or student, the behavior is sufficient cause.

Michael LaMorte also addressed the issue of nexus as related to decisions in dismissal cases. In an earlier quote he included the nexus standard as one of the liberalizing forces affecting homosexual dismissal cases. He has concluded that the courts are reluctant to bar conduct solely on the basis of historical opinion, community standards, or conventional wisdom. They are leaning more toward requiring that the behavior be connected with the actual teaching performance. He stated:

> As this test continues to be employed by the judiciary, it will undoubtedly continue to affect many aspects of the case law in public education, including that dealing with homosexuals. Consequently, it will become necessary to demonstrate that a person's homosexuality affects his teaching performance. An inability to establish this relationship may make it impossible to remove him from the classroom. The use of such a test will insure that a capable, effective teacher will not be dismissed merely because

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[53]Lowe, 504.

> he stands accused of unorthodox sexual behavior. It will not, on the other hand, protect an incompetent homosexual teacher.[54]

In conclusion, Merri Schneider-Vogel provided an excellent set of guidelines for administrators that were derived from her study of constitutional issues involved in cases of homosexuals who have been dismissed from their teaching positions. Included were the following: (1) minimal due process guarantees notice and a fair hearing before termination; (2) court have distinguished between terminating those homosexuals who engage in overt, frequent homosexual conduct and mere knowledge of the teacher's sexual preference; (3) teachers are more likely to be protected if the charges stem from speech and not sexual acts themselves; (4) discharges for public homosexual conduct are more likely to be upheld by the courts than those involving private conduct; (5) if courts do recognize that the right to privacy extends to homosexuals, school boards will be limited in the degree to which they may inquire into the private lives of teachers believed to be homosexual; and (6) the primary concern of the school board in assessing the fitness of teachers must be the educational competence of the teacher and the possibility of actual harm to students resulting from the teacher's conduct. School boards must also be careful in assessing the source of notoriety to determine if their inquiry was the actual cause of the notoriety surrounding the conduct which led to dismissal. Finally, she cautioned that such dismissals must be based on "cause, teacher unfitness, or an unworkable disruption that the employment of the homosexual individual causes."[55]

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[54]LaMorte, "Legal Rights and Responsibilities," 467. [55]Vogel, 316.

Unwed Pregnancy

The pregnancy of a single female teacher is another cause included in dismissal for immorality on grounds of sexual misconduct. In this instance, the misconduct is implied by the pregnancy.

In his book on teacher freedom, Beale pointed out that in the early 1900's school districts often dismissed married techers. One of the reasons cited was the pregnancy that often followed the marriage. In 1913, twelve married pregnant teachers in New York were dismissed and that dismissal was upheld by the court. The court ruled that teachers had a right to marry and a right to take leave for illness, but taking leave for pregnancy amounted to neglect of duty. Two years later, the state commissioner for education in that state reinstated the teachers. He further reported that, in 1936, many states did allow leave for childbirth. However, some of these states limited the number of leaves that one teacher could take.[56]

Whereas the concern of school officials in the early part of this century was focused on the issue of married pregnant teachers, the current concern is focused on the pregnancy of single teachers. The liberalized societal attitude about unwed pregnancy is reflected in the legal aspects of this issue. Teachers who are dismissed for immorality due to their status as unwed mothers are turning to the courts for relief. As Douglas Punger pointed out in his article:

> Not so long ago the unmarried teacher who became pregnant was summarily dismissed, if she had not already quit and moved out of town before her principal, superintendent, or school board learned

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[56]Beale, 386.

> of her condition. Today, many unwed teachers who become mothers are successfully challenging the efforts of superintendents and school boards to dismiss them.[57]

One reason frequently employed for the dismissal of unwed pregnant teachers is the concern that these individuals serve as an "immoral" role model for their students. Recently, there has been an increase in national concern about the number of teenage females becoming pregnant and bearing illegitimate children. A 1981 article entitled "Black and White, Unwed All Over" discussed the issue of teenage pregnancy and provided interesting statistics. In 1979, 17% of all babies in the United States were born out of wedlock. Nationally, approximately 33% of all babies born to white teenagers and 83% of babies born to black teenagers were out of wedlock. The number of these births has increased almost 50% since 1970 and has quadrupled since 1950. This article attributed the increase to "the steady decline of the social stigma against it."[58] Those who believe that unwed pregnant teachers are unacceptable role models often cite the statistics as support for their position. Punger stated:

> Despite this apparent social problem, and even though the classroom teacher has more personal contact with teenagers than any other professional, Congress and the courts have made it increasingly difficult, if not legally impossible, to dismiss an unwed teacher who becomes pregnant.[59]

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[57]Douglas S. Punger, "Unwed Mothers As Teachers?" School Law Bulletin XIV, no. 1 (January1983): 1.

[58]"Black and White: Unwed All Over, Time 118, no. 19 (November 19, 1981): 67.

[59]Punger, 1.

Two constitutional issues typically arise in cases involving dismissal for immorality based on pregnancy. Stelzer and Banthin pointed out in their discussion of life-style choices that

> Marriage and pregnancy, like other areas of personal and family life, are protected by the due-process clause of the Fourteenth Amendment. The U.S. Supreme Court has held that because rules about marriage and pregnancy directly affect basic civil rights, due process requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon people's lives.[60]

Nowhere is there a distinction made legally to remove unmarried women from the protection afforded women by this ruling.

Julie K. Underwood advanced the argument that unwed pregnancy is constitutionally protected conduct in her article on the right to privacy and unwed pregnancy: "I contend that a person's decision to conceive and bear a child is within the constitutionally protected zone of privacy. This is true even if the person is an unmarried teacher."[61]

In 1978 Congress passed legislation called the Pregnancy Discrimination Act[62] which was intended to amend Title VII of the Civil Rights Act of 1964. The purpose of the legislation was to clarify that the prohibition against sex discrimination included a prohibition against discrimination in employment on the basis of pregnancy, childbirth, or related medical conditions. Punger examined federal laws and Equal Employment Opportunity Commission guidelines and concluded: "An unwed teacher or any other unwed public employee who becomes pregnant and

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[60]Stelzer and Banthin, 14.

[61]Julie K. Underwood, "The right to Privacy and Unwed Pregnancy," Journal of Law and Education 18, no. 4 (Fall 1989): 537.

[62]42 U.S.C. Section 2000 c(k)(1981), P.L. 55-555.

is dismissed can establish a prima facie case of sex discrimination in violation of Title VII by alleging that she was dismissed because of her pregnancy."[63] Punger then examined pertinent case law and reached the following conclusion regarding the dismissal of unwed pregnant teachers for immorality:

> School boards may dismiss an unwed teacher because she becomes pregnant only if they find as a fact that there is a nondiscriminatory reason for dismissing her other than her pregnancy or that there is a legitimate business necessity for dismissing her that is connected to her job performance. Therefore, before recommending the dismissal of an unwed pregnant teacher on the grounds of immorality, a superintendent must be prepared to show by the testimony of parents, school psychologists, psychiatrists, or others that the teacher's condition has had or will have adverse effects on her job performance.[64]

In his discussion of the legal rights of teachers, Thomas Flygare stated: "Although marriage and parenthood have been given a modicum of legal protection in recent years, a school board can still impinge on these rights as long as the board has a legitimate objective and does not administer the policy in an unconstitutional manner."[65]

After his review of case law, Edward C. Bolmeier concluded that

> Pregnancies under normal conditions are legal for married as well as unwed females. (In fact they are essential for the perpetuation of society.) The pregnancy of an unmarried teacher, however, presents a situation which would be the subject of litigation, especially where right of tenure is concerned. But even here, the weight of judicial authority upholds the pregnant unwed teacher in the security of her teaching position.[66]

Two recent articles by professors in educational administration programs present opposite viewpoints on this issue. Donal M. Sacken

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[63]Punger, 3. [64]Ibid., 5. [65]Flygare, 30.

[66]Bolmeier, 98.

authored an article to take issue with the Eckmann v. Board of Education of Hawthorn School District[67] decision. This case is unique in the case law dealing with dismissal for immorality based on unwed pregnancy in that the plaintiff was pregnant as the result of rape. This decision upheld a jury's verdict which overruled the school district's dismissal and awarded Eckmann compensatory damages of 3.3 million dollars. In his article Sacken expressed concern about the impact that this verdict would have on other school boards. In his words: "While the outcome in this case is both desirable and legally defensible, this general constitutional principle could work intolerable mischief for school boards and represents an unnecessary judicialization of a complex social question, more appropriate to resolution in another governmental forum."[68] In his discussion of the outcome, he expressed concern about another issue:

> The verdict ultimately turned on a quite problematic legal proposition: that a teacher has a fundamentally protected constitutional right "to conceive and raise her child out of wedlock without unwarranted state (school board) intrusion." That right was characterized by the court as contained within the constitutional concept of substantive due process, and more specifically, as a component of the modern constitutional doctrine of privacy.[69]

Sacken also pointed out that this case embodies a potential paradox of the privacy concept:

> As a teacher appearing daily before her junior high school students, Eckmann most likely could not preserve her pregnancy as

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[67]636 F. Supp. 1214 (ND. Ill. 1986).

[68]Donal M. Sacken, "Eckmann v. Board of Education of Hawthorn School District: Bad Management Makes Bad Law," Journal of law and Education 17, no. 2 (Spring 1988): 281.

[69]Ibid., 283.

> a "private" decision. The consequences of her horrendous experience, and of her subsequent decision to bear her child, would become evident. Unlike other teachers, her alleged "immoral" conduct could not be cabined within her private life.[70]

Sacken also expressed concern that the virtually absolute protection this verdict gave unwed teachers would lead to these teachers modeling values and behaviors which were contrary to educational goals and social policy in many communities. He offered the opinion that ". . . the status of the unwed, pregnant teacher, much like that of the homosexual teacher, should remain legally fragile."[71] Sacken concluded his analysis of this decision with the following:

> . . . the manifest injustice done to this individual could have been rectified without the court concluding that all teachers enjoy a basic freedom to conceive out of wedlock. Perhaps the horrendous facts spurred the court to this doctrinal excess, but in any event, an egregious managerial judgment should not be met with parallel judicial misjudgment.[72]

Julie K. Underwood wrote an article which is essentially a rebuttal of Sacken's assertions concerning the Eckmann decision. She stated: "I strongly disagree with the argument that the conception and birth of a child out of wedlock should be per se grounds for a teacher's dismissal for immorality, and that the right to privacy should not extend to the decision to bear a child out of wedlock."[73] Underwood proceeded to point out errors in Sacken's logic including: (1) Sacken's extension of this decision to all cases involving dismissal of unwed pregnant teachers dismissed previous judicial authority; (2) the opinion of the court never focused squarely on the constitutional right to privacy;

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[70]Ibid., 285. [71]Ibid., 292. [72]Ibid., 298.

[73]Julie K. Underwood, "The right to Privacy and Unwed Pregnancy," Journal of Law and Education 18, no. 4 (Fall 1989): 537.

and (3) the focus of this decision was the errors made by the defendants in the action. She also pointed out if unwed pregnancy was considered within the constitutionally protected zone of privacy that

> This would not prohibit a district from dismissing an unwed pregnant teacher, but would require evidence of immorality based on constitutionally acceptable criteria. In addition, the district must prove that the alleged immoral behavior has a negative impact on the person's effectiveness as a teacher.[74]

After discussing the right to privacy, immorality, and the function of teachers as role models, Underwood reached the following conclusion:

> Granted, teenage prenancy is a problem in our society which should be addressed. However, it does not appear that dismissing public school teachers who are unwed and pregnant would be a rational solution to that problem. Teachers should act as role models for their students; however, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.
> In sum, it is my contention that a person's decision to conceive and bear a child out of wedlock is within those rights of privacy which have been afforded constitutional protection by the Supreme Court. School districts should be required to respect those rights of privacy even when exercised by a teacher.[75]

Although administrators, parents, and the general public are concerned about the problem of teenage pregnancy in the United States, this does not allow dismissal of unwed pregnant teachers for fear that their presence in the schools constitutes an immoral role model. School boards must show that the dismissal of the teacher was for reasons other than the illegitimate pregnancy. The presence of such a pregnancy does not imply immoral behavior according to the courts.

Sexual Misconduct with Students

There is more agreement in both court decisions and the literature concerning sexual misconduct with students as the basis for dismissal

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[74]Ibid. [75]Ibid., 546.

of a teacher than in any other area discussed in this dissertation. As Landauer and associates pointed out in their discussion of the dismissal of education employees for good cause:

> Sexual misconduct with students may not be engaged in by teachers, and such misconduct justifies removal of the teacher from the classroom. No other category of conduct used as a basis for immorality dismissals has generated such unanimous disapproval in court decisions as sexual misconduct by a teacher with students.[76]

Similarly, Richard D. Strahan and L. Charles Turner stated in their book, The Courts and the Schools, that "Some activities, such as sexual misconduct with students, are clearly grounds for an immorality dismissal."[77]

In his paper on the dismissal of public school teachers for immoral conduct, Floyd Delon observed that the volume of litigation dealing with sexual conduct with students has increased rapidly. He further stated:

> The reasons are no doubt very complex. Some of this reflects the general increase in sexual abuse of children, particularly when elementary school pupils are involved. There appears to be agreement, too, that secondary school students are more sexually aware and active than they were a generation or so ago. It is not difficult to understand how teachers might become involved with their students. The temptation could be especially great for the male teacher who may be only a few years older than his female pupils.[78]

The most detailed examination of this issue is provided by Patricia L. Winks in an article entitled "Legal Implications of Sexual Conduct Between Teacher and Student." She began the article by pointing out:

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[76]Landauer, 155.

[77]Richard D. Strahan and L. Charles Turner, The Courts and the Schools (New York: Longman, 1987), 153.

[78]Delon, 21.

> If there are teachers who, since 1907, have been sent to jail for seducing their students, their names do not appear in the case books. Two conclusions are possible: sexual misconduct between teacher and student does not occur--or students are reluctant to file charges. Anyone who has ever taught school knows that that first conclusion is erroneous . . . education journals are silent about sexual relationships between teachers and student. This unusual reticence is not attributable to ignorance. Among themselves, teachers are a repository of salacious anecdotes. Students, masking their disapproval with worldly wise cynicism, shrug off such behavior as just another variation of teacher's pet. Administrators avoid confrontation in the fervent hope that the parents remain uninformed. Students, teachers, administrators--all participate in the conspiracy of silence.[79]

The reasons for the reluctance to report such incidents are based on a number of factors. Many of these reflect the stereotypical excuse of the greater sexual needs of the male and his "normal response" to attractive young women. A woman often remains silent for fear that her charges will not be believed, as is frequently the case in rape cases. Also, professional loyalty is often cited as an excuse for not reporting these incidents. Much of the recent recognition of the problem of sexual relations between professor and student on college campuses is due to the efforts of students to expose the problem and help victims of sexual harassment deal with the situation effectively.

Winks pointed out that while most adult students who became involved sexually with professors may be said to have made a conscious decision to do so, most younger students may become involved because of psychological needs. She continued:

> Many high school teachers envision their role as both educational and therapeutic. They are often particularly effective counselors because of their daily classroom contact. . . . But the teacher

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[79]Patricia L. Winks, "Legal Implications of Sexual Contact Between Teacher and Student," Journal of law and Education 11, no. 4 (October 1982); 437.

> who assumes a therapeutic role must assume a special responsibility as well. The relationship between a young female student and her male teacher imposes a stringent duty of care. . . . A favorite teacher often fulfills the role of the true, the glamorous, the understanding parent, and becomes the center of the young student's fantasy life. The adolescent girl, reenacting her earliest unqualified love, may transfer her feelings to the teacher. . . . The very fact that this idealized relationship is in essence a parent-child relationship makes an erotic exchange altogether inappropriate, bordering on the incestuous.[80]

She quickly cautioned that

> To define a sexual relationship between teacher and student as simply a manifestation of the student's transference is to direct attention away from the teacher's initiation of that relationship. The teacher, after all, is in control and can set the tone. He is not absolved of responsibility when it is the student whose behavior is seductive. It is up to the teacher to maintain his role of parent and counselor, not abandon it for the role of lover and peer.[81]

In the past, sexual contact between teacher and student was clearly grounds for dismissal for immorality. However, recent constitutional considerations may enable a teacher to argue effectively that his conduct was unrelated to his professional competence in the performance of his duties. In her discussion of this argument, Winks asserted:

> It is my contention that sexual relations between teacher and student, however discreet, have an adverse effect not only on the two principals but on other students and other teachers. A high school teacher who assumes that his involvement with a student is secret ignores at his peril the sexual hypersensitivity of adolescents. Students are far more liable to imagine sexual involvement where it does not exist than to miss the signals between two people who do have an ongoing relationship. . . . The teacher who engages in a sexual relationship with a student is imparting a message not only to that student, but to the student's peers.[82]

Notoriety of the act is often a mitigating factor in the decision to dismiss a teacher for immoral conduct as it affects the effectiveness of the teacher's working relations or classroom performance. The court's

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[80]Ibid., 447. [81]Ibid., 448. [82]Ibid., 460.

decision to uphold the school board's decision to dismiss often hinges on the effect of publicity surrounding the act on the school's general welfare. Winks argued that notoriety should not enter into the decision to dismiss for sexual misconduct with a student:

> The teacher's behavior will not be notorious if the participants, students, and staff are all engaged in a conspiracy of silence. Nor will the parents who learn of a teacher's misconduct with their child want the incident publicized. They will, however, expect prompt action from the school district. Silence on all sides too often engenders indifference. It may be up to the victim to create the notoriety by litigation, if litigation is necessary in order to gain private redress and to direct public attention to a problem which must not be ignored.[83]

Another important point which administrators and school boards should consider was brought out by Winks in this article:

> Although the chances of recurrence of sexual misconduct cannot be predicted, most successful cases against teachers have involved multiple victims. It is safe to generalize that the teacher who has taken advantage of a single student will be emboldened to try again if his behavior has been ignored and unpunished. While the likelihood of repetition in an individual case is entirely speculative, that likelihood is bolstered where a pattern of sexual harassment has already been established. The board of education which does not act upon an individual complaint runs a greater risk of institutional liability in the event of a recurrence.[84]

Courts have consistently imposed liability on school districts for physical injuries incurred by the acts or negligence of their staffs. Liability can also be imposed for emotional injury caused by sexual harassment of students. A recent United States Court of Appeals decision allowed a student to file suit against school employees who knew of the misconduct but did nothing to help the student. This opens a new avenue for students who wish to seek legal remedy for this misconduct.

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[83]Ibid., 461. [84]Ibid., 461.

Winks concluded the article with the following prediction which will have implications for school officials:

> Women need to recognize that silent coping will not defuse incidents of sexual harassment. The only effective response is direct confrontation. Awareness of the legal implications of sexual misconduct between teachers and students will lead women to assert their rights. As women learn to voice their complaints, and men learn to listen to those complaints, sexual pressures now regarded as inevitable concomitants of academic life will be recognized for what they are: barriers to women's equal educational opportunity.[85]

Summary

Historically, sexual misconduct with students led to quick, unchallenged dismissals of teachers. In recent years, teachers have begun to challenge these dismissals requiring school officials to determine a nexus between their relationship with students and their effectiveness in the classroom.

In tracing the history of teaching in the United States, concern over the character and conduct of teachers is a recurrent theme. As a result of these concerns, school officials have tried to require that teachers adhere to a higher moral standard than that required of other citizens. In recent years, attitudes have become more liberal and litigation concerning constitutional rights more frequent. Dismissals for immorality based on sexual misconduct are resulting in teachers appealing to the state and federal courts for clarification of these constitutional issues.

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[85]Ibid., 476-477.

CHAPTER III

ANALYSIS OF STATE STATUTES REGARDING TEACHER DISMISSAL AND REVOCATION OF CERTIFICATION FOR IMMORALITY

State law regulates the certification and dismissal of teachers. There is a great deal of variation in the requirements of the fifty states. Some state statutes are very detailed and, therefore, provide specific causes for revocation of certificates and dismissal of tenured teachers. Other state statutes are more general in nature which allows local school districts more latitude in interpretation. The state statutes for all fifty states were analyzed to determine causes for the revocation of certificates as well as for dismissal procedures of tenured teachers since slightly more than half of the states allow certificates to be revoked upon substantiated charges of immorality. The leading causes for the dismissal of tenured teachers are summarized in Table 1.

State statutes do not differentiate between the various actions that constitute immorality as a cause for dismissal or revocation. Therefore, immorality in general will be the subject of this analysis of state statutes.

The Code of Alabama specifies that the state superintendent has the authority to revoke the teaching certificate of individuals who have been found guilty of immoral conduct or unbecoming or indecent behavior. It also allows cancellation of the teaching contract for any of the following reasons: incompetency; insubordination; neglect

Table 1

Most Frequently Cited Causes for Dismissal of Tenured Teachers

State	Imm.	Cond.	Incomp.	Insub.	Negl.	Disabl.	Ineff.	Cause
Alabama	X		X	X	X			X
Alaska	X		X	X				
Arizona			X					
Arkansas								
California	X	X	X	X		X		
Colorado	X		X	X	X	X		X
Connecticut								
Delaware	X	X	X	X	X			
Florida								
Georgia	X		X	X	X			X
Hawaii	X			X			X	X
Idaho								
Illinois	X		X		X			X
Indiana	X		X	X	X			X
Iowa								
Kansas	X	X	X	X		X	X	
Kentucky	X	X	X	X	X	X	X	
Louisiana	X		X		X			
Maine			X					
Maryland	X	X	X	X	X			
Massachusetts		X	X	X		X	X	X
Michigan								X
Minnesota	X	X		X	X	X	X	X
Mississippi	X		X		X			X
Missouri	X		X	X		X	X	
Montana	X		X	X				
Nebraska	X		X	X		X		X
Nevada	X	X	X		X	X	X	
New Hampshire	X		X	X				
New Jersey		X				X	X	X
New Mexico								
New York	X				X	X		X
North Carolina	X		X	X	X	X		
North Dakota	X	X		X		X	X	
Ohio	X			X			X	X
Oklahoma	X		X		X			
Oregon	X		X	X	X	X	X	
Pennsylvania	X		X		X	X		
Rhode Island		X		X			X	X
South Carolina	X			X	X			
South Dakota	X		X		X			
Tennessee		X	X	X			X	
Texas			X	X				X
Utah								
Vermont		X	X	X	X			
Virginia	X		X	X		X		X
Washington								
West Virginia	X		X	X	X			
Wisconsin	X			X			X	X
Wyoming	X		X	X	X			X
Total	33	13	32	30	22	16	14	19
Percentage	79	31	76	71	52	38	33	45

Key to Abbreviations Used

Imm.	Immorality, indecent behavior
Cond.	Conduct unbecoming a professional (or teacher) , unprofessional conduct, misconduct in office
Incomp.	Incompetency, inadequate performance
Insub.	Insubordination, noncompliance with reasonable rules and regulations
Negl.	Neglect of duty, negligence
Disabl.	Physical or mental disability or incapacity
Ineff.	Inefficiency
Cause	Cause, other good and just cause, due and sufficient cause, reasonable and just cause

of duty; immorality; justifiable decrease in the number of teaching positions; or other good or just cause with the exception of dismissals based on political or personal reasons.[1]

Alaska statutes list four causes for revocation and suspension: incompetency; immorality; substantial noncompliance with the school laws of the state or the regulations of the department; or upon determination of the Professional Teaching Practices Commission that there has been a violation of ethical or professional standards or contractual obligations. Teachers may be dismissed for incompetency; immorality; or substantial noncompliance with the school laws of the state, regulations or bylaws of the department, bylaws of the district, or written rules of the superintendent. As noted earlier, Alaska is one of the few states to define immorality. It is defined as the commission of an act which constitutes a crime involving moral turpitude.[2]

Arizona statutes provide detailed procedures for the dismissal of tenured employees. However, the only cause for dismissal specified in the statutes is inadequacy of performance. Certificate revocation is not addressed in the statutes.[3]

The state board of education in Arkansas may revoke the license of a teacher for any cause, but only after a hearing before the school board. Termination of a teacher during the term of the contract is

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[1]Code of Alabama 16-23-5, 16-24-8 (1988).

[2]Alaska Statutes 14.20.030, 14.20.140 (1987).

[3]Arizona Revised Statutes 15-536 (1984).

allowed for any cause which is not arbitrary, capricious, or discriminatory.[4]

Although it does not address causes for the revocation of certificates, the California Education Code lists the following causes for dismissal of permanent employees: immoral or unprofessional conduct; committing, aiding, or advocating acts of criminal syndicalism; dishonesty; incompetency; evident unfitness for service; physical or mental condition rendering him unfit to instruct or associate with children; persistent refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools; conviction of a felony or any crime involving moral turpitude; knowing membership in the Communist party; and alcoholism. Also included are lengthy provisions for the dismissal process.[5]

Grounds for revoking a certificate in Colorado are a determination of professional incompetence or unethical behavior. Dismissal of tenured teachers is allowed for the following causes: physical or mental disability; incompetency; neglect of duty; immorality; conviction of a felony or the acceptance of a guilty plea or a plea of nolo contendere to a felony; insubordination; or other good and just cause.[6]

Connecticut statutes list five reasons for revocation of teaching certificates: the holder used fraud or misrepresentation to obtain the certificate; the holder has persistently neglected to perform the

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[4]Arkansas Statutes 6:80.1214, 6:80.1266.4 (1987).

[5]California Education Code 44932 (1989).

[6]Colorado Revised Statutes 22-60-110, 22-63-116 (1988).

duties for which certification was granted; the holder is professionally unfit to perform the duties for which certification was granted; the holder is convicted in a court of law of a crime involving moral turpitude or of any other crime of such nature that in the opinion of the board would impair the standing of certificates issued if the holder was allowed to retain certification; or other due and sufficient cause. Lengthy procedures for termination of tenured employees are given. However, no specific causes for dismissal are included.[7]

In Delaware, revocation of professional status certificates may occur when the teacher is dismissed for immorality, misconduct in office, incompetency, willful neglect of duty, or disloyalty. The reasons for termination include the preceding five causes plus willful and persistent insubordination and reduction in the number of teachers required due to decreased enrollment or decrease in educational services.[8]

The Education Practices Commission in Florida has several options in the area of certificate suspension or revocation. The Commission can suspend the teacher's certificate for up to three years or revoke for either a period of up to ten years or permanently if the employee has used fraudulent means to obtain the certificate; has proven to be incompetent to teach or to perform the duties required as an employee of the public school system; has been guilty of gross immorality or an act involving moral turpitude; has had a certificate revoked in another state; has been convicted of a misdemeanor, felony, or other

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[7] Connecticut Revised Statutes Annotated 10-145, 10-151 (1986).

[8] Delaware Code Annotated 14:1204, 14:1411 (1981).

criminal charge other than minor traffic violations; has been found guilty upon investigation of personal conduct which severely reduces that person's effectiveness as an employee of the school board; has breached a contract; or has otherwise violated the provisions of law or the rules of the State Board of Education. The statutes do not address specific causes for dismissal of employees.[9]

Listed in the Official Code of Georgia are eight reasons for terminating or suspending the contract of employment: incompetency; insubordination; willful neglect of duties; immorality; inciting, encouraging, or counseling students to violate any valid state law, municipal ordinance, or policy or rule of the local board of education; to reduce staff due to loss of students or cancellation of programs; failure to secure and maintain necessary educational training; or any other good and sufficient cause. The state board is authorized to provide procedures for revoking or denying a certificate for good cause but only after an investigation is held and the certificate holder has been provided notice and an opportunity for a hearing.[10]

Statutes for the state of Hawaii allow the department of education to revoke any certificate when satisfied that the holder does not possess the necessary qualifications for certification. Also listed are the following reasons for discharge or demotion of tenured teachers: inefficiency or immorality; willful violations of policies and regulations of the department of education; decrease in the number of pupils; or any other good and just cause.[11]

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[9] Florida Statutes Annotated 231.28 (1989).

[10] Official Code of Georgia 20-2-200, 20-2-940 (1988).

[11] Hawaii Revised Statutes 297-3, 297-11 (1986).

Idaho teachers may have their certificates suspended or revoked for gross neglect of duty; incompetency; breach of teaching contract; giving false information on the application for certification; revocation or denial of certification by another state for reasons which are grounds for revocation in Idaho; any reason which would have disqualified the person from initial certification; or willful violation of professional codes or standards of ethics and conduct adopted by the state board. District superintendents are instructed to report to the office of certification the name of any educator who is dismissed or otherwise severed from employment for revocation or suspension of the teaching certificate. Statutes also give the procedure to be followed in the termination of employees but do not list specific causes for this action.[12]

In Illinois, any certificate may be suspended for a period not to exceed one year upon evidence of immorality, a condition of health detrimental to the welfare of pupils, incompetency, unprofessional conduct, neglect of any professional duty, willful failure to report suspected child abuse or neglect, or other just cause. Teachers may be dismissed for incompetency, cruelty, negligence, immorality or other sufficient cause. The statutes also allow for the dismissal of a teacher who has not satisfactorily completed a remediation plan or who, in the opinion of the officials of the school district, is not qualified to teach. Provision is also made for the dismissal of an employee when the district officials feel the dismissal is in the best interest

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[12] Idaho Code 33-1208 (1979).

of the school. Dismissal for temporary mental or physical incapacity and for marriage are specifically excluded by these statutes.[13]

License revocation and suspension in Indiana is allowed for immorality, misconduct in office, incompetency, or willful neglect of duty. Indefinite (tenure) contracts may be cancelled for immorality, insubordination, neglect of duty, incompetency, justifiable decrease in the number of teaching positions, or other good and just cause.[14]

The Iowa Code Annotated spells out the dismissal process including request for hearing and appeals either to an adjudicator or the courts. No specific causes for revocation of credentials or dismissal of teachers are delineated.[15]

Kansas statutes allow the cancellation of the teacher's certificate on the grounds of immorality, gross neglect of duty, annulling written contracts with boards of education without the consent of the board, or for any cause which would have prevented receipt of a certificate initially. Causes for discharge include immoral character, conduct unbecoming an instructor, insubordination, failure to obey reasonable rules of the board of education, inefficiency, incompetence, physical unfitness or failure to comply with the reasonable requirements of the board of education as may be required to show normal improvement and evidence of professional training.[16]

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[13] Illinois Annotated Statutes 122:21-23, 122:11-22.4 (1989).

[14] Burns Indiana Statutes Annotated 20-6.1-3-7, 10-6.1-4-10 (1976).

[15] Iowa Code Annotated 279.15 (1979).

[16] Kansas Revised Statutes 72-1383, 72-5406 (1988).

Statutes in the state of Kentucky permit revocation of teaching certificates on the written recommendations of the superintendent of public instruction in cases involving immorality, misconduct in office, incompetency, or willful neglect of duty. Certificates may also be revoked if it is determined that the certificate applicant presented false information to secure that certificate. Contracts of tenured teachers may be terminated for the following reasons: insubordination; immoral character or conduct unbecoming a teacher; physical or mental disability; inefficiency, incompetency, or neglect of duty.[17]

In the state of Louisiana a permanent teacher may not be removed from office except upon written and signed charges of willful neglect of duty, immorality, incompetency, dishonesty, or of being a member of any group, organization, movement or corporation that is by law prohibited from operating in the state and then only if found guilty of the charges at a hearing by the local board of education. No causes for revocation of certificates are given in the statutes.[18]

Maine statutes concerning education are very brief in comparison with those from other states. Grounds for revocation or suspension of a certificate are: evidence that a person has injured the health or welfare of a child through physical or sexual abuse or exploitation; and other grounds as may be established by the state board in its rules relating to criminal offenses. Dismissal is allowed when the school

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[17] Kentucky Revised Statutes 161.120, 161.790 (1985).

[18] Louisiana Revised Statutes Annotated 17.441, 17.443 (1982).

board decides, after investigation, that the teacher proves unfit to teach or that the teacher's services are unprofitable to the school.[19]

Maryland's state statutes permit the suspension or dismissal of public school employes for: immorality; misconduct in office, including failure to report suspected child abuse; insubordination; incompetency; and willful neglect of duty. Revocation of certification is not addressed in the statutes.[20]

A teaching certificate from the state of Massachusetts may be revoked for cause pursuant to the procedures established by the rules and regulations of the State Board of Education. Discharge of teachers and superintendents may occur for the following: inefficiency, incompetency; incapacity; conduct unbecoming a teacher or superintendent; insubordination; or other good cause.[21]

Michigan statutes on discharge or demotion of teachers on continuing contract cite only reasonable and just cause as cause for this action. No information is given on revocation of certificates.[22]

In Minnesota, a license to teach may be revoked or suspended for immoral character or conduct; failure to teach for the term of the contract without justifiable cause; gross inefficiency or willful neglect of duty; failure to meet licensing requirements; or fraud or misrepresentation in obtaining a license. Grounds for termination at the end of

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[19]Maine Revised Statutes Annotated 20-A sc. 13020 (1983).

[20]Annotated Code of Public General Laws of Maryland Education 6-101, 6-202 (1989).

[21]Annotated Laws of Massachusetts Chapter 71, Sec. 38G and 42 (1978).

[22]Michigan Statutes Annotated 15.2001 (1984).

a contract year for employees on continuing contract include: inefficiency; neglect of duty or persistent violation of school laws, rules, regulations, or directives; conduct unbecoming a teacher which materially impairs the teacher's educational effectiveness; and other good and sufficient grounds rendering the teacher unfit to perform the required duties. The contract may not be terminated for any of these reasons unless the employee has been notified of the deficiency and has been given adequate time to remedy the problem. The statutes allow immediate discharge for any of the following: immoral conduct, insubordination, or conviction of a felony; conduct unbecoming a teacher which requires immediate removal of the teacher from the classroom or other duties; failure to teach without first securing the written release of the school board; gross inefficiency which the teacher has failed to correct after reasonable written notice; willful neglect of duty; or continuing physical or mental disability subsequent to a twelve month leave of absence and inability to qualify for reinstatement.[23]

Certificated employees in Mississippi may be dismissed by the superintendent of schools for incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of pupils or other good cause. In the event that an employee is arrested, indicted, or otherwise charged with a felony, his presence is deemed to constitute a disruption of normal school operations and he can be removed immediately with a hearing by the school board to take place within five to thirty days of the suspension or discharge. A teacher's certificate will be suspended

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[23]Minnesota Statutes Annotated 125.09, 125.12 (1966).

for a period of one year for breach of contract or abandoning his employment.[24]

The Missouri state board of education may refuse to issue, revoke, or suspend a license to teach upon satisfactory proof of incompetency, cruelty, immorality, drunkenness, neglect of duty, or the annulling of a written contract with the local board of education without the consent of the majority of the members of the board. Local school districts may terminate a permanent teacher for physical or mental condition rendering him unfit to instruct or associate with children; immoral conduct; incompetency, inefficiency, or insubordination in the line of duty; willful or persistent violation of, or the failure to obey, the school laws of the state or the published regulations of the board of education of the employing school district; excessive or unreasonable absence from performance of duties; or conviction of a felony or a crime involving moral turpitude.[25]

In Montana, teaching certificates may be suspended or revoked for any of the following reasons: making any false statements of material fact in the application for a certificate; any reason which would have prevented initial certification if known at that time; incompetency; gross neglect of duty; conviction of, entry of a guilty verdict, a plea of guilty, or a plea of no contest to a criminal offense involving moral turpitude in this state or any other state; immoral conduct related to the teaching profession; substantial and material nonperformance

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[24]Mississippi Code Annotated 125.09, 125.12 (1966).

[25]Vernon's Annotated Missouri Statutes 168.071, 168.114 (1965).

of the employment contract between the teacher and the trustees of the school district without good cause or written consent of the trustees; and the denial, revocation, suspension, or surrender of a teacher certificate in another state for any reason constituting grounds for similar action in this state. The trustees of the school district may dismiss a teacher before the expiration of his employment contract for immorality, unfitness, incompetence, or violation of the adopted policies of the trustees of the district.[26]

The certificates of teachers and administrators in Nebraska may be revoked for incompetency, immorality, intemperance, cruelty, crime against the law of the state, neglect of duty, general neglect of the business of the school, unprofessional conduct, physical or mental incapacity, or breach of contract. Cancellation of an indefinite contract may be made for the following causes: incompetency; physical disability or sickness of any type which interferes with the performance of duty; insubordination, which is defined as a willful refusal to obey the school laws of the state, rulings of the State Board of Education, or reasonable rules and regulations of the local district; immorality; failure to give evidence of professional growth; justifiable decrease in the number of teaching positions; or any other good and just cause that is not for political or personal reasons.[27]

Nevada's state board of education has the authority to suspend or revoke any state certificate of any teacher after notice and an

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[26]Montana Code Annotated 20-4-110, 20-4-207 (1979).

[27]Revised Statutes of Nebraska 79-1234, 79-1260 (1987).

opportunity for a hearing for any of the following: immoral or unprofessional conduct; evident unfitness for service; physical or mental incapacity which renders the teacher unfit for service; conviction of a felony or crime involving moral turpitude; conviction of a sex offense in which the victim is a student enrolled in any Nevada public school district; advocating overthrow of the state or national government by force, violence, or unlawful means; and persistent defiance of or refusal to obey the regulations of the state board of education or the superintendent of public instruction which define and govern the duties of teachers. The statutes also cite the following reasons for the dismissal, suspension or nonrenewal of teachers and administrators: inefficiency; immorality; unprofessional conduct; neglect of duty; physical or mental incapacity; inadequate performance; and evident unfitness to teach.[28]

In New Hampshire, the school board may dismiss any teacher found by them to be immoral or incompetent, or one who will not conform to regulations prescribed by that body. The statutes require that the teacher be notified of the cause for dismissal and be granted a full and fair hearing. Any teacher who is convicted of a felony involving child pornography or felonious physical assault or any sexual assault will have his certificate revoked by the state board of education.[29]

New Jersey statutes do not allow the dismissal of tenured personnel except for inefficiency, incapacity, unbecoming conduct, or other just

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[28]Nevada Revised Statutes Annotated 391.330, 391.213 (1986).

[29]New Hampshire Revised Statutes 189:14-c, 189:13 (1986).

cause, and then only after a hearing by the commissioner of education or his designee. Statutes do not specify causes for revocation of certificates.[30]

Statutes in New Mexico outline the dismissal process but do not provide specific causes that are allowed for dismissal. However, local school boards may not dismiss tenured staff if the decision is based upon grounds that are arbitrary, capricious, or legally impermissible. Certificates may be revoked or suspended for incompetency, immorality, or any good and just cause.[31]

Education laws in the state of New York allow a teacher to be removed during the term of a contract for neglect of duty, incapacity to teach, immoral conduct, or other reason which is held to be sufficient cause when appealed to the commissioner of education but do not specify causes for revocation of credentials to teach.[32]

North Carolina statutes provide a relatively detailed list of grounds for teacher dismissal: inadequate performance; immorality; insubordination; neglect of duty; physical or mental incapacity; habitual or excessive use of alcohol or nonmedical use of a controlled substance; conviction of a felony or crime involving moral turpitude; advocating the overthrow of the government; failure to fulfill the duties and responsibilities imposed upon teachers by the statutes of the state; failure to comply with such reasonable requirements as the

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[30]New Jersey Statutes Annotated 18A:6-10, 18A:6-38 (1989).

[31]New Mexico Statutes Annotated 22-10-12 (1989).

[32]McKinney's Consolidated Laws of New York Annotated 3004, 3020 (1981).

board may prescribe; any cause which constitutes grounds for revocation of the teaching certificate (although the statutes do not address these grounds); justifiable decrease in the number of positions; failure to maintain the teaching certificate at the current status; and failure to pay money owed to the state. Revocation of certification is not included in the statutes.[33]

The superintendent of public instruction in the state of North Dakota has the right to suspend, revoke, or annul a teacher's certificate for incompetency, immorality, intemperance, or cruelty. Immediate dismissal is allowed when the following causes are involved: immoral conduct, insubordination, or conviction of a felony; conduct unbecoming a teacher which requires immediate removal from classroom duties; failure without justifiable cause to perform contracted duties; gross inefficiency which the teacher has failed to correct after reasonable written notice; or continuing physical or mental disability which renders the teacher unfit or unable to perform his duties as a teacher.[34]

Ohio statutes state that a tenured teacher may not be terminated except for gross inefficiency or immorality; willful and persistent violations of reasonable regulations of the board of education; or other good and just cause. Revocation of certification is allowed in cases involving a finding of incompetence.[35]

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[33]General Statutes of North Carolina 115C-325 (1987).

[34]North Dakota Century Code Annotated 15-36-15, 15-47-38 (1981).

[35]Page's Ohio Revised Code Annotated 3319.16, 3319.31 (1990).

Tenured teachers in Oklahoma may be dismissed or not reemployed for immorality; willful neglect of duty; cruelty; incompetency; teaching disloyalty to the American constitutional form of government; conviction of a felony; or any reason involving moral turpitude. Certificates may be revoked for the same causes. Statutes also allow dismissal for public homosexual conduct.[36]

Oregon state statutes allow the Teacher Standards and Practices Commission to revoke certificates upon complaint charging the teacher with gross neglect of duty or any gross unfitness to teach. Grounds for dismissal of permanent teachers cited are inefficiency; immorality; insubordination; neglect of duty; physical or mental incapacity; conviction of a felony or of a crime involving moral turpitude; inadequate performance; failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth; or any cause which constitutes grounds for revocation of the teacher's certificate.[37]

Causes for termination of a teacher's contract in Pennsylvania include immorality; incompetency; intemperance; cruelty; persistent negligence; mental derangement; advocation of or participation in un-American or subversive doctrines; and willful violation of the school laws of Pennsylvania. The Superintendent of Public Instruction has the right to annul the certificate of individuals for incompetency, cruelty, immorality, or intemperance.[38]

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[36]Oklahoma Statutes Annotated 70-6-103 (1989).

[37]Oregon Revised Statutes 342.175, 342.865 (1989).

[38]Purdon's Pennsylvania Statutes Annotated 24:11-1122, 24:12-1211 (1962).

The laws of the state of Rhode Island do not include reasons for the annulment of certificates. Rather, it is left to the commissioner of education to develop regulations for that process. The school committee of any town may dismiss any teacher for refusal to conform to regulations of that governing body, or for other just cause. Special rules for Woonsocket and Cumberland allow dismissal of a teacher by a two-thirds vote of the entire school committee for violation of law, flagrant or persistent violation of rules established by those school committees, inefficiency, incapacity, insubordination, conduct unbecoming a teacher, or other just cause.[39]

The South Carolina State Board of Education has the authority to revoke or suspend the certificate of any person for just cause. Just cause is defined as any of the following: incompetence; willful neglect of duty; willful violation of the rules and regulations of the State Board of Education; unprofessional conduct; drunkenness; cruelty; crime against the law of this state or of the United States; immorality; any conduct involving moral turpitude; dishonesty; evident unfitness for the position for which employed; or sale or possession of narcotics. Any teacher may be dismissed for evident unfitness for teaching which may be manifested by conduct such as, but not limited to, the following: persistent neglect of duty; willful violation of the rules and regulations of the district board of trustees; drunkenness; conviction of a violation of law; gross immorality; dishonesty; and the illegal use, sale, or possession of drugs or narcotics.[40]

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[39] General Laws of Rhode Island 16-11-4, 16-12-6 (1988).

[40] Code of Laws of South Carolina 59-25-160, 59-25-430 (1990).

South Dakota states grant the superintendent of elementary and secondary education the authority to revoke or suspend the certificate of a teacher for any cause which would have prevented its issue, or after dismissal for violation of contract, gross immorality, incompetency, or flagrant neglect of duty. The local school boards may dismiss any teacher at any time for the same causes.[41]

Teachers in Tennessee may be dismissed for the following causes: incompetence; inefficiency; unprofessional conduct; and insubordination. Although the statutes do not address revocation of the certificate, no one can receive certification in the state unless he has good moral character and is not addicted to intoxicants or narcotics.[42]

In Texas, certificates to teach can be suspended or cancelled by the state commissioner of education under any of the following circumstances; on satisfactory evidence that the holder is conducting his school or teaching activities in violation of the laws of the state; on satisfactory evidence that the holder is a person unworthy to instruct youth; or on complaint made by the board of trustees that the holder has abandoned his written contract without good cause. Dismissal during the school year may result when the teacher failed to comply with official directives and established school board policy; failed to maintain routine classroom management and discipline; or had constant problems with students, teachers, parents, and administrative personnel as to

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[41]South Dakota Codified Law 13-42-9, 13-43-15 (1982).

[42]Tennessee Annotated Code 49-5-511 (1983).

attitudes and methods. Also, a tenured teacher may be released from the teaching contract at the end of the year or returned to probationary status for incompetency; failure to comply with reasonable requirements for achieving professional growth and improvement; willful failure to pay debts; habitual use of addictive drugs; excessive use of alcoholic beverages; necessary reduction in personnel by the school district; failure to pass required certification examinations; or for good cause as determined by the local school board which includes failure of the teacher to meet accepted standards of conduct.[43]

Although Utah law specifies that certificates will be revoked or suspended for immoral, unprofessional, or incompetent conduct or evident unfitness for teaching, specific causes for dismissal of tenured teachers are not given in the guidelines for termination.[44]

Superintendents in Vermont may suspend a teacher under contract on the grounds of incompetence, conduct unbecoming a teacher, failure to attend to duties, or failure to carry out reasonable orders and directions of the superintendent and school board. After a hearing, the school board shall affirm or reverse the suspension or take other action which seems just including dismissal. Revocation of certification is not addressed.[45]

Virginia statutes specify that a teacher may be dismissed or placed on probation for incompetency, immorality, noncompliance with school

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[43] Vernon's Texas Codes Annotated 13.046, 13/109 (1972).

[44] Utah Code Annotated 53A-6-104, 53A-8-104 (1989).

[45] Vermont Statutes Annotated 16:53-1752 (1982).

laws and regulations, disability as shown by competent medical evidence, conviction of a felony or a crime of moral turpitude, or other good and just cause. Although the statutes include regulations governing certification, causes for revocation are not included.[46]

The statutes of Washington outline the procedures for notification of the employee of discharge and for hearings but do not give specific causes for either revocation of certificates or dismissal of tenured employees.[47]

Teaching certificates in the state of West Virginia may be revoked by the state superintendent after ten days' notice and upon proper evidence for the following reasons: drunkenness; untruthfulness; immorality; any physical, mental, or moral defect which would render him unfit for the proper performance of his duties as a teacher; neglect of duty or refusal to perform same; using fraudulent, unapproved, or insufficient credit; or any other cause which would have justified the withholding of an initial certificate. Local boards of education have the authority to suspend or dismiss any teacher at any time for immorality, incompetency, cruelty, insubordination, intemperance, or willful neglect of duty.[48]

After providing written notice of the charges and of an opportunity for defense, any certificate or license to teach issued by the state of Wisconsin may be revoked by the state superintendent for incompetency

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[46]Code of Virginia Annotated 22.1-298, 22.1-307 (1985).

[47]West's Revised Code of Washington Annotated 28A.58.450 (1982).

[48]West Virginia Code Annotated 18A-2-8, 18A-3-6 (1988).

or immoral conduct on the part of the holder. Further, teachers may be dismissed or refused employment for inefficiency, immorality, willful and persistent violation of reasonable regulations of the governing body of the school system or school, or other good cause.[49]

Finally, in Wyoming, teaching certificates may be revoked or suspended for incompetency, immorality, other reprehensible conduct, or gross neglect of duty. Teachers may be dismissed or suspended for incompetency, neglect of duty, immorality, insubordination, or any other good or just cause.[50]

As noted earlier in this chapter, the most frequently cited causes for the dismissal of tenured teachers in the United States are summarized in Table 1. Eight of the fifty states do not include specific causes for dismissal in their statutes and are, therefore, not included in the calculating of percentages. Of the remaining forty-two states, thirty-three (79%) permit the dismissal of tenured teachers for immorality. Thirty-two states (76%) permit dismissal for incompetency. Thirty states (71%) allow dismissal for insubordination. Neglect of duty is included in the statutes of twenty-two states (52%). Good and just cause, due and sufficient cause, and reasonable and just cause are cited in nineteen states (45%). The other leading causes and their frequency of inclusion in statutes are unprofessional conduct or misconduct in office, thirteen states (31%); physical or mental disability, sixteen states (38%); and inefficiency, fourteen states (33%).

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[49] West's Wisconsin Statutes Annotated 118.19, 118.23 (1973).

[50] Wyoming Statutes Annotated 22-7-303, 21-7-110 (1987).

Table 2 summarizes state statutes regarding dismissal for immorality and related areas which are used for dismissal in instances of questionable conduct. Nine of the forty-two states which list specific causes for dismissal do not list immorality specifically as a cause for dismissal. Five of those states do allow dismissal for conduct unbecoming a professional or misconduct in office which could include immoral conduct of a sexual nature. Michigan is one of the remaining five states which cites specific causes not including immorality. However, the Michigan statutes authorize dismissal for reasonable and just cause which could be utilized to dismiss for immorality. Three states that do not list specific causes for dismissal do authorize revocation of teaching certificates for either immorality or moral turpitude. Since revocation of certification would lead to dismissal, immoral conduct would be the cause for that dismissal. Therefore, within this context, Table 2 indicates there are forty-five states with statutory authority to dismiss tenured teachers for immorality on grounds of sexual misconduct. It is also conceivable that similar dismissal would be allowed in some of the five states which do not contain specific provisions for the dismissal of teachers on grounds of immorality.

The leading causes for revocation of certificates are presented in Table 3. Thirty of the fifty states address specific causes for revoking or suspending certification. Of these states, twenty-three (77%) revoke or suspend certification upon substantiated charges of immorality. The other leading causes are incompetency, twenty-four states (80%); unprofessional conduct and misconduct in office, eleven states (37%); neglect of duty, seventeen states (57%); and breach or violation of written contract, eleven states (37%).

Table 2

Immorality and Related Causes for the Dismissal of Tenured Teachers

State	Immorality	Moral Turpitude	Conduct	Cause
Alabama	X			X
Alaska	X			
Arizona				
Arkansas				
California	X	X	X	
Colorado	X			X
Connecticut				
Delaware	X		X	
Florida				
Georgia	X			X
Hawaii	X			X
Idaho				
Illinois	X			X
Indiana	X			X
Iowa				
Kansas	X		X	
Kentucky	X		X	
Louisiana	X			
Maine				
Maryland	X		X	
Massachusetts			X	X
Michigan				X
Minnesota	X		X	X
Mississippi	X			X
Missouri	X	X		
Montana	X			
Nebraska	X			X
Nevada	X		X	
New Hampshire	X			
New Jersey			X	X
New Mexico				
New York	X			X
North Carolina	X	X		
North Dakota	X		X	
Ohio	X			X
Oklahoma	X	X		
Oregon	X	X		
Pennsylvania	X			
Rhode Island			X	X
South Carolina	X			
South Dakota	X			
Tennessee			X	
Texas				X
Utah				
Vermont			X	
Virginia	X	X		X
Washington				
West Virginia	X			
Wisconsin	X			X
Wyoming	X			X
Total	33	6	13	19

Key to Terms

Immorality	Immorality, indecent behavior
Moral turpitude	Conviction of a crime involving moral turpitude
Conduct	Conduct unbecoming a professional (or teacher),unprofessional conduct, misconduct in office
Cause	Cause, other good and just cause, due and sufficientcause, reasonable and just cause

Table 3

Most Frequently Cited Causes for Revocation of Certificates

State	Immoral.	Conduct	Incomp.	Neglect	Contract
Alabama	X	X			
Alaska	X		X		X
Arizona					
Arkansas					
California					
Colorado			X		
Connecticut			X	X	
Delaware	X	X	X	X	
Florida	X	X	X		X
Georgia					
Hawaii					
Idaho			X	X	X
Illinois	X	X	X	X	
Indiana	X	X	X	X	
Iowa					
Kansas	X			X	X
Kentucky	X	X	X	X	
Louisiana					
Maine					
Maryland					
Massachusetts					
Michigan					
Minnesota	X			X	X
Mississippi					X
Missouri	X		X	X	X
Montana	X		X	X	X
Nebraska	X	X	X	X	X
Nevada	X	X	X		
New Hampshire					
New Jersey					
New Mexico	X		X		
New York					
North Carolina					
North Dakota	X		X		
Ohio			X		
Oklahoma	X		X	X	
Oregon			X	X	
Pennsylvania	X		X		
Rhode Island					
South Carolina	X	X	X	X	
South Dakota	X		X	X	X
Tennessee					
Texas					X
Utah	X	X	X		
Vermont					
Virginia					
Washington					
West Virginia	X			X	
Wisconsin	X		X		
Wyoming	X	X	X	X	
Total	23	11	24	17	11
Percentage	77	37	80	53	37

Key to Abbreviations and Terms Used

Immoral	Immorality, indecent behavior, moral turpitude
Conduct	Conduct unbecoming a professional (or teacher) , unprofessional conduct, misconduct in office
Incomp.	Incompetency, inadequate performance, unfitness to teach
Neglect	Neglect of duty, negligence
Contract	Violation, breach, or abandonment of the written contract

Table 4 summarizes the statutes as to immorality and other related causes for revocation of certificates. Only seven states (out of the thirty which cite specific causes) do not list immorality as a cause. One of those states, Georgia, cites other cause (which could be used for revocation based on immoral conduct) as a reason for revocation or suspension of certificates. Therefore, certificates can be revoked or suspended for immorality or related charges in twenty-four of the fifty states.

Summary

Immorality is the most frequently cited cause for the dismissal of teachers and the second most frequently cited cause for the revocation of a teaching certificate. Of the forty-two states which list specific causes, thirty-three include immorality as a cause for dismissal. Dismissal could result on grounds of immorality and other related causes in forty-five of the fifty states. In twenty-three states, substantiated charges of immorality can lead to revocation or suspension of teaching credentials. Contrary to commonly held beliefs in the education arena, state statutes do allow teachers to be dismissed for immorality based on sexual misconduct. As Chapter IV will show, many of these dismissals are leading to litigation in both state and federal courts.

Table 4

Immorality and Related Causes for Revocation of Certificates

State	Immorality	Moral Turpitude	Conduct	Cause
Alabama	X		X	
Alaska	X			
Arizona				
Arkansas				
California				
Colorado				
Connecticut		X		X
Delaware	X		X	
Florida	X	X	X	
Georgia				X
Hawaii				
Idaho				
Illinois	X		X	X
Indiana	X		X	
Iowa				
Kansas	X			
Kentucky	X		X	
Louisiana				
Maine				
Maryland				
Massachusetts				
Michigan				
Minnesota	X			
Mississippi				
Missouri	X	X		
Montana	X			
Nebraska	X		X	
Nevada	X	X	x	
New Hampshire				
New Jersey				
New Mexico	X			X
New York				
North Carolina				
North Dakota	X			
Ohio				
Oklahoma	X	X		
Oregon				
Pennsylvania	X			
Rhode Island				
South Carolina	X	X	X	
South Dakota	X			
Tennessee				
Texas				
Utah	X		X	
Vermont				
Virginia				
Washington				
West Virginia	X			
Wisconsin	X			
Wyoming	X		X	
Total	23	6	11	4

Key to Terms

Immorality	Immorality, indecent behavior
Moral turpitude	Conviction of a crime involving moral turpitude
Conduct	Conduct unbecoming a professional (or teacher), unprofessional conduct, misconduct in office
Cause	Cause, other good and just cause, due and sufficient cause, reasonable and just cause

CHAPTER IV

LEGAL ASPECTS OF TEACHER DISMISSAL FOR IMMORALITY ON GROUNDS OF SEXUAL MISCONDUCT

Teacher dismissals for immorality on grounds of sexual misconduct have frequently been appealed to the courts for clarification of both statutory and constitutional issues. Only a few of these cases have been heard by the United States Supreme Court which has resulted in a reliance on federal courts of appeals and state supreme courts for landmark rulings. The focus of this analysis of legal cases is the timespan from 1970-1990.

The facts of each case are discussed and the decision of the court is presented. Also, implications of the case for both the courts and practicing education officials are included.

The cases are divided into the following sections: homosexual conduct with adults; heterosexual misconduct with adults; unwed pregnancy; sexual misconduct with students; and unorthodox behavior. For the purpose of tracing judicial precedent in each area, the cases are arranged in chronological order.

Homosexual Conduct with Other Adults

Homosexual conduct by teachers has been one of the most emotionally charged issues in teacher dismissals for immorality on grounds of sexual misconduct in recent years. Although societal attitudes have become more tolerant in the past two decades, prejudice against these

individuals still continues. The issue is hotly debated when the individual involved is a public school teacher.

Before discussing the more recent cases dealing with the dismissal of teachers for immorality based on homosexuality, attention must be focused on two cases from the late 1960's: Sarac v. State Board of Education[1] and Morrison v. State Board of Education.[2] Both of these cases are frequently cited in other court decisions involving homosexuality as well as being cited in decisions involving other types of sexual misconduct.

Sarac v. State Board of Education involved the revocation of Thomas Sarac's teaching credentials by the state board of education after an incident involving public homosexual behavior. Sarac was arrested on July 28, 1962, in Long Beach, California, and charged with a violation of the state penal code for rubbing or fondling the private sexual parts of another male (who happened to be a police officer) with the intent to arouse sexual desires. The plaintiff admitted that he had had a homosexual problem for the last twenty years and was reported to have pled guilty to the charges against him. The state board of education conducted a hearing and revoked his credentials to teach in the California public school system. Sarac appealed this decision to the Superior Court of Los Angeles County which denied relief. Sarac again appealed to the Court of Appeals of California claiming that the section of the penal code under which he pled guilty was unconstitutionally vague; that he had not pled guilty to the charges but had

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[1]57 Cal. Rptr. 69 (1967). [2]461 P.2d 375 (1969).

merely refrained from contesting the charges; and that the state board of education had acted unconstitutionally in revoking his credentials which constituted cruel and unusual punishment as well as double punishment for the same offense. The Court of Appeals found that the testimony supported Sarac's conviction for committing a homosexual act on a public beach. Further, the court stated:

> Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples. It is clearly, therefore, immoral conduct within the meaning of the Education Code. It may also constitute unprofessional conduct within the meaning of that same statute as such conduct is not limited to classroom misconduct or misconduct with children. . . . It certainly constitutes evident unfitness for service in the public school system.[3]

In affirming the judgment of the lower court that the revocation of Sarac's credentials was correct, the court stated:

> In view of appellant's . . . necessarily close association with children in the discharge of his professional duties as a teacher, there is to our minds an obvious rational connection between his homosexual conduct on the beach and the consequent action of respondent in revoking his secondary teaching credential on the statutory grounds of immoral and unprofessional conduct and evident unfitness for service in the public school system. . . . We find no abuse of discretion by respondent in the penalty it here imposed on appellant, nor any constitutional questions whatsoever with respect to such action on its part.

Thus, the Sarac case supported the use of a conviction for a public homosexual act as grounds for the revocation of teaching credentials for immorality (thus preventing the individual from teaching in that state). It has also been cited frequently in other court cases involving homosexual conduct to justify the courts' decisions to affirm the

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[3]Sarac, 72. [4]Ibid., 73.

revocation of credentials and/or dismissal of these individuals. This case has provided precedent for school officials in the dismissal of homosexuals and others for public acts of sexual misconduct.

The Morrison case was decided by the Supreme Court of California in 1969. Many experts consider it to be the landmark case in the area of teacher dismissal for immorality based on private homosexual conduct. After a number of years with an unblemished record as a teacher, Marc Morrison was involved in a limited physical relationship with another man. This relationship lasted one week and was the only time that Morrison had ever engaged in a homosexual act although he admitted that he had had an undefined homosexual problem at the age of thirteen. The other participant, Mr. Schneringer, reported the incident to the superintendent of the Lowell Joint School District almost two years after it occurred. After a hearing, the board of education revoked Morrison's teaching credentials for immoral, unprofessional conduct and for committing an act which involved moral turpitude. Morrison appealed this decision to the Superior Court of Los Angeles County to no avail. The revocation was upheld. He then appealed to the Supreme Court of California. In a lengthy decision, the court examined all relevant legal cases and concluded that

> . . . a male teacher who engaged with a fellow male in limited noncriminal physical relationship of homosexual nature in first teacher's apartment on four separate occasions in a one-week period was not subject to disciplinary action under statute authorizing revocation of a teacher's life diplomas for immoral conduct, unprofessional conduct, and acts involving moral turpitude, in absence of any evidence that first teacher's conduct indicated his unfitness to teach. . . .[5]

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[5]Morrison, 376.

The court concluded that the board of education could not characterize this conduct as immoral unless the conduct indicated that Morrison was unfit to teach. Therefore, the lower court decision upholding the revocation was reversed and remanded. However, the court pointed out that this decision did not mean that homosexuals must be permitted to teach, only that relevant statutes and applicable principles of constitutional law required the board to find that the individual was not fit to continue in the teaching profession.

The importance of this case to other courts and to school officials wrestling with the immorality question is the list of factors set forth in this decision which should be considered in deciding whether an individual is unfit to teach as a result of his conduct:

> . . . the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining a teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards.[6]

In another California case decided in 1972, Moser v. State Board of Education,[7] Moser petitioned the court for a writ of mandate to require the state board of education to rescind its revocation of the plaintiff's teaching credentials. Moser was convicted of a violation of the penal code for masturbating in public view in a public restroom in Long Beach and then touching the private parts of another male.

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[6]Ibid., 386. [7]App., 101 Cal. Rptr. 86 (1972).

As a result, the state board of education found that the plaintiff had engaged in immoral conduct which established unfitness to teach and which warranted revocation of his certificate. He appealed the decision to Superior Court which upheld the decision of the board. On appeal to the Court of Appeal, Second District, of California, Moser argued that his conduct did not warrant revocation citing the Morrison decision as support for his argument. The court disagreed with his contention because the conduct in that case was private. Moser's was both public and criminal in nature and, therefore, constituted sufficient evidence of unfitness to teach. The decisions of the state board of education and the superior court were affirmed.

This case clarified the application of the Morrison criteria for measuring unfitness to teach. These factors were used to determine the effect of private sexual conduct on the individual's effectiveness in the classroom. They were not intended to be universally applied to all inappropriate conduct.

Although Burton v. Cascade School District Union High School No. 5[8] dealt with a nontenured teacher, it is important to this study because the United States District Court in Oregon found that the statute permitting dismissal for immorality was unconstitutionally vague. The court held that the statute failed to give fair warning of what conduct was prohibited and allowed erratic and prejudiced exercise of the right to dismiss teachers. In addition, the court stated that the statute

[8]353 F. Supp. 255 (1973), 512 F.2d 850 (1975).

also presented other serious constitutional problems by not requiring a nexus between conduct and classroom performance.

The principal of Peggy Burton's school was informed of her homosexuality by the mother of a student. She acknowledged this fact when questioned and was dismissed. When she brought a civil rights action against the school, the district court ruled in her favor and awarded damages and attorney's fes. However, the court did not order reinstatement. The Ninth Circuit Court of Appeals upheld the monetary award for damages. The court also ruled that the refusal to order reinstatement was not an abuse of discretion since the damage award amounted to the balance of her salary for the year in question plus one-half of her salary for the following year.

Governing Board of the Mountain View School District of Los Angeles County v. Metcalf,[9] which also dealt with a probationary teacher and a public act, reinforced the precedent that public acts of sexual misconduct are accepted by the courts as evidence of unfitness to teach. Metcalf was convicted of engaging in an act of prostitution when he was discovered performing an act of oral copulation in a doorless toilet stall in a public restroom of a downtown department store. The Superior Court of Los Angeles County had entered judgment that the school board had sufficient cause to place the defendant on compulsory leave of absence and to dismiss him on grounds of immoral conduct and evident unfitness to teach at a later date. When Metcalf appealed, the California Court of Appeals found that this act ". . . indicated a serious

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[9]App., 111 Cal. Rptr. 724 (1974).

defect of moral character, normal prudence, and good common sense and therefore evinced an unfitness to teach."[10] The ruling of the lower court was affirmed.

Marcus Calderon was a probationary teacher who was arrested on a local college campus and charged with having engaged in an act of oral copulation with another man. Although acquitted of the charges, Calderon was dismissed from his teaching position. When the superior court judge found that Calderon's conduct was immoral, that he was not entitled to recover any back pay, and that the school board acted within its authority when it dismissed him, Calderon appealed. In his appeal, Board of Education of the El Monte School District of Los Angeles County v. Calderon,[11] the Court of Appeal held that the acquittal for the sex offense did not prevent the board of education from dismissing him on the theory that his acquittal barred subsequent judgment by the school board under the doctrine of res judicata.

This case is important to school officials wrestling with the decision to dismiss a teacher who has been acquitted of charges for sexual offenses. Criminal acquittal does not prevent a dismissal action nor does it prevent that dismissal from being upheld if challenged in the judicial system.

The case Acanfora v. Board of Education of Montgomery County[12] involved the plaintiff's freedom of speech as guaranteed by the First Amendment of the United States Constitution. While in college, Joseph

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[11]App., 110 Cal. Rptr. 916 (1974).

[12]359 F. Supp. 843 (1974), 491 F.2d 498 (1974).

Acanfora had joined a group called the Homophiles which had as its purpose promoting public understanding of homosexuality. His public acknowledgment of his homosexuality led to his suspension from a student teaching assignment which was overturned by a state court. When he applied for certification, the college officials forwarded his application to the Pennsylvania Secreatry of Education without recommendation.

Acanfora was hired as a junior high school teacher by Montgomery County (Maryland) school officials who were not aware of his homosexuality. Several weeks later, officials learned of his sexual preference due to a widely publicized press conference in which the Secretary of Education of Pennsylvania announced favorable action on Acanfora's application for certification. The deputy superintendent of Montgomery County schools transferred Acanfora from teaching to an administrative position with no pupil contact. Following this transfer, Acanfora consented to several interviews including newspapers, television, and radio.

When school officials refused to return Acanfora to the classroom, he appealed to the courts for relief. The United States District Court for Maryland ruled that the refusal by school officials to reinstate Acanfora was neither arbitrary nor capricious and denied relief.

Acanfora appealed to the Fourth Circuit of the United States Court of Appeals. Although the court held that Acanfora's public statements were protected by the First Amendment and did not justify the action taken by the school system or the district court, the focus of its

decision was the deliberate withholding of information on Acanfora's application for certification.

> Acanfora wrongfully certified that his application was accurate to the best of his knowledge when he knew that it contained a significant omission. . . . Acanfora purposely misled the school officials so he could circumvent, not challenge, what he considers to be their unconstitutional employment practices. He cannot now invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid.[13]

On the basis of that reasoning, the court affirmed the lower court decision.

The following case addressed an individual's status as a known homosexual rather than any overt act on the part of that individual. The Supreme Court of Washington first decided Gaylord v. Tacoma School District No. 10[14] in 1975. James Gaylord had been employed for a number of years at Wilson High School and had received satisfactory evaluations each year.

In 1972, the school principal was approached by a former student who provided a written statement that he suspected Gaylord of being homosexual. When confronted with the accusation, Gaylord admitted that he was a homosexual. As a result, Gaylord received a letter from the school board stating that probable cause had been found for his discharge. The letter stated: "The specific probable cause for your discharge is that you have admitted occupying a public status that is incompatible with the conduct required of teachers in this district. Specifically, that you have admitted being a publicly known homosexual."[15]

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[13]Ibid., 504. [14]Wash., 535 P.2d 804 (1975).

[15]Ibid., 807.

Gaylord then requested a hearing before the board of directors which, after hearing the evidence, upheld the dismissal.

After the Superior Court of Pierce County upheld the dismissal, Gaylord appealed to the Supreme Court in Washington. The court remanded the case to superior court after ruling that the school district bore the burden of proving sufficient cause for Gaylord's dismissal. The superior court again upheld the dismissal and its decision was appealed.

The Supreme Court of Washington heard the case again in 1977.[16] The decision included the following statement:

> It is important to remember that Gaylord's homosexual conduct must be considered in the context of his position of teaching high school students. Such students could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality. It would be unreasonable to assume as a matter of law a teacher's ability to perform as a teacher required to teach principles of morality is not impaired and creates no danger of encouraging expression of approval and of imitation. Likewise to say that school directors must wait for prior specific overt expression of homosexual conduct before they act to prevent harm from one who chooses to remain 'erotically attracted to a notable degree toward persons of his own sex and is psychologically, if not actually disposed to engage in sexual activity prompted by this attraction' is to ask the school directors to take an unacceptable risk in discharging their fiduciary responsibility of managing the affairs of the school district.[17]

This time the court concluded that there was substantial evidence to support the trial court's conclusion that Gaylord was guilty of immorality and that, as a known homosexual, his fitness to continue as a high school teacher was impaired. It, therefore, affirmed the lower court decision. Gaylord filed a writ of certiorari which was denied by the United States Supreme Court[18] in 1977.

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[16]Wash., 559 P.2d 1340 (1977). [17]Ibid., 1347.

[18]434 U.S. 879 (1977).

The Gaylord decision is significant to the educational community because it involved his status as a homosexual rather than any overt acts of homosexual conduct. School boards may dismiss a teacher based on his status as a homosexual if there is sufficient evidence to substantiate unfitness to perform classroom duties.

An elementary teacher referred to in this case as Jack M.[19] was known as a teacher of fitness, ability, and unimpeached moral character. He was arrested for a violation of the penal code. A police officer entered a department store restroom with doorless stalls and occupied the stall furthest from the door. Jack M. entered the adjoining stall, bent over, and looked up at the officer from under the partition. The officer dressed and upon leaving his stall observed Jack M. masturbating. He allegedly beckoned to the officer and said: "Come here. You will like this."[20] The defendant testified that he had not engaged in the behaviors with which he was charged. Immediately after his arrest, he reported the incident to his principal. When the board learned of the incident, it filed suit in superior court against Jack M. to establish its right to discharge him from his tenured position.

During the trial, the principal of the defendant's school expressed her concern that she was not willing to take a chance on this behavior occurring again and, therefore, did not consider Jack M. fit to teach. An experienced principal who did not know the defendant but who testified as an expert on teaching qualifications, also expressed concern

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[19]Board of Ed. of Long Beach Unified School District of Los Angeles County v. Jack M., 566 P.2d 602 (1977).

[20]Ibid., 603.

about the effect of this conduct on the defendant's relationships with students, parents, and other staff. Testifying on behalf of Jack M., a psychiatrist who was experienced in treating sexual deviates stated that he had examined the defendant and concluded:

> . . . that defendant was not a homosexual, that if the arresting officer's version were true, this account would suggest . . . an isolated act of aggressive behavior by one of an otherwise passive sexual disposition precipitated by an unusual accumulation of pressure and stress stemming from his mother's serious illness; that it would be most unusual for an individual with a predisposition to aggressive homosexual behavior to reach middle age without some prior antisocial conduct reflected in a police record . . . and that even if the incident happened, he believed there was no danger of recurrence because of the trauma to defendant from this arrest and the trial . . . there was no danger to pupils or associates, and no possibility of recurrence. . . .[21]

The trial court resolved the conflicting testimony on the issue of fitness in favor of the defendant and ordered his reinstatement with back pay. The school board appealed to the Supreme Court of California which affirmed the lower court decision since there was not sufficient evidence to establish that Jack M. was unfit to teach.

Again, the importance of relating sexual misconduct to effectiveness as a teacher is obvious. Had the school board or lower court made this determination, the dismissal might have been upheld.

Ross v. Springfield School District No. 19[22] involved an elementary school librarian. During a police investigation of the Adult World Bookstore, which sold sexually explicit materials and operated a movie arcade, Frank Ross was observed entering one of the movie booths which was occupied by another person and closing the door. By standing

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[21]Ibid., 604. [22]Or. App., 641 P.2d 600 (1982).

on the shoulders of a fellow officer, a police officer observed the plaintiff watching a movie and engaging in anal intercourse with the other person.

Although Ross was not charged in this incident, he was called to testify in the court case that was brought alleging that the Adult World Bookstore was a nuisance. Ross did not actually testify in court. Even though he was not named in the extensive newspaper coverage of this case, information about his involvement quickly spread throughout the communities in which he taught.

The district superintendent informed him that he would be transferred on February 29, 1979, to a position which did not involve contact with students and proceeded to seek the revocation of Ross' teaching credentials. Ross was reassigned to his library post on June 4.

However, the principal began to receive calls and letters from parents who wanted Ross removed from his position. Therefore, he was reassigned to the nonteaching position on August 28 and was informed that the superintendent intended to recommend his dismissal for immorality, inefficiency, and gross unfitness. The dismissal was implemented on Janaury 14, 1980.

Ross appealed his dismissal to the Fair Dismissal Appeals Board (FDAB). The FDAB found that the facts on which the school district relied were true and substantiated, and that those facts supported the charges of immorality and gross unfitness, but not the charge of inefficiency.

Ross then appealed to the Court of Appeals of Oregon on the following constitutional issues: (1) the FDAB order deprived him of due process of law under the Fourteenth Amendment to the United States Constitution because the vagueness of the standards of immorality and gross unfitness failed to give adequate warning to teachers as to what conduct is prohibited; and (2) his dismissal violated his right to privacy and equal protection under the state and federal constitutions. The court quickly concluded that Ross' conduct was "not of the character afforded protection."[23] Further, the court stated:

> We do not decide whether petitioner's conduct was "immoral" or rendered him "grossly unfit" to teach. That is not our function. Rather, we decide only that petitioner's dismissal on either or both grounds was within the authority delegated by the legislature to the local school boards and that the FDAB order is supported by substantial evidence.[24]

The court affirmed the FDAB decision to uphold Ross' dismissal.

On appeal to the Supreme Court of Oregon, this decision was reversed and remanded in 1982. The Court held that "Because there is no rationale to support the conclusion that petitioner's conduct was immoral dismissal on this ground is remanded to the FDAB for a determination of whether the facts as to immorality are adequate to justify the statutory grounds."[25]

In 1984, this case returned to the Court of Appeals of Oregon.[26] The FDAB had provided its interpretation of immorality as used in teacher dismissal statutes and found that Ross' conduct was immoral

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[23]Ibid., 608. [24]Ibid.

[25]Ross v. Springfield School District, Or., 657 P.2d 188 (1982).

[26]Ross v. Springfield School District, Or. App., 657 P.2d 509 (1984).

under that standard. Ross appealed. The court found that the Board's interpretation of immorality to include engaging in sexual intercourse publicly was not erroneous, and the teacher engaged in a public sexual intercourse contrary to this interpretation of immorality.

Once again the Supreme Court of Oregon heard the case and reversed and remanded the decision. The court held that the Fair Dismissal Appeals Board was not to determine whether teacher's conduct was immoral merely by reference to alleged factual content of community moral standards but was to exercise its own interpretive judgment. As stated in the conclusion:

> The Court of Appeals erred in sustaining FDAB's assumption that its task was to find "community moral standards" as a fact, and that the fact in this case needed no evidence. Because the court and FDAB were satisfied that the outcome in this case could not be in doubt, they did not stop to consider the implications of that approach when "community moral standards" are in doubt. "Easy" cases make bad law.[27]

The final Ross decision has clear implications for administrators. Community standards for moral conduct are difficult to measure and substantiate in the courtroom. Reliance on this type of standard without evidence to support it may result in the dismissal being overturned in the judicial system.

The National Gay Task Force, representing homosexual interests, brought action in district court to challenge the constitutionality of the Oklahoma statute that permitted dismissal of teachers for public homosexual conduct. As used in the statute, public homosexual conduct referred to an act which was ". . . committed with a person of the same

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[27]Ross v. Springfield School District, 716 P.2d 724 (Or. 1986).

sex, and indiscreet and not practiced in private."[28] Included in this classification of conduct were ". . . advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees."[29] The statute also included the following factors to be considered in the determination of whether the public homosexual conduct rendered the teacher unfit to teach: the likelihood of adverse effect on students or school employees; the proximity in both time and place to the teacher's official duties; any extenuating or aggravating circumstances; and whether the conduct is of a continuing nature which would tend to encourage children toward similar conduct. The judge upheld the constitutionality of the statute and the organization appealed.

National Gay Task Force v. Board of Education of the City of Oklahoma City[30] was heard in the United States Court of Appeals, Tenth Circuit in 1984. The court found the portion of the statute which dealt with advocacy was unconstitutionally overbroad. The court stated: "We also hold that the unconstitutional portion is severable from the part of the statute that proscribes 'homosexual activity,' and we find that portion constitutional."[31] Therefore, the district court judgment was reversed.

The National Gay Task Force pursued this case with an appeal to the United States Supreme Court.[32] The judgment of the Court of Appeals

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[28]Oklahoma Statutes 70:6-103.15. [29]Ibid. [30]729 F.2d 1270 (1984).
[31]Ibid. [32]105 S. Ct. 1858 (1985).

was affirmed by an equally divided Court with Justice Powell taking no part in the decision.

This case had major implications for the educational community. The Supreme Court decision validated the constitutionality of state statutes which allow dismissal for acts of homosexual misconduct.

The next case involved a nontenured guidance counselor whose contract was not renewed. Marjorie Rowland was hired as a vocational guidance counselor at Stebbins High School in Montgomery County, Ohio, in August, 1974. Later that fall, she confided in a secretary that she was a bisexual and had a female lover.

In December, the principal met with Ms. Rowland and suggested that she resign. She refused and then told several other teachers that she was asked to resign because she was a bisexual. A second meeting was held in which she was again asked to resign. After she refused, she was suspended with full pay for the remainder of the contract year.

Ms. Rowland filed suit in district court alleging that the defendants had violated her due process rights by suspending her without a hearing. This contention was not upheld. In a second action, she alleged that her right to privacy had been violated because her suspension was solely due to her status as a bisexual. The district court dismissed all the claims and Rowland appealed. The district court decision was remanded by the Sixth Circuit of the Court of Appeals.[33]

Both parties agreed to a jury trial before a magistrate and the entry of the final judgment by that individual. The magistrate found

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[33]Rowland v. Mad River Local School District, Montgomery County, Ohio, 615 F.2d 1362 (6th Cir. 1980).

that the school district had suspended Ms. Rowland in violation of her rights to equal protection and free speech. The jury then awarded $13,500 in damages for personal humiliation and mental anguish and $26,947 in damages for loss of earnings.

The school district appealed this decision to the United States Court of Appeals, Sixth Circuit. The court concluded:

> The district court awarded damages against the school district on two theories: (1) That the school district violated plaintiff's Fourteenth Amendment right to equal protection of the law by suspending her because she is bisexual or homosexual; and (2) That the school district violated plaintiff's First Amendment right to freedom of speech by not renewing her one-year contract because she told Mrs. Monnel, the secretary, Mr. Goheen, the assistant principal, and other teachers of her bisexuality. We conclude that the record does not support a finding that plaintiff established either constitutional violation.[34]

Having reached this conclusion, the court reversed the appeal with directions to the district court to enter judgment for the school district.

Ms. Rowland's writ of certiorari was denied by the United States Supreme Court[35] in February, 1985. Justice Brennan filed a dissenting opinion with which Justice Marshall concurred:

> This case raises important constitutional questions regarding the rights of public employees to maintain and express their private sexual preferences. . . . Because determination of the appropriate constitutional analysis to apply in such a case continues to puzzle lower courts and because this Court has never addressed the issues presented, I would grant certiorari. . . . Because petitioner's case raises serious questions relating to this issue of national importance, an issue that cannot any longer be ignored, I respectfully dissent from the decision to deny this petition for a writ of certiorari.[36]

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[34]Rowland v. Mad River Local School District, 730 F.2d 444 (1984).

[35]Rowland v. Mad River Local School District, 84 L. Ed. 2d 392 (1985).

[36]Ibid.

Although this case involved a nontenured teacher, it was important to this discussion because it provided an opportunity for the justices of the Supreme Court to voice their belief that it was time for the Court to address the constitutional issues involved with the dismissal of public employees for homosexuality. This is an issue which is crying out for clarification from the Supreme Court to establish clear constitutional guidelines.

Lyle Stephens was terminated as a teacher in Pierce County, Nebraska, for unprofessional conduct and immorality. The charges arose in part from an incident between Stephens and a visiting salesman. Gerald Zimmerman, a typewriter salesman, arrived for a meeting with the high school principal who was unavailable when Zimmerman arrived. Stephens invited Zimmerman to the teacher's lounge for a cup of coffee while he waited for the principal. During their conversation, Stephens made several sexually oriented remarks which were out of context. During these periods in the conversation Stephens appeared restless, moving in his chair, and at one point rubbing his own genital area. Later in the conversation, while discussing materials to use for seats for bar stools Zimmerman was building, Stephens suggested that he use a foam cushion that would conform to his buttocks. While making this comment, Stephens placed his hand on Zimmerman's genital area and made several fondling motions.

Del Beaudette, the husband of the school secretary, also testified at the hearing about an incident that occurred when he attended a school staff Christmas party. While Beaudette was washing his hands in the

restroom, Stephens grabbed Beaudette in the genital area and on the buttocks after "playing with himself," "flipping his penis."[37] Stephens denied that he had ever engaged in such conduct with anyone.

Following the hearing in which the board terminated Stephens' teaching contract, he appealed to district court which ruled that the dismissal was neither arbitrary nor capricious. Stephens then appealed to the Supreme Court of Nebraska.[38] The court affirmed the district court decision and held that the school board had complied with statutory procedure in the termination proceedings; Stephens' aggressive and uncontrollable sexual assault gave rise to the reasonable inference of his unfitness to teach; and there was sufficient evidence to uphold the school board's decision to terminate Stephens' contract.

Lack of direction from the United States Supreme Court has led to contradictory opinions in lower courts which are trying to resolve the constitutional issues involved in the dismissal of teachers for homosexual conduct. In general, dismissals resulting from public acts of homosexual conduct will be upheld by the courts. Dismissals based on status as a homosexual must show that there is a detrimental effect on the teacher's classroom effectiveness for courts to affirm the dismissal. Until the Supreme Court grants certiorari and rules on the pertinent issues, this confusion will continue.

Heterosexual Misconduct with Adults

Teachers dismissed for heterosexual conduct with other consenting adults have also turned to the courts for relief. These cases

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[37]Stephens v. Board of Education of School District No. 5, 429 N.W. 2d 722 (Neb. 1988).

[38]Ibid.

have involved charges of immorality based on co-habitation and adultery.

In 1972, the United States District Court of Nebraska heard the case Fisher v. Snyder.[39] Frances Fisher, a divorcee, lived alone in a one bedroom apartment. Her contract was terminated at the close of the school term for conduct unbecoming a teacher. The evidence presented at the school board hearing indicated that from time to time Mrs. Fisher had overnight guests in her one bedroom apartment. The charges of conduct unbecoming a teacher arose from the overnight visits of Cliff Rowan, whom Mrs. Fisher described as her second son. He visited during his vacations from college as well as staying in her apartment while observing classes for one of his college courses.

The only evidence of possible impropriety was offered by Mrs. Brady, an Avon lady and wife of a local minister. She visited Mrs. Fisher early on a Saturday morning and observed Rowan emerging from the bedroom of the apartment. She testified that she could not see any bedding on the sofa in the living room although she admitted that she did not go all the way into the living room.

The district court found that the school board had merely shown association with no inference of immorality. The judge concluded that ". . . the association of persons within one's own home is an activity constitutionally protected within the meaning of privacy."[40] He further stated:

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[39]346 F. Supp. 396 (1972).

[40]Ibid., 400.

> When viewed most favorably from the position of the board of education and taking every permissible inference from the testimony elicited at the hearing, there is simply no proof of impropriety in Mrs. Fisher's conduct which affected her classroom performance, her relationship with students under her care, or otherwise had any bearing on any interest possessed by the board of education. At most, the evidence may be said to raise a question of Mrs. Fisher's good judgment in her personal affairs, when measured against an undefined standard which someone could suppose exists in a small town in Nebraska. I am constrained to hold that that was not enough to justify termination of the contract.[41]

The court ordered that the termination be voided and that Mrs. Fisher be reinstated to her teaching position.

Questionable judgment in one's personal relationships is not enough to form the basis for the dismissal of a tenured teacher. School officials must show that the conduct had an adverse impact on the effectiveness of the teacher to perform the duties for which he was hired.

Erb v. Iowa State Board of Public Instruction[42] was an appeal to the Supreme Court of Iowa resulting from the Polk District Court's annulment of a writ of certiorari filed by Erb to challenge the revocation of his teaching certificate. Richard Erb was employed at Nishna Valley School. The complaint against him was made by Robert Johnson whose wife, Margaret, taught home economics at the same school.

Margaret planned to quit teaching and open a boutique. Erb agreed to assist her in designing the store and they saw each other often. Johnson became suspicious that they were having an affair and hid in the trunk of the Johnson automobile one night to attempt to confirm his suspicions. On this particular night, Margaret and Erb drove to a secluded area and engaged in sexual intercourse while Johnson remained

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[41]Ibid., 398. [42]216 N.W.2d 339 (1974).

hidden in the trunk. Johnson did not make his presence known but rather consulted an attorney the following day to file for a divorce from Margaret. The attorney advised that Johnson needed witnesses in order to strengthen his case

Therefore, Johnson and a group of his friends began to follow Margaret and Erb. After several fruitless attempts, they succeeded in locating the couple parked in a secluded area and took photographs of them partially disrobed in the back seat of the car. Johnson told Margaret not to come home and that all further communication would be through their attorneys. Erb told his wife about the affair after it had been terminated.

Johnson reported the adulterous liaison to the school board for the purpose of having Erb fired. He expressed that he had no desire to have Erb's teaching certificate revoked. However, after a hearing, the board voted to revoke in spite of the fact that there were numerous witnesses who vouched for Erb's character and fitness to teach.

When the district court annulled the writ of certiorari, Erb appealed to the Supreme Court of Iowa. He alleged that the board had acted illegally by denying his right to cross examine witnesses; by limiting the number of witnesses he could call; by failing to make findings; and by revoking his teaching certificate without substantial evidence that he was morally unfit to teach.

The court would not hear arguments concerning the first allegation since Erb had not raised an objection during the hearing before the board nor before the trial court. The court also ruled that the board had acted illegally in failing to make findings of fact in the case.

Although the board contended that the adultery was sufficient for a finding of unfitness to teach, the court disagreed and quoted the Morrison case: "Surely incidents of extramarital heterosexual conduct against a background of years of satisfactory teaching would not constitute 'immoral conduct' sufficient to justify revocation . . . without any showing of an adverse effect on fitness to teach."[43] The court then used the Morrison criteria and determined that there was no evidence of adverse effect on Erb's fitness to teach. The court concluded:

> There was no evidence than that Erb's misconduct was an isolated occurrence in an otherwise unblemished past and is not likely to recur. The conduct itself was not an open or public affront to community mores; it became public only because it was discovered with considerable effort and made public by others.[44]

The court ruled that the board had acted illegally in revoking his certificate and that the trial court had erred in annulling the writ of certiorari.

Again, the court supported the precedent that private sexual conduct does not indicate unfitness to teach without supporting evidence to that effect. School officials must clearly indicate an adverse effect on the individual's effectiveness for the dismissal to be upheld when the conduct is private and involves two consenting adults.

Sullian v. Meade County Independent School District No. 101[45] involved the dismissal of a single female teacher who was living with a male whom she referred to as her boyfriend. Kathleen Sullivan began teaching in Union Center in the fall of 1974 and resided in a mobile home provided by the school district. In October Donald Dragon moved

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[43]Morrison, 383. [44]Erb, 344. [45]387 F. Supp. 1237 (1975).

into the mobile home with Miss Sullivan. She freely admitted that she was living with Mr. Dragon when asked by members of the community. Since many of her students had visited in her home, they were aware of Miss Sullivan's living arrangements. The parent of one of these students complained to the principal of her school. In a conference, the principal informed Miss Sullivan that there was a great possibility that she would lose her job if she did not discontinue living with Mr. Dragon. She responded that she had no intention of terminating her arrangement with him.

The original notice of the school board hearing advised Miss Sullivan that the superintendent would recommend that she be dismissed from her teaching duties on grounds of gross immorality. Subsequent notice included incompetence as a reason for dismissal. The school board made thirty-six determinations from the evidence presented and voted to dismiss Miss Sullivan after she was given several opportunities to agree to change her living arrangements with Mr. Dragon. The board voted to pay her full compensation for services rendered to the school district.

She appealed to United States District Court in South Dakota alleging that her dismissal was arbitrary, capricious, and a violation of the due process clause of the Fourteenth Amendment and her constitutional right of freedom of association and right to privacy. In the decision the court stated:

> . . . there must be a nexus between the conduct to be proscribed and the workings of the educational system. In seeking to justify dismissal in this case, the school board found that the plaintiff's conduct was an affront to the moral standard of the Union Center

> community, and that its continuance sets a bad example for the young impressionable people that she is teaching. This Court . . . cannot say that the reasons for the plaintiff's discharge were unrelated to the education process or the working relationship within the educational institution. . . . It would seem reasonable for the school board to conclude that the controversy between the plaintiff and the parents and the community members of this locale would make it difficult for Miss Sullivan to maintain the proper education setting in her classroom. Thus, this is not a case where a teacher is dismissed for past conduct which has no relationship to her fitness to teach, since the school board gave Miss Sullivan every opportunity to discontinue her living arrangement with Mr. Dragon, and complete the remainder of the 1974-75 school year.[46]

The court ruled that although board members could be sued, the school district was not a person within the Civil Rights Act and, therefore, could not be sued under that act; that the dismissal of the teacher due to her conduct in living with her boyfriend without benefit of matrimony was not unrelated to proper functioning of the educational system and did not deny due process; and that the South Dakota statute setting forth grounds for dismissal of teachers did not deny due process due to vagueness. Therefore, Miss Sullivan was not entitled to damages and the case was dismissed.

Miss Sullivan appealed to the Eighth Circuit of the United States Court of Appeals.[47] The court affirmed the lower court decision. However, the decision included the following:

> . . . we remand this case to the district court with directions to modify its judgment to reflect a dismissal of the action for failure of Ms. Sullivan to establish a claim for damages. . . . Such modification of the judgment may serve to avoid or lessen any stigma which might otherwise attach to Ms. Sullivan's teaching record.[48]

In this case and the one which follows, the conduct which resulted in dismissal was shown to have an adverse effect on the performance

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[46]Ibid., 1246. [47]530 F. 2d 799 (1976). [48]Ibid., 808.

of the duties required by the job. In Sullivan, the conduct was well known by both parents and students. Miss Sullivan was also given numerous opportunities to remedy the situation which she refused to do. In the following case, there was the clear indication that the plaintiff's performance of his job responsibilities was affected by the adulterous affair in which he was involved. Therefore, since there was evidence to support a decline in effectiveness as a result of the immoral conduct, both dismissals were upheld by the courts.

In 1976, the United States District Court in Delaware heard the case Sedule v. Capital School District.[49] Joseph Sedule, an assistant superintendent of the school district, was charged with immorality, misconduct in office, incompetency, and neglect of duty as a result of an adulterous relationship with Joyce Naftzinger. The relationship began in January of 1971.

Until June of 1972 when Mr. and Mrs. Naftzinger moved to Georgia, Sedule met Joyce three or four times a week during normal working hours. His subordinates noted his extended absences from his office and observed that he seemed less attentive to his professional responsibilities. Although the plaintiff's duties required him to leave his office, the court concluded that it was clear that many of his unexplained absences were due to his amorous relationship with Joyce Naftzinger. Joyce accompanied Sedule to a professional convention in 1971. As a result he spent little more than one hour at the convention. While the Naftzingers resided in Georgia, Sedule made lengthy telephone calls

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[49] 425 F. Supp. 552 (1976).

to her during normal working hours. When sent to a convention in Atlantic City, New Jersey, in February, 1973, he missed one entire day of the convention because he had driven to Reading, Pennsylvania, where the Naftzingers were living at the time. In June of 1973, Sedule rented an apartment in Dover and persuaded Joyce to leave her husband.

Sedule also had on several occasions taken nude or partially nude photographs of Joyce which he sent to Mr. Naftzinger. He threatened to send copies of the photographs to Mr. Naftzinger's employers as a means of inducing Mr. Naftzinger to allow Joyce to stay in Dover when he was transferred to Georgia. Sedule also sent photographs to Naftzinger in Georgia in an attempt to persuade him to allow Joyce to return to Dover. When the Naftzingers moved to Reading, Sedule again sent a nude photograph of Joyce to Mr. Naftzinger with the message: "Please don't make trouble, just go."[50] The court observed: "In sum, it is likely that this conduct alone would have supplied an adequate reason for dismissal."[51] However, the board chose to base its immorality charges solely on the adulterous relationship.

Beginning in the summer of 1971, Mr. Naftzinger complained to the board about Sedule's involvement with his wife. The board initially took no action except to send two of the members to encourage Sedule to break off his relationship with Joyce Naftzinger before it became a matter of embarrassment to the board. In late October, 1973, both of the Naftzingers petitioned the board for assistance and filed a complaint in writing. Following a November board meeting, Sedule was sent

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[50]Ibid., 557. [51]Ibid.

a notice of his dismissal which contained three pages of specific charges. After a hearing was held on the charges in December, the board voted to dismiss Sedule.

Sedule appealed to district court on the basis that his dismissal (1) was arbitrary and capricious because the charges lacked a rational nexus to his duties as a school administrator; (2) should be overruled because he was not given adequate warning that his conduct would lead to his dismissal; and (3) invaded his constitutionally sanctioned right to privacy. Sedule also claimed that the hearing held by the board was biased and that board members had prejudged him before the hearing. The court concluded: ". . . the plaintiff has failed to persuade the court by a preponderance of evidence that his discharge was defective in any material way, and judgment will be entered in accordance with this opinion."[52] Judgment was entered in favor of the defendants.

Diane Thompson had been an elementary teacher in a rural Missouri school district for eleven years. In the spring of 1979 she met and began dating Cal Thompson. During June of that year Cal's ex-wife went to Diane's house in a drunken state and violently confronted Diane and Cal. The sheriff was called to remove her from the premises. A few days later the principal of Diane's elementary school, Mr. Timmons, visited her at her home to express his concern about this incident and her relationship with Cal. Cal's ex-wife had called him to complain that Diane and Cal were living together. Mr. Timmons was especially

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[52]Ibid., 565.

concerned because Cal's ex-wife lived in the district and had school-aged children. He later noticed Cal's car in front of Diane's house both late at night and early in the morning.

During the following fall, Mr. Timmons had further discussions with Diane to express his concern. Diane informed him that she and Cal planned to marry soon. At a meeting with Mr. Timmons and the district superintendent on November 15, she was offered a chance to resign. They offered to recommend her for employment elsewhere, based on her consistently satisfactory performance evaluations. Mr. Timmons and a substantial segment of the local community felt that Diane's conduct was immoral. Diane married Cal on November 19. However, she was suspended with pay from her job on November 20 after a unanimous school board vote charging her with immoral conduct.

Thompson v. Southwest School District[53] was heard by the United States District Court of Missouri in 1980. The basis for this case was Diane's allegation that her dismissal constituted a violation of her constitutional rights. She claimed that the statute allowing dismissal for immorality was unconstitutionally vague, that she had been denied due process, and that her dismissal was a violation of her constitutional rights to privacy and freedom of association. Entering judgment for the plaintiff, the court held that the Missouri statute permitting the termination of employment of permanent teachers for engaging in immoral conduct would be interpreted to apply only to immoral conduct which adversely affected a teacher's performance. In this case, the

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[53]483 F. Supp. 1170 (1980).

court found no evidence to show that the alleged immoral conduct had affected Miss Thompson's teaching performance. Further, the court held that Miss Thompson had presented a sufficiently serious question on her claim of denial of substantive due process to make the issue a fair one for litigation. Having dealt with the vagueness and due process issues, the court chose not to address the privacy issue in this decision.

The Thompson decision is important in that the court combined criteria from several prior decisions, including Morrison and Weissman, to provide the following list of factors to be used in determining if alleged immoral conduct renders the teacher unfit to teach. These include (1) the age and maturity of the students of the teacher involved; (2) the likelihood that the teacher's conduct will have adversely affected students or other teachers; (3) the degree of the anticipated adversity; (4) the proximity or remoteness in time of the conduct; (5) extenuating or aggravating circumstances surrounding the conduct; (6) the likelihood that the conduct may be repeated; (7) the motives underlying the conduct; and (8) whether the conduct will have a chilling effect on the rights of the teachers involved or of other teachers.[54]

Tim Yanzick was a tenured teacher employed to teach math and science at Polson Middle School in Lake County, Montana. In 1976, problems arose from Yanzick's living arrangements with Sharon Scott, a fellow teacher, and from several events taking place both in and out

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[54]Ibid., 1182.

of the classroom. A year prior to the current controversy surrounding Yanzick, he was observed by the school superintendent on several occasions crossing a bridge coming to work early in the morning with Miss Scott and was warned to be more discreet about his living arrangements. In January of 1977, the superintendent and the principal of Polson Middle School met with Yanzick and questioned him as to why he had moved Miss Scott into his home in the city of Polson and had openly admitted that they were living together when he had earlier been cautioned about his lack of discretion. In this meeting, Yanzick acknowledged that his living arrangements were common knowledge among his students.

The Board of Trustees notified Yanzick in March that it had decided not to renew his contract for the 1977-78 school term. A letter followed this notification and outlined the specific reasons for his nonrenewal. These included:

> . . . you have demonstrated a lack of fitness for teaching . . . as indicated in all statements made to your class of junior high school students . . . with the effect that your "girlfriend" had to move out of your home because some people did not like your living arrangements . . . you have further demonstrated a lack of fitness . . . by reason of your introduction of the subject of abortion in your classroom, wherein you inquired of the boys in your class, ages 11 to 14, "How many of you boys would have your girlfriend get an abortion if she were pregnant?" . . . you have also demonstrated a lack of fitness . . . by a serious lack of good judgment in permitting the use in your classroom of human fetuses brought by one of your students . . . you have demonstrated a lack of moral values by openly and notoriously cohabitating with a female teacher, not your wife, within the relatively small community . . . the knowledge of which fact among your students has adversely affected your performance.[55]

Yanzick requested a hearing before the board of trustees. His request was denied and litigation followed which culminated in an order

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[55]Yanzick v. School District No. 23, Mont., 641 P.2d 431 (1982).

from the Montana Supreme Court requiring the board of trustees to hold a hearing and reconsider their decision. This hearing was held August 9, 1978, and the board affirmed its original decision. Yanzick appealed this decision to the county superintendent of schools who upheld the decision of the board. He then appealed the decision to the state superintendent of schools who also upheld the Board's decision to dismiss. Yanzick appealed to the First Judicial District Court which reversed the decision.

The school district then appealed to the Supreme Court of Montana.[56] The district court had relied on the Morrison criteria to determine Yanzick's fitness to teach. The Supreme Court disagreed:

> The facts of the Morrison case and its holding are not applicable here. . . . Yanzick's conduct was not some form of private conduct unknown to the community, but . . . was conduct broadly known throughout the community . . . which the Board of Trustees found adversely affected Yanzick's performance as a teacher.[57]

The court held that both the county and state superintendents had properly heard and decided the case as presented to them. After finding that these decisions were supported by reliable and substantive evidence, the court stated: "We further conclude that the record is sufficient to support the administrative conclusion that Mr. Yanzick demonstrated a lack of fitness as a teacher, and to establish good cause for the decision by the board of trustees not to renew his contract."[58] The court reversed the district court decision and reinstated the decisions of the state superintendent and the county superintendent.

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[56]Ibid., 434. [57]Ibid., 431. [58]Ibid., 441.

Board of Education of Alamogordo Public Schools District No. 1 v. Jennings[59] was heard by the Court of Appeals of New Mexico in 1982. The local board of education appealed the decision of the state board of education which reversed the dismissal of Lyman Jennings for having an extramarital affair with a school secretary.

The romance began in late 1979 and ended the following spring. The secretary then filed a complaint with the local board accusing Jennings of sexual harassment.

At the hearing the secretary testified that she and Jennings had frequently had intercourse, usually at her apartment but once in the home economics classroom when school was not in session. Love notes were also introduced into evidence. There were also numerous rumors about the affair which were fueled by Jennings' suspension and the secretary's pregnancy. Jennings presented evidence that the secretary had twice been convicted for shoplifting and that there were two outstanding bench warrants for her failure to appear on two other undisclosed criminal charges. The local board presented a polygraph examiner who testified that the secretary was telling the truth when she revealed the details of the affair. Jennings countered with a psychologist who testified that polygraph tests are not reliable and that the secretary appeared to be a sociopathic personality type who would lie to suit her subjective emotional needs.

As a result of the hearing, Jennings' employment was terminated on the following grounds: "1. Sexual harassment and immoral conduct

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[59]N.M. App., 651 P.2d 1037 (1982).

(the extramarital affair); 2. Gross inefficiency (sexual harassment of other secretaries); 3. Gross inefficiency (knowledge of the above had reached others, adversely affecting Jennings' ability to do his job)."[60] This decision was appealed and a hearing officer was appointed by the state board of education.

The hearing officer concluded that Jennings' ability to do his job was affected by the affair. However, he set aside the sexual harassment charge since the procedure requiring work conferences had not been followed. The state board reversed the local school board's decision to fire Jennings and the local school board appealed.

The Court of Appeals ruled that the state board could reject the findings and conclusions of its hearing officer without conducting further hearings. It ruled that it could not find that the decision by the state board to reinstate Jennings was unreasonable or was not supported by substantial evidence. The decision of the state board was affirmed because the local board had failed to show good cause for the dismissal.

The final case discussed in this section was heard by a Florida court in 1984. Sherburne v. School Board of Suwannee County[61] involved a teacher who was terminated on the grounds that she lacked good moral character. The Board's notice of hearing charged that Pamela Sherburne had cohabitated with an adult male to whom she was not married or related and that she had permitted him to visit her classroom during times when she should have been teaching. The notice also stated that

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[60]Ibid., 1039. [61]455 So. 2d 1057 (Fla. App. 1 Dist. 1984).

she had been warned about her behavior and had persisted to demonstrate an absence of good moral character by continuing to live with this man. Finally, it stated that knowledge of this relationship was so well known within the community that there had been complaints to the school principal about the example she was setting for her students.

The evidence in the case disclosed that Miss Sherburne had lived with Mr. Palmer for a period of one month while her trailer was being repaired. Although at the time of the hearing Miss Sherburne was again residing in her own trailer, she did testify that she occasionally spent the night at Mr. Palmer's trailer or that he spent the night at her trailer. There was no direct evidence to suggest an improper sexual relationship between the couple. There was also no evidence to support the charge that Miss Sherburne had been warned about her behavior. Her principal testified that there were no discipline problems in her classes, that he had received no complaints from students concerning this relationship, and that he considered her to be an excellent teacher. The court also found that the board had presented no proof that the relationship was common knowledge before the news of Sherburne's dismissal was reported in the local newspaper. The court ruled:

> . . . in the absence of specific, valid, statutory directives, the appropriate standard to be applied is that private, off-campus conduct ostensibly involving a consensual sexual relationship between a teacher and an adult of the opposite sex cannot, in and of itself, provide "good cause" for a school board's rejection of a teacher nominated for employment by the superintendent unless it is shown that such conduct adversely affects the ability to teach. . . . Since the evidence here does not meet this standard, the order must be set aside.

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[62]Ibid., 1062.

The cases presented in this section show that the courts will not uphold the dismissal of teachers for immorality based on heterosexual conduct with other consenting adults unless there is substantive proof that this conduct has had an adverse effect on the performance of the teachers involved. The dismissal will not be upheld, even if the nexus standard is met, if the school district has failed to follow proper procedures in handling the dismissal process.

Unwed Pregnancy

Teachers dismissed for immorality on grounds of unwed pregnancy have also turned to the courts for relief. These challenges have been brought on a variety of constitutional issues.

Ilena Drake received a letter in April, 1973, notifying her that the Board of Education in Covington County, Alabama, intended to cancel her employment contract for immorality. The board had received a physician's certificate which stated that she became pregnant during the current school year while she was single. Miss Drake appealed to the Alabama State Tenure Commission which sustained the validity of the dismissal. She then appealed to the United States District Court[63] alleging that the state statute which allowed dismissal for immorality was unconstitutionally vague and that her dismissal resulted from a violation of her constitutional right to privacy. The decision of the court focused on the privacy issue.

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[63]Drake v. Covington County Board of Education, 371 F. Supp. 974 (1974).

Murray King, superintendent of the Covington County school system, heard a rumor in March that Miss Drake was pregnant and was hospitalized. Mr. King called the administrator of the hospital, Dr. Evers, to confirm the rumor. Dr. Evers confirmed that Miss Drake was in the hospital and had asked that he perform an abortion since she feared she would lose her job if she had the baby. Mr. King then visited Miss Drake in the hospital and informed her that his knowledge of her condition would be submitted to the board regardless of her decision on the abortion. During the hearing before the board, Mr. King entered a certificate from Dr. Evers as evidence. There was no evidence to show that Miss Drake had consented for her doctor to disclose this information to the board. Therefore, the court concluded:

> The Board made no finding that Drake's claimed immorality had affected her competency or fitness as a teacher, and no such nexus was developed in the evidence. No "compelling interest" as to the cancellation of Drake's contract of employment was established by the evidence which would justify the invasion of Drake's constitutional right of privacy.[64]

The court ordered that Miss Drake be reinstated to her teaching position.

Andrews v. Drew Municipal Separate School District[65] was filed by two teachers' aides to challenge a rule established by the superintendent of the school district which declared that unwed mothers were ineligible for employment with the school system. The school district offered three reasons to support the use of this rule for the purpose of creating a proper moral environment:

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[64]Ibid., 979. [65]507 F.2d 611 (1975).

> (1) unwed parenthood is prima facie proof of immorality; (2) unwed parents are improper communal role models, after whom students may pattern their lives; (3) employment of an unwed parent in a scholastic environment materially contributes to the problem of school-girl pregnancies.[66]

The Court of Appeals was not convinced by this argument and held that the rule had no rational relation to the objectives of the school district and that it was ". . . fraught with invidious discrimination and thus constitutionally defective both as denial of equal protection and of due process."[67]

In 1976, the United States District Court in Nebraska heard the case Brown v. Bathke[68] which involved a probationary teacher who was dismissed because she was pregnant and not married. On March 26, 1973, the Board had voted not to renew her contract because the administration had not received her college transcript. Miss Brown provided the transcript on March 28, but no further action was taken by the board.

In early April, Dr. Bathke, principal of Monroe Junior High School where the plaintiff was employed, learned that Miss Brown was pregnant. He contacted her and urged her to resign. She requested additional time to consider submitting her resignation. On May 7, 1973, the board voted to terminate her contract based on her status as unwed and pregnant.

Miss Brown did not request a hearing but filed a sex discrimination complaint with the Nebraska Equal Opportunity Commission. The Commission held a public hearing and found that there had been discrimination on the basis of sex.

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[66]Ibid., 614. [67]Ibid., 611. [68]416 F. Supp. 1194 (1976).

When first heard by district court, the case was remanded with directions to the board to conduct a hearing as required by law. In the second appeal to the district court, Chief Judge Urbom held that the 1975 hearing (as ordered by the court) afforded the plaintiff due process; that Miss Brown had no expectancy of continued employment beyond that school year; that the board's action in terminating a teacher for being pregnant while unwed bore a rational relationship to the board's legitimate educational function; that the termination did not violate the teacher's rights of privacy or association; and that the teacher was not entitled to damages from individual board members.

This case provides an interesting contradiction of the previous decision in Drake. While Miss Drake's dismissal was overturned because of the failure of the school board to show a relationship between her status as an unwed pregnant female and her classroom performance, the court in this case held that that relationship was implied.

New Mexico State Board of Education v. Stoudt[69] involved the dismissal of Katherine Stoudt for the following reasons:

> (1) she was pregnant and unmarried; (2) her conduct was deemed immoral in the Taos community; and (3) her continued presence in the classroom would have a potentially adverse effect upon her teaching effectiveness in the classroom and as a coach, and upon the moral climate at Taos High School.[70]

Miss Stoudt was recommended for reemployment for the 1976-77 school term and signed her contract in July 1976 in spite of the fact that her pregnancy had been made known to the superintendent in May.

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[69] 571 P.2d 1186 (1977). [70] Ibid.

On August 19, 1976, a special Taos board meeting was held and resulted in a motion being passed to ask Miss Stoudt to resign. Miss Stoudt responded in writing that she would not resign. Further, she requested maternity leave. It is interesting to note that at the time of the board's action against Miss Stoudt there were five other unwed mothers employed in Taos schools against whom no action had been taken.

The board conducted a hearing in September and confirmed its earlier decision to dismiss her. On January 20, 1977, the state board of education held a hearing and affirmed the decision of the Taos Board to dismiss Miss Stoudt. She appealed to the Court of Appeals[71] which reversed the decision of the state board and ordered her reinstatement with back pay. When the state board appealed to the Supreme Court of New Mexico, it held that ". . . her dismissal for being unmarried and pregnant was arbitrary, unreasonable, and not supported by substantial evidence."[72] Therefore, the decision of the state board of education upholding Miss Stoudt's dismissal was vacated.

The case Cochran v. Chidester School District of Ouachita County, Arkansas,[73] was filed in United States District Court by June Cochran who alleged that the termination of her contract was in violation of her constitutional rights. June Nelson's pregnancy out of wedlock came to the attention of school officials in April of 1976. On April 6, a special meeting of the school board was held which resulted in the decision that the school superintendent would speak with Miss Nelson

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[71] 91 N.M. 183 (1977). [72] 571 P.2d 1186 (1977).

[73] 456 F. Supp. 390 (1978).

and ask for her resignation. If Miss Nelson failed to resign, she would be fired effective April 14, 1976. Miss Nelson alleged that she was verbally informed that her dismissal was due to the fact that she had become pregnant out of wedlock. Miss Nelson was married on April 10 and the subsequent birth of her child was legitimate. The plaintiff was not afforded any written standards concerning sexual relations or pregnancy nor was she notified about the April 6 special meeting of the school board. The Chidester school officials had been required by the court as a result of Moore v. Board of Education of Chidester School District[74] to develop and use objective nondiscriminatory standards in the employment, assignment, and dismissal of teachers. The district had failed to do this. As a result of these factors, the judge of the district court held that

> (1) since teacher's employment history, showing that her contract and teaching duties had been terminated prior to end of school year, even without communication of derogatory reasons therefore, might clearly be expected to have adverse effect upon her future employment opportunities and would carry a professional stigma, teacher was deprived of her liberty interest by lack of a pretermination hearing; (2) Arkansas statute, insofar as it purports to permit and establish as sufficient a posttermination hearing to school teacher, and then only upon request of teacher, does not meet due process standards required for termination of existing contract by school district, and (3) teacher was entitled to award of damages under contract with district and to $7,500 damages for stigma and impact of constitutional deprivation upon her professional future.[75]

The Cochran decision emphasized the importance of following due process procedures, including notice and a predetermination hearing, in any dismissal case.

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[74]448 F.2d 709 (1971). [75]456 F. Supp. 390 (1978).

Jean Avery taught remedial reading in Homewood City, Alabama, for five years before being dismissed by the Board of Education. Miss Avery notified her principal in November of 1976 that she was pregnant and due to deliver in late December. The principal commented that she had violated the written school district policy requiring that teachers who became pregnant must inform the superintendent no later than the fourth month of pregnancy. When Miss Avery met with the superintendent, Dr. French, to discuss that situation, he urged her to resign due to the moral issue of conception out of wedlock.

Dr. French notified Miss Avery in writing on December 15, 1976, that the board would meet to determine whether to cancel her contract for insubordination, neglect of duty, and immorality. "As Dr. French testified, both 'insubordination' and 'neglect of duty' referred to Avery's violation of the notice rule, and 'immorality' referred to her pregnancy out of wedlock."[76] On February 8, 1977, the board voted to terminate Avery's employment immediately. Avery sued the board, Dr. French, and the individual board members alleging deprivation of her rights as guaranteed by the equal protection and due process clauses of the Fourteenth Amendment.

When Avery v. Homewood City Board of Education[77] was heard by the United States District Court, it held that although one of the grounds, immorality, for the plaintiff's discharge was arguably impermissible, the presence of another permissible ground rendered the termination lawful.

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[76]Avery v. Homewood City Board of Education, 674 F.2d 337 (1982).

[77]Ibid.

Avery then appealed to the United States Court of Appeals, Fifth Circuit. Utilizing the framework of proof established by the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle,[78] the court stated:

> The burden was initially on Avery to show that her conduct was constitutionally protected and was a substantial or a motivating factor in the Board's decision to discharge her. We assume . . . that Avery's out of wedlock pregnancy was constitutionally protected. The district court found that the pregnancy was one of the reasons for Avery's discharge. . . . Having found that Avery had carried her initial burden, the district court should have gone on to determine whether the appeal had proven by a preponderance of the evidence that they would have discharged Avery even in the absence of her out of wedlock pregnancy.[79]

Therefore the court ruled that Avery's discharge was in violation of her rights under the equal protection clause of the Fourteenth Amendment and declined to rule on the other claims. The case was remanded to the district court to determine the relief to which Miss Avery was entitled.

The final case involving unwed pregnancy, Eckmann v. Board of Education of Hawthorn School District,[80] was reviewed briefly in the section on unwed pregnancy in Chapter II. This case involved the dismissal of an unwed pregnant teacher who was pregnant as a result of rape and who had decided to raise her child alone. After a jury verdict in favor of the teacher and an award of two million dollars in compensatory damages, the school board appealed. In addition to the compensatory damages, punitive damages totaling $1,310,000 were assessed against the individual members of the school board. The case was heard

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[78]50 L. Ed.2d 471 (1977). [79]Avery, 340.

[80]636 F. Supp. 1214 (N.D. Ill. 1986).

by United States District Court in Illinois in 1986. In deciding the teacher's constitutional claim, the Court relied on the reasoning of the Mount Healthy decision:

> . . . there are three burdens in a case of this sort. The teacher must first show some constitutionally protected conduct. Once this is established, the teacher carries the burden of showing that the protected conduct was a "substantial" or "motivating" factor behind the school board's conduct. Once the teacher carries these two burdens the school board must then show by a preponderance of the evidence that it would have taken its action even if the teacher had not engaged in the constitutionally protected conduct.[81]

The court further stated that the fact that the school board could have reached the same decision is not enough. The school board must prove that it would have reached the same decision without considering the protected conduct. The court concluded that the constitutionally protected conduct which allegedly motivated the school board to fire Eckmann was her out-of-wedlock pregnancy coupled with her decision to raise her child as a single parent. Although the court found that the plaintiff's conduct was not protected by a specifically enumerated constitutional right, it considered the conduct to be covered by substantive due process.

The court also cited two United States Supreme Court decisions, Eisenstadt v. Baird[82] and Roe v. Wade,[83] as precedents in this case:

> Supreme Court precedent thus clearly shows that the individual's decisions regarding marriage and child bearing are constitutionally protected from improper state infringement. . . . Under the overwhelming weight of this authority, it is beyond question that plaintiff had a substantive due process right to conceive and raise her child out of wedlock without unwarranted state (School Board) intrusion.[84]

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[81] Ibid. [82] 405 U.S. 438 (1972).

[83] 410 U.S. 113 (1973). [84] Eckmann, 1218.

The district court concluded that the evidence supported the finding that the school board's motivation in its dismissal of Miss Eckmann was her constitutionally protected decision to remain pregnant and to raise her son as a single mother; that the evidence was insufficient to support the two million dollars in compensatory damages; and that dismissing school board members as defendants in civil rights actions did not preclude the award of punitive damages against the individual members. The compensatory damage award was changed to $750,000.

As was pointed out in the discussion of Donal Sackman's article in Chapter II of this study, this case could have major implications for school officials if it is interpreted as establishing the precedent that unwed pregnancy is constitutionally protected in all circumstances. This was probably not the intent of the court. Unwed pregnancy which has an adverse impact on classroom performance might not be afforded the same degree of constitutional protection as was provided in this case.

School officials must consider the effect of the individual's pregnancy on classroom performance as part of the decision to dismiss for unwed pregnancy. Clearly, the courts will not support dismissal decisions unless this test has been met with a preponderance of the evidence. Violation of the personal moral standards of the board or of the community is not sufficient alone to justify dismissals of teachers for being unwed and pregnant.

Sexual Misconduct with Students

Sexual misconduct with students or other minors of school age has frequently led to the dismissal of teachers. As with other areas of sexual misconduct, teachers who have been dismissed for this type of conduct are petitioning the courts to challenge these dismissals. Again, the teachers frequently base their litigation on the claim that their constitutional guarantees have been violated in the dismissal process.

The case Board of Trustees of the Compton Junior College District v. Stubblefield[85] is often cited in the litigation of court cases which deal with sexual misconduct with students. Although it involved a teacher at a junior college, the findings in this case are applicable to public school teachers since Stubblefield's position was one which required certification.

The case stemmed from an incident that occurred on the night of January 28, 1969. Stubblefield drove a female student who was enrolled in his night class at Compton Junior College to a side street in the area of the college and parked there. A Los Angeles County deputy sheriff noticed the car and stopped to investigate since it appeared to be abandoned. Stubblefield sat up in the car as the deputy approached the vehicle. When the deputy illuminated the interior of the car with his flashlight, he saw that Stubblefield's pants were unzipped and lowered from the waist exposing his genitals. The student was nude from the waist up and her pants were also unzipped.

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[85]App., 94 Cal. Rptr. 318 (1971).

When Stubblefield realized that they had been discovered by a police officer, he threw open the door and yelled, "Get the hell away from me, you dirty cop."[86] Stubblefield then shifted the car into reverse and knocked the deputy to the pavement, resulting in minor injuries. The defendant drove away with the deputy in pursuit. The chase, which resulted in speeds as high as one hundred miles per hour, ended when the student grabbed the steering wheel and forced Stubblefield to stop.

On March 4, 1969, the board of trustees suspended Stubblefield from his employment based on charges of immoral conduct and evident unfitness for service. An informal hearing was held at which the defendant and his counsel were present. Subsequently, the board filed a complaint in superior court requesting that the court inquire into the charges and determine whether or not those charges were true. If it were determined that the charges were true, the board also requested the court to determine whether the charges constituted sufficient grounds for the dismissal. The court found that the charges were true and provided sufficient basis for the board's dismissal action.

On appeal, Stubblefield contended that the trial court was in error in holding that his conduct constituted sufficient grounds for dismissal. He based his appeal on the Morrison decision. The Court of Appeals did not agree with Stubblefield's broad interpretation that this decision prevented his dismissal because the board had not shown how his conduct rendered him unfit to teach. Further, the court stated that

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[86]Ibid., 320.

> The clear import of that decision . . . is that a teacher may be discharged or have his certificate revoked on evidence that either his conduct indicates a potential for misconduct with a student or that his conduct while not necessarily indicating such a potential, has gained sufficient notoriety so as to impair his on-campus relationships. There is no requirement that both the potential and the notoriety be present in each case.[87]

The court felt that while there was no evidence directly addressing notoriety of the conduct, the very fact that the defendant was easily discovered by a police officer demonstrated the dubious security provided by the front seat of an automobile.

Addressing the fitness issue, the court also distinguished this case from Morrison and concluded: "'Unfitness to teach' in terms of an indication that defendant was 'more likely than the average adult male to engage in any untoward conduct with a student' can be inferred from the very conduct itself. Defendant's actions in this case speak louder than any words of a psychiatrist."[88] The court felt that the conclusions of the trial court were amply supported by the evidence presented and affirmed its decision. However, to avoid any possible uncertainty in the record, the court made the specific finding that Stubblefield's conduct constituted immoral conduct which indicated an evident unfitness to teach.

Another case, which involved the discovery of a teacher engaged in sexual misconduct with a student, was heard by the Appellate Court of Illinois in 1973. Yang v. Special Charter School District No. 150, Peoria County[89] was an appeal from a circuit court decision which upheld the board of education's dismissal of Stephen Yang.

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[87]Ibid., 322. [88]Ibid., 323. [89]296 N.E.2d 74 (1973).

On the night of December 7, 1971, Stephen Yang's automobile was parked near a bridge in East Peoria. A police officer discovered Yang and a female student under the age of eighteen in the automobile. Both were partially undressed. A criminal complaint resulted from this discovery.

Proceedings by the board of education to dismiss Yang began on December 20 with a resolution for his immediate suspension without pay and his dismissal which would become effective on February 25, 1972. A public hearing was requested and held on January 17. The hearing officer allowed thirteen witnesses to testify as to the character and reputation of Yang but refused to allow an additional eleven witnesses to testify. The officer also did not allow evidence to be entered concerning Yang's acquittal on the criminal charges. The hearing officer concluded that Yang's dismissal was in the best interest of the school district.

In this appeal, Yang contended that he was denied due process because the school board was not an impartial fact finder and because his dismissal preceded the hearing. He further argued that the hearing officer erred in denying the admission of the additional witnesses and the verdict of not guilty. The appellate court found that since Yang had admitted playing strip poker with the female student in his automobile, he had no argument concerning the fact finding process. The court also denied his assertion that his dismissal preceded the hearing. He had received notice of the dismissal prior to the hearing but that notice set the date of dismissal in February. In addition, the court

ruled that limiting the number of witnesses was a matter left to the discretion of the hearing officer. Although the court indicated that the criminal verdict of not guilty should have been entered into evidence at the hearing, it did not feel that this error was prejudicial in light of the teacher's own admissions concerning the incident in question. The court affirmed the decisions of the board of education and the circuit court to dismiss Yang from his teaching position.

On January 29, 1970, a Texas grand jury indicted H. L. Moore on four charges: two separate charges of aggravated assault and battery; contributing to the delinquency of a minor; assault with intent to rape; and indecent exposure. These charges arose from incidents involving two children. At the time of the indictments, Moore was an eighth grade teacher. School officials immediately removed Moore from his classroom duties when they learned of the charges against him. Subsequently, the school board decided, without conducting a hearing, to suspend Moore with pay from his teaching duties for the remainder of the 1969-70 school term. Later, the board refused to consider renewal of his contract for the following year. Again, this action was taken without conducting a hearing.

Moore commenced legal action against the school board alleging that his due process rights had been violated by the board's failure to conduct proper hearings on both his suspension and the nonrenewal of his contract for the following year. The district court treated the board's removal of Moore from teaching duties and its subsequent suspension as a suspension with pay for the remainder of the school

year. After careful consideration of the issues involved, including the nature and seriousness of the charges, the court concluded that there had been no violation of due process in the board's actions involving the suspension. However, the court did find that the refusal of the board to consider renewal of Moore's contract for the 1970-71 school year was a violation of due process and awarded Moore back pay for 1970-71 and attorney's fees.[90]

On appeal to the United States Court of Appeals, Fifth Circuit,[91] Moore urged consideration of the Sinderman and Roth decisions. Moore argued that, under the Sinderman decision, he was entitled to a remand to afford him the opportunity to offer proof that he possessed a property interest in his continued employment even though he lacked formal tenure. The court agreed and vacated the district court judgment of back pay and attorney's fees. It also remanded the case for further consideration under the new standards of the Sinderman decision.

A second argument Moore set forth was that the board's decision not to rehire him deprived him of his liberty interest without due process. This argument was based on the Roth decision. The court, however, disagreed with his assertion: "We conclude that the action of the board in declining, without hearing, to consider renewal of Moore's contract, was not a violation of due process under Roth. . . . Moore had knowledge of the indictments and had notice of the board's reasons for refusing to act on his contract."[92] The court did specify that the board would be obligated under Roth to offer Moore a hearing

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[90]333 F. Supp. 53 (1971). [91]482 F.2d 1069 (1973). [92]Ibid., 1073.

to provide him the opportunity to clear his name if Moore was acquitted of the charges against him.

The Moore decision should serve as an important reminder to school officials that the teacher being dismissed is entitled to due process, regardless of the reason for dismissal. Failure to provide the opportunity for a hearing on the charges which lead to dismissal may result in the decision being reversed by the courts.

Gary L. Denton, a teacher at Marcus Whitman Junior High School, became acquainted with a student at South Kitsap High School as a result of his friendship with her parents. She had attended Denton's school but had never been in one of his classes. In the summer of 1971, Denton and the girl began dating with her parents' permission. In early November of that year, school administrators were informed by a counselor that the girl was pregnant and that a teacher was involved.

On November 8, 1971, a conference was held by the principal and vice principal with Denton. Denton acknowledged both the relationship and the paternity of the child. On November 15, the board of directors of the school district directed a notice of probable cause for dismissal to Denton. The stated cause was ". . . that as a male person you carnally knew and abused a female child under the age of eighteen years, who was not your wife, namely, . . . a student of South Kitsap School District No. 492."[93] Denton requested a hearing which was held on December 8 and resulted in his dismissal. Denton and the student in question were married on November 12, 1971.

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[93]Denton v. South Kitsap School District No. 402, Wash. App., 516 P.2d 1080 (1973).

On appeal to the Superior Court of Kitsap County, the dismissal was upheld. At both the hearing and the trial, Denton asserted the privilege against self-incrimination to all questions concerning his sexual involvement with the girl.

Denton appealed to the Court of Appeals of Washington alleging that his sexual relations with a minor female did not constitute sufficient cause for his dismissal absent a showing of adverse impact on his effectiveness as a classroom teacher. The court began its discussion of the case with the following: "It is difficult to conceive of circumstances which would more clearly justify the action of the school board than the sexual misconduct of a teacher with a minor student in the district."[94]

Denton's appeal relied heavily on the Morrison decision which required a showing that the conduct adversely affected the teacher's fitness to teach. On this assertion, the court concluded:

> While the argument that "immorality" per se is not a ground for discharge without a showing of adverse effect upon "fitness to teach" or upon the school has merit . . . we decline to set such a requirement where the sexual misconduct complained of directly involves a teacher and a minor student. In our view, the school board may properly conclude in such a situation that the conduct is inherently harmful to the teacher-student relation, and thus to the school district.[95]

The court affirmed the dismissal of Denton from his teaching position.

Even though Denton dated the minor female with her parents' permission, the dismissal was held to be for valid cause. The message from the court in this case is clear. Sexual misconduct with a minor in the school district implies adverse effect on a teacher's

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[94]Ibid., 1081. [95]Ibid., 1082.

effectiveness without the board actually showing proof of that effect. The conduct alone is adequate support for a dismissal on grounds of immorality. The same judicial reasoning was also utilized in the next decision.

Tomerlin v. Dade County School Board[96] was heard by the District Court of Appeal of Florida in 1975. James Tomerlin appealed his dismissal by the Dade County school board for immoral conduct with his nine-year-old stepdaughter. Prior to his dismissal, Tomerlin had an unblemished record as an elementary school teacher. After school hours, Tomerlin performed cunnilingus on his stepdaughter at his home. Although expert testimony at the hearing indicated that this was an isolated act which probably would not happen again, the board proceeded with the dismissal. The dismissal was upheld by the state board of education.

Tomerlin's appeal was based on his contention that the Florida statute which authorized dismissal for immorality was void due to its vagueness. The court disagreed. Tomerlin also contended that the statute was unconstitutional unless it was interpreted to connect his immoral conduct with his job performance. The court concluded that although the act occurred at home after school hours, it was indirectly related to his job: "His conduct is an incident of a perverse personality which makes him a danger to school children and unfit to teach them. Mothers and fathers would question the safety of their children; children would discuss Tomerlin's conduct and morals. All of these relate

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[96]Fla. App., 318 So.2d 159 (1975).

to Tomerlin's job performance."[97] In denying his writ of certiorari, the court's decision concluded with the following:

> A school teacher holds a position of great trust. We entrust the custody of our children to the teacher. We look to the teacher to educate and to prepare our children for their adult lives. To fulfill this trust, the teacher must be of good moral character: to require less would jeopardize the future lives of our children.[98]

Perry Weissman was a tenured teacher at Arvada Senior High School at the time of his dismissal. He had earned the reputation as an excellent teacher and was noted for his exceptional rapport with students. This rapport, coupled with his use of innovative, nontraditional methods of teaching, caused friction between Weissman and his colleagues, including the administration of the school. He was assigned to a newly established program called School Within a School (SWS) which was projected to be a student-centered program.

The SWS scheduled three field trips to Santa Fe and Taos, New Mexico, for students to study Indian and Spanish cultures and their influence on the Southwest United States. On the second of these field trips which began on October 6, 1972, Weissman was riding in the back seat of a Volkswagen van being driven by another adult chaperone, Mrs. Beck. During the journey, Weissman engaged in activities with several of the female students which included touching and tickling the girls on various parts of their bodies, including between the legs in proximity to the genital area. The girls also were involved in tickling and touching Weissman. During the course of this conduct, the

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[97] Ibid., 160. [98] Ibid.

conversation between Weissman and the girls was occasionally vulgar, suggestive in nature, and contained many sexual innuendoes. Similar behavior, although somewhat more subdued, occurred on the second day of the trip. The girls involved in the conduct in the van apologized to Mrs. Beck. Weissman expressed pride in his behavior and indicated that he would probably behave in the same way if he were in a similar situation again. He referred to the behavior as good-natured horseplay which was a positive, educational experience.

Several other incidents occurred on this field trip. Weissman and a female student spent some time alone in the van discussing her personal problems. On another occasion during the trip, he and one of the girls were seen lying on a bed watching television.

When the group returned from the trip on October 9, Mrs. Beck and another female chaperone complained to the principal about Weissman's behavior. On October 17, the board of education decided to review the complaints. A hearing panel was convened to consider charges of neglect of duty, insubordination, immorality, and other good and just cause. After extensive hearings, the panel members unanimously agreed that the charges of insubordination had not been proven. Two of the three members found that the physical touching combined with the vulgar language justified the charge of immorality. Similarly, these two members also concluded that Weissman had neglected his duty to act morally and that the totality of his actions constituted other good and just cause for his dismissal. Although the third member dissented, he conceded that Weissman lacked a sense of dignity and decorum in his behavior.

On February 6, 1973, the board of education heard further argument and statements from a number of individuals who urged the board to retain Weissman. The board concluded that the facts were sufficient to support the dismissal of Weissman on the grounds of neglect of duty, immorality, and other good and just cause. After the District Court of Jefferson County upheld the dismissal, Weissman appealed.

Weissman v. Board of Education of Jefferson County School District No. R-9[99] was heard by the Supreme Court of Colorado. Weissman challenged the constitutionality of his dismissal for immorality on two basic issues: (1) that the term immorality was excessively vague, meant different things to different people, and subjected the teacher to the irrational and arbitrary whims of the school board members; and (2) the statute required no nexus between the conduct and the classroom teacher's effectiveness.

The court began by addressing the nexus argument. In the opinion of the court, immorality, as used in the statutes, implied a standard that was directly related to the teacher's fitness for service. The opinion contained the following elaboration on this point:

> We do not believe that the legislature intended to potentially subject every teacher to discipline, even dismissal, for private peccadilloes or personal shortcomings that might come to the attention of the board of education, but yet have little or no relation to the teacher's relationship with his students, his fellow teachers, or with the school community.[100]

Although the court noted that the factors were not to be considered as exclusive given the wide variation of human conduct, it utilized

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[99]547 P.2d 1267 (1976). [100]Ibid., 1272.

the Morrison criteria to uphold Weissman's dismissal for immorality. The court further indicated: "In our view, whenever a male teacher engages in sexually provocative or exploitive conduct with his minor female students a strong presumption of unfitness arises against the teacher."[101]

The vagueness argument was the next focus of the court's opinion. Having defined immorality as having a direct relation to the teacher's performance, the court ruled that the statute was not unduly vague and constituted a valid reason for dismissal. Finally, the court addressed Weissman's due process assertions which it found to be without merit. The final decision reversed the portion of the lower court's decision which required Weissman to pay a share of the costs of the panel hearing while it affirmed the decision which upheld Weissman's dismissal.

Again, this court decision utilized the reasoning that there is the implication of unfitness inherent in provocative or sexually suggestive conduct with students. Therefore, the board was not required to show that Weissman's conduct had had an adverse impact on his effectiveness in the classroom. This case is also important because the statute which allowed dismissal for immorality was held to constitute a valid cause for dismissal of teachers charged with sexual misconduct with students.

Carrao v. Board of Education, City of Chicago[102] was the appeal of a circuit court decision which upheld the dismissal of Joseph Carrao for conduct unbecoming a teacher. The dismissal was based on charges

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[101] Ibid., 1273. [102] 360 N.E.2d 536 (1977).

that Carrao had taken indecent liberties with a student from his school on June 30, 1974. The alleged incident took place on a trip to Minnesota.

Joseph Carrao accompanied the Vandervieren family on a vacation. He drove a separate vehicle with a camp trailer attached. He resided in this camp trailer which was parked next to the cabin which the Vendervieren family had rented. On the night in question, eight-year-old Susan Vandervieren slept in Carrao's trailer. She stated that she awoke to find her sleeping bag unzipped, her pants down, and Carrao touching her private parts. Although she said that she was afraid to tell him to stop, she left the trailer and told her mother what had happened. Her mother told Carrao to leave the property.

A week later, Ms. Vandervieren received a note from Carrao asking her to come to a local motel so that he could talk to her. She notified the sheriff who went to the motel, accused Carrao of child molestation, and told him to leave the county. The school board then learned of the incident and held a hearing to determine whether to dismiss Carrao.

Although Carrao testified that the alleged misconduct had not occurred, Susan's mother testified at the hearing that she asked him how he could have done such a thing to her daughter. Carrao's response was: "I must have been dreaming."[103] She also stated that she received a letter from Carrao which was mailed from Chicago immediately after the incident. The letter stated ". . . that he was sorry and that he

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[103]Ibid., 539.

hoped for the children's sake the whole thing was not a permanent scar."[104] She continued her testimony to relate receiving the note asking her to meet him at the local motel. This note was accompanied by a bag of groceries and a carpet sweeper. The sheriff also testified that, when questioned about the accusations, Carrao responded: "I don't know what got into me. I know I should't have did [sic] it."[105]

Carrao testified on his own behalf and claimed that Susan was upset with him because he would not let her get into his sleeping bag. He had scolded her for attempting to do so and she left to return to the cabin. He denied taking indecent liberties with Susan or any other child. Carrao also called several character witnesses.

The hearing committee recommended Carrao's dismissal and the board concurred with this recommendation. Carrao appealed and the decision was affirmed by the trial court.

Carrao appealed to the Appellate Court of Illinois for review of the following issues: (1) whether he was denied due process; (2) whether the superintendent's attorney assisted and advised the hearing committee; (3) whether a member of that committee was biased and had prejudged the facts; (4) whether the committee submitted specific findings of fact; (5) whether the board's decision was against the weight of the evidence. The Cout found none of these contentions had merit and affirmed the circuit court's decision which upheld Carrao's dismissal.

Kilpatrick v. Wright[106] was an action brought by Howard Kilpatrick under the civil rights statute of 1871 to challenge his dismissal on

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[104]Ibid. [105]Ibid. [106]437 F. Supp. 397 (1977).

the grounds that the Alabama statute allowing dismissal for immorality was unconstitutionally vague. Kilpatrick received a letter from the superintendent of the Montgomery County Board of Education on July 2, 1976, which stated that he had been terminated effective immediately for immorality.

A hearing was held at which the plaintiff was represented by counsel. The board found that the evidence presented established that Kilpatrick was guilty of immorality during the 1975-76 school year. Further, the board concluded: "That during the 1975-76 school year Mr. Kilparick [had] been guilty of highly unprofessional conduct in regard to his students, stemming from his actions, as proven by the oral testimony presented to this Board and this furnishes good and just cause for his termination."[107]

Kilpatrick appealed to the Alabama Tenure Commission which upheld the dismissal based on the presence of sufficient evidence for his dismissal. He then filed this action to challenge the constitutionality of the statute allowing his dismissal for immorality.

On the issue of vagueness, the court found that the misconduct with which Kilparick was charged related to his fitness to discharge the duties required of him as a classroom teacher. Specifically, the Court concluded that ". . . the plaintiff's activities are within the 'hard core' of activities prohibited by section 358, thus making it unnecessary for the court to determine whether section 358 is unconstitutionally vague at its outermost boundaries."[108]

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[107]Ibid., 398. [108]Ibid., 400.

The second prong of the plaintiff's attack on the dismissal statute stemmed from the overbreadth doctrine which contends that ". . . a statute, which otherwise may be clear and precise, catches within its sweep conduct which is constitutionally protected."[109] In its discussion of this issue, the court stated:

> It cannot be contended that the conduct for which plaintiff was discharged does not provide sufficient basis for his discharge. Making sexual advances towards female pupils, threatening a pupil with a loaded gun, and attempting to unzip a female pupil's pants in front of a class is conduct that not only cannot be condoned in the classroom setting, but also cannot be condoned in society in general. Instead, plaintiff contends that the unconstitutionality of the act is found not in the act's relation to the activities of the plaintiff but in the activities which the act may reach. In other words, plaintiff is contending that the act is unconstitutional on its face, not as applied. . . . This case is not one for application of the overbreadth doctrine.[110]

The court entered judgment for the defendant.

The judgment in this case upheld the constitutionality of the state statute which allowed dismissal for immorality. Teachers who commit acts of misconduct which are clearly related to their fitness to perform their classroom duties may not prevail in a challenge of the statute for vagueness. Similarly, the overbreadth doctrine can not be utilized to provide protection for teachers who engage in misconduct of this nature.

Penn-Delco School District v. Urso[111] was an appeal to the Commonwealth Court of Pennsylvania to review the order of the Secretary of Education to reinstate Thomas Urso who was dismissed on grounds of immorality. The charges against Urso stemmed from two incidents that involved female students assigned to his classes.

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[109]Ibid. [110]Ibid. [111]Pa. Comwlth., 382 A.2d 162 (1978).

The first of these incidents occurred in March of 1975. Urso served as the faculty advisor to the school newspaper in addition to his teaching duties. He called the female student into the corridor and offered to spank her since it was her seventeenth birthday. The student assumed Urso was joking until she received a phone call later that same day from Urso in which he brought up the subject of spanking again. She became concerned that he was making a sexual overture and reported the incident to another teacher the following day. This teacher informed the principal who discussed the incident with the student. It was decided to ignore Urso's behavior and treat it as a joke.

Over the next two weeks, Urso continued to seek out the student outside of the classroom and tried on two separate occasions to again discuss spanking with her. After the last of these two incidents, a conference was held with Urso, school administrators, and the student's parents. Urso claimed that his comments were intended to motivate the girl out of her shyness. He apologized to the parents and was warned by school administrators not to engage in similar conversations with students in the future.

In December of 1976, a similar incident occurred which involved a fifteen-year-old female student in Urso's English Composition and Rhetoric class. The student was writing a note in class which Urso confiscated. She requested a conference after class for the purpose of getting the note returned. In the discussion on the appropriate punishment for her conduct, Urso suggested that she wear a dress to school as part of that punishment. He also brought up the subject of

spanking. Urso suggested that she come to his house after school so that this spanking could take place. He also had made a copy of the note which he said that he would send to the student's father if she did not comply with the punishment. The girl talked with her brother who urged her to report Urso's conduct to the school principal.

As a result of her conference with the principal, a conference was held with Urso, school administrators, and the president of the school board. During this meeting, Urso admitted that he had had sexual fantasies about spanking girls for a number of years.

On January 20, 1976, Urso was notified that he was being suspended with pay pending a hearing on charges of mental derangement and immorality. At the hearing, evidence was presented to show that, prior to these two incidents, Urso had an exemplary record for all of his nine years of teaching in the district. At the conclusion of the hearing, the charges of mental derangement were dropped. However, the school board voted to dismiss Urso on grounds of immorality.

Urso appealed his dismissal to the Secretary of Education for the state of Pennsylvania. The Secretary defined immorality as ". . . a course of conduct that rises to the level of a grievous assault upon the mores of the community."[112] This definition provided a more stringent standard for judging immorality. The Secretary felt this was necessary since Urso's conduct primarily involved speech which has constitutional protection. After a hearing, the Secretary concluded that there was insufficient evidence to support Urso's dismissal.

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[112]Ibid., 167.

The school district appealed this ruling. In its decision, the Commonwealth Court ruled that a more stringent standard for immorality was not called for since Urso's conduct was not protected by his First Amendment rights. Therefore, the use of that standard by the Secretary was improper. The court also found substantial evidence to support the board's finding of immorality. The court also concluded that the Secretary erred in holding that findings of fact and a statement of reasons must accompany a decision to dismiss a professional employee. The order of the Secretary of Education was vacated and the decision of the school board was reinstated.

Although dismissals for immorality usually involve acts of misconduct, this case clarifies that teachers may be dismissed for sexually provocative comments to students. Teachers do not have the right to make inappropriate comments to students and then invoke their constitutionally guaranteed right to freedom of speech. Although in this case the speech was not followed by action, school officials can not afford to take the chance that inappropriate sexual conduct could occur.

Marvin McKown was charged by the school board on June 28, 1977, with allegations that he had engaged in conduct of a sexual and romantic nature with two female students on nine separate occasions over a period of one year. Proper notice was provided and five separate hearings were conducted by the board. On September 13, 1977, the board voted individually and found that three of these charges involving Tracy had not been proved. The board voted that the other six charges involving Karyl had been proved and voted to dismiss McKown for immorality.

After reviewing the records of the hearings, the Secretary of Education concluded that Karyl's testimony was uncorroborated and appeared to have been influenced by Tracy's accusations. Karyl had testified at the hearing that on several occasions McKown had kissed and fondled her in the preparation room adjacent to the science classroom. However, when initially questioned, she had denied any improper relationship with McKown. The same day she made allegations about the sexual intimacy with McKown. This pattern of denial and reversal happened again three days later. This inconsistency led the Secretary to the conclusion that the events alleged could not have occurred. McKown's dismissal was overturned and the Wissahickon School District appealed to the Commonwealth Court of Pennsylvania.[113]

On the issue of Karyl's credibility, the court stated: "Because we conclude after a review of the entire testimony that a reasonable man acting reasonably might have relied on the student's testimony . . . we must reverse the Secretary."[114] Although the court agreed that review of the record could result in questions about Karyl's credibility, it was of the opinion that it was not within the Secretary's power to substitute her judgment for that of the board. Further, the court was at a loss to explain how the Secretary came to the conclusion that the alleged events could not have taken place. The court pointed out: "It is clear that only two individuals know what occurred on the dates in question and their testimony is in conflict. It was for the Board

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[113]Wissahickon School District v. McKown, Pa. Cmwlth., 400 A.2d 899 (1979).

[114]Ibid., 900.

in weighing all the testimony to determine which version to accept."[115] The court entered judgment in favor of the school district, vacated the order of the Secretary of Education, and reinstated the dismissal of McKown for immorality.

When a school board conducts a hearing on charges leading to the dismissal of a teacher, it has the advantage of not only hearing the testimony of witnesses but also observing the demeanor of those individuals. Outside agencies or individuals do not have this advantage and err when they seek to substitute their own judgment for that of the board. As this case shows, the courts will not uphold these decisions.

When Richard Ricci's dismissal for immorality was upheld by the Arapahoe County District Court, he filed suit against the members of the school board individually and as members of the board.[116] On August 22, 1977, written charges were filed against Ricci with the school board: "You, Richard Ricci, are charged with engaging in improper and/or unprofessional conduct with females who are or were, at the time of the incidents, students at Hinkley High School, which conduct constitutes immoralitiy or other good and just cause for your dismissal."[117] At the time the charges were filed, the board had received signed, notarized statements from four female students who alleged that Ricci had engaged in acts of sexual misconduct with them, specifically hugging, kissing, and other inappropriate touching.

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[115]Ibid., 901. [116]Ricci v. Davis, Colo., 627 P.2d 1111 (1981).

[117]Ibid., 114.

A teacher tenure hearing was held at Ricci's request on September 16-21. A fifth female student testified at the hearing as to Ricci's misconduct with her. The panel issued findings of fact and recommended that Ricci be dismissed.

After the dismissal was affirmed in district court, Ricci filed this appeal. He challenged his dismissal on several grounds. He argued that the board's review of portions of the hearing transcript tainted its ultimate findings of fact and that the findings of fact by both the board and the teacher tenure panel were unsupported by substantial evidence. He also alleged that the statements of the four original students comprised extra-record evidence which the board could not consider constitutionally before entering its order of dismissal. Finally, he argued that dismissal for other good and just cause was unconstitutionally vague and thus, since the panel denied his motions for a more definite statement and to permit discovery, he had been denied due process of law. The court did not consider the last two issues since it had ruled that there was sufficient evidence to dismiss for the charge of immorality alone. Therefore, the court affirmed the decision to dismiss Ricci.

Lang v. Lee[118] involved alleged homosexual misconduct with minors by James Dean Lang. Lang received notice that he was charged with immoral conduct and that a hearing would be held to determine if he should be terminated as a permanent teacher with the South Callaway School District. The charges specified that in March and April of

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[118]639 S.W.2d 111 (Mo. App.1982).

1980, Lang had taken ". . . indecent and immoral liberties with a 13-year-old male by showing him pornographic magazines and movies and by placing his hands on the boy's genital area."[119] The charges also specified that Lang had taken liberties with at least four other minor males.

At the beginning of the hearing on August 15, 1980, Lang's attorney requested a continuance of one week to allow the resolution of a pending criminal case against Lang. He stated that Lang could not testify before the board without that testimony being used against him in the criminal proceeding. When the board refused to allow the continuance, the attorney produced a letter from Lang. Although the attorney said that he was authorized to say that the letter was Lang's resignation, the letter did not actually state that Lang was resigning. The board refused to accept the resignation.

During the hearing, testimony was heard from two police officers and their investigative report was entered into evidence. The evidence presented indicated that the alleged misconduct with the thirteen-year-old boy had occurred on two separate occasions. In Lang's voluntary statement to the police which was part of the report, Lang admitted to the incidents with this young man as well as to incidents with four other boys, ages fourteen to eighteen, between 1971 and 1980. Each of these four relationships lasted for periods of several months. The board voted to terminate Lang's contract and this decision was upheld by the Circuit Court of Callaway County.

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[119]Ibid., 112.

On appeal to the Missouri Court of Appeals, Lang contended that the action of the board should be reversed because ". . . (1) the Board failed to grant a continuance because a criminal case was pending against him at that time; (2) the Board received hearsay evidence; and (3) the Board's attorney improperly influenced rulings by the Board."[120] The Court disagreed with the contention that the hearing should have been postponed due to the pending criminal proceeding:

> In this case the School Board was dealing with a teacher who obviously had contact daily with young people. The strong interest which the Board had in determining whether or not a teacher was guilty of immoral conduct naturally motivated the Board to try to dispose of Lang's case as expeditiously as possible.[121]

In their consideration of Lang's contention that the board had considered hearsay evidence, the court ruled that since Lang had admitted to the conduct contained in the statement given by the thirteen-year-old boy that it could not be considered as impermissible evidence. The court also ruled against Lang's contention that the board's attorney had improperly participated in the board's ruling since both attorneys had the opportunity to express their views at the hearing. Lang's dismissal was affirmed.

Verl Potter, a fourth grade teacher at Kalama Elementary School, was discharged for inappropriate physical behavior toward female students in his class. During the fall of 1978, Potter placed his hand on the knee of one of his female students in a caressing manner. This incident came to the attention of the principal who confronted Potter. The principal made it clear that this type of conduct was inappropriate.

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[120] Ibid. [121] Ibid., 114.

Potter indicated that he would try to be sure that it did not happen again.

On June 6, 1979, Potter blew a kiss to another female student who reported the incident to her mother. When this incident was brought to the attention of the principal, Potter received a letter from the superintendent informing him that he had been placed on probation for the following year. The leter also contained the warning that any similar incidents could result in more severe disciplinary action including discharge.

On February 27, 1980, Potter lifted the dress of another girl in his class allegedly to examine a bruise on her knee. When the incident was brought to the attention of the principal, he and the superintendent initiated an investigation and discovered that the teacher's inappropriate conduct with the girls assigned to his class had occurred regularly. Potter was discharged.

A hearing officer heard Potter's initial appeal. During the hearing, it was revealed that the touching involved the teacher placing his hand on the girls' legs and rubbing them in a caressing manner. The girl, who was involved in the incident in which Potter lifted her dress, indicated that the dress was only raised an inch or two because she had prevented it form being raised further. She also indicated that the bruise could have been examined without lifting the dress at all. The principal and the superintendent provided testimony concerning the reaction from both the parents of the students involved and the community in general. The hearing officer ruled that the teacher's conduct was sufficient cause for his discharge.

After this decision was affirmed by the Superior Court in Cowlitz County, Potter appealed to the Court of Appeals of Washington.[122] Potter argued that his discharge was improper because his conduct fell within the statute which governed correction of remedial teaching deficiencies. The court stated:

> . . . the undisputed facts here overwhelmingly suffice as cause for discharge. The fourth grade girls were justifiably bothered, their parents had reacted negatively and community sentiment was similar and strongly felt. The conduct was ongoing. The teacher was warned and later placed on probation but persisted in his behavior with no sign of improvement. We perceive no right of any teacher which may be chilled by discharge for conduct of this nature after the apparent failure of progressive discipline.[123]

Ruling on Potter's assertion that his discharge was based on remediable teaching deficiencies, the court concluded: "There is an obvious distinction between conduct which is involved with the professional qualities of teaching . . . and conduct of the kind involved here. There was no legitimate professional purpose in this teacher's physical contact with his female students."[124] The court held that the teacher's dismissal was for sufficient cause and that the statute governing dismissal for deficiencies that could be remediated did not apply.

Inappropriate conduct with students cannot be considered as a remediable deficiency. The school board in this case had met with the teacher for the purpose of preventing further incidents with his students. In spite of the warnings from his superiors, the behavior continued. School boards are justified in the dismissal of teachers who

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[122]Potter v. Kalama Public School District, No. 402, 644 P.2d 1229 (1982).

[123]Ibid., 1231. [124]Ibid.

engage in inappropriate conduct. The courts do not require a showing that attempts have been made to remediate the problem since it does not involve professional teaching responsibilities.

Robert Ross was dismissed from his teaching position for immorality following a public hearing which was held on January 10 and 12, 1980. Seven charges were filed against the teacher: (1) The teacher permitted the only female student in his carpentry class to be harassed by male students with questions of how much money she would take for sexual favors. Out of exasperation, the girl responded that she would take one hundred and fifty dollars. The teacher pulled two one hundred dollar bills out of his pocket and placed them on the desk in front of the girl. (2) The teacher had grabbed the girl, hugged her, put his arm around her, and pinched her when they were alone on a job site. (3) The teacher permitted a nude centerfold from Playboy magazine to be posted on the classroom wall in full view of the students. (4) The teacher had permitted the male students to subject the female student to sexual harassment. (5) Male students had given the female student a plastic substance in the form of a phallus, which was also displayed in a sexually suggestive manner by one of the males. The teacher allegedly displayed the object to fellow teachers and joked about the incident. (6) The female student was interrogated by a male student about her sexual experience. The male student further refused to plug in a heater unless she performed a sexual act with him. This incident supposedly occurred while the teacher was within hearing range of the students. (7) The teacher did not reprimand students for bringing a

pornographic audiotape to the classroom and playing it in the presence of the female student.[125]

The Randolph County Circuit Court reinstated Ross and the school board appealed to the Missouri Court of Appeals.[126] Although the court ruled that there was no question that the board's finding was supported by substantial and competent evidence, the case was transferred to the Supreme Court of Missouri[127] because Ross had raised and preserved his constitutional attack on the validity of the statute allowing his dismissal for immorality.

After a brief discussion of the facts of the case, the court turned its attention to Ross's constitutional challenge: ". . . that the phrase 'immoral conduct' is impermissibly vague and denies him due process. He argues that the phrase fails to provide a standard against which conduct can be judged and thus fails to give a person of ordinary intelligence a reasonable opportunity to know what acts are prohibited."[128] Using the judicial definition provided in Thompson v. Southwest School District[129] of immoral conduct as "conduct rendering plaintiff unfit to teach,"[130] the court was persuaded to deny Ross's constitutional challenge of the statute. It concluded:

> The Board was within its discretion in determining that Ross's conduct rendered him unfit to teach; tacit encouragement and demonstrated tolerance of explicit and grotesque sexual harassment

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[125]Ross v. Robb, 651 S.W.2d 693 (Mo. App. 1983). [126]Ibid., 680.

[127]Ross v. Robb, 662 S.W.2d 257 (Mo. banc 1983). [128]Ibid., 259.

[129]483 F. Supp. 1170 (W.D.Mo. 1980). [130]Ibid., 1181.

> constitutes statutorily proscribed "immoral conduct." The Board reached this determination after it afforded petitioner a fair trial.[131]

The judgment was reversed and the case was remanded with the direction to reinstate the decision of the board of education dismissing Ross from his teaching position.

Although Ross had engaged in limited inappropriate conduct himself, he had condoned inappropriate conduct on the part of the male students in his class. Therefore, Ross was considered unfit to teach. The court made it clear that tolerance of sexual harassment constituted immoral conduct on the part of the teacher. A teacher has the responsibility not only to exhibit appropriate conduct but also to enforce expectations of appropriate conduct in the classroom. Failure to do so can lead to dismissal for immorality which will be upheld in court.

Lewis Rosenberg was dismissed from his teaching position for immorality and other good and just cause for incidents involving a twelve-year-old male student. The student, who had a history of chronic emotional problems, was enrolled in Rosenberg's class for students with behavioral problems.

On May 23, 1980, Rosenberg allowed this student to caress his face while Rosenberg engaged in a rocking motion. The student also embraced and kissed Rosenberg on the face and lips. Rosenberg then hugged and kissed the student whose face was flushed.

On May 28, Rosenberg and the student left the field day activities, returned to the school building, entered Rosenberg's classroom

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[131]Ross, 260.

and locked the door. The student sat on Rosenberg's lap for approximately thirty minutes during which both engaged in short kisses and a slight rocking motion. The physical contact ended when the principal's assistant unlocked the door and entered the room.

Following a hearing, charges were filed against Rosenberg on June 13, 1980, alleging immorality and other good and just cause for dismissal. The hearing officer had concluded that this conduct represented an abuse of Rosenberg's position as a teacher and had a detrimental effect upon the student.

Rosenberg appealed to the Colorado Court of Appeals[132] and then to the Supreme Court of Colorado.[133] In both appeals, Rosenberg's contentions were the same. He argued that the hearing officer had abused his discretion (1) by refusing to allow Rosenberg to take written depositions from twelve witnesses; (2) by refusing to allow Rosenberg to take a written deposition from the student involved in the incidents; and (3) by refusing to allow a continuance of the hearing pending the outcome of parallel criminal proceedings. Both courts affirmed the decision of the school board to dismiss Rosenberg.

Shipley v. Salem School District[134] was an appeal of an order from the Fair Dismissal Appeals Board which reversed the school district's dismissal of Richard Shipley. At issue was whether the notice Shipley

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[132]Rosenberg v. Board of Education of School District No. 1, Denver Public Schools, 677 P.2d 348 (Colo. App. 1983).

[133]Rosenberg v. Board of Education of School Disrict No. 1, Denver Public Schools, 710 P.2d 1095 (Colo. 1985).

[134]669 P.2d 1172 (Or. App. 1983).

received from the school board provided sufficient facts to substantiate his dismissal as a middle school teacher.

The decision to dismiss Shipley stemmed from a civil action filed against him. This complaint alleged that Shipley had assaulted and battered a twelve-year-old child on twelve occasions during a five month period in 1978. Eleven of these incidents involved Shipley's touching the boy's genitals or forcing the boy to touch Shipley's genitals. In the remaining incident, Shipley allegedly placed his hands under the boy's clothing and rubbed his body. On October 2, 1981, Shipley was found guilty by a trial jury and was ordered to pay $3850 in damages.

Shipley then received a written notice informing him that the superintendent intended to recommend his dismissal on the grounds of immorality and gross unfitness. Attached to the notice was a copy of the civil complaint against Shipley. After a hearing, the board dismissed Shipley from his teaching position.

Shipley appealed to the Fair Dismissal Appeals Board alleging that his dismissal should be reversed because the notice did not inform him of facts sufficient to support the statutory grounds cited by the school board for his dismissal. The board stated: "We take it a plain, concise statement means statements of charges with sufficient clarity as to give notice to the teacher of what he has been charged with and how those charges relate to his duties and responsibilities as a teacher in the district."[135] Shipley's dismissal was reversed and he was to be reinstated to his teaching position. The school district filed an appeal.

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[135]Ibid., 1173.

The Court of Appeals of Oregon concluded that the Fair Dismissal Appeals Board was in error in finding that the notice was insufficient under Oregon state statutes. It stated:

> We conclude that the notice is sufficient to inform respondent of the allegations and charges so that he could prepare an adequate defense. The notice informed him of the acts constituting "gross unfitness" and "immorality": 12 instances of battery, 11 of which involved offensive sexual contact, with a student in the district where respondent taught, who was the same approximate age as respondent's students. Although the notice did not expressly set out the connection between respondent's acts and his teaching responsibilities, we conclude that the nexus may obviously be inferred.[136]

The court concluded that the Fair Dismissal Appeals Board erred in reversing the dismissal and ordering Shipley's reinstatement. The case was reversed and remanded.

Again, the court has upheld the dismissal of a teacher for sexual misconduct with a minor. Even though the boy was not a student of Shipley's, the court found the misconduct was indicative of unfitness to teach because the boy was of the same age as students in Shipley's classes. Therefore, a teacher's misconduct with any minor can lead to a dismissal for immorality which will be supported in the judicial system.

Jerrell Clark was a drama teacher at Community High School, a non-traditional school designed to provide an individualized educational program for each of its students. Emphasis was placed on developing close contact between teachers and students. However, in the opinion of the school board of the Ann Arbor School District, Miss Clark took this philosophy to the extreme.

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[136]Ibid., 1175.

In the spring of 1975, the principal had warned Miss Clark about inappropriate conduct with male students. Although she denied any impropriety, the principal advised her that such conduct could lead to her dismissal. In addition, he further cautioned her that she should avoid not only impropriety but also any appearance of impropriety.

In the fall of 1977, her former principal, who was now the deputy superintendent of the school district, was made aware of further impropriety on the part of Miss Clark. A parent expressed his concern about Miss Clark's relationship with his seventeen-year-old son, Rob, who was a student in her class.

Investigation of the complaint was begun immediately. Several incidents led to the decision to dismiss Miss Clark. In June of 1977, Rob's younger brother (Seth) and his friend (Willard) decided to sneak into Rob's room in the basement to see if ". . . they could catch him doing something."[137] Seth testified that when he entered the room he saw Miss Clark and Rob kissing on Rob's mattress on the floor. Willard, who had entered Rob's room ahead of Seth, provided a more detailed account. He stated that Miss Clark was lying on top of Rob and that they were kissing. He also stated that although Rob was partly covered by his sleeping bag, his chest was bare. Rob later admitted in his testimony at the hearing that he was naked under the sleeping bag. However, he denied that they had been kissing.

Also in June, a building contractor had gone to Rob's room to see if Rob wanted to do some work for him. When he arrived at 7:30 in the

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[137]Clark v. Ann Arbor School District, 344 N.W.2d 48 (Mich. App. 1983).

morning for that purpose, he saw Miss Clark leaning against Rob on the mattress on the floor.

Miss Clark admitted that she had spent the night in Rob's room. According to her testimony, Rob and Polly, another student, had been at Miss Clark's home one evening to celebrate Polly's birthday. She had driven Polly home first and then took Rob to his home. Her car would not start when she was leaving Rob's house. Afraid to walk the two miles to her house because Rob's house was in a bad neighborhood, she went back to Rob's room. Rob gave her a back massage and she fell asleep.

She also admitted that she had been in Rob's room on several occasions during the summer of 1977. The couple had also taken a two week trip with another student during the summer.

After reviewing all the evidence presented at the hearing, the school board voted to dismiss Miss Clark. On appeal, the tenure commission found that Miss Clark's actions dislayed a total disregard for her responsibilities even though it found no evidence to substantiate any sexual misconduct. Having found just and reasonable cause for the dismissal, the commission affirmed the board's decision. Miss Clark appealed to the Ingham Circuit Court which reversed the dismissal because school officials had not shown evidence of any adverse effects on Miss Clark's performance as a teacher.

The school district appealed to the Michigan Court of Appeals.[138] After reviewing the Morrison and Stubblefield decisions, the court

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[138]Ibid.

quoted the Stubblefield court: "It would seem that, as a minimum, responsible conduct upon the part of a teacher, even at the college level, excludes meretricious relationships with his students."[139] Based on this rationale, the court concluded that the tenure commission's determination that Miss Clark had participated in an unprofessional relationship with a student and its decision that these actions were just and reasonable cause for her dismissal were supported by substantial evidence. Therefore, it reversed the circuit court decision, and affirmed the decision of the tenure commission which upheld the dismissal of Miss Clark.

Katz v. Ambach[140] was an appeal to the Appellate Division of the Supreme Court of New York by Mark Katz. He sought review of the judgment of the Supreme Court, Special Term in Albany County which dismissed his application to annul the order of the Commissioner of Education that terminated his employment with the Community School District No. 18 in Brooklyn, New York. Katz's termination was the result of improper conduct with female students in his sixth grade classroom. Katz admitted that he had hugged and kissed girls in his class and had also given them a "pat on the behind."[141] In addition, he admitted that he had allowed obscene jokes and profanity to be spoken in the classroom.

The Commissioner of Education had found Katz's conduct to be ". . . intolerable behavior on the part of a teacher, unbecoming a teacher, and warranted a finding that he was unfit to teach."[142] His

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[139]Stubblefield, 318. [140]472 N.Y.S.2d 492 (A.D.3 Dept. 1984).

[141]Ibid., 493. [142]Ibid.

petition to annul was denied by Special Term, Supreme Court of New York. The court found that the Commissioner's order was supported by the record. Further, it did not agree with Katz's contention that the penalty of dismissal from his employment was disproportionate to the offense.

The Appellate Division of the Supreme Court of New York affirmed the decision of the lower court. The court concluded:

> Notwithstanding the fact that the testimony of four pupil witnesses who complained of sexual offenses might very well have been inconsistent and uncorroborated, those acts and patterns of classroom demeanor to which petitioner admitted, standing alone, constitute more than sufficient evidence to sustain the commissioner's determination that petitioner was unfit to teach. . . . We do not find the penalty of dismissal to be "shocking to one's sense of fairness" or to the conscience of the court . . . in view of the potentially harmful effect upon the young minds entrusted to a teacher's care.[143]

Finally, the court found Katz's claim that he was deprived of due process because of the lack of adequate notice of the charges against him to be without merit.

An Iowa case, Libe v. Board of Education of Twin Cedars Community School District,[144] challenged the use of polygraph results as evidence in the school board's hearing to terminate Frank Libe's contract. The superintendent recommended Libe's termination for the following reasons: (1) engaging in a sexual relationship with a female student; (2) kissing and petting with the student in a parked car while giving her rides home from school events; (3) writing unprofessional and inappropriate letters to the student and dropping them in her lap during class. Polygraph evidence which indicated that the student was truthful when she

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[143]Ibid., 494. [144]350 N.W.2d 748 (Iowa App. 1984).

stated that she had sexual intercourse with Libe was entered into evidence at the school board hearing.

The introduction and consideration of this evidence provided the basis of Libe's subsequent appeal to the District Court of Marion County which affirmed the dismissal and to the Court of Appeals of Iowa which also upheld the termination of Libe's contract. Noting that school boards were not as restricted in receiving evidence as were the courts of law, the Court of Appeals found that Libe's hearing was not unduly prejudiced by the introduction of the polygraph evidence.

Libe also alleged that his dismissal was not supported by competent, credible evidence. Stating that the school board was in a better position to judge the question of credibility, the court denied this allegation:

> Plaintiff's [Libe's] explanation of this theory as to complainant's [student's] motivation to lie, though rather ingenious, is nothing more than sheer speculation. Plaintiff gives us no good reason for rejecting the board's conclusion that complainant testimony was credible and we find none.[145]

Therefore, the court concluded that Libe's termination was supported by a preponderance of the evidence and affirmed the district court's decision to uphold the termination of his contract.

Braddock v. School Board of Nassau County[146] involved the dismissal of Donald Braddock, a tenured teacher and coach at Fernandina Beach High School. The decision to dismiss Braddock was based on three incidents of alleged misconduct. (1) On March 11, 1983, Braddock met and spent time with a minor female student at 2:00 a.m. 2) During the 1983

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[145]Ibid., 750. [146]455 So.2d 394 (Fla. App. 1 Dist. 1984).

spring track season, Braddock left the same female student at a convenience store, transported other students to their homes, and returned alone to transport the female to her home. (3) On April 27, 1983, Braddock and the student spent the afternoon alone at Fernandina Beach.

Although it was established at the hearing that the student was infatuated with Braddock, no evidence of sexual misconduct was presented. The school board decided to dismiss Braddock based on its finding that his conduct ". . . represented not only poor judgment . . . but such conduct and behavior was [sic] so serious as to impair his effectiveness as a teacher in the Nassau County School system."[147]

Braddock appealed the dismissal to the District Court of Appeal of Florida alleging that the dismissal was not supported by competent or substantial evidence. The court concluded: "While we must agree that this teacher's conduct demonstrated poor judgment on his part, the Board made no finding that Braddock's effectiveness with the school system had been impaired by virtue of the three incidents with which he was charged."[148] Braddock's dismissal was reversed.

Again, a court has held that, without direct evidence of sexual misconduct, the school officials are required to show that the teacher's inappropriate conduct had an adverse impact on his effectiveness to perform the duties of the job. Absent such a finding, the dismissal will not be upheld.

On February 20, 1976, Prince Lewis placed one of his fifth grade female students in the hall to take a make-up test. While taking the

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[147]Ibid., 395. [148]Ibid., 396.

test, the girl was approached by Lewis who placed his hand on the inner part of her upper thigh and made a rubbing motion. On the verge of hysteria, the child ran to the office and reported the incident. An investigation was begun immediately. During this investigation the superintendent received complaints from the parents of other female students in Lewis' class. In each complaint, Lewis was alleged to have placed his hands on or near the genital area of the child. During the tenure hearing which followed the investigation, testimony indicated that these young girls were either ashamed or scared to report the incidents to their mothers immediately after they happened.

After the school board found Lewis guilty of the charges and voted to dismiss him from his position, Lewis appealed to district court which upheld the dismissal. His appeal to the Court of Appeal of Louisiana[149] resulted in the ruling that the teacher had not been denied his due process rights. However, the case was reversed and remanded to the district court to allow Lewis to present additional evidence.

After hearing evidence from two psychologists and a polygraph examiner, the district court again upheld the dismissal. Lewis appealed once more to the Court of Appeal.[150] After review of the additional evidence, the court held: "[T]he totality of evidence in this case does not merit that the decision of the School Board be reversed. That decision does not cease to be based on substantial evidence. It has not been found to be arbitrary, or capricious and is affirmed."[151]

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[149]Lewis v. East Feliciana Parish School Baord, 372 So.2d 649 (La. App. 1 Cir. 1979).

[150]Lewis v. East Feliciana Parish School Baord, 452 So.2d 1275 (La. App. 1 Cir. 1984).

[151]Ibid., 1280.

Theodore Fisher, an elementary school principal in Minnesota, was dismissed on charges that he had sexually molested a male student twelve to sixteen years prior to that dismissal. Olson was in the second grade in 1967 when a pattern developed in which he was called to the office once or twice a month for visits that included sexual contact with Fisher. These visits continued until 1971 when Olson's family moved from the district.

Olson mentioned these incidents to a counselor in 1983 who urged him to report the incidents to the local police department. He then met with the superintendent and provided a copy of the written statement he had made to the police.

After an investigation, the superintendent called Fisher to inform him of the charges for dismissal. Fisher met with the superintendent and offered to resign without admitting guilt. The superintendent presented the resignation to the school board which voted unanimously to reject the resignation. The board then adopted a resolution to dismiss Fisher from his position.

Fisher requested a hearing. The two issues which were in dispute were whether the privacy required for such acts was physically possible and whether the frequency of the visits was possible without attracting the attention of others in the school. Testimony, including Olson's detailed description of Fisher's office, established that private visits were not impossible as Fisher claimed. On the second issue, witnesses generally admitted that recall was difficult due to the time which had elapsed since the alleged incidents. The hearing officer upheld the dismissal and Fisher appealed.

In Fisher v. Independent School District No. 622,[152] the Court of Appeals of Minnesota was asked to rule on two questions: (1) Was the board's dismissal of Fisher for immoral conduct and conduct unbecoming a teacher supported by substantial evidence? (2) Did the remoteness of the charges against Fisher result in a denial of due process? The court found that the record contained competent and substantial evidence to support the school board's decision to dismiss Fisher.

In addressing the second question, the court relied on the Morrison decision. One of the factors used in that case to determine whether the conduct indicated unfitness to teach was the proximity or remoteness in time of the conduct. The court held: "In the terms employed in Morrison, the adverse effect upon students and the degree of that adverse effect easily outweigh the remoteness of the conduct charged."[153] Further, the court stated: "By virtue of the nature of the offense . . . it may be considered doubtful whether such conduct could ever be too remote in time."[154] Although Fisher argued that he was prejudiced by the remoteness of the incident because of the loss of relevant evidence when teachers who testified could not recall the frequency of Olson's visits to Fisher's office, the court did not find this to constitute a deprivation of due process. The court stated: "The sexual contact alleged here occurred in the private confines of the principal's office. It was not likely to produce any corroborating evidence nor is any required."[155] Therefore, the court affirmed Fisher's dismissal.

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[152]357 N.W.2d 152 (Minn. App. 1984). [153]Ibid., 156.

[154]Ibid. [155]Ibid.

This case should be of interest to school officials because this court has held that there is virtually no statute of limitations on this type of dismissal due to the seriousness of the charges of sexual misconduct. No other case in this study has addressed this issue. Therefore, it cannot be concluded that other courts would use this case as a precedent. However, school officials should consider the seriousness of the offense as opposed to the time that has elapsed since the incident in dismissal decisions.

Henry T. Mondragon was dismissed from his position as an elementary school teacher as a result of charges that he had engaged in sexual relations with a female student. In May, 1981, the student informed a church youth counselor that she had engaged in a sexual relationship with Mondragon from the summer of 1977 until October 31, 1979. Criminal charges resulted from a police investigation but were subsequently dismissed due to the applicable statute of limitations. On November 9, 1981, the school board voted to accept the superintendent's recommendation to dismiss Mondragon on the grounds of immorality and neglect of duty. A hearing was held in April, 1982, after which the hearing officer presented his findings of fact and recommendations to the school board. On June 14, 1982, the board voted to adopt the recommendations and to dismiss Mondragon.

Mondragon sought relief by appealing his dismissal to the Colorado Court of Appeals.[156] The first issue argued involved the hypnosis of the student as part of the criminal investigation. Mondragon contended

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[156]Mondragon v. Poudre School Distrit R-1, 696 P.2d 831 (Colo. App. 1984).

that the hypnosis rendered the student incompetent to testify. Since only pre-hypnotic evidence was heard by the hearing officer, the court ruled that the student was competent to testify. The court also found Mondragon's contention that, as a result of the hypnosis, the student was not available for cross-examination to be without merit.

Mondragon further contended that the evidence presented by a number of witnesses to corroborate the student's testimony was hearsay. At issue was the fact that the student had made the statements about the relationship to these individuals prior to the hypnosis. Mondragon claimed this evidence was hearsay and, therefore, not admissible. In disagreeing with this argument, the court stated: "In a hearing of this nature, the rules of evidence are somewhat relaxed and hearsay testimony may be allowed. Reversal is proper only if otherwise inadmissible hearsay is the sole evidence relied on by the finder of fact."[157]

Mondragon's final argument was that the hearing officer was required to report all the facts to the school board. Citing their Thompson[158] decision, the court disagreed:

> In Thompson, we held that the hearing officer's role is to make findings of basic or evidentiary facts upon which the school board is to base its findings of ultimate fact. The hearing officer has the power to receive and weigh conflicting evidence, assess credibility, and draw factual inferences. . . . To require that the findings present all the evidence contained in the record would subvert the role of the hearing officer.[159]

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[157]Ibid., 834.

[158]Thompson v. Board of Education, 668 P.2d 954 (1983).

[159]Mondragon, 835.

The court concluded that the findings of fact in this case were supported by the evidence.

Similarly, two other arguments offered by Mondragon were dismissed by the court. These arguments involved statements made by the school board attorney and a letter entered into evidence which contained a statement of the results of a polygraph examination conducted on Mondragon as part of the criminal investigation. The court did not find either of these issues to be prejudicial to Mondragon's case. The order to dismiss Mondragon was affirmed.

Two facts from this case are of interest to school officials: (1) Hearsay evidence may be utilized in dismissal hearings as long as the sole basis for dismissal does not rest on that evidence. (2) The role of the hearing officer was clarified to include weighing evidence and drawing factual conclusions without being required to present all the evidence in the record in his decision.

Saxby v. Bibb County Boad of Education[160] was the appeal of the dismissal of Robert Saxby who was employed as an athletic coach. Saxby was notified on March 22, 1983, that the superintendent was going to recommend disciplinary charges against him. The letter specified:

> The ground for my recommendation is that you have engaged in immoral conduct with [a 14-year-old female student]. The basis for this charge is that on January 25, 1983, you carried [the student] to your apartment . . . where you had sexual relations with her. Also, on February 14, 1983, you made arrangements to again take [the student] to the . . . Apartments.[161]

After a full hearing, the Bibb County Board of Education concluded that it did not find sufficient evidence to support the specific charge

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[160] 327 S.E.2d 494 (Ga. App. 1985). [161] Ibid., 495.

of sexual misconduct. Instead, the board voted to dismiss based on charges of willful neglect of duty, unspecified immoral conduct, and other good and sufficient cause.

On appeal to the state board of education, Saxby asserted that he had received insufficient notice of the charges and that there was insufficient evidence to dismiss him on the grounds stated by the school board. The file was submitted to a hearing officer who examined the evidence in great detail. "The hearing officer concluded that the local board properly concluded that there was no sufficient evidence of sexual conduct as charged, but he also concluded there was no evidence of willful neglect or other evidence of immorality other than that that the local board found insufficient."[162] Adopting the findings of its hearing officer, the state board reversed Saxby's dismissal.

The school board appealed to the Superior Court of Bibb County which reversed the decision of the state board and reinstated Saxby's dismissal. When Saxby appealed this decision to the Court of Appeals of Georgia, it ruled that (1) the teacher was given inadequate notice of the charges of willful neglect and other good and sufficient cause; (2) the evidence was insufficient to support the finding of immorality as grounds for Saxby's dismissal; and (3) by determining that the evidence was insufficient to support the charges of sexual misconduct, the board of education precluded the consideration of that evidence to determine whether the evidence supported their finding of unspecified immoral conduct.[163]

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[162]Ibid., 496. [163]Ibid., 494.

Board of Education of Tonica Community High School District No. 360 v. Sickley[164] was another case in which the court ruled that there was insufficient evidence to support a counselor's dismissal for immorality. The charges against Sickley were based on the allegations by a ten-year-old girl.

Audrey had been referred to Sickley in October of 1981 because she was failing most of her subjects and her parents had failed to respond to notices from the school. During the counseling sessions, Sickley allowed Audrey to sit on his knee while they talked. When she began to cry on one occasion, he stroked her back and allowed her to put her arms around his neck. On another occasion, she complained about a lump on her hip which Sickley felt with his hand.

Shortly after the last counseling session with Sickley, Audrey told her parents about her relationship with him. They contacted the police. Sickley was charged with taking indecent liberties with a child. Final disposition of these charges was not reported in the court decision of the Appellate Court of Illinois.[165]

Sickley was immediately suspended from his job. The Board of Education subsequently voted to dismiss Sickley on three charges: (1) he acted immorally by taking indecent liberties with a student by lewdly fondling and touching her; (2) he had acted unprofessionally by utilizing improper counseling techniques which were detrimental to the students of the school; (3) he had acted in a manner which was not in the best interest of the school district in that his immoral and

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[164]479 N.E.2d 1142 (Ill. App. 3 Dist. 1985). [165]Ibid.

unprofessional conduct resulted in the irreparable loss of confidence in his ability to perform his job duties.[166]

Sickley appealed to the state board of education which appointed a hearing officer. Although Audrey testified that Sickley had placed his hands inside her clothing to touch her chest and also to examine the lump on her hip, the hearing officer ". . . was not impressed with the credibility of Audrey."[167] Numerous witnesses offered testimony as to Sickley's effectiveness as a counselor. Sickley emphatically denied any sexual misconduct. However, he admitted that he had become emotionally involved with Audrey in a parental fashion. The hearing officer submitted a lengthy report in which he concluded that the board of education had failed to substantiate each charge by a preponderance of the evidence.

The Circuit Court of LaSalle County reversed the decision of the hearing officer. Sickley appealed. The Appellate Court addressed the first and third charges together. Stating that the question was not whether the counselor's conduct was wise but whether it was immoral and unprofessional, the court concluded that the manifest weight of the evidence did not support the charges.

> Nothing in the record indicates that it is or should be considered immoral to hug or stroke a crying, distraught ten-year-old child. . . . Nothing in the record indicates that it is immoral to permit a ten-year-old child to sit on a man's knee while they discuss her school work and her family situation. Both the first and third charges of the Board require a finding of immoral conduct, and those charges simply were not proved.[168]

The court also ruled that the second charge was not proven because there was no evidence in the record to show that Sickley's counseling

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[166]Ibid., 1145. [167]Ibid., 1144. [168]Ibid., 1146.

techniques had been detrimental to any of the students he had counseled. Accordingly, the court reversed Sickley's dismissal.

On November 14, 1983, the superintendent of the Argo-Summit School District No. 104 and the principal of Walsh School met with William Hunt to inform him that allegations of immoral and unprofessional conduct had been made against him. Three female students in Hunt's second grade physical education class alleged that Hunt had pinched them on their buttocks on numerous occasions during class. On November 22, the school board voted to dismiss Hunt.

In May, 1984, a hearing was held by a hearing officer of the Illinois State Board of Education. In his testimony, Hunt admitted pinching the students but denied that he had done so in an effort to obtain sexual gratification. After hearing additional testimony from the students, their mothers, child psychologists, and Hunt's teaching associates, the hearing officer concluded: "(1) the testimony of the students was 'competent and credible'; and (2) the undisputed acts of pinching the buttocks of the students were improper."[169] However, he found insufficient evidence to show that Hunt's conduct was intended to be sexually provocative. Therefore, he ruled that Hunt's conduct was remediable and necessitated a warning prior to his dismissal.

The board sought administrative review of this decision by the Circuit Court of Cook County. The court concluded that Hunt's conduct could not be considered remediable, reversed the decision of the hearing officer, and ordered Hunt's dismissal.

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[169]Board of Education of Argo-Summit School District No. 104 v. Hunt, 487 N.E.2d 24 (Ill. App. 1 Dist. 1985).

Hunt appealed to the Appellate Court of Illinois on the issue of whether the cause for his dismissal was remediable conduct. The court utilized the two-prong test for remediability set forth by the Illinois Supreme Court in Gilliland v. Board of Education: "The test in determining whether a cause for dismissal is irremediable is whether damage has been done to the students, faculty, or school, and whether the conduct resulting in that damage could have been corrected had the teacher's superiors warned [him]."[170]

Applying the first prong of this test, the court concluded:

> Upon review of the record, we find that there is sufficient evidence to indicate that Hunt's conduct had immediate adverse psychological effects on the three children. With respect to damage to the faculty and school, it is our view that conduct such as that exhibited by Hunt is not only inherently harmful to the individual teacher-student relationship, but is equally harmful to the reputation of the faculty and the school district. . . . We concur with the trial court that it is inconceivable that a situation would arise in which immoral conduct of any type between a teacher and student could be excused by reprimand. The breach of trust caused by such conduct violates the public trust not only in the teacher, but in the entire faculty and school system associated with the teacher.[171]

The court then focused on the issue of warning raised by Sickley:

> . . . the more appropriate focus in cases alleging immoral conduct is not whether the conduct itself could have been corrected by a warning, but whether the effects of the conduct could have been corrected . . . we are not persuaded that a warning could correct the psychological damage to the students or the damage to the reputation of the faculty and school district that was precipitated by Hunt's immoral conduct. Moreover, even if we were to look at whether the conduct could have been corrected by a warning, our decision would be the same. There is unrefuted expert testimony that the type of conduct engaged in by Hunt has a high degree of

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[170] 365 N.E.2d 322 (1977).

[171] Board of Education of Argo Summit School District, 27.

> recurrence. In our opinion, the possibility of the recurrence of such impermissible and intolerable behavior should be avoided.[172]

In light of the remediability test, the trial court's decision was affirmed and Hunt's dismissal was ordered.

The decision in this case reinforces the earlier Potter decision. Although the earlier court did not apply the remediability test, the conclusion was the same. In both cases, the court found that inappropriate conduct with students was not within the scope of remediable teaching deficiencies.

Lile v. Hancock Place School District[173] was an appeal to the Missouri Court of Appeals of a circuit court decision which affirmed the termination of Charles Lile. Lile was a fourth grade teacher in the school district when he was charged with sexually abusing two minor girls. The two girls, identified as A.H. and S.H., were nine and thirteen years old respectively at the time of this appeal.

In 1980, S.H.was a student in Lile's fourth grade classroom. Lile met her mother and they began to date. Later in that year, the two girls and their mother began residing with Lile. They lived with him until April 1984, when the mother was hospitalized. After the girls moved in with their natural father, he filed a complaint against Lile with the police department alleging sexual abuse.

The board, in its findings of fact, found that Lile had made the following admissions to the police: (1) that he had walked into the bathroom on several occasions while the girls were bathing and that the girls were free to enter the bathroom while he was bathing; (2) that

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[172]Ibid., 28. [173]701 S.W.2d 500 (Mo. App. 1985).

Lile had taken nude photographs of the girls when the girls asked him to after seeing one of their mother in the nude; (3) when the mother had been hospitalized, Lile had both girls sleep with him; (4) that he had walked around the house in the nude on numerous occasions because the medication he was taking "made him hot";[174] (5) that he had taken baths with both girls when they were younger; (6) that on one occasion Lile had S.H. remove her bra so that he could examine sores on her body.

In her testimony, S.H. alleged that while Lile was sleeping with her, he reached around her and fondled her breast. She further related that he would urinate at times when he entered the bathroom while she or her sister was bathing. Finally, she said that she and her sister did not consider the taking of the nude photographs to be a joke. They were both embarrassed.

Ironically, the girls' mother testified for Lile. She stated that it was normal for all four to walk around the house in the nude and for any one of them to go into the bathroom while one of the others might be using it. She further testified that "Mr. Lile had a nickname for S.H., 'blackie,' because that was the color of her pubic hair."[175]

When the superintendent of the school district learned of the charges in May, he interviewed both girls. In early June, the principal delivered a written report to the superintendent which summarized comments made to him by students and parents concerning the charges against Lile.

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[174]Ibid., 502. [175]Ibid., 503.

After making its findings of fact, the board concluded that the acts committed by Lile constituted immoral conduct which rendered him unfit to teach children. Utilizing the information in the report from the principal, the board further concluded that there would be ". . . a cloud of uncertainty and suspicion surrounding Mr. Lile's future activities . . . which would adversely impact on his students, their parents and consequently on his ability to teach."[176] The board voted to terminate Lile's contract with the district. When his dismissal was upheld by the circuit court, Lile appealed.

He alleged that the board had based its decision on incompetent and insubstantial evidence. Specifically, he challenged two of the board's findings of fact which, in his opinion, were supported only by hearsay evidence. One of these findings involved the allegation that he had fondled S.H.'s breast. The other challenged the finding that described the contents of the principal's summary of attitudes concerning the charges against Lile. On both, the court ruled that ". . . an erroneous finding or conclusion by an administrative agency is not grounds for reversal of the agency's decision if other competent and substantial evidence supports that decision."[177] The court found that there was substantial evidence to support the other findings of fact by the school board.

The court rejected Lile's contention that his constitutional rights to procedural and substantive due process had been violated. On his final assertion that his right to privacy had also been violated, the

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[176]Ibid., 504. [177]Ibid.

court concluded: "Having accepted the unique position and responsibility of a schoolteacher, appellant cannot invoke his right of privacy to prevent the Board from regulating conduct that threatens its vital interests."[178] Accordingly, the court affirmed the decision to dismiss Lile for immoral conduct.

The Commonwealth Court of Pennsylvania heard Keating v. Board of School Directors of Riverside School District[179] in 1986. Harold Keating appealed an order by the Secretary of Education which affirmed his dismissal by the board of school directors based on alleged misconduct with a student.

The facts found by the board and adopted by the Secretary presented the following scenario. Harold Keating had become enamored with a sixteen-year-old female who was a sophomore in the high school during the Spring of 1983. He attempted to initiate an emotional relationship with the young lady through a number of actions. He wrote a love note to the student on the blackboard of his classroom in which he professed his love for her. He attempted to establish a date with her during the summer. He also made phone calls to the student's mother in which he expressed his desire to date the girl for two years and then to marry her. In December, he sent a complete outfit of clothing to the young lady accompanied by another love note. Finally, he sent flowers to her as a Christmas gift.

Evidence presented at the hearing for his dismissal showed that Keating's efforts to initiate a romantic relationship were in no way

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[178]Ibid., 508. [179]513 A.2d 547 (Pa. Cmwlth. 1986).

encouraged by the student. In fact, the situation was the cause of considerable embarrassment for her. The evidence also showed that school administrators had made at least four attempts to dissuade Keating from his continued pursuit of the girl.

Keating was dismissed on April 4, 1984, for immorality, incompetency, and willful violation of school laws. He appealed to the Secretary of Education on May 2, 1984. Although he gave notice of his intent to offer additional evidence, the Secretary denied his request and subsequently affirmed the dismissal.

Keating's first contention in his appeal to the Commonwealth Court was that the Secretary had abused her discretion by refusing to hear additional testimony. Since Keating's request was delivered only ten days before the scheduled hearing date and contained no explanation of the purpose of this testimony, the court denied this contention.

Keating also challenged the Secretary's determination that his dismissal was supported by sufficient evidence. The court concluded: "We have no hesitancy in concluding that Keating's continual public pressing of affections upon a sixteen-year-old student without any provocation or encouragement on her part and in blatant disregard of several requests to stop constituted substantial evidence to support his dismissal on the basis of immorality."[180] The court further ruled that Keating's disregard for the orders of the administration to stop pursuing this relationship constituted persistent and willful violation of school laws.

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[180]Ibid., 549.

Finally, Keating contended that his due process rights were violated because the board failed to provide him with the same due process provided for mentally incompetent defendants in criminal hearings. He argued that his inability to recognize that his conduct was wrong rendered him mentally incapacitated to stand trial. The court stated:

> Balancing Keating's interest in his employment against the community's substantial interest in the protection and welfare of its youth, and taking into account the minimal possibility of resultant error from the procedures used in this case, we decline to extend to Keating the due process safeguards afforded mentally incapacitated criminal defendants.[181]

The court concluded: "Finding no error of substantive law or procedural process and being satisfied that there is substantial evidence in the record to support the Secretary's critical findings of fact and that none of Mr. keating's constitutional rights were violated, we are obliged to affirm the Secretary's order."[182] Thus, Keating's dismissal from his teaching position was allowed to stand.

Keating had committed no acts of sexual misconduct. However, his continued pursuit of a female student led school board members and the court to the conclusion that his behavior constituted immorality. Again, there are no other cases of this type to determine if this case has established a precedent in dealing with this type of behavior.

Thomas Dietrich had taught in the Scott County School District No. 2 in Indiana for seventeen years prior to his dismissal. In the school year preceding his dismissal, he had been reprimanded for placing himself in a compromising situation with a female student. Later in that school year, parents expressed concerns that Dietrich was frequently

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[181]Ibid., 550. [182]Ibid.

seen with the cheerleaders. The superintendent again talked with Dietrich about his conduct.

Dietrich's dismissal on May 26, 1982, stemmed from these incidents in addition to allegations by a female student who was enrolled in one of Dietrich's high school classes. She alleged that he had (1) placed his hand on her leg on several occasions; (2) pinched her hip on St. Patrick's Day for not wearing green; (3) made several implicit sexual remarks while he was walking behind her; and (4) pressed papers against her chest while he was returning students' papers in class. She also alleged that Dietrich required her to occupy the desk directly in front of his desk. During class, he would sit on his desk and place his feet on her desk which resulted in the student looking between his legs.

Dietrich refuted some of the accusations, explained some, and could not recall some of the incidents. Although he offered evidence concerning the girl's reputation and reasons for her to seek vengeance against him, the school board voted to cancel his contract.

On appeal, the trial court found for Dietrich. The school board appealed to the Court of Appeals of Indiana[183] which remanded the case to the trial court because it had failed to make findings of fact and conclusions of law. On remand, the trial court made the necessary findings and conclusions in favor of Dietrich. Again, the school board appealed.[184]

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[183]Scott County School District v. Dietrich, 496 N.E.2d 91 (Ind. App. 1 Dist. 1986).

[184]Scott County School District v. Dietrich, 499 N.E.2d 1170 (Ind. App. 1 Dist. 1986).

At issue in the second appeal was whether the trial court had erred when it found no substantial evidence to support Dietrich's discharge. In discrediting the student's testimony and choosing to believe Dietrich's testimony, the trial court had substituted its judgment for that of the school board. Stating that ". . . it was improper for the trial court to reweigh the evidence or judge the credibility of witnesses,"[185] the Court of Appeals reversed the judgment and remanded the case for further proceedings.

The decision in this case echoed the sentiments of the court in the McKown case reviewed earlier in this study. Although this case involved the reweighing of evidence and judging of the credibility of witnesses by a trial court rather than by a Secretary of Education, the court ruling was the same. Outside agencies or courts do not have the right to substitute their judgment for that of the school board unless there were obvious errors in the hearing of the case.

The dismissal of Thomas Fadler was a result of allegations of immoral conduct based on two incidents. In the first of these incidents on October 23, 1984, Fadler placed his hand in the area of the buttocks inside the waistband of the jeans and undergarment worn by one of his students as she was leaning over her desk. The second incident on October 31 involved the fondling of the breasts of another of his female students in a hallway of the school building.

An administrative hearing officer found the allegations to be supported by a preponderance of competent evidence and sustained Fadler's

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[185]Ibid., 1173.

dismissal. She further found that his conduct was irremediable and had caused damage to the students and the school as a whole. Fadler appealed to the local trial court which also sustained his dismissal.

On appeal to the Appellate Court of Illinois,[186] Fadler argued that the trial court had abused its discretion in sustaining the hearing officer's finding that his conduct was both immoral and irremediable. The court utilized the remediability test as set forth in the Gilliland decision. In its analysis of the first prong of this test which deals with the damage done to the students, the faculty, or the school by the conduct in question, the court stated: "The board is not required to wait until such conduct causes clinical adverse effects on the students before finding the conduct immoral and irremediable while other students may be subject to future abuse. . . . True damage resulting from sexual abuse may take years to fully manifest iself."[187] Addressing the second prong of the test which questions whether the conduct resulting in the damage could have been corrected with a warning, the court adopted the reasoning of Board of Education of Argo-Summit School District No. 104 v. State Board of Education: "The more appropriate focus is not whether the conduct itself could have been corrected but whether the effects of the conduct could have been corrected."[188] Using this standard, the court found that Fadler's conduct was irremediable and, therefore, affirmed Fadler's dismissal.

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[186]Fadler v. Illinois State Board of Education, 506 N.E.2d 640 (Ill. App. 5 Dist. 1987).

[187]Ibid., 644. [188]487 N.E.2d 24 (1985).

The decision in this case mirrors that in the Hunt case in which that court also applied the remediability test to the conduct in question. Both courts found the inappropriate conduct to be irremediable and allowed the dismissals for immorality to stand.

In a 1986 case from North Carolina, Crump v. Board of Education,[189] the Court of Appeals of North Carolina was asked to review the dismissal of Eddie Ray Crump from his position as a driver education instructor with the Hickory school system for immorality and insubordination. His dismissal had been upheld by the Superior Court of Catawba County. In this appeal, Crump alleged that the board of education's findings and conclusions were not supported by substantial evidence in the whole record.

On April 9, 1981, Elizabeth Davis complained to Henry Williamson, principal of Hickory High School, about Crump's behavior during the first day of the road work phase of her driver's education class. Her written complaint alleged that Crump had asked personal questions about her dating activities, had made a comment about her crotch, and had called her "babe and honey."[190] She further alleged he had touched her upper thigh and had played with her hair.

As a result of this complaint, Mr. Williamson had issued written instructions in a letter to Crump. Crump was instructed to have a third person in the driver's education car when he was conducting road work with a female student. This directive was violated during the instruction of two students in the summer of 1982 and the fall of 1983.

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[189] 339 S.E.2d 483 (N.C. App. 1986). [190] Ibid., 486.

On March 16, 1984, the superintendent, Dr. Stuart Thompson, notified Crump of his intention to seek Crump's dismissal on the grounds of immorality and insubordination. After a hearing, which began on June 6, 1984, and lasted into the early hours of the following morning, the board voted to dismiss Crump.

The Court of Appeals indicated that the purpose of its review was to determine whether the board's decision to dismiss Crump on the grounds of immorality and insubordination was based on substantial evidence in light of the whole record. Further, the court noted that "It is not necessary that we find that all of the grounds for dismissal are supported by substantial evidence."[191] After reviewing all the findings of fact, the court found substantial evidence to support the charges of insubordination. Having supported these charges, the court declined to address the charge of immorality. In July, 1986, the Supreme Court of North Carolina denied Crump's appeal[192] of this ruling.

In 1989, a second superior court decision which related to the dismissal of Eddie Crump was appealed to the Court of Appeals of North Carolina.[193] Crump had filed a Section 1983 civil rights claim against the school board at the beginning of the judicial review of his dismissal. This action had been severed from the appeal of his dismissal. Crump's due process claim alleged that the board had denied him a fair and impartial hearing. The basis for his allegation was the disparity between alleged involvement in the case by board members prior to the

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[191]Ibid., 485. [192]346 S.E.2d 137 (N.C. 1986).

[193]Crump v. Board of Education 378 S.E.2d 32 (N.C. App. 1989).

hearing and their disavowals of any significant knowledge of the case when questioned about it at the beginning of Crump's hearing. At the conclusion of the superior court hearing, Crump was awarded $78,000 in damages by a jury. The Court of Appeals ruled that Crump had sufficiently demonstrated that there was disqualifying personal bias on the part of board members and affirmed the superior court decision.

The decision was then appealed to the Supreme Court of North Carolina which decided the case on June 13, 1990.[194] Justice Mitchell opened his discussion of the case with the following summary of the issue before the court and the court's opinion on that issue:

> The issue before us is whether, at a teacher dismissal hearing, a single school board member's bias against the teacher taints the entire board's decision-making process, denying the teacher due process and entitling him to compensatory damages, regardless of whether the bias affected the correctness of the board's decision. We conclude that such bias makes the decision-making process *inherently unfair and violates due process.*[195]

The court was careful to point out that this case did not involve Crump's dismissal. Since that case was severed and the dismissal was upheld, the court did not consider that verdict or the facts which led to the verdict in its deliberations.

The court upheld the decision of the Court of Appeals which affirmed the superior court decision concerning the violation of Crump's due process rights and his right to compensatory damages. However, the court found the portion of that decision which involved the assessment of damages to be in error.

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[194]Crump v. Board of Education 392 S.E.2d 579 (N.C. 1990).

[195]Ibid., 580.

> The plaintiff sought only punitive damages from the individual defendants. The jury having returned its verdict awarding only compensatory damages, but no punitive damages, the trial court's judgment should have ordered that the damages and costs be recovered only from the defendant Board and not from the other defendants individually. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Catawba County, with instructions that the judgment be modified and amended accordingly.[196]

This case has been included in the discussion of teacher dismissals for sexual misconduct with students because although the charges of immorality which led to Crump's dismissal were not addressed in the litigation, the charges of insubordination stemmed from the directive issued to address Crump's alleged immoral conduct with female students. This case emphasizes the right of teachers to a fair, impartial hearing prior to their dismissal regardless of the charges against them. Board members must exercise considerable care to insure that they are not unduly prejudiced by pre-hearing information.

Strain v. Rapid City School Board[197] was an appeal to the Supreme Court of South Dakota of a circuit court decision which affirmed the dismissal of David Strain. Strain was a highly regarded tenured teacher with the Rapid City school district prior to his dismissal.

On May 8, 1986, a female sophomore student (A.S.) at Central High School met with a school counselor about her attendance problems. Later that day, she returned to the counselor's office to discuss another problem which she felt she could not handle alone. She told the counselor that, beginning in November of 1985, Strain had engaged in improper conduct with her on several occasions. This conduct began

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[196] Ibid., 591. [197] 447 N.W.2d 332 (S.D. 1989).

with Strain placing his hand on her knee. Although she thought that Strain was being overly friendly, this conduct did not bother her. However, he soon progressed to touching her on other parts of her body including her breasts. On one occasion, Strain began to unbutton her top but was interrupted by the unexpected appearance of another teacher. A.S. further alleged that on another occasion Strain had exposed himself and placed her hand on his penis. The student asked the counselor ". . . to confront Strain so he would know someone else knew and maybe he would stop."[198]

Although the student had asked the counselor not to reveal this information to anyone else for fear that Strain would lose his job, the counselor reported the accusations to the school principal that evening. The following morning the principal met with A.S. and recorded her accusations. He then reported the incidents to the South Dakota Department of Social Services as required by law. The principal met with Strain and advised him to obtain the services of an attorney since serious allegations of sexual misconduct with a student had been made against him.

The Pennington County Sheriff's office began an investigation after the principal reported the allegations to the department of social services. Although no criminal prosecution was initiated against Strain, transcripts of the statements from a number of individuals were furnished to the school board near the end of June, 1986.

On August 27, 1986, Strain received written notification that the board was contemplating his dismissal. The letter informed Strain

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[198]*Ibid.*, 333.

that he was suspended immediately (with pay) from his teaching responsibilities. The reason given for this dismissal action was improper sexual contact with a student.

Strain's hearing began on September 18, 1986. At the hearing, A.S. related the incidents of sexual contact and indecent exposure. Additionally, she testified about another occasion when she and Strain were alone in the computer room. A.S. alleged that Strain turned off the light, pushed her against the wall, unbuttoned her jeans, pulled them down, and had sexual intercourse with her. She acknowledged that she had not told the principal or the sheriff's department about this last incident. Her reasons for failure to disclose this information were that ". . . she was afraid of what they would think of her, and she was afraid no one would believe her because of Strain's position."[199]

Strain claimed that A.S. was lying to avoid punishment for her unexplained absences. However, other testimony offered at the hearing established that A.S. had told friends about the incidents as early as December of 1985. This testimony negated Strain's assertion that A.S.'s story was a recent fabrication. Although Strain had told investigators from the sheriff's department that he and A.S. were never alone in the computer room, the testimony of another teacher established that the pair had been seen in the room alone on numerous occasions.

Additional testimony from Paula Gregory, a former student, established that Strain's behavior with A.S. was not an isolated incident.

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[199]Ibid., 334.

She related several incidents in which Strain had improperly touched her on her legs and breasts while she was a student in his class. Some of these incidents happened when she was called to Strain's desk. He placed his hands between her legs in the genital area and ". . . he would move his hands around as if he was trying to sexually excite me."[200] She further testified that she had not reported Strain's behavior at the time it occurred because she was a friend of Strain's daughter. Having been troubled by these incidents since high school, she was encouraged by a friend to report the behavior to the South Dakota Child Protection Agency. She did so without knowing about A.S.'s allegations aginst Strain.

After nine hours of testimony, the board went into executive session with the hearing officer. When the members emerged, they voted unanimously to dismiss Strain for grossly immoral conduct which rendered him incompetent to teach in the district. This dismissal was upheld in circuit court on March 8, 1988.

Strain raised a number of issues in his appeal to the Supreme Court of South Dakota. First, he contended that the board had withheld exculpatory evidence which contradicted Gregory's testimony and, therefore, had violated his due process rights. However, the statements from two other students which Strain claimed would have cleared him of the charges would have actually corroborated the testimony of both A.S. and Paula Gregory. Both students had given statements to the sheriff's department during the investigation that related similar

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[200]Ibid., 335.

incidents which had happened to them while they were in Strain's class. The court ruled: "Since the two statements in question are not exculpatory, there is no due process requirement that the board provide the statements to Strain."[201]

Strain also alleged that the board's review of the sheriff's investigative file had created an unacceptable risk of actual bias, thus depriving him of his due process right to a fair hearing before a fair tribunal. The court found that Strain had not met his burden of overcoming the presumption that the board acted fairly and impartially. The court stated: "In fact, the procedures used by this Board in hiring independent counsel to preside over the hearing and rule on objections, and hiring a court reporter to transcribe the hearing should serve as a model to other school boards."[202]

Strain's third contention on appeal was that the admission of evidence of prior misconduct had violated his due process rights. The court found that Gregory's testimony about prior incidents of improper conduct was used ". . . for the limited purpose of corroboration of the truth and veracity of the witness who is the complaining witness."[203] The court further stated: "In criminal cases of sexual contact, this court has repeatedly held that 'prior bad acts' evidence is admissible."[204] Since the evidence of prior conduct was only offered as relevant evidence on the issues of intent and credibility (which were strongly contested), the court disagreed with Strain's

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[201] Ibid., 336. [202] Ibid., 337.

[203] Ibid. [204] Ibid.

contention of a violation of his due process rights by the introduction of this evidence.

The final two issues raised by Strain were found to be without merit. He had alleged that the board's decision was clearly erroneous based upon a review of all the evidence. The court found that the record did not support this claim. His final argument was that the school board was required by due process to make findings of fact and conclusions of law. Since the circuit court had conducted an independent inquiry into the facts which formed the basis for the board's decision to determine the legality of that decision, the court found that ". . . a meaningful review of the issues can be conducted without findings of fact and conclusions of law."[205]

The procedures used in this case should be utilized by all school boards who are conducting dismissal hearings. Hiring an impartial attorney to preside over the case and rule on any objections that arise insures that the hearing is conducted in a manner which protects the rights of the teacher involved in the hearing. Also, the use of a court reporter to record the testimony presented at the hearing provides an accurate record which can be utilized to defend the dismissal decision if it is appealed to the courts.

On March 24, 1987, Kathleen Stoneking brought a Section 1983 civil rights action against the Bradford Area School District; Frederick Smith, principal of the Bradford Area High School; Richard Miller, assistant principal of the school; and Frederick Shuey, superintendent

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[205]Ibid., 339.

of the school district. On May 22, 1987, this case was consolidated for trial with similar actions brought by Kim Harbaugh and Lisa Rovito. The combined action was heard as Stoneking v. Bradford Area School District.[206]

This complaint alleged that

> . . . the individual defendants knew or recklessly failed to discover that Edward Wright, the band director at the High School, was sexually assaulting female members of the band. Additionally, it is alleged that the School District had a practice or custom of failing to appropriately respond to complaints by female students of sexual abuse or harassment perpetrated by male teachers.[207]

The defendants filed a motion for summary judgment on the following grounds: the plaintiff failed to file her complaint in a timely fashion; the plaintiff failed to identify a constitutional right which had been violated; there was no Section 1983 claim because there was no individual liability nor was there a policy or practice which implicated the school district; the defendants were entitled to qualified immunity; and the complaint failed to set forth a violation of state law.

Edward Wright was hired in August of 1975 to serve as the band director at the high school. Under his direction, the band became very successful in competitions and, therefore, a source of pride for the school and the community.

In 1979, Judy Grove, a student in the school band, informed Dr. Smith, the school principal, and Mr. Miller, the assistant principal, that Wright had sexually assaulted her. Further details of this case

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[206] 667 F. Supp. 1088 (W.D. Pa. 1987). [207] Ibid., 1090.

will be discussed in Sowers v. Bradford Area School District[208] since Judy Grove Sowers brought similar action one year after this action was originally heard. However, it is important to note that Dr. Miller addressed the entire band and attempted to force Judy to apologize to the group for her accusations against Wright.

Wright's sexual abuse and harassment of Kathleen Stoneking began in the fall of 1980 when he forcibly kissed her. As time progressed, the abuse accelerated both in frequency and intrusiveness. The abuse continued on an almost weekly basis until Kathleen's graduation in 1983. Isolated incidents of abuse continued as late as May, 1985.

In March 1986, Dr. Smith's son informed him that Wright was sexually assaulting female band members. The school district began an immediate investigation which included meetings with students who had allegedly been assaulted and their parents. Wright was suspended on March 10, 1986, and later resigned. On November 6, 1986, he entered a plea of guilty to a ten count criminal indictment which included four counts of indecent assault.

In addressing the defendants' claim that Kathleen had not filed her complaint within the statute of limitations, the court ruled that the discovery rule applied and that, therefore, the statute of limitations did not start to run until the plaintiff actually discovered the injury and the cause of that injury. As Kathleen had effectively argued, she did not discover that the individual defendants were the cause of her injuries until the school district took action against

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[208]694 F. Supp. 125 (W.D. Pa. 1988).

Wright in March, 1986. Therefore, the two-year statute of limitations should have run from that date. Concurring with this argument, the court denied the motion for summary judgment pertaining to the statute of limitations defense.

The court then addressed the constitutional claims:

> . . . the plaintiff alleges that she was deprived of her liberty interest which entitled her to be free from constant threats, intimidation, sexual abuse, and sexual harassment perpetrated by Edward Wright. Although the plaintiff does not expressly link her claim to the substantive due process clause of the fourteenth amendment, identification of the liberty interest serves that purpose.[209]

After a lengthy review of pertinent case law, the court stated:

> The acts of sexual abuse, sexual harassment and intimidation inflicted by Edward Wright on Kathleen Stoneking, literally shocks the conscience of this Court. As evidenced by case law, abuse of this type is not tolerated when the victim is a prison inmate or a patient in a state hospital. . . . Clearly then, the constitution must offer school children similar protection.[210]

Based on this reasoning, the court rejected the defendants' assertion that the facts in this case failed to support a violation of Kathleen Stoneking's constitutional rights.

The court then examined whether the defendants owed a specific duty to the plaintiff. Although Kathleen was not in the custody of the defendants, she spent a large part of her day in an environment where the defendants had ultimate control. Therefore, the court concluded: "These defendants were charged with the duty of ensuring that the school environment was a safe one for students. Therefore, this Court concludes that a special relationship exists between the plaintiff and the individual defendants."[211] Having concluded that this special

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[209]Stoneking, 1093. [210]Ibid., 1095. [211]Ibid., 1097.

relationship existed, the court then had to determine whether the defendants had breached their duty to the plaintiff: "Based on the affidavit of Dr. Kent [Superintendent of Keystone Oaks School District in Pittsburgh, Pennsylvania], this Court concludes that there are genuine issues of material fact pertaining to the question of defendants' compliance with 'accepted professional judgment, practice, or standards.'"[212]

Addressing the final issue by the individual defendants which pertained to their liability, the court had to determine the applicable standard. The court stated:

> In addition to the affidavit of Dr. Kent, there is evidence by which a jury could conclude that: (1) the defendants were reckless in their handling of the 1979 incident involving Judy Grove Sowers; (2) the defendants were reckless in their failure to investigate other reported incidents involving Mr. Wright and female students; and (3) the defendants were reckless in their attempts to remedy and/or rectify the problems involving Mr. Wright. In light of this evidence this Court holds that the issue of liability is one for a jury to decide.[213]

The next issue addressed in this decision was Kathleen's allegation that the school district had a practice of failing to take appropriate action when allegations of sexual abuse were made against teachers. She alleged that the district had failed to investigate reports of sexual abuse and had permitted the teachers to remain in charge of extracurricular activities even though they posed a danger to female students.

In support of this allegation, a deposition by Theresa Rodgers was entered into evidence. She had been sexually assaulted by her

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[212]Ibid., 1098. [213]Ibid.

social studies teacher, Richard DeMarte, during her senior year at the Bradford Area High School. When she reported the incident to Dr. Smith and Mr. Miller, she was told ". . . that it was going to be her word against Mr. DeMarte's and that she should not go home and tell her parents about the assault."[214] Dr. Smith did suggest that she stay away from DeMarte if at all possible. Although he assured her that he would take care of the problem, Theresa was never informed of any action taken by the administration against DeMarte. Further, there was no record of any disciplinary action in DeMarte's personnel file. It is interesting to note that Dr. Smith had given DeMarte a perfect score on his teaching evaluation which included assessments of his emotional stability, professional conduct, and judgment.

In addition to Theresa's allegations, four other female students had informed Dr. Smith and Mr. Miller of problems with DeMarte during the time period of January, 1981, through October, 1985. None of these incidents appeared in DeMarte's personnel file either. It is significant that, in spite of these allegations, DeMarte continued to coach the girls' tennis team at the high school.

The court also considered the Judy Grove incident in its discussion of the liability of the school district. After reviewing the facts of that incident, the court concluded:

> The episode of the forced apology has special significance in light of the assaultive conduct that occurred between Edward Wright and Katahleen Stoneking. Apparently, the "forced apology" served as a trump card in the hands of Edward Wright. When a student would threaten to disclose the abuse, Wright quickly reminded

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[214] Ibid., 1100.

> his victim about the "Judy Grove incident." His message was clear and convincing: "No one believed Judy Grove, why would anyone believe you." His tactical threat proved to be quite effective at least for a period of time.[215]

After consideration of all the evidence, the court concluded:

> . . . there is sufficient evidence from which a jury could infer the existence of a practice or custom. Additionally, it could be inferred from the evidence that the School District was responsible for the practice or custom and that the practice or custom caused the plaintiff's injuries. Thus, the defendants' motion, as it pertains to the liability of the School District, must be denied.[216]

In support of its conclusion that the defendants were not entitled to qualified immunity, the court quoted Hall v. Tawney[217] which involved the corporal punishment of a student at school:

> . . . the existence of this right to ultimate bodily security--the most fundamental aspect of personal privacy--is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as the last line of defense against those literally outrageous abuses of official power whose very variety make formulation of a more precise standard impossible. Clearly recognized in persons charged with or suspected of crime and in the custody of police officers, we simply do not see how we can fail also to recognize it in public school teachers.[218]

On the final issue, the court granted summary judgment to the defendants. Kathleen's complaint did not identify a specific state law as the cause of action.

The defendants appealed the decision to the Third Circuit of the United States Court of Appeals.[219] The court was asked to review the issue of qualified immunity. The basis for the defendants' claim of

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[215]Ibid., 1101. [216]Ibid., 1102.

[217]621 F.2d 613 (4th Cir. 1980). [218]Ibid.

[219]Stoneking v. Bradford Area School District, 856 F.2d 594 (3rd Cir. 1988).

immunity was that "Stoneking did not have a clearly established right to be free from the sexual abuse of Wright, . . . that they were under no clearly established duty to protect her, and that, in any event, they could not have reasonably known that their conduct might violate any of Stoneking's constitutional rights."[220]

The court began its discussion of this issue by providing an explanation of qualified immunity. "The doctrine of qualified immunity entitles government officials performing discretionary functions to immunity from liability for civil damages when their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[221] After a lengthy discussion of this doctrine as applied in case law, the court then turned its attention back to the case at hand.

The court noted that school officials knew, or should have known, as eary as 1979 of Wright's sexual misconduct. Further, they knew, or should have known, that female band students were in a particularly vulnerable position. The court continued:

> In these circumstances, defendant school officials had a constitutional duty to investigate and take reasonable steps to protect the students. Defendants stated at oral argument that they had a duty to investigate the complaints but not a duty to protect the students. The distinction is meaningless, because the duty to investigate must also encompass some duty to act based on the results of the investigation . . . it is implausible that by 1979 reasonable school officials would not have known that there was a duty to take some affirmative action to investigate and protect students from a teacher's sexual abuse of which they were made aware, and to take steps to eliminate rather than condone an atmosphere in which teachers could sexually harass students with impunity.[222]

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[220]Ibid., 598. [221]Ibid. [222]Ibid., 603

Therefore, the court affirmed the district court order which denied the defendants summary judgment on the grounds of qualified immunity.

The defendants' appeal to the United States Supreme Court[223] resulted in this latest decision being vacated and remanded to the Third Circuit[224] for further consideration in light of the recent DeShaney[225] decision. In this decision, the Supreme Court had ruled that a minor could not maintain an action against the county, its department of social services, or its individual employees for injuries the boy had received at the hand of his father. The basis for this action was the decision to return the boy to his father's custody even though the caseworker was aware of the risk of violence to the boy.

In light of the discussion in the DeShaney case, the Court of Appeals stated: ". . . we can no longer rely on the statutory and common law duties imposed in Pennsylvania on school officials as the basis of a duty to protect students from harm occurring as a result of a third person."[226] However, the court found that Kathleen Stoneking still maintained a viable civil rights claim due to her allegation that the defendants had established a practice or custom which directly caused her constitutional harm. The court summarized the evidence which supported her claim:

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[223]Smith v. Stoneking, 109 S. Ct. 1333 (1989).

[224]Stoneking v. Bradford Area School District, 882 F.2d 720 (3rd Cir. 1989).

[225]DeShaney v. Winnebago County Department of Social Services, 109 S. Ct. 998 (1989).

[226]Stoneking, 723.

> . . . there is evidence in the record that between 1978 and 1982 Smith and Miller received at least five complaints about sexual assaults of female students by teachers and staff members; that Shuey was told about some of these complaints; that Smith recorded these and other allegations in a secret file at home rather than in the teachers' personnel files, which a jury could view as active concealment; that the defendants gave such teachers excellent performance evaluations, which a jury could view as communication by the defendants to the teachers that the conduct of which they were accused would not be considered to reflect negatively on them; and that Smith and Miller discouraged and/or intimidated students and parents from pursuing complaints, on one occasion by forcing a student to publicly recant her allegation.[227]

In conclusion, the court found that Kathleen Stoneking's claim against Shuey, the superintendent, was not proven by any acts which could be construed as condoning sexual harassment by the teachers in the district. However, the claims against Smith and Miller were upheld. The court ended its discussion with the following:

> . . . trial of this case has been pending in the district court for a substantial period of time while the qualified immunity issue has been litigated. Our conclusion that Smith and Miller are not entitled to qualified immunity as a matter of law in their individual capacity is not in any way suggestive of any view on the merits of Stoneking's claim against them personally or against all of the defendants in their official capacities as to which no qualified immunity can be asserted. Thus, we are hopeful that upon remand this case can proceed to an expeditious conclusion.[228]

Unfortunately, at the time of this study, there has been no decision in the district court case.

This case has major implications for practicing education officials. Sexual harassment of students by teachers is inexcusable. Even more inexcusable is the fact that school officials did not take action in this case. As a result of Kathleen Stoneking's successful litigation, school officials are now liable for damages if they know of such

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[227]Ibid., 728. [228]Ibid., 731.

harassment and take no action to stop the incidents or to discipline the teacher.

Sowers v. Bradford Area School District,[229] mentioned in the discussion of Stoneking, resulted from the sexual assault on Judy Grove Sowers by the band director, Edgar Wright. Mrs. Sowers, like Kathleen Stoneking, filed a civil rights complaint against the school district, Mr. Frederick Shuey, Dr. Frederick Smith, and Mr. Richard Miller. Mrs. Sowers alleged that the school district maintained a policy or practice of reckless indifference to and/or active concealment of incidents involving known or suspected sexual abuse of students. She further alleged that this practice was the cause of her deprivation of her constitutional rights to freedom from sexual abuse and free access to the courts unimpeded by threats, intimidation, embarrassment, and mental anguish. The plaintiff also alleged that the individual defendants were part of a conspiracy to conceal sexual abuse of students by several teachers.

Judy Sowers was a member of the band while she was a student in high school. On the evening of June 16, 1979, she went to Wright's house to get a tape of marching music. She was a section leader and had to learn the music in preparation for summer band practice. Since she was going to be out of town for two weeks, she needed the tape to familiarize herself with the music so she would be prepared for practice when she returned. While at Wright's home, she was sexually assaulted.

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[229]Sowers v. Bradford Area School District, 694 F. Supp. 125 (W.D. Pa. 1988).

She reported the assault to a youth counselor who informed Dr. Smith and Mr. Miller. Shortly thereafter, Mrs. Sowers met with Dr. Smith and Mr. Miller to inform them of the assault. She alleged that both of the men actively discouraged her from pursuing the matter in court. They indicated that they did not believe her accusations. Dr. Smith even implied that the assault was her fault since she had been drinking prior to going to Wright's house. After both men had threatened her with public disclosure and personal humiliation, Judy retracted her allegation in a flippant manner.

Judy's father requested a meeting with Dr. Smith and Mr. Miller. He testified that both men made an effort to convince him that no teacher would behave in the manner alleged by his daughter.

Both Judy and her father were given the impression that, in order for her to continue to participate in the band, she would have to apologize and deny her allegations in front of the entire band. Dr. Smith and Mr. Miller dispute this version of the events. However, Dr. Smith assembled the band members. He acknowledged that there were rumors circulating and indicated that a certain student would address those rumors. Dr. Smith then turned to Judy who ran from the room in tears. The impact of this forced apology has been discussed in the preceding discussion of the Stoneking case.

The plaintiff's complaint also listed numerous other instances of sexual abuse by Wright and other male teachers. It was also pointed out that no disciplinary action beyond warning the teachers about being alone with female students was ever taken against any of the teachers involved in the sexual misconduct.

This case raised many of the same issues that were raised in the previous case. In this case, however, the defendants argued that since this assault took place off school grounds at the beginning of summer vacation, no special relationship with the plaintiff existed. The court disagreed:

> The increased threat to female students created by the defendants' alleged tolerance for sexual abuse was not the sort of danger that disappeared when those students packed up their instruments and walked out of the band room. Because Wright conducted marching band practices during the summer months, his opportunity to abuse his female band students . . . did not disappear when the school bell sounded the end of the day or the beginning of vacation.[230]

The court stood by its earlier decision in the Stoneking case and refused to uphold the defendants' motion to dismiss on the basis of qualified immunity. "This Court held that the defendants were not entitled to qualified immunity, concluding that a reasonable person would have been aware that the plaintiff had a substantive due process right to be free from intrusions into her personal privacy and bodily integrity."[231]

The judicial system has been consistent in upholding the dismissal of teachers for acts of sexual misconduct with students or other minors. In general, the very nature of the conduct has been found to infer unfitness to teach. The courts have also held that inappropriate or provocative language, sexual harassment, and condoning sexual harassment constitute grounds for dismissal on charges of immorality. School officials, however, must safeguard the constitutional right to due process for the teacher regardless of the cause for dismissal in order for the dismissal to pass judicial muster.

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[230]Ibid., 132. [231]Ibid., 140.

Unorthodox Conduct

Three cases from the early 1970's deserve mention to complete this study of the dismissal of teachers for sexual misconduct. Since they do not clearly fit into any of the previous categories of misconduct, they have been grouped together as representative of unorthodox sexual behavior.

The first of these cases, Pettit v. State Board of Education,[232] was heard by the Supreme Court of California in 1973. The State Board of Education's order to revoke Elizabeth Pettit's teaching credentials for sexual misconduct which evidenced her unfitness to teach was at issue in this case.

On the evening of December 2, 1967, an undercover police officer attended a party which was sponsored by the Swinger's Club at a private residence. Elizabeth Pettit and her husband were members of this club. Throughout the evening, the officer observed several couples engaging in sexual intercourse in open bedrooms with other guests observing the activity.

During a one hour period, the officer observed Mrs. Pettit engage in three separate acts of oral copulation with three different men. Both participants in each act were undressed and were observed by other guests. Mrs. Pettit was subsequently arrested and charged with committing oral copulation. She ultimately pled guilty to the lesser charge of outraging public decency. She was fined and placed on probation.

In February of 1970, proceedings were begun to revoke Mrs. Pettit's teaching credentials on the grounds that ". . . her conduct involved

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[232] 513 P.2d 889 (1973).

moral turpitude and demonstrated her unfitness to teach."[233] During the hearing, Mr. Pettit testified that he and his wife knew in advance that sexual activities would occur at the party. He further testified that he had observed while his wife had engaged in both sexual intercourse and oral copulation with other men. Additionally, he testified that he and his wife had appeared on two television shows in 1966 to take part in the discussion of ". . . nonconventional sexual life styles."[234] Although the couple had attempted to disguise their appearance, testimony was offered to show that they were recognized by at least one other teacher in the school district.

Following additional testimony by a number of witnesses, including a clinical psychologist, the hearing officer concluded:

> . . . that the plaintiff has engaged in acts of sexual intercourse and oral copulation with men other than her husband; that plaintiff appeared on television programs while facially disguised and discussed nonconventional sexual behavior, including wife swapping; that although plaintiff's services as a teacher have been "satisfactory," and although she is unlikely to repeat the sexual misconduct, nevertheless she has engaged in immoral and unprofessional conduct, in acts involving moral turpitude, and in acts evidencing her unfitness for service.[235]

The hearing officer concluded that there was ample evidence to support the revocation of her teaching credentials. The board concurred and adopted the findings and conclusions of the hearing officer.

After the superior court denied mandate, this appeal followed. Mrs. Pettit contended that the Morrison case was applicable since there was no substantial evidence to support the finding that she was unfit for service as a teacher. The court disagreed, finding several important distinctions between the cases. In Morrison, the conduct in

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[233]Ibid., 890. [234]Ibid. [235]Ibid., 891.

question was both private and noncriminal in nature. Also, the board had acted without sufficient evidence that Morrison was rendered unfit to teach by that conduct. In this case, the hearing officer had heard three expert witnesses express concern about Pettit's continued effectiveness as a classroom teacher in light of her professed sexual morality. The court stated: "Even without expert testimony, the board was entitled to conclude that plaintiff's flagrant display indicated a serious defect of moral character, normal prudence and good common sense."[236]

The court found that ". . . the board and the trial court were entitled to conclude, on the basis of the expert testimony set forth . . . and the very nature of the misconduct involved, that Mrs. Pettit's illicit and indiscreet actions disclosed her unfitness to teach in public elementary schools."[237]

In the second case, D. Franklin Wishart sought relief in United States District Court[238] following his dismissal by the Easton Public Schools in June, 1973. On March 8, 1973, Wishart met with Paul McDonald, the superintendent of schools in Easton, who informed him both orally and in writing that he had been observed engaging in conduct unbecoming a teacher. Wishart was also informed that he was being removed from his teaching position with pay immediately. He was also advised of his procedural rights and of the hearings that would be held regarding his suspension and dismissal. Attempts made to resolve the matter were fruitless and a hearing was held on June 18.

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[236]Ibid., 893. [237]Ibid., 894.

[238]Wishart v. McDonald, 367 F. Supp. 530 (1973).

At the hearing and at the trial which resulted from Wishart's appeal, testimony was heard from the superintendent, a police officer, and three of Wishart's neighbors. All had witnessed Wishart's behavior on separate occasions and offered similar versions of his behavior.

Wishart was observed in various parts of his yard with what was described by the witnesses as a female dress mannequin. He would move the mannequin from place to place, including placing it on top of his car on one occasion. Although the witnesses disagreed as to how the mannequin was clothed (either in a dress or a nightgown), all agreed that he had caressed the breast area of the object. He would frequently rearrange the clothing and would lift the hem of the garment occasionally. Two of the witnesses testified they had seen Wishart engaging in what they interpreted to be a form of masturbation. At least one neighbor testified that Wishart's yard was well lighted.

Wishart testified that he did engage in unusual conduct. However, he denied touching the figure in any way other than moving it about in his yard and arranging its clothing. He described the object as ". . . a camera tripod with a pillow tied around it and a dress placed over it."[239] He admitted that the behavior had occurred on a weekly basis when his wife was attending an evening class.

At the conclusion of the hearing, the board voted to dismiss Wishart and agreed to pay his full salary for the 1972-73 school year. Wishart appealed this decision alleging violation of his constitutional rights under the First, Ninth, and Fourteenth Amendments to the Constitution. Also at issue was that the phrase "conduct unbecoming a

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[239]Ibid., 532.

teacher" was in violation of the Fourteenth Amendment. He further asked that the court order his reinstatement to his full-time teaching position.

The court began with an examination of whether the school board's reasons for dismissing Wishart were arbitrary or capricious. Citing Drown v. Portsmouth School District,[240] the court summarized the three ways set forth in that decision in which dismissal decisions could be found to be arbitrary or capricious: "First, if the reason is unrelated to the educational process or to working relationships within the educational process; second, if the reason is trivial; and third, if the reason is wholly unsupported by a basis in uncontested fact either in the statement of reasons itself or in the teacher's file."[241]

The court found the second and third issues easy to resolve since the reason for Wishart's dismissal was neither trivial nor unsupported by facts. The first issue presented the most difficulty. Wishart offered testimony by his psychiatrist. He had diagnosed Wishart's problem as ". . . a personality disorder which probably developed during adolescence and is manifested by plaintiff displacing his sexual interests into a dress."[242] He continued by pointing out that Wishart had been successful in controlling his conduct until the death of his first child three years prior to his dismissal. He further testified that he felt that Wishart's prognosis was good and that this disorder would not affect his ability to perform his classroom duties.

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[240]451 F.2d 1106 (1st Cir. 1971). [241]Wishart, 533.

[242]Ibid., 534.

In spite of this testimony, the court found that McDonald was justified in his concern that Wishart's conduct would become known in the small town in which he lived and taught. Therefore, the court could substitute its judgment for that of the school board since the evidence did not support a finding that the dismissal was arbitrary nor capricious.

Addressing Wishart's contention that his dismissal violated his constitutional right to privacy, the court was not impressed with his reasoning:

> However convincing his argument may be that private sexual conduct is protected from governmental intrusion, the evidence in this case is ample that on various occasions the conduct was public in nature or at least was carried on with such reckless disregard of whether or not he was observed that it lost whatever private character it might have had.[243]

The final issue addressed in this decision was the argument that "conduct unbecoming a teacher" was unconstitutionally vague. The court refused to address this argument and offered the opinion that a state court would interpret the phrase as including only conduct which was job related.

The court concluded by denying Wishart's requests for relief. Therefore, his dismissal was upheld.

The final case in this section is one which most school administrators will never have to face. The principal issue in this novel case is whether a male tenured teacher who underwent sex reassignment surgery to change his external anatomy to that of a female can be dismissed from a public school system on the sole ground that his

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[243]Ibid., 535.

continued employment could result in emotional harm to the students. In Re Grossman[244] resulted from this dismissal.

Paul Monroe Grossman had had a gender identity problem for many years although he had married and fathered three children. This problem worsened after his fiftieth birthday and he sought medical advice. He was diagnosed as a transsexual. In March, 1971, he had sex reassignment surgery performed. Although he had notified his superiors of his impending absence for the surgical procedure, he neglected to disclose the nature of the surgery. When he returned in May, he contacted the superintendent of the school system and informed him of his intention to return to his teaching position. He completed the academic year in male attire. At the end of the year, he assumed the name Paula Miriam Grossman and began to live openly as a woman.

During that summer, the matter of Ms. Grossman's continued employment was under active and continuous consideration by the school board. A series of meetings was held to attempt to resolve the situation. A proposal was made to engage Ms. Grossman on a one year contract at the same pay to teach elective music courses in the high school. Also included in the proposal was the provision that Ms. Grossman would resign from the tenured position Paul Grossman had held and would secure a new teaching certificate in her female name. Ms. Grossman rejected the proposal.

On August 19, 1971, the board filed written charges against Ms. Grossman and suspended her without pay. The charges included: (1) Ms.

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[244]316 A.2d 39 (1974).

Grossman's presence in the schools would create a degree of notoriety within the system which would impair the efficient and orderly operation of the school system; (2) Ms. Grossman's failure to disclose the sexual condition and the nature of the surgery constituted conduct unbecoming a teacher; (3) Ms. Grossman underwent a fundamental and complete change in her role and identification which rendered her incapable of continuing in a teaching position; (4) Ms. Grossman exhibited conduct and behavior which was deviant from the accepted standards of the community; and (5) she exhibited abnormality.

The charges were forwarded to the state Commissioner of Education. After heaing lengthy testimony, the Commissioner found that only the third charge was substantiated by adequate evidence. However, he amended this third charge, which involved the change in Grossman's role and identity, to include:

> . . . thereby rendering himself incapable to teach children in Barnards Township because of the potential her (Grossman's) presence in the classroom presents for psychological harm to the students. . . . Therefore, Paula a/k/a/ Paul Grossman should be dismissed by the system by reason of just cause due to incapacity.[245]

He therefore directed that Ms. Grossman be dismissed. He further directed the board to apply for disability on behalf of Ms. Grossman and ordered the payment of her back salary from the time of her suspension.

Both parties appealed this decision to the state board of education which affirmed the directives ordering the dismissal and the application for disability. The order to pay Ms. Grossman's back salary

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[245]Ibid., 42.

was reversed. Ms. Grossman appealed this decision to the Superior Court of New Jersey. The local board also appealed the rejection of its other four charges.

Testimony before the court included a number of medical witnesses for both parties in the case. Two psychiatrists, one experienced in sexual disorders and the other experienced in the treatment of children, offered testimony on behalf of the local board. Both expressed concern that Ms. Grossman's continued presence in the classroom would be detrimental to mental health of the children. Ms. Grossman countered with expert medical witnesses who disagreed with this contention. The court concluded that the evidence ". . . sustained as reasonably probable the board's hypothesis that there would be emotional harm to the students if Ms. Grossman were retained in the school system."[246] Therefore, the court declined to reverse the Commissioner's finding.

The court then addressed the issue of incapacity. Following a review of pertinent case law, the court stated:

> We are convinced that where . . . a teacher's presence in the classroom would create potential for psychological harm to the students, the teacher is unable to properly fulfill his or her role and his or her incapacity has been established within the purview of the statute. In fairness to Ms. Grossman, we emphasize that the Commissioner's conclusions relate only to her fitness to continue teaching in the Barnards Township school system. We express no opinion with respect to her fitness to teach elsewhere and under circumstances different from those revealed in the present case.[247]

After addressing various other issues presented in this appeal, the court decided that only the directive by the Commissioner of Education concerning back salary was to be reversed. The directives that

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[246]Ibid., 46. [247]Ibid., 49.

Ms. Grossman be dismissed and that the local board apply for disability on her behalf were affirmed.

Although it is doubtful that school officials will encounter similar dismissal cases, the discussion of teacher dismissal for immorality on grounds of sexual misconduct would not have been complete without including these three cases. Public behavior such as this automatically leads to the conclusion that the individual's fitness to teach is impaired. In the event that school officials have to deal with similar unorthodox behaviors, the courts will uphold the dismissals if the constitutional rights of the teachers have been safeguarded.

Summary

Decisions in the area of teacher dismissal for immorality on grounds of sexual misconduct are consistent in all areas except when the misconduct involves homosexuality. The United States Supreme Court has failed to grant certiorari and rule on the pertinent issues involving the dismissal of homosexual teachers. As a reuslt, there have been contradictory opinions from lower courts especially when the case involves the individual's status as a homosexual rather than actual homosexual acts. Further, private acts of homosexual conduct have been treated more leniently by the courts than public acts. School officials have been required to show that the conduct has had an adverse impact on the teacher's effectiveness.

The common element in all the cases is the courts' insistence that the due process rights and other constitutional rights of the teacher involved be preserved regardless of the type of misconduct

involved. At a minimum, the teacher must receive written notice of the charges leading to the dismissal and the opportunity for a hearing before a fair and impartial panel. The individual's right to privacy may be violated only when there is a compelling state interest which overrides this right. Caution must be exercised when dismissing a teacher for his exercise of the right to freedom of speech.

School officials must take a number of factors into consideration when dismissing a teacher for immorality based on sexual misconduct. Except in extreme cases, these officials must now argue convincingly that the behavior in question has had an adverse impact on the effectiveness of the teacher's classroom performance and/or the reputation and effectiveness of the school in general.

Misconduct which involves students or other minors will result in the teacher's dismissal, and the courts have been consistent in upholding these decisions. The judicial system has frequently inferred unfitness to teach from the very nature of the acts involving students. Unless there has been a violation of the constitutional rights of the teacher, these dismissals are affirmed on appeal to the courts of America.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS FOR FURTHER STUDY

Summary

Throughout the history of American education, the character and conduct of public school teachers have been of great concern to parents and the general public. Teachers work in a very sensitive area which leads to the expectation of exemplary conduct on their part. The daily contact with impressionable young people has led to this expectation since children learn from example as much as from what is actually taught in the classroom. For this reason, the American public expects teachers to abide by a strict moral code of conduct despite the liberalization of sexual mores that has occurred during the last two decades.

This expectation of exemplary conduct has led to the dismissal of teachers for immorality on the grounds of sexual misconduct. Further problems arise from these dismissals because of the variability of expectations. The factors used to decide such dismissals differ widely from one district to another, as well as from one state to another. What is considered reprehensible conduct in one location may be condoned in another. Often one finds that a wider range of sexual behavior is tolerated in a cosmopolitan area than in the more provincial localities. American society in general has no uniformly consistent view of morality. This has led many teachers who have been dismissed

for immoral conduct on grounds of sexual misconduct to challenge their dismissals in the judicial system of America. Until the state statutes reflect the liberalization of sexual values, cases involving dismissals of teachers for immorality on grounds of sexual misconduct will continue to be heard in the nation's courts.

Answers to the Research Questions

In Chapter I, five questions were posed for this study to answer. The following answers are the result of a careful review of the current literature on the dismissal of teachers for immorality on grounds of sexual misconduct, the analysis of state statutes, and the analysis of pertinent case law from both state and federal courts.

Question one: What is revealed in the current literature concerning the dismissal of teachers for immoral conduct? Many of the authors have addressed the issue of dismissal for immorality in general. Of those who have addressed specific areas of sexual misconduct which led to dismissal for immorality, more have addressed the issues of homosexuality and unwed pregnancy than the other areas investigated in this study.

After review of the historical aspect of the public's concern about the character and conduct of public school teachers, it is clear that this concern was well-founded. The topic has continued to be of interest to authors of both legal and educational literature. The current literature, in general, defends the actions taken by the courts in these cases.

In the past, teachers charged with sexual misconduct would simply resign and often disappear from the area. With the current emphasis on constitutional rights, especially those involving privacy and due process, many of these teachers are challenging their dismissals in the courts.

The literature tends to support the nexus requirement used by many courts in decisions concerning heterosexual misconduct with other consenting adults and unwed pregnancy. The consensus is that the right to privacy enjoyed by all citizens prevents school boards from dismissing these teachers unless there is a compelling state interest in doing so. School district officials must establish a clear relationship between the behavior in question and the effective operation of the school system.

Contradictory opinions in the literature reflect the conflicting opinions from the courts when dealing with the dismissal of teachers for homosexual conduct. The majority of the authors on this topic seem to favor protection for these individuals under the right to privacy as long as the conduct is private and involves two consenting adults. When a homosexual goes public thorugh flagrant conduct, such as public homosexual acts or advocating the homosexual lifestyle, the right to privacy no longer applies, and the conduct should, and usually does, result in dismissal. The question of how to deal with homosexuals in the public schools will continue to be of interest even after the Supreme Court grants certiorari and addresses the pertinent legal issues involved in the dismissal of teachers for immorality on grounds of homosexual conduct.

The current literature reviewed for this study reflects substantial agreement in the area of sexual misconduct with students or other minors. The consensus is that sexual misconduct with students or other minors is prima facie evidence of immorality and the dismissal should be upheld. Most authors expressed the opinion that conduct of this nature is excluded from all constitutional guarantees with the exception of the right to due process.

Question two: What is the status of immorality as a cause for dismissal as outlined in state statutes of all fifty states? Since statutes do not distinguish charges of immorality on grounds of sexual misconduct from charges based on other immoral conduct such as drug and alcohol abuse and illegal conduct, this review focused on immorality in general as a cause for dismissal.

Of the forty-two states in the United States which list specific causes for the dismissal of tenured teachers in their state statutes, thirty-three states allow the dismissal of tenured teachers for immorality. When other related causes, such as conduct unbecoming a teacher, unprofessional conduct, and other good and just cause, which can be used to dismiss a teacher for sexual misconduct are included in the analysis, the number of states allowing dismissal of teachers for immoral conduct rises to forty-two. Three states which do not list specific causes for dismissal do allow revocation of teaching certificates for immorality or moral turpitude. The revocation would result in the subsequent dismissal of the teacher. Therefore, there are forty-five states with statutory authority to dismiss teachers on grounds of immoral conduct. Additionally, of the thirty states which list

specific causes for revocation of teaching certificates, twenty-three states provide statutory permission for the revocation of certification for teachers charged with immorality. Although societal attitudes have become more lenient concerning sexual conduct, state statutes do not reflect this attitude in the provisions for the dismissal of tenured teachers.

The third and fourth questions can be treated together since both involve the analysis of case law involving teacher dismissal for immorality on grounds of sexual misconduct. What is the status of dismissal for immorality as revealed in analysis of case law? Are there discernible patterns and trends that can be identified in judicial decisions?

Seventy-five cases which have been heard by state and federal courts within the last two decades were reviewed and analyzed for this study. Although the number of cases involving heterosexual misconduct and unwed pregnancy has shown a gradual decline, the number of cases involving homosexual conduct has remained fairly constant. There has been an increase in the number of cases heard which involved dismissal for sexual misconduct with students in the 1980's.

Analysis of pertinent case law has revealed that immorality continues to be a valid cause for dismissal of teachers. Cases in which the school officials have shown that the conduct has had a detrimental impact on the performance of the teacher involved and in which the school officials have followed due process guidelines are upheld by the courts regardless of the type of misconduct. Dismissal for sexual

misconduct with students will be legally defensible as long as the due process rights of the teacher were protected during the dismissal process.

Question five: What legal guidelines can be set forth as a result of this research to aid administrators and school board members? The guidelines which have been developed during the course of this study will be presented later in this chapter.

Conclusions

Even when legal issues appear to be similar and/or the same as those in cases already decided by the courts, a different set of circumstances can produce an entirely different decision. Therefore, drawing specific conclusions from legal research is difficult. However, based on the analysis of pertinent case law, the following general conclusions concerning the legal aspects of teacher dismissal for immorality on grounds of sexual misconduct can be made:

(1) Private sexual conduct can result in dismissal if the school board has successfully established the nexus between the sexual misconduct and the teacher's classroom effectiveness that is required by the courts.

(2) The administrator should consider the nature of the act when dismissing a teacher because of sexual preference. Teacher dismissals for public acts of homosexual conduct are more easily defended as the cause for dismissal than those that occur in the privacy of the home.

(3) Dismissal based on a teacher's admission of homosexual preference will generally not be upheld by the courts unless the school system can show that the teacher's life style has an adverse impact on his classroom performance or on the reputation of the school in general.

(4) In order for dismissals of teachers for heterosexual misconduct to be upheld when challenged, there must be substantial evidence that the conduct has had an adverse impact on the performance of the duties required by the teacher's contract.

(5) Unwed pregnancy is no longer considered to be prima facie evidence of immorality; there must be a showing of adverse impact on teaching performance for the dismissal to be upheld.

(6) Dismissal of a teacher for sexual misconduct with students generally results in a legally defensible dismissal if the teacher's constitutional rights are protected during the process.

(7) The recent Stoneking decision may result in successful civil rights actions against school districts when teachers engage in sexual abuse or harassment of students and when there is a pattern of failure by school officials to address student complaints.

(8) Given the complexity of individuals and the openness of sexual conduct in today's society, school officials must be ready to deal with any type of sexual misconduct as evidenced by the cases in this study which involved unorthodox conduct.

Guidelines for School Officials to Use in Dismissal of Teachers for Immorality on Grounds of Sexual Misconduct

The following guidelines will be of help to school officials in the decision to dismiss a teacher for immorality on grounds of sexual misconduct. Although these guidelines do not guarantee a legally defensible dismissal, they will assist the practicing school administrator or school board member toward that purpose.

The constitutional guarantees afforded to all citizens require that teachers being dismissed must be given written notice of the charges against them. School officials must also hold a hearing prior to voting to dismiss the teacher. Care must be exercised to insure that this hearing is held before an impartial group. School board members must refrain from becoming involved in the case prior to this hearing.

It is recommended that the school board employ an independent legal counsel or another individual knowledgeable in school law to conduct the hearing and rule on objections and other matters of law. It is further recommended that a court reporter or other independent individual be used to record the testimony and proceedings of the hearing. Both of these recommendations are intended to provide a more legally defensible dismissal process.

In most situations involving dismissals for immorality on grounds of sexual misconduct, the courts require that the nexus between the teacher's behavior and his teaching effectiveness be established by a preponderance of the evidence. The Morrison criteria have been

relied on in most cases involving sexual misconduct to establish this relationship. The factors in this precedent are:

(1) the likelihood that the conduct may have adversely affected students or fellow teachers;

(2) the degree of that adverse impact anticipated as a result of the conduct;

(3) the proximity or remoteness in time of the conduct;

(4) the type of teaching certificate and position held by the individual;

(5) the extenuating or aggravating circumstances surrounding the behavior;

(6) the praiseworthiness or blameworthiness of the motives resulting in the conduct;

(7) the extent to which the disciplinary action taken against the teacher will have a chilling effect on the constitutional rights of the teacher involved or of teachers in general.

Legal authorities also suggest the following determinative factors to be considered in the dismissal of teachers for immoral conduct:

(1) The status of the participants in the sexual activity must be taken into consideration. This consideration should include the age of the individuals involved, the age level of the students taught by the teacher, and the position held by the teacher who was involved in the misconduct.

(2) The proximity of time is also an important consideration in the dismissal decision. The period of time which has elapsed between the misconduct and the dismissal action is an

important element in the decision by the school board as well as in the decision by a judge who may be asked to review the dismissal. Isolated incidents of misconduct several years prior to the dismissal have less chance of being upheld as the cause for dismissal than conduct which occurred in proximity to the dismissal decision.

(3) Courts are interested in the likelihood that the conduct may re-occur. This can be determined from an examination of the number of times that the misconduct has occurred as well as the length of time over which the conduct has occurred.

(4) The degree of notoriety which the teacher's conduct has attracted must be determined. If the conduct is well known and has attracted negative attention from the community, the chances are greater that the disapproval of the community could cause pupils to lose their respect for the teacher and their desire to continue in the class. Resentment and antagonistic attitudes on the part of colleagues toward this individual would adversely affect the performance of assigned duties. School officials must also consider the source of the notoriety that surrounds the conduct. Did it arise from the conduct itself or was it the result of the dismissal process?

(5) The nature of the offense is a final consideration which should be taken into account in the dismissal decision. If the teacher has been convicted of a criminal offense or if there are criminal charges pending, the dismissal has a

greater likelihood of being upheld by the judiciary. It is important to note that acquittal on criminal charges does not preclude dismissal of the individual from his teaching position.

Recommendations for Further Study

Applicable precedents for the dismissals for immorality on grounds of sexual misconduct have been established for all areas of misconduct with the exception of homosexuality. Until the Supreme Court of the United States addresses the pertinent constitutional issues involved in teacher dismissals for homosexuality, conflicting opinions will continue to be handed down in these cases. Therefore, this area deserves further investigation at a later date.

Final disposition of the Stoneking case may also cause major repercussions in the educational community. If Ms. Stoneking does prevail in her action which seeks monetary damages against the school district, the case will need to be followed to determine if it establishes a precedent for future civil rights cases based on the sexual abuse and harassment of students by teachers.

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