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The application of Section 1983 to teacher freedom of speech from Pickering to the present

Pate, Gary DeWeese, Ed.D.

The University of North Carolina at Greensboro, 1988

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THE APPLICATION OF SECTION 1983 TO TEACHER FREEDOM OF SPEECH FROM PICKERING TO THE PRESENT

by

Gary DeWeese Pate

A Dissertation Submitted to
the Faculty of the Graduate School at
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APPROVAL PAGE

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Dissertation Adviser _____

Committee Members _____

_____

_____

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Section 1983 of the Civil Rights Act of 1871 has for nearly one hundred years remained largely unused. However, with the Monroe v. Pape decision reached in 1961, Section 1983 came to be used as a tool in litigating civil rights claims in federal courts. It has become the major piece of federal legislation affecting school boards in employment decisions.

This study is the product of both historical and legal research. The creation and evolution of Section 1983 of the Civil Rights Act of 1871 were researched to explore the era of history in which the Act was enacted and to trace the developments and changes of the Act. Cases involving the freedom of speech for public school teachers based on Section 1983 were then found and briefed.

Based on an analysis of the data the following conclusions are drawn: (1) teachers enjoy basically the same degree of freedom of speech as do other citizens; (2) the state does, however, have a contervailing interest in limiting the speech of teachers that causes disruptions to the educational system; (3) the speech of teachers is, therefore, protected provided it is on issues of public concern; (4) the private lives of teachers including their membership in organizations, their dress and appearance is protected as long as it does not result in disruptions to the educational process; and (5) Section 1983 provides for civil remedies for those individuals whose constitutional rights of free speech have been abridged.

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CHAPTER I

INTRODUCTION

Overview

One of the most important pieces of federal legislation that affects school boards and administrators was written during the years following the American Civil War. This legislation was originally designed to help protect the rights of American Negroes during the period of history known as Reconstruction. It was one thing for congress to pass and the states to ratify an amendment that gave former slaves all benefits of citizenship. It was still another matter for the freed slaves to enjoy the protections and rights that the Constitution bestowed on them. As a result, Congress passed a number of acts clarifying the rights of blacks, Section 1983 being only one of such acts. Over a century later, Section 1983 has been viewed as being one of the most significant pieces of reconstruction legislation.

This legislation, known as Section 1983 of the Civil Rights Act of 1871, remained relatively unknown ans unused until the 1960s. In 1961 the Supreme Court expanded Section 1983 with its decision in Monroe v. Pape.[1] That decision allowed government officials to be sued for Section 1983 violations. Through this and similar decisions, Section 1983 was in effect no longer limited in coverage only to

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[1]365 U.S. 167 (1961).

blacks, but rather included all categories of citizens subject to superordinate control under state action. The expanded interpretation of this act thus included teachers.

Purpose of This Study

The purpose of this study was to determine to what extent Section 1983 of the Civil Rights Act of 1871 has been applicable to public school teachers in the exercise of their freedom of speech and expression as provided for in the first amendment of the federal Constitution.

Significance of This Study

The significance of this study is based on the tremendous reliance on Section 1983 in litigation between school employees and their superordinates. The American society, as all free societies, is in a continuing state of change. In recent years there has been a tremendous change both in how teachers view themselves as well as how society views them. In the past, many people thought that teaching was more of an appointment or a reward from the local governing body than a profession. Teachers had to lead a lifestyle that would not focus attention upon themselves from the citizens of the area. Their references were checked to assure that their lifestyles were in keeping with the community. To illustrate this point, listed below are a group of rules for teachers for the year 1872 and a contract and a reference form for the Wilson, North Carolina school system.

1872
Rules For Teachers

Teachers each day will fill lamps, clean chimneys.

Each teacher will bring a bucket of water and a scuttle of coal for the day's session.

Make your pens carefully. You may whittle nibs to the individual taste of the pupils.

Men teachers may take one evening each week for courting purposes or two evenings a week if they go to church regularly.

After ten hours in school, the teachers may spend the remaining time reading the Bible or other good books.

Women teachers who marry or engage in unseemly conduct will be dismissed.

Each teacher should lay aside from each pay a goodly sum of his earnings for his benefit during his declining years so that he will not become a burden on society.

Any teacher who smokes, uses liquor in any form, frequents pool or public halls, or gets shaved in a barber shop will give good reason to suspect his worth, intention, integrity and honesty.

The teacher who performs his labor faithfully and without fault for five years will be given an increase of twenty-five cents per week in his pay, providing the Board of Education approves.[2]

FORM OF CONTRACT
WILSON CITY AND COUNTRY PUBLIC SCHOOLS

Teacher's Contract

I hereby accept a position as a teacher in the Wilson _____ Public Schools for the years 192___ and 192___ at a salary of $_____ for the school year of ____ months. My N.C. Certificate is Numer _____, Class _____. I have had ____ years experience. My N.C. Certificate expires July 1, 192__.

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[2]1872 Rules For Teachers (Student National Education Association).

I further agree that 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 next day inefficient; that I will not attend sorry moving picture and vaudeville shows; that I will not fall in love or become familiar with high school pupils; that I will not attend card dancing parties; that I will not fail to use my good sense and discretion in the company I keep; that I will use my best endeavors 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 my work.

This _____ day of _____, 192____.[3]

M_____

_____

_____

Dear _____:

1. M _____ of _____ has give me your name as one who can tell me of her ability as a teacher, etc.

2. Some Wilson teachers, 1923-24, have failed for the following reasons: (a) lack of knowledge of subject matter and inability to manage children; (b) attention to card playing, dancing and other society interests to the neglect of their school work; (c) on account of falling in love with high school pupils; (d) on account of keeping the company of sorry men; (e) on account of night riding without a chaperon; (f) on account of attendance of rotten vaudeville and sorry moving picture shows; (g) on account of entertaining company until late hours at night, making good work next day impossible; (h) on account of failure to take any vital interest in church and Sunday school work and other community activities.

3. If you think this applicant will and can avoid all the above sources of failure, I shall appreciate your saying so.

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[3]Teacher Contract for the Wilson City and County, North Carolina Board of Education. Courtesy of H. C. Hudgins.

> If you think there is doubt about her having good sense to avoid these sources of failure, I shall appreciate your frankness. We are after teachers who are in earnest about doing what they are paid to do. We prefer that all other kinds go elsewhere.
>
> 4. Answer:
>
> 5. Reply sent to Supt. C. L. Coone, Wilson, N.C. on _____ day of _____, 1924.[4]

As teaching has taken a more professional identity, teachers have become more assertive regarding their civil rights. A number of teacher unions and associations are now demanding equal treatment with other professions. These unions also demand all civil rights and privileges that other professions enjoy. Teachers want it to be made known that they, like students, "do not leave their constitutional rights on the schoolhouse steps."[5]

Many educators perceive a growing rift in the fabric of the educational community. Principals are often viewed as becoming more and more removed from the issues that affect teachers and, consequently, are looked on with suspicion by teachers. A similar comparison can be made regarding superintendent and principal relationships. There appears to be a constant struggle for power between the different administrative levels of education.

As a result of these changes, there has been a tremendous growth in the amount of litigation that deals with educational issues and

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[4]Teacher Reference Form, Wilson, North Carolina, Board of Education. Courtesy of H. C. Hudgins.

[5]Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969).

personnel. Prior to the 1940s there were relatively few court decisions that affected education. By contrast, currently teachers are instructed in education courses to, "either know your school law or to know your school lawyer."[6] Prior to 1960 only 280 Section 1983 suits were filed in federal court. In contrast, thirteen thousand Section 1983 suits were filed in 1983.[7] Thomas Shannon, editor of The Yearbook of School Law, reported that in a five-year period the use of Section 1983 litigation increased some one thousand percent.[8]

There are four basic reasons for the dramatic increase in the use of Section 1983 as a vehicle in litigating cases based on a deprivation of civil rights. First, there is no statute of limitation on Section 1983 suits in federal courts. This is important in that limitation statutes vary from one state to another. Second, a Section 1983 action does not require the exhaustion of administrative remedies. A Section 1983 claim can originate either in a federal court or a state court. In addition, greater remedies are allowed on cases based on Section 1983 than litigation sought through other types of claims. Plaintiffs can receive compensatory and punitive damages as

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[6]Quote taken from Guy T. Swain, Professor of Education, Appalachian State University, Boone, North Carolina.

[7]Ralph Mawdsley and Steve Permuth, "Private Schools' Tax Exempt Status and Application of Section 1983." School Law Update. NOLPE, 1984, p. 47.

[8]Richard S. Vacca, "Section 1983 Liability: Recent Developments in the Merger of State and Federal Remedies." School Law Update. NOLPE, 1985, p. 81.

well as equitable relief. Finally, a Section 1983 claim requires fewer procedural requirements than either a Title VII or a Title IX claim.[9]

Research Questions

There are several extremely important questions that this study seeks to answer:

1. To what extent does Section 1983 protect teachers in areas of private and public verbal and written criticisms of a superordinate?
2. To what extent does Section 1983 protect teachers with regards to academic freedom to speak on controversial issues in the classroom?
3. To what extent does Section 1983 protect the rights of teachers to regulate their dress and appearance?
4. To what extent does Section 1983 protect teachers that enga e in political and union activity?
5. To what extent are public school teachers protected by Section 1983 in their social lifestyle including their sexual preferences?
6. What remedies are available to teachers whose rights have been abridged by their superordinates?

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[9]"Private School's Tax Exempt Status and Application of Section 1983." School Law Update, p. 48.

Methodology

This study was the product of both historical and legal research. Historical research was a necessary component as it is important for one to understand the era of history in which the first group of civil rights laws were enacted. Also, since this study was designed to trace the application of Section 1983 from the landmark Pickering v. Board of Education[10] in 1968 to 1986, historical research was necessary. To this end many articles and books were used to trace the growth and change of court decisions of both freedom of speech and the tremendous increase of the number of cases based on Section 1983.

Cases involving Section 1983 that pertained to the topic of freedom of speech for teachers came from four primary sources. The broad topic "Schools" was located in American Jurisprudence. Under the heading "Teachers and Other Employees" was then located. Under this subtopic it became apparent that sections 161 to 214 were appropriate. Each case from the citations was then reviewed and those not applicable to the study were discarded. Corpus Juris Secundum, another multi-volume work, was handled in a similar fashion. The broad subject heading "Schools and School Districts" was found. Under this heading the subtopic, "Teachers, Principals, and Superintendents" was located. Cases listed under this subtopic were then reviewed to determine their application to the topic of this study. Possibly the best help in locating primary sources was the system of ALR2nd, ALR3rd and ALR Federal. These proved invaluable in locating both cases and

[10] 391 U.S. 563 (1968).

statutes. The American Digest System was then examined for appellate court decisions rendered from 1968 to 1986. After appellate court cases were located by key number 13.12(8) in the American Digest System, each case was then located in the legal indices such as the Federal Supplement, Federal Reporter, and the Supreme Court Reporter. The North Carolina Lawyers Research Center also provided numerous case citations involving Section 1983 and the abridgment of teacher's first amendment freedoms. The cases revealed by these citations were also read for their applicability to this study. These citations identified from all of the sources above were also checked against the 1968 to 1986 volumes of the Yearbook of School Law published by the National Organization On Legal Problems of Education (NOLPE).

Cases that were determined to be applicable to this study were then briefed or summarized into four areas: (1) the background or facts in the case, (2) the question(s) of law to be decided by the court, (3) the decision reached by the court, and (4) the rationale used by the court in making its decisions.

Supplementing the primary sources listed above were a variety of secondary sources found in the libraries of the Universities of North Carolina at Asheville and Greensboro, East Tennessee State University in Johnson City, Tennessee, and Wake Forest Law Library. They included books and journal articles located through The Index to Legal Periodicals, the Education Index and the Reader's Guide to Periodicals. These secondary sources were read to determine their applicability to the study of Section 1983 and teachers' freedom of

speech. Information on this topic was made possible through card catalog searches conducted through the two libraries mentioned earlier. Definitions of legal terms were found in Black's Law Dictionary and The Law of Public Education.

Five unpublished dissertations that paralleled this topic were found from a dissertation abstract search. The dissertations proved helpful in providing an overview of teacher freedom of speech in general and Section 1983 specifically.[11]

Delimitations of the Study

Not all issues involving either Section 1983 or teacher's freedom of speech have been included in this study. Both of these topics are far too broad to cover adequately in a study such as this. Teacher freedom of speech only as it relates to Section 1983 was included in this study. The following are further delimitations of this study:

1. This research did not treat all questions of teacher's freedoms of speech and expression.

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[11]The four unpublished dissertations that were used as a general type reference are: (1) Glend D. Nichols, "Insubordination as a Basis for the Dismissal of Professional Employees of the Public Schools," University of Arkansas, 1985, (2) Edward Ernest Fink, "The Interpretation of Academic Freedom in Relation to Civil Rights for Professional Employees in the Public Schools," University of Pittsburg, 1980, (3) Richard R. Bertocki, "An Analysis of Appellate Court Decisions Determining the Authority of Boards of Education and Their Agents to Establish Rules and Regulations Governing the Conduct of Pupils, 1960-1983," University of Pittsburg, 1984, (4) Virginia Ann Maroney, "The Doctrine of Sovereign Immunity with Regard to Educational Tort Liability," Syracuse University, 1984, and (5) E. Wayne Trogdon, "The Effect of the Civil Rights Law of 1871 on Teacher Dismissal," University of North Carolina at Greensboro, 1980.

2. This study only concerned itself with questions of teacher freedom of speech and expression that were based on Section 1983.
3. Only the period from the 1968 Pickering v. Board of Education[12] decision of 1968 up to and including 1986 were covered.
4. This study was limited to only an examination of cases involving public school teachers in grades kindergarten through the twelfth grade.
5. Litigation between school employees and their superordinates that was resolved prior to going into a court of record was not treated.
6. Both state and federal court decisions of record were addressed.
7. Cases that involved issues other than Section 1983 were treated only to the extent that Section 1983 was germane to the issue and its resolution before the court. The exception to this are some cases in Chapter II that were included to demonstrate the historical change in freedom of speech for teachers and the public in general.
8. This research did not directly attempt to address civil rights infringements other than those involving free speech granted by the first amendment of the United States Constitution.

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[12]391 U.S. 563 (1968).

Definition of Terms Used

The following are definitions of terms that were used in this study:

1. Freedom of Expression. Freedom of expression is defined as the right guaranteed by the First Amendment of the United States Constitution. It includes by definition, freedoms of speech, religion and association.[13]

2. Color of Law. Color of law is defined as, "The appearance of semblance, without the substance, of legal right. Misuses of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state, is action taken under color of law."[14]

3. Amicus Curiae. Amicus Curiae means "friend of the court." A person with a strong interest in the court action of another may petition the court for permission to file a brief. This is commonly done in civil rights cases.[15]

4. Appellant. The term appellant has to do with someone or something making an appeal to a higher body. The term is used to signify the difference between original jurisdiction and appellent jurisdiction.[16]

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[13]Joseph R. Noland and M.J. Connolly, Black's Law Dictionary. Fifth Edition. West Publishing Co.: St. Paul, Minnesota, 1979, p. 598.

[14]Ibid., p. 241.

[15]Ibid, p. 75.

[16]Ibid., p. 89.

5. Appellee. The appellee is the party in a cause against whom an appeal is taken. It is the person that does not want the judgment set aside or reversed.[17]

6. Certiorari. Certiorari is a writ issued by a superior court to an inferior court requiring the inferior court to produce a certified record of a particular case tried. The term is uded most commonly at the Supreme Court level where a writ of certiorari is used to determine which case the high court will hear.[18]

7. Class Action or Class or Representative Action. A class action provides a means in which a large group of people are interested in a matter and allow one or more individuals to bring suit as a representative for the class.[19]

8. Clear and Present Danger Doctrine. This doctrine was first stated in the case, Schenck v. U.S.[20] The doctrine provides that governmental restriction on freedom of speech and press will be upheld if needed to prevent danger to interests which the government may lawfully protect.[21]

9. Declaratory Judgment. A declaratory judgment is one that is agreed upon by the parties to a suit and approved by a court. A

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[17] Ibid., p. 90.

[18] Ibid., p. 207.

[19] Ibid., p. 226.

[20] 297 U.S. 47 (1919).

[21] Ibid., p. 227.

declaratory judgment is not the result of judicial determination.[22]

10. Petitioner. A petitioner is one who presents a petition to a court, officer or legislative body. The term also signifies the person or group that takes an appeal from a judgment.[23]

11. Remand. To remand a case denotes when a higher court sends the case back to the court from which it came for further action.[24]

12. Res Judicata. Res Judicata is a term meaning that the highest court of competent jurisdiction has settled a matter on the merits of the case. It constitutes an absolute bar on further action involving the same claim, demand or cause of action.[25]

13. Summary Judgment. A summary judgment is a term used in a civil action which permits any party to move for an immediate judgment when he believes that there is no basis for the claim as a matter of law.[26]

14. Supra. The term supra refers the reader to the previous part of the book or page.[27]

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[22]E. Edmund Reutter, Jr., The Law of Public Education. Third Edition. The Foundation Press, Inc., 1985, p. 908.

[23]Black's Law Dictionary, p. 1032.

[24]Ibid., p. 1162.

[25]Ibid., p. 1174.

[26]Ibid., p. 1287.

[27]Ibid., p. 1291.

15. Vacate. Vacate means to set aside, to declare null and void, to rescind.[28]

16. Non obstante veredicto. A judgment entered by the court notwithstanding the finding of the verdict for the other party.[29]

17. Sub Judice. Under judicial consideration.[30]

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[28] Ibid., p. 1388.

[29] Ibid., p. 952.

[30] Ibid., p. 1278.

CHAPTER II

REVIEW OF LITERATURE

42 U.S.C. Section 1983 has evolved through court decisions to become one of the most used federal laws in employee termination litigation. To better understand the law and its significance this chapter will be divided into three main areas: (1) the origin of the act, (2) the components and requirements of the act, and (3) certain selected cases that show the development and expansion of the application of the first amendment right as it relates to teachers.

Background of the Reconstruction Period

Civil Rights Laws

At the close of the American Civil War, Congress passed the thirteenth, fourteenth and fifteenth amendments to the Constitution. These amendments abolished slavery and gave the former slaves both citizenship and the right to vote. These amendments also gave Congress potentially broad sources of power both to secure and protect individual and personal liberties.[1] Because of these new congressional powers and the obvious disregard by many people in the South for the Negroes' newly created liberties and freedoms, Congress took further measures to enforce the amendments. Seven civil rights statutes were passed.

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[1]Lee Modjeska, Handline Employment Discrimination Cases. Lawyers Cooperative Publishing Co.: Rochester, New York. 1980. p. 139.

Of the seven, five were general, while two were specific. The first act, enacted on April 9, 1866, was entitled, "An Act to Protect All Persons in The United States in Their Civil Rights, and Furnish the Means of Their Vindication."[2] The purpose of the act was the elimination of the "Black Codes" of the southern states. Now known as 42 U.S.C. Section 1983, the law provides equal rights to blacks and whites and is used in discrimination cases.[3] The second act was passed on May 31, 1870. It was entitled "An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of This Union and for Other Purposes."[4] This act was later amended by an act of February 28, 1871. The expressed purpose of these acts was to implement the fourteenth and fifteenth amendments of the Constitution.

The Civil Rights Act of April 21, 1871 was written in an attempt to help protect the freedoms of the newly emancipated slaves during the period of American history known as Reconstruction. On March 21, 1871, President Grant sent to Congress a special message requesting legislation to deal with what he called "A condition of affairs . . . in some of the States of the Union rendering life and property insecure." Congress acted swiftly on the President's request and in one month

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[2]Robert K. Carr, Federal Protection of Civil Rights: Quest for a Sword. Cornell University Press: Ithaca, New York. 1947. p. 39.

[3]See Jones v. Alfred H. Mayer Co., 392 U.S. 409, (1968) and Johnson v. Railway Express Agency, Inc., 421 U.S. 454, (1975).

[4]Federal Protection of Civil Rights, p. 40.

enacted the legislation.[5] The law was enacted as Section I of the Ku Klux Klan Act of April 20, 1871, and was designed to enforce the provisions of the fourteenth amendment to the Constitution--the amendment that gave the slaves citizenship.[6] The act was originally designed as a remedy to protect the newly created citizens from abuses brought about by state government officials during the period following each state's readmission to the Union.[7] The act provided criminal penalties for conspiracies against governmental or court operations. It authorized the President to use federal troops against conspirators, suspend habeas corpus as needed, and established civil liabilities for the deprivation of civil rights.[8] This law was extremely unpopular in the South and was known as the "Southern-outrage Repression Bill."[9] The section of the law still applicable today is known as Section 1983. It states:

> Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the

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[5] Statutory History of the United States: Civil Rights, Part I. Bernard Schwartz, ed. Chelsea House Publishers: New York. 1970. p. 591.

[6] Richard S. Vacca, "Section 1983 Liability: Recent Developments in the Merger of State and Federal Remedies." School Law Update. National Organization on Legal Problems of Education: Topeka, Kansas. 1980, a5 80-81. (Vacca notes that this material was taken from his and H. C. Hudgins', Liability of School Officials and Administrators for Civil Rights Torts. 1982.)

[7] American Jurisprudence. Lawyer's Cooperative Publishing Company: Rochester, New York. 1976. p. 305.

[8] Handling Employment Discrimination Cases. p. 143.

[9] Ibid.

> United States or other person within the Jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act to Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[10]

The Civil Rights Act of March 1, 1875 was entitled "An Act to Protect all Citizens in Their Civil and Legal Rights."[11] The purpose of this act was to provide or "guarantee the Negroes equal accommodations with white citizens in all inns, public conveyances, theaters, and other places of amusement."[12]

The two remaining statutes were very specific. They were known as (1) The Slave Kidnapping Act of May 21, 1866, which made it a federal crime to "kidnap or carry away a person with the intention of placing him in slavery or involuntary servitude"; and (2) The Peonage Abolition Act, signed on March 2, 1867, which prohibited the "System of Peonage in the Territory of New Mexico and Other Parts of the United States."[13]

Most of these civil rights laws passed by Congress during the Reconstruction period were short lived for a variety of reasons. First First, one must note the "mood" of Congress when they were passed. These acts were passed by a group of congressmen known as the "Radical

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[10]Act of 1871, 17 Stat. 13. As amended by the Act of December 29, 1979, Public Law Number 96-170, Section 1, 93 Stat. 1284.

[11]Federal Protection of Civil Rights. p. 38.

[12]Ibid.

[13]Ibid.

Republicans." They were interested in protecting the rights of Negroes and also punishing the South. Secondly, many of these laws were declared invalid by the Supreme Court. The Court in six decisions in a period of thirty years declared many of the provisions of the legislation listed above as unconstitutional.[14] The third reason was that many of the provisions were eventually repealed by Congress. Finally, there was an increasing amount of reluctance to use the authority left in the legislation.[15] There were a total of 7,372 criminal prosecutions based on all civil rights statutes between 1870 and 1897. Of these prosecutions, 5,172 took place in the South. Approximately only twenty percent of the prosecutions resulted in convictions.[16] Only twenty-one cases based on a Section 1983 claim were heard by federal courts between 1871 and 1920 with only nine of those cases reaching the Supreme Court.[17] The number of cases based on 42 U.S.C. Section 1983 has continued to expand. There were twenty-one Section 1983 cases litigated in 1944, 116 in 1948 and 196 in 1956.[18] Judge Magruder offered an explanation for the increase in the use of 42 U.S.C.

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[14]Civil Rights Cases, 109 U.S. 3 (1883).

[15]Federal Protection of Civil Rights. p. 41.

[16]Thomas Emerson and David Haber, Political and Civil Rights in the United States. Vol. 1. Dennis and Company: Buffalo, New York. 1958. p. 46.

[17]Eric H. Zagrans, "Under Color of What Law: A Reconstructed Model of Section 1983 Liability." Virginia Law Review. Vol. 71. May 1985. p. 499.

[18]Thomas Emerson and David Haber, Political and Civil Rights in the United States. Vol. 1. Dennis and Company: Buffalo, New York. 1958. p. 82.

Section 1983 in Francis v. Lyman[19] by stating:

> As is well known, the statute in question was originally enacted by the Congress in the turbulent days of Reconstruction. For many years the enactment remained on the books, in a somewhat dormant state; and the Congress has never taken occasion to revise or modify the statutory language substantially. It may be that this is to be explained by the fact that until recent years resourceful plaintiffs' lawyers have not sought, in a significant number of cases, to invoke the application of the Civil Rights Act in situations far removed from those which were no doubt predominantly in the minds of the members of Congress of 1871 when they first enacted the legislation.[20]

Provisions of Section 1983

The 1871 law known as Section 1983 created a vehicle which easily allows individuals to bring suit in both state and federal courts for violations of both constitutional and statutory rights.[21] Constantly being expanded by court decisions, this law has become a means whereby individual liberties and property rights are protected against erosion by individuals acting under what is known as "color of state law." To help the reader understand the law, Section 1983 has been broken down in this study into the following six components: (1) evolution of Section 1983, (2) Section 1983 plaintiffs, (3) color of law, (4) deprivation of rights, (5) immunities from Section 1983 action, and (6) remedies for violations based on Section 1983.

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[19] 216 F. 2d 583 (1st Cir. 1954).

[20] Id. at 585.

[21] Maine v. Thiboutot, 448 U.S. 1, (1980). The Court, in a decision concerning the deprivation of welfare entitlement under the Social Security Act, held that Section 1983 protects federal statutory rights as well as constitutional rights.

1. Evolution of Section 1983. 42 U.S.C. Section 1983 has during the twenty-seven years since 1960 continued to evolve to become one of the most important pieces of federal legislation concerning civil rights. Much of the evolutionary process of Section 1983 has been through the different levels of federal court opinions. There have been at least three extremely important cases that have caused Section 1983 to become so popular as a litigious tool for a civil rights violation. Prior to Monroe v. Pape[22] agents of a governing body were not held liable under Section 1983 since they were considered, like a governmental agency, to be immune from prosecution. The Monroe decision held that, unlike a governmental agency, an official could be held liable for civil rights' violations.

In 1966 the Court of Appeals for the Fourth Circuit in Johnson v. Branch[23] held that school board members could be held liable under Section 1983. The Supreme Court eight years later stated that officials of a governmental body, including a board of education, had considerably less protection under a Section 1983 claim than did

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[22]365 U.S. 167 (1961).

[23]364 F. 2d 177 (4th Cir. 1966).

the political body itself.[24] In Wood v. Strickland,[25] a landmark decision reached the next year, the Court granted to members of a governing body what it called "qualified good faith immunity." The Court, in a case that centered on the deprivation of rights of students, stated that members of a school board could be sued if they violated the constitutional rights of students.[26]

The Monroe decision was vacated in 1978 with the Supreme Court decision in Monell v. Department of Social Services.[27] In Monell the Supreme Court ruled that a local governing body could be sued and damages could be collected if the "government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.[28]

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[24]Schuer v. Rhoads, 416 U.S. 233 (1974). This case involved the parents of three slain students at Kent State University sueing James Rhodes, Governor of Ohio, under 42 U.S.C. Section 1983. In the Schuer case the court said . . . "Section 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial powers of the Federal government." (at 248)

[25]420 U.S. 308 (1975).

[26]The Court stated, "Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of student affected, or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury to the student."

[27]436 U.S. 658 (1978).

[28]Id. at 694.

Two years later the Court again spoke to the issue of the applicability of suits against government officials in Owen v. City of Independence.[29] In Owen the Supreme Court held that local governing bodies may be more vulnerable to Section 1983 suits than their officers. The Court further held that if a governing body, either through custom or policy, violates or abridges the constitutional rights of others, the governing body has no immunity from damages. In its opinion, the Court continued to support the idea of "good faith immunity" presented in Wood.

2. Section 1983 Plaintiffs. Federal law and court decisions control the standing of plaintiffs to bring suit under Section 1983. This was made clear in the cases, Almong v. Kent[30] and Pierson v. Grant.[31] Under 42 U.S.C. Section 1983, a person who had been subjected to the deprivation of rights, privileges, or immunities secured by the federal Constitution or laws through acts by individuals acting under "color of law" can become a plaintiff under a Section 1983 action.

The term, "every person," has been broadened through litigation to include many other groups. In 1976 a federal court ruled in Examining Board of Engineers, Architects and Surveyors v. Flores De

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[29] 445 U.S. 622 (1980).

[30] 459 F. 2d 200 (4th Cir. 1972).

[31] 347 F. Supp. 397 (N.D. Iowa, 1973)

Otero[32] that aliens may become plaintiffs under Section 1983. In the New York case, Holley v. Lavine,[33] the court ruled that even an alien who was in the country illegally could become a plaintiff under Section 1983.

Corporations have through a period of time come to be considered an "other person" in regards to Section 1983 when a suit is based on its own behalf.[34] In Grosjean v. American Press Company[35] and Hague v. Committee for Industrial Organization[36] the Supreme Court ruled that only naturalized persons can be citizens of the United States. However, the court also ruled that a corporation could be considered to be a person within the meaning of the equal protection and due process of law clauses.

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[32]426 U.S. 572 (1976). This case dealt with the applicability of Section 1983 and to the standing of citizens of Puerto Rico to bring a Section 1983 claim into federal court. The Court in a somewhat similar case, Graham v. Richardson, 402 U.S. 365 (1971) ruled that Section 1983 protects "any citizen of the United States or other person within the jurisdiction thereof."

[33]529 F. 2d 1294 (2nd Cir. 1979), cert. denied, 426 U.S. 964, (1979).

[34]Des Vergnes v. Seekonk Water District, 601 F. 2d 9 (1st Cir. 1979), vacated on other grounds, 454 U.S. 807 (1981); Fulton Market Cold Storage Company v. Cullerton, 582 F. 2d 1071 (7th Cir. 1978), cert. denied, 439 U.S. 1121 (1979); Adams v. City of Park Ridge, 293 F. 2d 585 (7th Cir. 1961).

[35]297 U.S. 233 (1936). This case involved newspaper publishers who brought suit against the state of Louisiana against the enforcement of a license tax.

[36]307 U.S. 496 (1939).

Like corporations, labor unions and unincorporated associations can be Section 1983 plaintiffs. The Supreme Court, in Allee v. Medrano[37] held that "unions may sue under 42 U.S.C. Section 1983 as persons deprived of their rights secured by the Constitution and laws."[38] A federal court in Aguayo v. Richardson[39] held that unincorporated associations and groups can sue in Section 1983 actions for injuries to the group itself and not to individual members. However, in NAACP v. Alabama[40] and Memphis American Federation of Teachers v. Board of Education[41] the Supreme Court and a lower court both recognized the standing of certain groups to protect the rights of their members. A state may sue under Section 1983 as parens patrie to protect the constitutional rights of its citizens.[42]

There are several classes or groups of individuals and organizations that have been considered not to be an "other person" as related to their standing as plaintiffs in suits based on Section 1983. The Court of Appeals for the Third Circuit affirmed without an

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[37]416 U.S. 802 (1974).

[38]Id.

[39]473 F. 2d 1090, cert. denied. 414 U.S. 1146 (1973).

[40]357 U.S. 449 (1958).

[41]534 F. 2d 699 (6th Cir. 1976)

[42]Pennsylvania v. Porter, 659 F. 2d 306, (3rd Cir. 1981), cert. denied. 458 U.S. 1121 (1982). The United States government in United States v. City of Philadelphia, 644 F. 2d 187 (3rd Cir. 1980), and a municipality of City of Safe Harbor v. Birchfield, 529 F. 2d 1251 (5th Cir. 1976) have been denied the standing of plaintiff in actions based on Section 1983.

opinion that an unborn fetus was not a "person" in McGarvey v. Magee Womens Hospital.[43] In 1979 the Court of Appeals for the Ninth Circuit in Guyton v. Phillips[44] held that the "other person" status ended with an individual's death. In at least two cases, however, Wolfer v. Thaler[45] and Galindo v. Brownell[46] courts ruled that parents had standing to bring Section 1983 actions for the death of their children.

3. Color of Law. The term "under color of law" in Section 1983 cases refers to color of state law. The United Supreme Court in Monroe v. Pape[47] defined the term as the "misuse of power possessed by virtue of state law which is made possible only because the wrongdoer is clothed with the authority of state law."[48] Courts have stated that local officers and employees acted "under color of law" when they performed their official duties to the prescribed limit or excess of that limit. The Supreme Court in Lugar v. Edmondson Oil Company[49] explained the requirements of the "color of law"

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[43]340 F. Supp. 751 (W.D. Pa. 1972), aff'd. 474 F. 2d 1339 (3rd Cir. 1973).

[44]606 F. 2d 248 (9th Cir. 1979).

[45]525 F. 2d 977, (5th Cir. 1976) cert. denied, 425 U.S. 975 (1977).

[46]255 F. Supp. 930, (S.D. Cal., 1966).

[47]Supra.

[48]Id. at 184.

[49]639 F. 2d 1058 (5th Cir. 1981), revg. 457 U.S. 922 (1982).

prerequisite as:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state, or a rule of conduct imposed by the state, or by a person for whom the state is responsible . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state official, or because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.[50]

Sometimes private parties or organizations can be considered to be acting under "color of law" if they perform activities usually considbred to be state functions. The Court of Appeals for the Second Circuit in Jackson v. Statler Foundation[51] listed five factors that determine to what extent a private person can be held to have acted under "color of law." They are:

> (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the state: (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or constitutional terms.[52]

A wide variety of both voluntary groups and professions can be considered to be acting under "color of law." Examples of these private institutions or individuals include: private volunteer fire

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[50] Id. at 937.

[51] 496 F. 2d 623 (2nd Cir. 1974), cert. denied, 420 U.S. 927 (1975).

[52] Id. at 629.

departments, private foundling homes, civil process servers, and the commissioners of a collegiate athletic conference.[53] Those individuals who work for and are salaried by funds originating from state or local agencies are usually considered to be acting under "color of law."

Failure to do something can also be considered to be acting under "color of law." This occurs when state officials fail to exercise a legal duty or obligation.[54]

4. Deprivation of Rights. One of the basic requirements for a Section 1983 action is that an individual be deprived of his "rights, privileges, or immunities secured by the Constitution and laws."[55] The fourteenth amendment states in part: "Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[56] The Supreme Court in Maine v. Thiboutot[57] interpreted Section 1983 to include violations of selected federal statutory law as well as the Constitution.

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[53]Williams v. Rescue Fire Company, 254 F. Supp. 556 (D.C. Md. 1966), Carrasco v. Klein, 381 F. Supp. 782 (E.D. NY. 1974), Stanley v. Big Eight Conference, 463 F. Supp. 920 (W.D. Mo. 1978).

[54]Smith v. Ross, 482 F. 2d 33 (6th Cir. 1973), and Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967).

[55]42 U.S.C. Section 1983.

[56]United States Constitution. Amendment XIV.

[57]Supra. This decision was modified by Pennhurst State School v. Halderman, 451 U.S. 1 (1981) and Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981).

Most Section 1983 claims arise from a deprivation of either a first, fourth or eighth amendment right. These amendments and others compel the federal government to guarantee rights to all citizens. The fourteenth amendment compels states to grant these rights to their citizens.

First Amendment Claims. Many Section 1983 claims originate from an alleged deprivation of a first amendment freedom. For example, religious groups have been found to have the right to distribute literature and solicit funds on state or municipal property under certain circumstances. A federal court in Goetz v. Ansell[58] held that children could remain seated while their classmates participated in the pledge of allegiance. Cooper v. Pates[59] provided one could not be discriminated against on the basis of a particular religious preference.

Possibly the broadest use of Section 1983 as it relates to the first amendment is in the area of freedom of speech and expression. Pickering v. Board of Education[60] dealt with a teacher, who the Supreme Court found, was wrongfully discharged for an application of this constitutionally protected freedom. In Pickering, the Court established a balance test to determine if an employee's speech was

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[58]477 F. 2d 636, (2nd Cir. 1973).

[59]382 F. 2d 518, (7th Cir. 1967).

[60]391 U.S. 563 (1968).

protected by the Constitution. The Court stated:

> The problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting on matters of a public concern, and the interest of the State, as an employer, in promoting the efficacy of the public service it performs through its employees.[61]

Public school students in Butt v. Dallas Independent School District[62] were allowed to wear black armbands that expressed their political sentiment against the Viet Nam War. The Court ruled that this freedom of expression, as long as it did not create a significant educational disruption, was protected under the first amendment.

At issue in the 1958 case, NAACP v. Alabama[63] was the question of whether a state could force the NAACP to divulge a list of names and addresses of members of the NAACP without regard to their position in the organization. In a similar 1946 case, Marsh v. Alabama[64] the Supreme Court stated:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[65]

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[61] Id. at 568.

[62] 436 F. 2d 728 (5th Cir. 1971).

[63] Supra.

[64] 326 U.S. 501 (1946). This case centered on the legality of a member of the Jehovah's Witnesses distributing religious literature on the streets of a town. The town was a company town and was completely owned by a private corporation.

[65] Id. at 506.

The first amendment right of association also enjoys considerable protection un 42 U.S.C. Section 1983. In a series of cases, federal courts have ruled that membership in organizations for political, professional or personal reasons in itself should not bar a person from employment.

Fourth Amendment Claims Based on Section 1983. Section 1983 provides remedies against wrongful arrest, privacy, and search and seizure. These claims often arise against individuals performing police or prison guard functions. However, there have been several cases involving fourth amendment claims made by students. Possibly the most recent case was New Jersey v. TLO.[66] These and similar cases center on the issue of the degree of freedom that public school students enjoy from searches made either on their person or of their possessions by school officials.

Eighth Amendment Claims Based on Section 1983. The eighth amendment of the United States Constitution, with its provision against "cruel and unusual punishment," has had numerous claims litigated based on Section 1983. Most of these claims have been brought by persons incarcerated in either jails or penal institutions. There have been some claims based on the eighth amendment brought by public school students or their parents against school personnel for inflicting either unusual physical or mental punishment on students.

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[66] 105 S. Ct. 733 (1985).

5. Immunities From Section 1983 Action. Through an interpretation of the eleventh amendment states are immune from private actions against them. Several courts have, from that immunity, broadened it to include certain state agencies. State universities have tended to rely on the immunity of the eleventh amendment to shield them from suits for claims based on alleged personnel discrimination.[67]

In Scheur v. Rhodes[68] the Supreme Court ruled that "official" immunity apparently rested on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith of subjecting to liability an officer who is required, by the legal obligation of his position to exercise discretion, and (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.[69]

There are two types of immunities available which protect individuals from prosecution. These immunities are absolute immunity and qualified immunity. Immunities against prosecution from a Section 1983 violation, have been created by the federal courts and

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[67]Martha M. McCarthy, Discrimination in Public Employment: The Evolving Law. National Organization on Legal Problems of Education: Topeka, Kansas, 1983, p. 58.

[68]416 U.S. 232 (1974).

[69]Id. at 240.

not by Congress. Courts have based their reasons for creating immunity on:

> (1) The danger of influencing public officials by threat of a law suit, (2) the deterrent effect of potential liability on men who are considering entering public life, (3) the drain on the valuable time of the official caused by insubstantial suits, (4) the unfairness of subjecting officials to liability for the acts of their subordinates, (5) the theory that the official owes a duty to the public and not to the individual, and (6) the feeling that the ballot and the formal removal proceedings are more appropriate ways to enforce honesty and efficiency of public workers.[70]

Absolute immunity was created by the courts for judges and those working directly under their authority (e.g., prosecuting attorneys, bailiffs, etc.).[71] The immunity exists as long as judges and their subordinates, including legislators and prosecutors, act within their jurisdiction. They lose all immunity when an act is in excess of their jurisdiction. The Supreme Court, as well as inferior courts, has ruled that absolute immunity does not exist for injunctive or declaratory relief.

Certain groups enjoy what is known as qualified immunity. Qualified immunity has been granted to certain groups in part because they perform what the Court stated were "quasi-judicial" activities. Qualified immunity was created by the courts as a balance between preventing and compensating for constitutional violations and avoiding the overdeterrence of decision-making by government officials.

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[70] Federal Civil Rights Acts, p. 182.

[71] The following cases further explain the immunities provided for the groups of people listed above: Pierson v. Ray, 386 U.S. 547 (1967), Maritone v. McKeithen, 413 F. 2d 1373 (5th Cir. 1969), Imbler v. Pachtman, 424 U.S. 409 (1976).

Qualified immunity has been granted to many governmental officials including school officials, police officers, government officials, and others.[72] School districts do not enjoy qualified immunity.[73]

6. Remedies for Violations Based on Section 1983. Section 1983 provides that an individual who successfully proves that his civil rights were abridged is entitled to damages for those abridged rights.[74] The amount of damages awarded can either be nominal, where the individual fails to prove a significant financial or emotional loss; compensatory, designed to compensate the victim for mental or emotional distress and damages done that impaired the reputation of the plaintiff; punitive or exemplary, which are designed to make it clear that the deprivations of certain rights should end.[75]

A federal judge, in his decision, stated:

> Whether or not actual compensatory damage is present, a plaintiff is an action under 42 USC Section 1983 may also recover nominal damages because the constitutional rights of a citizen are so valuable to him that an injury is

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[72]Wood v. Strickland, 420 U.S. 308 (1975), Pierson v. Ray, 386 U.S. 547 (1967) and Scheuer v. Rhodes, 416 U.S. 232 (1974), among others.

[73]Kingsville Independent School District v. Cooper, 611 F. 2d 1109 (5th Cir. 1980).

[74]A Section 1983 plaintiff does not have to exhaust state remedies prior to entering federal court. Patsy v. Board of Regents of Florida, 102 S. Ct. 2557 (1982).

[75]Kelly Frels, "Punitive Damages in Civil Rights Actions." Thomas Jones and Darel Semler, ed. School Law Update, 1985. National organization on Legal Problems in Education: Topeka: Kansas, 1985.

> presumed to flow from the deprivation itself. In most cases when a public official denies rights that the citizen felt were secure under our Constitution, the result is hurt feelings, outrage, embarrassment or humiliation . . . .[76]

The Supreme Court, in Carey v. Piphus,[77] stated that damages must be proven to have occurred in order for a plaintiff to gain any damages other than nominal ones. In Carey, a case that was consolidated out of two separate suits, the Court stated a plaintiff must show actual injury before he can collect anything more than one dollar. A jury is not obligated to award nominal damages to the plaintiff.[78]

During the course of litigation of Section 1983 claims that arise from an alleged unjust dismissal, a court must determine if the plaintiff has a liberty or a property interest to continued employment.

The Constitution's eleventh amendment prohibits citizens from bringing suit against the individual states. The Supreme Court ruled in 1981 that punitive damages were not available to plaintiffs bringing suit against municipalities and other governmental bodies or their employees when sued in their official capacities.[79]

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[76]United States ex rel. Moteley v. Rundle, 340 F. Supp. 807 (E.D. Pa., 1972).

[77]435 U.S. 247 (1978).

[78]Ganey v. Edwards, 759 F. 2d 337 (4th Cir. 1985).

[79]City of Newport v. Fact Concerts, Inc., 453 U.S. 247, (1981).

In 1976 Congress passed the Civil Rights Attorney's Fees Award Act.[80] Attorney's fees may now be awarded to the prevailing party in a Section 1983 action. As a rule attorney's fees are not awarded to the prevailing defendant unless the suit brought by the plaintiff was "unreasonable, frivolous, or completely meritless."[81] The decision in awarding attorney's fees in litigation involving Section 1983 is left to the discretion of the federal courts.[82]

First Amendment Rights - Freedom of Speech

The framers of the United States Constitution did not initially include a list of rights or freedoms. The convention delegates did not think that individual rights were in danger and that they would be protected by their individual states. However, the absence of a bill of rights became the strongest objection to the ratification of the Constitution. Many feared that the states would not ratify the Constitution and, consequently, there was the general demand for written guarantees of individual freedom. James Madison, with the help of others, thus wrote the first ten amendments to the Constitution. The first amendment of the Bill of Rights states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or

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[80] 42 U.S.C. Section 1988. The section states:". . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonably attorney's fee as part of the costs."

[81] Discrimination in Public Employment: The Evolving Law, p. 58.

[82] "Legal Issues in Public School Employment," p. 93.

> abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[83]

Free speech and expression are essential for one to gain knowledge in order to make rational and intelligent decisions. Freedom of expression is an essential process in an advanced society. It is an absolute necessity if man is to reach his individual self-fulfillment. People cannot be free if their minds are not free to investigate, to explore and to question. By allowing individuals to make suggestions, to ask questions, to understand the critical issues facing them, freedom of expression helps a country by providing a framework where citizens can experience intellectual growth. Political beliefs can change and culture can expand without destroying society.[84] On this point Justice Brandels wrote:

> Those who won our independence believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political trugh: that without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be fundamental principle of the American government.[85]

Since the American society is inhabited with millions of people, all freedoms including speech are, to a degree, limited. The adage that states, "our freedoms end where another's begins" is true.

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[83]United States Constitution. Amendment I, Section I.

[84]Thomas L. Emerson, The System of Freedom of Expression. Random House: New York, 1970, p. 7.

[85]The First Freedoms Today, p. 8.

ConCongress and the Supreme Court recognized the hazards of absolute freedom of speech early in the nation's history.

The Supreme Court has recognized that certain types of speech such as obscenity, "fighting words" and defamation are not protected by the first amendment.[86] It has likewise held that the first amendment does not bar government from imposing reasonable time, place and manner restrictions on speech.[87] Justice Oliver Wendell Holmes established the principle that freedom of speech could be restricted under special circumstances in Schenck v. United States.[88] The Court stated that those circumstances were those which created a "clear and present danger." These restrictions on speech could apply when other freedoms such as public safety, established government, national security and private property were in danger.[89] Justice Holmes in his opinion stated:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and

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[86]Schenck v. United States, 297 U.S. 47, (1919).

[87]George Rogister, Ann Majestic and Stephen Lindsay, "Recent Developments in First Amendment Law: Narrowing the Scope of Constitutional Protection." North Carolina Leadership for Principals. Chapel Hill, North Carolina, June 1984, p. 1.

[88]Supra.

[89]Id. at 52.

> are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional rights.[90]

In their decisions involving freedom of speech, federal courts have often reflected the mood of the country. The Bill of Rights had been in existence less than ten years when the freedoms granted by the first amendment were challenged. Because war with France looked imminent Congress, in 1798, passed the Alien and Sedition Acts. These acts limited the first amendment freedoms of citizens either to speak or to publish articles that would cast a bad light on either the government or government officials. The Sedition Act of 1798 stated:

> If any person shall write, print, utter or publish . . . any false, scandalous and malicious writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them or either of them, into contempt or disrepute; or to excite against them or either of any of them, the hatred of the good people of the United States or to stir up sedition within the United States, or to excite any unlawful combination therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States, or to resist, oppose or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then

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[90] Id. at 53.

> such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.[91]

The Alien and Sedition Laws became one of the major issues of the presidential election of 1800. On being elected President, Thomas Jefferson promptly pardoned all those convicted under the Alien and Sedition Laws. Congress then passed laws remitting all fines. The laws were allowed to expire the following year.[92]

President Andrew Jackson in 1835 proposed an attack on the first amendment. Jackson invited Congress to enact legislation that would prohibit the use of the mails for "incendiary publications intended to instigate the slaves to insurrection." Congress refused to enact this legislation citing that it was in conflict with the first amendment.[93]

In the period following World War I, the Supreme Court in Abrams v. U.S.[94] and Gitlow v. People of the State of New York[95] adopted the standard of a "dangerous tendency in order to curb radical speaking rights." In 1920 some five hundred FBI agents and local

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[91] Alien and Sedition Act.

[92] The First Freedoms Today, p. 6.

[93] Ibid.

[94] 250 U.S. 616 (1919).

[95] 268 U.S. 652 (1924). In this case the Court stated, "It is a fundamental principle, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may chose . . ." (at 667).

police, without the benefit of arrest or search warrants, entered the homes of approximately three thousand Russian, Finish, Polish, German, Italian and other alien workmen, looking for Communist party members to deport.[96] This type of abridgment of first amendment rights was repeated in the 1950s with the "Red Scare" during the tenure of Senator Joseph McCarthy as Chairman of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations. Senator McCarthy convinced millions of Americans that the government was infiltrated by Communist agents. As a result, books were burned, libraries were closed and people, accused of having sympathies with the Communists, were dismissed from their jobs.[97] It was during this period that many schcol systems, as well as other employers, began to require loyalty oaths as a condition of employment.

The Supreme Court in 1974 reversed the trend of the 1950s with its decision in Communist Party of Indiana v. Whitcombe, Governor of Indiana.[98] The Court ruled invalid an Indiana law that restricted the political expression of the Communist party of that state.

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[96]The First Freedoms Today, p. 5. Also, Joseph E. Bryson and Elizabeth W. Detty, Censorship of Public School Library and Instructional Materials. Michie Company: Charlottesville, Va., 1982.

[97]Ibid., p. 7.

[98]414 U.S. 441, rehearing denied, 415 U.S. 952 (1974).

Teacher Freedom of Speech

Public school teachers, as all other citizens of the United States, are auaranteed the right by the Constitution to speak freely. The Supreme Court has held that teachers cannot be disciplined for exercising their free speech rights as protected by the United States Constitution.[99] Yet, this has not always been the practice. Since the Civil War period, teachers have been faced with restrictions both on speech and certain other behaviors that were accepted by other professions.

Over the years there has been a dramatic shift in community perceptions toward teachers. American teachers are now abler to enjoy the same freedoms, including speech, that other professions have. This has been brought about to a large degree by cultural developments in the United States such as the demographic shift to urban centers of population, the influence of the press and other media, the development of teacher organizations and an increase in the militancy of teachers.[100]

There has also been a dramatic shift in the amount of freedom granted by the courts to teachers. Both state and federal courts have continued to expand personal and professional freedoms of America's public school teachers. The following are selected cases dealing with

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[99]Chester Nolte, "Teachers May Communicate Directly with School Boards on Matters of Public Concern." West's Education Law Reporter. Vol. 30, No. 3, May 1, 1987, p. 448. See also Pickering v. Board of Education, 391 U.S. 563 (1968).

[100]Louis Fischer and David Schimmel, The Civil Rights of Teachers. Harper and Row: New York, 1973, p. 3.

freedom of speech as it related chiefly to public school teachers. Two cases are presented which do not directly involve the application of the first amendment guarantee of free speech to teachers. The two cases are presented here since the opinions of the courts have a direct bearing on all occupations, including teaching. These cases are presented sequentially, thereby highlighting the increased amount of freedom of speech allowed by state and federal courts through their decisions.

Membership in the Communist party was the issue in Board of Education of Eureka v. Jewett.[101] Jewett, a California social studies teacher, was dismissed from his job for refusing to deny that he was a Communist. Additionally, he made statements such as: "It was silly and foolish to salute the American flag." and "Russia had the best government in the world." The court in holding for the board of education stated:

> By section 5.544 of the School Code, the people of California speaking through the legislature, make it the duty of all teachers to endeavor to impress upon the minds of the pupils the principles of patriotism, and to train them up to a true comprehension of the duties and dignity of American citizenship . . . . The preservation of our nation depends on the patriotism of its people. Our School Code gives recognition to the principle that patriotism is to be instilled in the pupils attending our public schools. This purpose is not accomplished by the retention on our teaching staffs of instructors who entertain the beliefs held by the appellant, and sho seek to impress those beliefs upon their pupils.[102]

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[101] 68 P. 2d 404 (1937).

[102] Id. at 407.

Although Frost Trucking Company v. Railroad Commission of California,[103] decided in 1926, did not directly involve the public schools, it is relevant to this subject since the United States Supreme Court spoke to the issue of job related rights. In Frost the Court stated:

> It would be palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.[104]

The Pennsylvania Supreme Court, in Appeal of Albert,[105] dealt with the dismissal of an experienced teacher for her participation in what was called un-American or subversive doctrines. Albert was exposed by an undercover F.B.I agent who stated that she attended meetings of the Communist party. No evidence was presented by the board of education in her suit that stated that she ever exposed her students to either her political philosophy or to written teachings concerning the Communist party. The Supreme Court of Pennsylvania,

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[103] 271 U.S. 583 (1926).

[104] Id. at 594.

[105] 92 A. 2d 663 (Pa. 1952).

in its opinion, stated:

> Miss Albert is not being penalized in her capacity as a private citizen because of any political, economic or social view she may entertain or any expression she may care to give to those views. The concern here is with her rights as a teacher, and the legislature can certainly prescribe qualifications for teachers in the public schools with respect not only to their academic attainments, but also to their moral character and their loyalty to the state and federal government.[106]

In 1949 the New York legislature passed the Feinberg Law which made membership in a subversive organization prima facie evidence of disqualification for appointment or retention in the public schools of the state.[107] It further directed local boards of education to file reports on the loyalty of all teachers.[108] Adler v. Board of Education of the City of New York[109] dealt with the constitutionality of that law. Adler, a New York teacher, was fired from his teaching position for his membership in what the state cited as a subversive organization. On appeal to the Supreme Court in a six-to-three decision, the Court concluded that the Feinberg Law was constitutional. Justice Minton, writing for the majority, stated:

> It is clear that citizens have the right under our law to assemble, speak, think, and believe as they will. It is

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[106] Id. at 665.

[107] Education Law, Section 3021, Civil Service Law, Section 105, McKinney's Consol. Laws, C. 16, (section 3022) 1967.

[108] Edmund Reutter, Jr., The Law of Public Education. The Foundation Press, Inc., 1985, p. 531.

[109] 342 U.S. 485 (1952).

> equally clear that they have no right to work for the state in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the state thus deprived them of any right to free speech or assembly? We think not . . . One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in party by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and person with whom they associate.[110]

The three dissenting justices each wrote opinions in the Adler decision. Justice Douglas wrote:

> I cannot find in our constitutional scheme the power of a state to place its employees in the category of second-class citizens by denying them freedom of thought and expression. The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher. We need to be bold and adventuresome in our thinking to survive. A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction. The Framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued wherever they lead. We forget these teachings of the First Amendment when we sustain this law. The guilt of the teacher should turn on overt acts. So long as she is a law-abiding citizen, so long as her performance within the public school system meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.[111]

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[110] Id. at 492.

[111] Id. at 511.

In 1967 a majority of the Supreme Court reversed Adler with its opinion in Keyishian v. Board of Reagents of New York.[112] Because Keyishian refused to sign a certificate stating that he was not a Communist, his contract was not renewed. The Supreme Court held that mere membership in an organization without specific intent to further the unlawful aims of the organization was not a constitutionally adequate basis for failure to renew Keyishian's contract.[113]

Possibly the most famous case dealing with freedom of speech for teachers was Pickering v. Board of Education,[114] decided in 1968. Pickering, a high school teacher, was employed by the Will County, Illinois, Board of Education. He was dismissed from his position for sending a letter to the local newspaper to be published under the editorial section. In his letter, Pickering attacked both the superintendent and the board of education for their handling of a bond referendum that failed and for what he considered to be an excessive amount of emphasis placed on athletics. He further hinted that other teachers had been prevented from criticizing the proposed bond issue. Following the publication of the letter, the Will County Board of Education voted for his dismissal.

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[112] 385 U.S. 589, (1967).

[113] The Court wrote: The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. (at 605 S. Ct.).

[114] Supra.

At the dismissal hearing the board stated that Pickering's statements impugned the "motives, honesty, integrity, trughfulness, responsibility and competence of both the board of education and the district's administration." The board further charged that the allegations made by Pickering damaged the professional reputations of individual board members, "would create a significant disruption to faculty discipline," and would tend to forment "controversy, conflict and dissension among teachers, administrators, the board and residents of the district."[115]

In the decision, delivered by Justice Marshall, the Court immediately dismissed the board's allegations that its individual reputations were damaged by the charges made in Pickering's letter. The Court stated that the letter was "greeted by everyone but its main target, the board, with massive apathy and total disbelief." The Court continued by stating that since both attempts at raising revenues for the schools through bond referendums had failed and since there was no evidence presented that another referendum was planned, Pickering's letter did not, in fact, damage the board's ability to raise revenues for the school. The board's charges that Pickering had spread false information concerning the budget of the school system were also dismissed. It was noted that the board dould very easily have published the correct information if it had chosen to

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[115] Id. at 571.

do so. The Court stated:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the school generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not similar contribution by any member of the general public.[116]

In 1977 the Supreme Court decided the case, Mt. Healthy City School District Board of Education v. Doyle.[117] Doyle filed suit after he was dismissed by the Mt. Healthy, Ohio, Board of Education. Doyle, a nontenured teacher, was dismissed for what the board charged was a "notable lack of tact in handling professional matters which leaves much doubt as to your (Doyle's) sincerity in establishing good school relationships."[118]

Doyle had been involved in several incidents both with students where he had used vulgar hand gestures and with faculty and staff members. In addition, Doyle had telephoned the local radio station and had given the station information concerning a proposed teacher dress policy. The district court found that the call to the radio was "clearly protected by the first amendment," and because it had played a major part in the board's decision not to rehire him, the

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[116] Id. at 573.

[117] 429 U.S. 274 (1977).

[118] Id. at 281.

court ruled for reinstatement and awarded backpay. The court of appeals affirmed in a brief per curiam opinion.[119]

The Supreme Court, in a decision handed down by Justice Rehnquist, stated that the absence of tenure was not a factor in the decision in that the board's decision not to rehire Doyle was based on the exercise of his constitutionally protected first amendment freedom. The Court was concerned as to how the district court and the court of appeals decided that Doyle's dismissal was substantially a result of the telephone call to the radio station. It agreed that the call was a protected freedom of the first amendment but doubted that it was necessarily the "substantial part" of the decision in the nonrenewal of Doyle's contract. The Court suggested a three-part test. Under the test the burden of proof was placed on the employee to show first that his or her conduct was constitutionally protected and second, that the conduct was a substantial or motivating factor in the board's decision. In the third part of the test the employer must then show that it would have reached the same employment decision had the constitutionally protected expression not have occurred. As such, the Court ordered that the opinion of the court of appeals be vacated and that the case be remanded for further proceedings.[120]

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[119] Id. at 284.

[120] Id. at 287.

The next important case dealing with a teacher's freedom of speech was Givhan v. Western Line Consolidated School District[121] decided in 1979. The case dealt with a teacher, Givhan, a black woman, who had been dismissed from her employment at the end of the school year because of a series of private conversations with her principal. The school district introduced evidence that the conversations tended to be made up of petty unreasonable demands, and the tone of them was "insulting, hostile, loud and arrogant.[122] The district court found for Givhan stating that her dismissal was in violation of the first amendment granting her freedom of speech. The Court of Appeals for tye Fifth Circuit reversed on the basis that Givhan's complaints were made in private conversations and, as such, were not protected by the first amendment.[123]

In the decision written by Justice Rehnquist that reversed the court of appeals, the Court stated:

> The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his view before the public. We decline to adopt such a view of the First Amendment.[124]

The final case discussed in this section, Connick v. Myers[125] decided in 1982, is not one involving teacher freedom of speech. It

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[121] 555 F. 2d 1309 (5th Cir. 1977).

[122] Id. at 1311.

[123] Id. at 1314.

[124] 439 U.S. 410 (1977) at 416.

[125] 461 U.S. 138 (1983).

is discussed here as it involves Section 1983 and is the Supreme Court's most recent case involving free speech.

Connick v. Myers involved Assistant District Attorney Sheila Myers who was fired from her job for passing around a questionnaire about confidence in superordinates and office morale to fifteen other attorneys in her office after being notified of her transfer to another section of criminal court. Myers wrote and distributed questionnaires at the office, both during a coffee break and during regular office working hours.[126] In a meeting, Myers was terminated for her refusal to accept the transfer and her distribution of the survey, which Connick considered to be an act of insubordination.[127]

In deciding the case, the Supreme Court first considered the issues of office morale, confidence, and grievance policies. The Court stated that some subject matter is "inherently of public concern" regardless of its context. The Court found that the survey was designed to gather opinion, not to disseminate it. Finally, the Court decided that the audience of the survey was Myers's co-workers, not the general public. In considering the facts of the case, the Court decided that there was not public speech concern involved in the case

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[126]The questionnaire consisted of fourteen questions including the following; (1) From your experience, do you feel office procedure regarding transfers has been fair?, (2) Do you have confidence in and would you rely on the word of (names of five superiors)?, (3) Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?, and (4) How would you rate office morale? (103 S. Ct. 1684 at 1694).

[127]Id. at 141.

other than the one question regarding political campaigns and that the potential harmful effects of Myers's survey outweighed her free speech rights.[128]

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[128] Id. at 154.

CHAPTER III

REVIEW OF CASES INVOLVING 42 U.S.C. SECTION 1983 AND AN ALLEGED ABRIDGMENT OF THE FREEDOM OF SPEECH ON PUBLIC SCHOOL TEACHERS

Teachers, as all citizens, enjoy rights granted to them by the Constitution. Theses rights are, however, not absolute and unlimited. Although the mere acceptance of public school employment does not by itself strip one of any constitutional rights, including the right of free speech, courts have held that the rights of the individual teacher must be weighed against the school system's interest in providing education. As a result, the activities of teachers both during school and after school hours must be balanced between the rights of teachers to live their lives as they choose and the public's interest in promoting the learning process. A majority of cases where public school teachers challenge their nonpromotion or dismissal are based upon a denial of the right of freedom of speech. 42 U.S.C., Section 1983 has become the chief vehicle for teachers bringing first amendment claims into federal courts.

Litigation involving freedom of speech for teachers can be broken into several different segments: (1) out-of-class speech, in both spoken and written form, (2) classroom speech involving academic freedom, (3) the personal appearance of teachers, (4) the private lives of teachers, and (5) the political activity of teachers.

Although all areas of teacher speech will be covered, the emphasis in this chapter will be on out-of-class speech by teachers, either in spoken or written form that is critical of a superordinate since this appears to have produced the major portion of litigation involving public school teachers.

Verbal Criticisms and Threats Made on a Superordinate

Courts have, since Givhan[129] and Pickering,[130] generally accepted limited criticisms by teachers of the school administration provided that the subject of the criticism was not limited to private matters but rather reflected issues of public concern. Yet courts have rejected the appeals concerning adverse employment decisions made by boards when the affected teacher has made threats on his superordinate. This section will be divided into cases litigated because of public verbal criticisms of school administrators and litigation based on threats made by public school teachers on their superordinates.

Verbal Criticisms. The Supreme Court in Pickering v. Board of Education[131] wrote that from its decision "more specific rules (would be developed) that would leave both sides with a clearer understanding

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[129] 439 U.S. 410, (1970).

[130] 391 U.S. 563, (1968).

[131] Supra.

of their rights and responsibilities."[132] State and federal courts have continued to expand Pickering along with other landmark free speech cases such as Givhan v. Western Line Consolidated School District,[133] Mt. Healthy v. Doyle,[134] and Connick v. Myers[135] to separate the rights of teachers and their portected use of the first amendment from the rights of their employers in promoting the efficient and successful operation of the public school.

It is balancing the rights of teachers to speak on issues of public concern and the rights of boards of education to provide orderly instruction that often create uncertainties as to how much freedom of speech a teacher or a board of education possesses. In Irby v. McGowan[136] a nontenured teachers whose contract was not renewed sought to enjoin an Alabama board of education from denying her another contract. Irby contended that her nonrenewal was based on her criticisms concerning social promotion and the federally funded pilot project for which she was employed. Irby also challenged the board's entry of "Fairhope-Mrs. Paula Irby-Dismissed Noncooperative" into its official record of minutes concerning her nonrenewal.

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[132] Id. at 574.

[133] Supra.

[134] 429 U.S. 274, (1977).

[135] 461 U.S. 138 (1983).

[136] 380 F. Supp. 1024 (S.D. Alabama, 1974).

The court in Irby summarized the balancing of first amendment rights of teachers and boards of education. The district court wrote:

> Let there be no mistake, it is this court's opinion that a teacher has a right to express her views with reference to such things as excessive and cumbersome paperwork, the validity or invalidity of "Social Passing," the evaluation of school programs, including the pilot program which the defendants were anxious to see succeed, ets. "Unity," "support," "oneness" should not be achieved by silence, blind obedience, or apathy. On the other hand, while all must be given an opportunity to be heard, for an orderly and intelligent administration of any program time necessarily must be limited in which debate can be had, then decisions must be made and followed.[137]

Two things that often separate verbal and written criticisma are the context and manner in which the criticism was given. Often statements that are made in anger are abrasive and cause a permanent rift between employee and employer. A federal district court in its decision in Jones v. Battles[138] stated:

> The plaintiff's abusive language directed toward his nominal superior, was of such a nature as to destroy any likelihood of a future amiable professional relationship between his and the administrative staff . . . The plaintiff's reckless unsupported and subjective accusations plant the seeds of disruptive dissension among the many. The standards of professional conduct expected of a public school teacher must never be lowered to the level of name-calling and abuse under the guise of protected free speech. If this was condoned and permitted to occur, it would invite chaos, bitterness and a general loss of morale in all facets of public service.[139]

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[137] Id. at 1030.

[138] 315 F. Supp. 601 (D. Conn. 1970).

[139] Id. at 604.

In Jones a teacher had appeared at an open board forum and stated the following about the Director of Secondary Education:

> I questioned his ability, obviously, questioned his honesty without a doubt. I wonder if what he did to me is a pattern. I wonder in other words, to speak with candor . . . I wonder if Doctor Barry is simply a liar or if Doctor Barry is simply a bad liar?[140]

The superintendent had requested Jones to write a latter of apology for his remarks made at the public forum. Jones refused to apologize and was notified that his contract would not be renewed. Jones unsuccessfully sought an injunction to prevent his contract from being nonrenewed.

In Gahr v. Trammel[141] a teacher not only criticized his superintendent but also accused him and other administrators of criminal misconduct, theft of school property. The facts in Gahr were that Superintendent McFatridge, upon hearing complaints from students that they were not learning in Gahr's classroom, decided to investigate the complaints. During the course of the investigation, the superintendent discovered that Gahr had made statements that the superintendent and other members of the school system were stealing food from the cafeteria. Gahr was suspended with pay during an investigation and was later informed that he was to be dismissed at the end of the school year. In his letter of dismissal to Gahr, McFatridge stated that the school system "could not tolerate unfounded

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[140] Id. at 604.

[141] 796 F. 2d 1063 (8th. Cir. 1986).

accusations being made in the community by you which reflect upon the integrity of school personnel."[142] The Eighth Circuit, in affirming the district court's decision, held that Gahr's first amendment claim had already been litigated in the Arkansas courts and under res judicata[143] Gahr could not appeal the state court's decision by bringing it into federal court.

On the basis of the Pickering decision, even public employees who make critical remarks concerning their employers on issues of public concern are not completely insulated. The Court in Pickering recognized that considerations must be accorded to the "state as employer, im promoting the efficiency of the public services it performs through its employees."[144] The Court of Appeals for the Eighth Circuit in Patterson v. Masem[145] denied the ppeal of a teacher who was passed over for promotion to a supervisory position because of her leadership of a group of protestors. Ruth Patterson had been assigned to mediate a controversy concerning the high school production of the play, "You Can't Take It With You." Patterson agreed with a group of parents and citizens that the language of the play was racially insulting and asked that the play be cancelled. Later she

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[142] Id. at 1065.

[143] Under 28 U.S.C. Section 1738, federal courts must give the same preclusive effect to state court judgments in Section 1983 actions as the judgments would receive in the courts of the rendering state.

[144] Id. at 568.

[145] 774 F. 2d 251 (8th. Cir. 1985).

was passed over for promotion to a higher supervisory position and claimed that the basis of the board's decision was her objection to the play's performance. In finding for the board, the court held that the board's reaction to Patterson was not the position which she took but was rather directed at her inability to mediate between the groups. The court stated:

> Here a play was selected by the school district . . . it was Dr. Patterson's duty to respect the district's choice. While her conduct did indeed address a matter of public concern, it also interfered with the proper performance of her job. We cannot find that the district court erred in its conclusion that the incident could have raised questions regarding Dr. Patterson's willingness to follow her superiors' directives as to curriculum and as to whether a person with Dr. Patterson's propensities toward censorship and bowderism should supervise the teaching of literature and history.[146]

An employee must do more than simply claim an abridgment of a first amendment right. He must also prove that his or her speech was protected and that it was the motivating reason for the board's adverse employment decision. This being done, the board of education must then show that it would have reached the same employment decision regardless of the employee's speech. When an employee fails to show that his speech was constitutionally protected and that it was the reason for his superordinate's employment decisions, courts will deny relief as in the following two cases.

Ronald Powers, a third-year teacher for the Montezuma County Colorado Board of Education, charged that his contract nonrenewal was

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[146] Id. at 257.

for his criticisms of the board, his candidacy for town mayor, his using the record "Jesus Christ Superstar," and his activities as president of the local teachers' association.[147] The district court heard evidence on each of these charges and concluded that Powers failed to prove that any of his actions were the basis of his non-renewal. In a similar case, Rocker v. Huntington,[148] Ann Marie Rocker alleged that her dismissal was in retaliation for her complaints given at board meetings. She failed to prove that her dismissal was due to the exercise of her first amendment rights. Both the district court and the Court of Appeals for the Second Circuit pointed out that the board of education for which she was employed actually invited teachers to attend their meetings and encouraged their comments.

Wichert v. Walter[149] differs from the above cases in several important points. The facts in this case were that a teacher was notified of his transfer to a distant school for reasons that were widely considered to be political. Walter Wichert, who also served as mayor, attended a rally with some three hundred people in support of the transferred teacher. At the rally Wichert was asked by a

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[147]Powers v. Mancos School District RE-6, Montezuma County, Colorado, 391 F. Supp. 322 (D.C. Colo. 1975).

[148]550 F. 2d 804 (2nd. Cir. 1977). See also Brown v. Bullard Independent School District, 640 F. 2d 651 (5th Cir. 1981).

[149]606 F. Supp. 1516 (D. N.J. 1985). See Swilley v. Alexander, 629 F. 2d 1018 (5th Cir. 1980) where a teacher's comments concerning a principal were published in the local paper and Aebisher v. Ryan, 622 F. 2d 651 where two teachers had reprimands placed in their personnel files for discussing a school disruption with the press.

reporter regarding his fellow teacher's transfer. Wichert responded, "It was one of the most ridiculous, stupid and obvious political moves they have done."[150] His comment was quoted the following day in the local paper.

The next day the president of the board of education filed charges against Wichert which, if acted upon, would remove his tenure status. Walter, the president of the board, charged that Wichert had:

> Intentionally and with malice verbally assaulted the board of education, that he intentionally and . . . with a reckless disregard of the truth made false and or misleading statements touching upon the daily operation of the school system by the Union City Board of Education with the intent of misleading the public on this issue . . . and that he intentiona-ly made derogatory, false and inaccurate statements, the truth of which could be easily ascertained.[151]

The board president stated that these actions amounted to insubordination and misbehavior and demanded that the board and Wichert's tenure status and reduce his pay. Prior to any action of the board, Wichert requested that the federal court grant him preliminary relief, thus preventing the board of education from proceeding with its charges.

In reviewing the facts of the case the district court immediately stated that from the evidence presented, it was clear that the

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[150] Id. at 1518.

[151] Id. at 1518.

board of education which was to hear the tenure case bore the "taint of bias against the plaintiff" and because of that, the court was not barred from issuing the requested relief.[152]

There are several distinct points that should be noted in this particular case in light of the decisions of Pickering and Connick. First, unlike Connick's, Wichert's statements addressed matters of public concern. Second, Wichert's statements were made on his own time and not at his workplace as were Connick's. Finally, like Pickering's and unlike Connick's, Wichert's statements were addressed to the board of education for which he did not have a direct working relationship.

In finding for Wichert the court spoke to the need for first amendment protection. The court wrote:

> What distinguishes a democratic state from a totalitarian one is the freedom to speak and criticize the government and its various agencies without fear of government retaliation. It is difficult to envision any right more fundamental to the establishment and continuation of a free society. To utilize something as vital as teaching assignments as a means of punishing or rewarding political activity would be reprehensive enough, but to then punish one who purports to disclose such activity would be even a greater evil.[153]

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[152]The school system argued that the court should be precluded from granting preliminary relief as that would create an unwarranted invasion of the administrative process by the court. The court refering to the Supreme Court decision of Younger v. Harris, 401 U.S. 37 (1971), held that ". . . In this case, the context in which the charges were brought, and their underlying lack of merit, convinces the court that they were brought only for the purpose of harassment and retaliation, with no hope of eventual success," at 1522.

[153]Id. at 11517.

Some first amendment cases are not based on public criticisms of an employer but rather rest on whether public comments cast a doubt as to an employee's social fitness and the probability of future friction between employer and employee as in Anderson v. Evans.[154] Anderson involved the dismissal of a teacher for "conduct unbecoming a teacher" and for "inefficiency."

Evelyn Anderson, a white teacher, was employed in a predominantly black Tennessee school. After an incident involving her daughter, Anderson entered the principal's office and told both her black principal and assistant principal that she "hated all black folks."[155] She further stated that she hoped that the police would catch a black person for assaulting her daughter even if they caught the wrong person. She concluded that she did not care even if the principal was wrongfully arrested and had to serve time for the incident as long as it was a black person.

After that incident Anderson received a black teaching aide that she found unacceptable. She threatened Evans with a lawsuit if he did not remove the aide from the classroom. Anderson's contract was nonrenewed the following school year and Anderson received a due process hearing before the board of education. Anderson appealed the board's decision to nonrenew her contract to the district court which found for the board. Anderson appealed to the Court of Appeals

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[154] Id. at 11517.

[155] 660 F. 2d 153 (6th. Cir. 1981).

for the Sixth Circuit alleging an abridgment of both the first and fourteenth amendments.

In a split decision the appeals court affirmed the district court's decision. Th- court relied on Pickering, Mt. Healthy, and Givhan. The court wrote:

> Reading Pickering, Mt. Healthy and Givhan together leads to the conclusion that a two-step analysis may be required when a public employee alleges retaliation for the exercise of her constitutional right to freedom of speech. If the action of the employer is found to have had the effect of limiting the speech of an employee, a balance must be struck between the interest of the employee as an individual and the public interest served by the employer. If it is found that the interest of the state, as employer, in limiting the employee's freedom of expression is significantly greater than any interest it might have in similarly limiting expression by a member of the general public, the public employer's action against its employee does not amount to a constitutional violation requiring remedial action.[156]

The previously cited court decisions involving verbal criticisms made to a superordinate in education indicate that it is preferable to insure a democratic system that educators express their differing views as opposed to maintaining blind obedience or silence. Nevertheless, certain guidelines must be followed to insure the on-going educational process: (1) the issue is of public concern; (2) the issue is not debated in the workplace (classroom) after a specified time period set aside for debate; (3) differences of opinion are addressed to the board of education and are expressed in a professional manner to prevent loss of morale and the destruction of future professional relationships; (4) the manner in which an issue

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[156] Id. at 158.

of concern is addressed should not interfere with the proper performance of one's duties; and (5) the educational system does not have the right to use teaching assignments as reinforcers of political activities.

In summation, courts stress the importance of not disrupting the educational process while educators debate issues of public concern. Yet the courts also acknowledge the validity of internal disagreement as educational programs develop. The courts are saying that while there needs to be a time and place for all dissatisfied employees to express opposing viewpoints regarding issues of public concern, the ultimate decisions must rest with the board of education. Once such decisions are made, it is the professional duty of the employee to carry out the program.

Threats Made on a Superordinate. Courts have agreed that threats of physical harm do not enjoy first amendment protections. The United States Supreme Court in Chaplinsky v. New Hampshire[157] discussed the types of speech that do not enjoy the protections of the first amendment. The Court wrote:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include lewd and obscene, the profane, the libelous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace.[158]

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[157] 315 U.S. 568 (1942).

[158] Id. at 572.

Both White v. South Park Independent School District[159] and Amburgey v. Cassady[160] involved physical threats made to superordinates. In White, a Texas teacher and coach was dismissed for repeated threats to kill the school's athletic director and other members of the athletic department. White contended that at least part of the reasons for his dismissal were legitimate complaints he made concerning the athletic department and the lack of supplies for it. The court of appeals agreed with the lower court that under Mt. Healthy the school board's termination was not unconstitutional in that although part of white's speech may have been constitutionally protected, the threats made to kill other employees were not.

Like White, Amburgey v. Cassady involved both public criticisms and physical threats against a superordinate. Grace Amburgey was notified that her contract was to be nonrenewed for six separate reasons including: threatening to shoot both the principal and superintendent, shoving the superintendent at a board meeting, and requesting, at a staff meeting, to be given the right to criticize the principal over the intercom system to all classrooms. As in White, Amburgey claimed that her actions were protected by the first amendment. The court held that the board was correct in viewing all the complaints against Amburgey together and further that the incidents were not protected under first amendment guarantees.

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[159] 693 F. 2d 1163 (5th. Cir. 1982).

[160] 370 F. Supp. 571 (E.D., Kentucky, 1974).

The paucity of cases involving threats to a superordinate obviously indicates that the first amendment does not protect threats that are obscene, libelous, or incite injury.

Written Criticisms Against a Superordinate

While written criticisms are usually not as inflamatory as are public criticisms and attacks against a superordinate, they often reach further than do public statements since they often appear in such media as the local paper and radio and television news. The following cases deal with employees who claimed adverse employment considerations because they exercised what they considered to be their protected first amendment rights in openly criticizing their employers.

Written Letters to Newspapers, Legislators and Board Members. In Zoll v. Eastern Allamakee Community School District,[161] Rose Zoll, the former principal of the school where she then raught, wrote two letters to the local paper criticizing the school administration and board members about a decline in concern for academic excellence. The two letters were published during June and July. When school reconvened in the fall the principal called Zoll into his office where he expressed his displeasure with Zoll's criticisms. Zoll was terminated at the close of the academic year based on the county's reduction in force (R.I.F.) policy. She had received the highest possible number of points in objective evaluation of experience and training

[161] 588 F. 2d 246 (8th Cir. 1978).

but received fewer points than other teachers in the subjective evaluations by the principal, superintendent and school board. The following year the board hired two new teachers and transferred another teacher to three vacancies that Zoll was certified for, in open violation of the R.I.F. policy. Zoll successfully brought suit in federal district court alleging that her termination was based on her written criticisms of the administration. In finding for Zoll the jury awarded her the maximum permissible damages to Zoll against the school principal and superintendent. The court ordered that Zoll be offered the next available teaching position but limited recompensation for her attorney's fees.

The principal and superintendent appealed the district court's decision and Zoll cross-appealed the decision limiting the award of attorney's fees, the instructions to the jury concerning the "rights of free speech," and the decision not to extend the back pay period of the date of offered reinstatement. The court of appeals affirmed the entry of judgment against the principal and superintendent and remanded the case to the district court for reconsideration as to the back pay period and the award of attorney's fees.

Once a teacher proves that his actions were protected under the first amendment and that his constitutionally protected actions were the reasons for the adverse employment considerations given him, the defendant board must then show that it would have reached the same employment considerations irrespective of the employee's first amendment conduct. When a board of education fails to show that it would

have reached the same decision as in Zoll, the teacher is usually awarded backpay, attorney's fees and reinstatement.

Reinstatement was the issue in Allen v. Autauga County Board of Education.[162] In Allen, two teachers circulated signed petitions to the state school board questioning the board's use of state funds. Their contracts were nonrenewed and both teachers brought Section 1983 suits charging violations of first amendment quarantees. They asked for damages, back pay, reinstatement to their teaching positions, costs, and attorney's fees. The district court determined that the involvement of the teachers in circulating the letter to the state school board was the motivating reason for their dismissal and further that it was constitutionally protected conduct. The court granted the plaintiff's request for damages, costs, and attorney's fees but denied reinstatement. Reinstatement was denied since the district court concluded that it would "breed difficult working conditions" and due to "a lack of mutual trust . . . which is essential in the operation of a school."[163]

On appeal, the Court of Appeals for the Eleventh Circuit ordered reinstatement. The court concluded that "reinstatement is a basic element of the appropriate remedy in wrongful employee

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[162]685 F. 2d 1302 (11th Cir. 1982). For a case involving a teacher that claimed his dismissal was based on his letter to the state athletic association see Williams v. Day, 412 F. Supp. 336 (E.D. Ark. 1976).

[163]Id. at 1304.

discharge cases and, except in extraordinary cases, is required.[164] The court wrote:

> Unless we are willing to withhold full relief from all or most successful plaintiffs in discharge cases, and we are not, we cannot allow actual or expected ill-feeling alone to justify nonreinstatement. We also note that reinstatement is an effective deterrent in preventing employer retaliation against employees who exercise their constitutional rights.[165]

All letters critical of employers are not protected by the provisions of the first amendment as were Pickering's, Zoll's and Allen's. In Long v. Board of Education of City of St. Louis,[166] a teacher's contract was nonrenewed because she wrote a letter on board stationery to a state legislator critical of funding for a program for which she was employed. Her immediate supervisor, Ruby Long, was then notified that her position was terminated for her refusal to sign an unsatisfactory evaluation of the letter writing teacher. Both teachers appealed to the federal district court charging an abridgment of protections under the first amendment. The court noted that the incident differed from Pickering in that by using board stationery the teacher in Long appeared to be speaking not as a private citizen but for the board itself. In so doing the court decided that the "balance is clearly struck in favor of efficient administration of the school district."[167]

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[164] Id. at 1305.

[165] Id. at 1306.

[166] 456 F. 2d 1058 (8th Cir. 1972).

[167] Id. at 1060.

Alinovi v. Worchester School Committee[168] is an unusual Section 1983 case in that it involved both first and fourth amendment claims. The facts in Alinovi were that Joanne Alinovi, a fourth grade teacher, wrote a term paper for a special education class. In that paper she discussed both the child and criticized the pricipal's lack of knowledge in dealing with a disturbed child. Alinovi brought her paper to a meeting held with the child's parents and other members of the child's Individualized Education Program (I.E.P.) team but the paper was not read. The following day her principal requested to read her paper. Because of her critical comments of the principal, Alinovi refused his request to read the paper. Three separate meetings were held over the next four months between herself, her attorney and the district administration over her refusal to allow the schol principal to read the paper, which they considered to be a part of the child's official file.

At a Parents' Night, Alinovi posted three letters she had received from the administration concerning her refusal to allow the principal to read the paper next to the parent's sign-in sheet. Alinovi was suspended for two days without pay for posting the letters at the parent's meeting. During the next year she was involuntarily transferred to different programs which she claimed caused her to seek professional counseling.

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[168] 777 F. 2d 776 (1st Cir. 1985). See also Boyce v. Alexis I. DuPont School District, 341 F. Supp. 678 (D. Del. 1972).

Alinovi filed suit in federal district court charging both first and fourth amendment violations. Her fourth amendment claim concerned her privacy interest in her cade study which she had refused to give to the principal. Alinovi claimed that the first amendment protected her in posting the letters from the school administration at parents' night.

The district court and a majority of the Court of Appeals for the First Circuit held that Alinovi's privacy interest in her paper ended when she brought the paper to the I.E.P. meeting. The appeals court further found that since she had presented the paper to a college professor for grading and had offered it to a special education official that "she should not have retained an expectation of privacy in said paper."[169]

The appeals court was unanimous in affirming the district court's decision that Alinovi's posting the letters from the school administration was not protected speech. Referencing Connick, the court held that "the resolution of a pending personnel problem between a public school teacher and her employer is not a metter of public concern."[170]

Many Section 1983 cases involving the abridgment of the first amendment center on the definition of what constitutes matters of public concern. In McGee v. South Pemiscot School District[171] and

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[169] Id. at 785.

[170] Id. at 787.

[171] 712 F. 2d 339 (8th Cir. 1983).

Anderson v. Central Point School District,[172] the contracts of two coach-s were nonrenewed due to letters written to the editor and to members of the board of education. In McGee, a teacher and track coach, wrote a letter to the local paper critical of the board's decision to exclude track as a team sport three days prior to a board election. Shortly after the election, McGee's contract was nonrenewed. A jury awarded McGee damages for his first amendment violation but the court granted the defendant school board's motion for a judgment non obstante veredicto.

The Court of Appeals for the Eighth Circuit reversed the district court's decision that there was insufficient evidence to support the jury's findings. The appeals court rejected the board's contentions that McGee's letter was not constitutionally protected since it did not address a public issue and it contained erroneous statements. The court pointed to a statement made by the superintendent to McGee:

> You are supposed to be loyal to the school. Whenever you say things that embarrass the school or say things we don't like, you will get what's coming to you. You know, you'll get terminated.[173]

In Anderson a teacher appeared before the board of education and spoke on the issue of athletics. He followed his speech with a

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[172] 746 F. 2d 505 (9th Cir. 1984). See also Knapp v. Whitaker, 757 F. 2d 827 (7th Cir. 1985), appeal dismissed, 106 S. Ct. 36 (1985).

[173] McGee, at 343.

letter to each board member criticizing the present athletic policy and suggested changes. Superintendent Groshong replied in a letter to Anderson admonishing him for communicating directly with board members and indicating that he would no longer be assigned coaching duties. He sent copies of his letter to the board members, the athletic director and Anderson's principal.

Anderson sued under Section 1983 charging an abridgment of his rights under the first amendment. The court found for Anderson and granted him damages for physical and emotional distress. The court further entered an injunction against the application of the "channels" policy on matters of public concern. In affirming the district court's decision the appeals court rejected the board's argument that under Connick it was justified in nonrenewing Anderson's contract as it considered it not to be of general public interest. Finally, the appeals court rejected the board's argument that Anderson's claim was not maintainable under Section 1983 since he had suffered no loss of salary. Citing Carey[174] as controlling, the court held that physical and emotional distress is compensationable under 42 U.S.C. Section 1983.

The courts maintain that it is within the rights of an employee to make a public written criticism of a school administration and school board when the issue is of public concern. A personnel problem between employer and employee has not been viewed as touching on

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[174] 435 U.S. 247 (1978).

matters of public concern. The employer may not punish employees with nonreinstatement when they disagree on matters of public concern nor may the employer threaten nonreinstatement. Finally, physical and emotional distress may be compensated under Section 1983.

Filing of Grievances and Union Activities

Dismissals Based on the Filing of Grievances. Simple membership and participation in an organization such as a teachers' union or association does not, by itself, preclude any rights inclucing continual employment in the public schools. Because school boards and teacher unions often have adversarial relationships, however, many cases are litigated by teachers charging an abridgment of a constitutionally protected right.

An example of this type of case based on a dismissal for exercise of a first amendment right was Saye v. St. Vrain Valley School District RE-1J.[175] Diane Saye brought suit under 42 U.S.C. Section 1983 charging that her dismissal was unconstitutional in that it was in retaliation for her union activities and her remarks made to parents.

Saye had been informed by her principal that, although she received a high evaluation, she would be recommended for transfer because of her difficulties with a serious emotionally disturbed student. As problems with the student continued, Saye was advised that her evaluation was being reconsidered. The following year Saye's

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[175]785 F. 2d 862 (10th Cir. 1986).

use of an instructional aide was reduced. She complained to the assistant director of special education and received more hours of aide assistance which disturbed other teachers and aides. Saye also discussed aide time with two parents of special education children. As a result, a meeting was held with the concerned parents, the director of special educ ation and her principal.

The same year, Saye was elected faculty representative for the union. In that capacity she relayed to the faculty information concerning contract negotiations and began hearing complaints from teachers about the practices of her principal. She was informed by her principal that he was considering recommending nonrenewal of her contract for precipitating the aide situation. Saye responded by filing a union grievance alleging that the memo was harassment in retaliation for her activities on behalf of the teacher union.

In discussing the issues of the case the court relied heavily on the language of both Pickering and Connick. Citing also the three-part analysis in Childers v. Independent School District[176] concerning first amendment rights of employees, the court stated:

> Under this test, an employee's first amendment rights are protected unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure the effective performance by the employee. If an employee's activities are protected . . . he must then demonstrate that this conduct was a "motivating factor" in the detrimental employment decision. The employer then

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[176]676 F. 2d 1338, 1341 (10th Cir. 1982).

> bears the burden of showing by a preponderance of the evidence that it would have reached the same decision . . . in the absence of the protected activity.[177]

The court found that allocation of teacher aide time was not a matter inherently of public concern and that Saye did not raise the matter in a public forum and was speaking "not as a citizen upon matters of public concern but instead as an employee upon metters of personal interest."[178] The court denied that Saye's conversations to parents of her students was protected by first amendment guarantees:

> The parents of a child receiving special education must work closely and trustfully with teachers and administrators in implementing the legally mandated individualized education program for that child. Saye's discussions with the two parents here disrupted that necessary relationship and required defendants to call a meeting to explain the situation and to attempt to reestablish an amicable and cooperative atmosphere.[179]

The court of appeals differed from the district court, however, in finding that Saye's union activities could have been a motivating factor in her dismissal. The court pointed to evidence that her principal had informed the superintendent of Saye's union activities as faculty representative. The appeals court dismissed her claim of a denial of a first amendment right but remanded and reversed the district court's decision that her union activities had played no part in her dismissal.

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[177] Id. at 1341.

[178] Id. at 866.

[179] Id. at 866.

The case, Roberts v. Van Buren Public Schools,[180] is similar to Saye in that it also centered on the nonrenewal of two teachers who charged that they were released because they had filed grievance forms. In Roberts two teachers submitted grievances to the Arkansas Education Association and gave copies of them to their principal. Two of the grievances expressed dissatisfaction with the manner in which a class trip was conducted, while the third expressed concern over the necessity of sacrificing "Weekly Readers" in order to have other instructional supplies. One teacher, Roberts, also charged that her nonrenewal was based on her union activities.

The following year the principal lowered the teachers' evaluations to the "needs to improve" category and recommended to the district that their contracts not be renewed. The superintendent recommended that the board nonrenew their contracts and the board unanimously agreed. The teachers unsuccessfully requested a hearing before the board.

In deciding the case, the court looked to the reasoning advance advanced by the Supreme Court in Pickering, Connick, and Mt. Healthy. In discussing the three cases the court identified the "Pickering balance" as"

> (1) the need for harmony in the office or workplace; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech, (4) the context in which

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[180] 773 F. 2d 949 (8th Cir. 1985).

> the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.[181]

Citing both Pickering and Connick, the court concluded that the teachers' allegation charging an abridgment of a first amendment right did not involve protected speech. The court, citing Keller v. Flawn[182] reasoned that the teachers' grievances regarding "Weekly Readers" was not protected speech. The court stated:

> The concerns underlying the Pickering balance suggest that a government as an employer has a legitimate interest in achieving compliance with decisions that, while once open to dispute and discussion, have been made through proper channels.[183]

The court could not determine if Roberts' union association and duties played any part of the board's decision to nonrenew her contract and thus remanded that part back for a new trial.

Like Roberts, a teacher in Cox v. Dardanelle Public School District[184] claimed that her nonrenewal was in retaliation for the grievance she entered against the school principal. Nancy Cox and two other teachers who entered grievances were either dismissed or placed

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[181] Id. at 954.

[182] 761 F. 2d 1079 (5th Cir. 1985) "It is firmly established that the First Amendment's shield does not extend to speech and conduct amounting to insubordination directed at school officials."

[183] Id. at 956.

[184] 790 F. 2d 668 (8th Cir. 1986). Also, Johnson v. Butler, 433 F. Supp. 531 (W.D. Va. 1977).

on probation. Cox was notified in her dismissal letter that she was being dismissed for eleven specific charges.

The board of education, in Cox's dismissal hearning, held that one of the charges was false, fourt charges were true but not sufficient for grounds of nonrenewal and two charges were true and were sufficient for nonrenewal. One charge was withdrawn by the board's attorney. The two charges held as sufficient were: (1) Cox refused to follow directions as she had signed in for a fellow teacher on five different occasions; and (2) she allowed a visitor to interrupt her class without permission from the principal.

The district court held that Cox's dismissal was based, not on the two reasons given by the board, but for the entering of frievances against her principal, an action it held as constitutionally protected. Cox was awarded damages for the wrongful dismissal and the board appealed. The Court of Appeals for the Eighth Circuit affirmed the district court's decision. The court held Cox's speech, "was composed of more than criticisms of internal personnel policies, but touched on matters of public concern."[185] The court further found that there was no evidence that Cox's speech either affected her teaching performance, aggravated her relationship with her principal or that her criticisms throughout the year were intemperate or antagonistic.

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[185] Id. at 673.

Yet still another case where charges that a teacher's nonrenewal was based on the entering of a grievance is found in Day v. South Park Independent School District.[186] The facts in the case were that Marvis Day had received a satisfactory evaluation from her principal in eighteen of twenty-four skill areas but less than satisfactory in six categories. The principal recommended a transfer stating that Day had demonstrated little skill in working with peers, and she would possibly perform better in another environment. Day, through a letter, complained to the principal over the negative evaluation and asked for suggestions as to how she could improve. The principal did not respond to her letter and Day entered a formal grievance. The superintendent responded to Day's grievance that her complaint was not grievable. At the end of the year she was notified that her contract was to be nonrenewed. Day appealed both her denied request for a grievance hearing and her nonrenewal to the state commissioner of education and later to the federal district court. The state commissioner of education held that the school district's policies prohibited retaliation for an employee's exercise of grievance rights and directed the case, sub judice, to arbitration.

The district court held that Day's dismissal was based on her request for grievance concerning her low evaluation and, as such, was not a matter of public concern but rather a private matter and thus afforded no first amendment protection. The appeals court agreed with the district court that Day's complaint was "purely a private matter"

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[186]768 F. 2d 696 (5th Cir. 1985).

and that she did not speak "as a citizen upon matters of public concern but only as an individual with individual personal disputes and grievances."[187] Citing Connick, the court wrote:

> Connick dictates sensitivity to the form and content of the employee's speech. An employee's complaint to her superior on a personal matter is no more a matter of public concern when embodied in a letter to him requesting a hearing than it is when spoken to him. We are hesitant to elevate such an employee's complaint to the level of constitutional protection merely because she has asserted it in the form of a grievance.[188]

Dismissals Based on Union Activity. Often teachers are dismissed for their participation in teacher unions and associations. Since membership in a union or an association is a protected right, it is left to the teacher to prove that his or her membership was the motivating factor for the adverse employment decision.

In Chase v. Fall Mountain Regional School District[189] a teacher was informed that his contract was not to be renewed on grounds that he had lost his effectiveness as a teacher due to unsubstantiated rumors of improper behavior toward three female students, one being the daughter of one board member. Chase, an officer in the local teacher association, had been recommended for contract renewal by both his principal and his department chairman with the highest possible ratings. Donald Chase argued that his nonrenewal was in direct violation of both his freedom of speech and association. The

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[187] Id. at 700.

[188] Id. at 703.

[189] 330 F. Supp. 388 (D. N.H. 1971).

court found for Chase, stating, "The plaintiff's negotiating activities had a profound bearing, either consciously or unconsciously, on the decision not to renew."[190] Chase was awarded damages by the court from the district, the superintendent, and five members of the board of education. He was ordered reinstated and the superintendent was ordered to expunge any record of his nonrenewal from his personnel folder.

Newborn v. Morrison[191] was a similar case involving the nonrenewal of a teaching contract based on association with a teaching organization. The facts in Newborn were that Pamela Newborn charged that she was denied a renewal of her teaching contract due to the union activities of her husband, the executive secretary of the Illinois Education Association. Newborn charged in her complaint that she was denied the protections afforded by the first, ninth and fourteenth amendments. The defendant school board entered several arguments for dismissal including: (1) that Newborn had not exhausted the administrative remedies before proceeding with a federal action; (2) that the school board as a municipal corporation was not amendable to a suit based on 42 U.S.C. Section 1983; and (3) that since the school board was required to indemnify members sued for civil rights damages, that any awards would ultimately come from the public treasury and thus violate the eleventh amendment.

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[190] Id. at 396.

[191] 440 F. Supp. 623 (S.D. Ill. 1977).

The district court judge handled each allegation and argument for dismissal separately in finding for the plaintiff. The court first stated that although no right of privacy is mentioned in the Constitution, one does exist. Citing several cases including Roe v. Wade[192] and Griswold v. Connecticut[193] the district court listed four rights enjoyed through marriage. The court continued by stating, "It is my opinion that marriage is clearly a fundamental right and is entitled to the guarantee of privacy expressed in Roe and Griswold.

The court next dealt with the appeal for dismissal in that Newborn had not exhausted state remedies. Because Newborn was a probationary teacher and did not have the "elaborate administrative review" of tenured teachers, the court decided to hear the case. The court rejected the board's contention that since it was a municipal corporation it was immune from suits based on Section 1983. The court also rejected the board's argument that since the board was a municipal corporation that any monetary award would have to come from the public treasury. The court's rejection of this argument was because the board was being sued individually and not in its public capacity.

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[192]93 S. Ct. 726 (1973). This case effectively legalized abortions in the United States.

[193]381 U.S. 479 (1965). This case involved the Executive Director of the Planned Parenthood League of Connecticut and a physician that were found guilty under Connecticut law that forbade giving married persons information and medical advice concerning how to prevent conception.

The remarks made by a teacher, who served as the president of the teacher's association at the opening orientation meeting, served as the basis for the teacher's dismissal and her subsequent appeal in Pietrunti v. Board of Education of Brick Township.[194] Kathleen Pietrunti had been invited to speak by the board to the teachers but used that opportunity to attack the school administration by discussing: (1) the dismissal of two nontenured teachers, (2) the suspension of a teacher, (3) the lack of black teachers in the school district, and (4) the removal of three books from the English curriculum. She ended her address to the teachers by describing the superintendent as a villain. She was suspended from her teaching position on September 7, 1971. The same day she distributed both copies of her speech and a written apology for her remarks.

Pietrunti lost her appeal both to the Commissioner of Education and to the State Board of Education. She then appealed to the superior court which also agreed with the board. The court stated that her position as president of the local teachers' association did not grant her sufficient leave to openly use the orientation meeting as a platform for attacking the administration.

As in previously discussed cases, litigation involving the filing of grievances and union activities emphasize that first amendment rights are not protected when: (1) actions disrupt job

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[194]319 A. 2d 262. (N.J. 1974).

performance, aggravate professional relationships or are expressed in an antagonistic manner; (2) personal grievances are expressed; (3) grievances are expressed at the workplace; and (4) policies continue to be questioned after a reasonable time of debate. The litigation also points out that it is not advisable to involve parents in disagreements involving matters of personal interest, that a formal grievance or letter is viewed legally the same as a verbal complaint, and the right of privacy is guaranteed as it regards marriage.

Academic Freedom

The first amendment rights of teachers in the classroom to instruct their students as they see fit has remained an issue before the courts. The United States Supreme Court stated in Keyishian v. Board of Regents:[195]

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the first amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[196]

Both state law and local board policies dictate to some extent the amount of academic freedom that teachers may enjoy in teaching

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[195] 385 U.S. 589, (1967).

[196] Id. at 603.

students.[197] This freedom has a direct relationship with the age and maturity of the students involved and also to the prevailing sense of values that are expressed and accepted by the community.

The Court of Appeals for the First Circuit in Mailloux v. Kiley[198] and a federal district court in Parducci v. Rutland[199] have ruled that academic freedom is not absolute. These two opinions expressed the limits of freedoms that teachers have in instructing their students. The Mailloux court wrote:

> Free speech does not grant teachers a license to say or write in class whatever they may feel like, and that the propriety of regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between the specific technique used and some concededly valid educational objective, and the contest and manner of presentation . . . We see no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech.[200]

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[197]Academic freedom can not be used to avoid teaching certain issues or subjects as was the case in Palmer v. Board of Education for the City of Chicago, 605 F. 2d 1271 (7th Cir. 1979), cert. denied 444 U.S. 1026 (1980) and Ahern v. Board of Education of School District of Grand Island, 456 F. 2d 399 (8th Cir. 1972).

[198]448 F. 2d 1243 (1st Cir. 1971).

[199]316 F. Supp. 352 (D. Ala. 1972).

[200]Id. at 1245.

The Parducci court wrote:

> Although academic freedom is not one of the enumerated rights of the first amendment, the Supreme Court has on numerous occasions emphasized that the right to teach, to inquire, to evaluate, and to study is fundamental to a democratic society. The right to academic freedom, however, like all other constitutional rights, is not absolute, and must be balanced against the competing interests of society.[201]

Often teachers attempt to use the umbrella of academic freedom to incorporate their religious, politifal, and social views and values into the classroom. The following cases involve litigation between dismissed teachers and their superordinates over the amount of freedom that teachers have in their classrooms.

The Court of Appeals for the Second Dircuit in James v. Board of Education of Central District[202] reversed a lower court in finding that the wearing of a black armband was constitutionally protected speech. James, a Quaker, had worn an armband on two separate occasions to school where he taught literature in protest of the war in Vietnam. On the first instance he was suspended and then reinstated on the condition that he "engage in no political activities while in the school."[203] The second time he wore the armband he was discharged. The district court granted the school board's motion for dismissal on the grounds of res judicata and that none of James's federally protected rights were violated.

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[201] Parducci at 353.

[202] 461 F. 2d 566 (2nd Cir. 1972).

[203] Id. at 569.

The Court of Appeals for the Second Circuit rejected the findings that James was precluded on bringing forth his complaint under res judicata. The court also noted the wearing of the armband created no classroom disturbances. The school board argued that a school should not wait for a disturbance before it takes action. It further argued that this case was unlike Tinker v. Board of Education[204] in that a teacher, in expressing a political view, has far more pervasive influence over a student than does a statement made by a student. The court rejected both arguments. It wrote:

> It is appropriate, however, lest our decision today (which is based on the total absence of any facts justifying the Board of Education's actions) be misunderstood, that we disclaim any intent to condone partisan political activities in the public schools which reasonably may be expected to interfere with the educational process.[205]

In another case involving academic freedom, a federal district court in Moore v. School Board of Gulf County[206] ruled that a teacher could not spend class time expounding his views of the superintendent and the school system. The facts in the case were that Melvin Moore, a tenth grade biology teacher repeatedly used class time to discuss the problems of the school system including the superintendent and school board. He also discussed with his class other topics such as

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[204] 393 U.S. 502 (1969).

[205] Id. at 576.

[206] 364 F. Supp. 555 (D. Fla. 1972). For somewhat similar cases see Robins v. Board of Education, 313 F. Supp. 642 (N.D. Ill. 1970) and Knarr v. Board of School Trustees, 317 F. Supp. 832 (N.D. Ind. 1970).

his personal experiences with prostitutes. Several parents complained to the school board about the wasted instructional time and the controversial talks that he was having with the students in class. The school board decided to offer him a contract provided that he not use his class time on subjects unrelated to biology. Moore refused the probationary contract and was dismissed. The court, in holding for the school board, concluded that tenth grade students had a right not to be subjected as a captive audience in listening to the subjective views of their teacher. The court further held that by subjecting students to listen to a teacher expound his criticisms in class against the school administration that they might tend to hold other teachers and the school board in "varying degrees of contempt."

Many complaints regarding academic freedom arise out of science and literature classes for both religious and moral reasons. Often the teachings of teachers in these two areas diametrically oppose those beliefs and customs held by parents. As in Moore, the complaints in Stachura v. Truszkowski[207] arose from events that occurred in a high school biology class. Edward Stachura, a teacher in the Memphis School System, brought a Section 1983 suit in federal court alleging a denial of his first amendment rights. Stachura showed two films in his life science class, "From Boy to Man" and "From Girl to Woman." The films had been obtained from the county health department and had been shown to students at the school

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[207] 764 F. 2d 211 (6th Cir. 1985). See also Kingsville Independent School District v. Cooper, 611 F. 2d 1190 (5th Cir. 1980).

previously without objections. Parental permission was required by the school and the films were shown to sexually segregated classes at the direction of the principal and with the approval of the board of education.

Delores Truszkowski, a parent, organized a group of parents who complained to the school board about the subject matter in the two films. The school board met the day following the presentation of the films and suspended Stachura for an indefinite period of time. The superintendent told Stachura that "he would never see the inside of a Memphis classroom again."[208] Approximately one month later the superintendent handed Stachura a letter of reprimand. Stachura, through his attorney, asked for immediate reinstatement and the removal of his letter of reprimand from his personnel file. Stachura then brought suit in federal district court. The district court held that Stachura's first amendment rights had been violated but set aside the jury awarded damages against Truskowski, citing her first amendment right to petition the board. The court of appeals affirmed the district court's award of substantial punitive and compensatory damages.[209] The court noted that "the actions of the school board

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[208] Id. at 214.

[209] On appeal the United States Supreme Court reversed and remanded the award of damages back to the district court. The district court judge had instructed the jury that if they found the board liable they could award (1) compensatory damages for harm to respondent, (2) punitive damages, and (3) compensatory damages for violations of constitutional rights. The Court rejected the third category. 106 S. Ct. 2537 (1986).

imposed a stigma on Stachura and foreclosed a definite range of employment opportunities."[210]

Teacher assigned reading materials were the subject of the suit in Keefe v. Geanakos.[211] The facts in Keefe were that Robert Keefe gave his senior English students copies of "Atlantic Monthy" magazine and assigned them the first article to read. Keefe discussed the article and particularly an obscene word found in the article. The following evening the school committee met and asked Keefe to defend his assigning the article that included the objectionable word. Keefe was asked at the meeting to refrain from using the word in class again to which he refused. He was then suspended and filed an appeal in district court requesting an injunction to prevent the school board from voting on his discharge. The district court refused and Keefe appealed to the Court of Appeals for the First Circuit.

The appeals court found the article to be "scholarly, thoughtful and thought-provoking."[212] It found the offensive word to be important to the development of the thesis. The court, in reversing the district court, noted that the offensive word appeared in at

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[210] Id. at 215.

[211] 418 F. 2d 359 (1st Cir. 1969).

[212] Id. at 361.

least five books in the school's library. The court wrote:

> Hence the question in this case is whether a teacher may, for demonstrated educational purposes, quote a "dirty" word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand. If the answer were that the students must be protected from such exposure, we would fear for their future. We do not question the good faith of the defendants in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education.[213]

The ruling in Keefe was cited in Lindros v. Governing Board of Torance School District.[214] Stanley Lindros, a tenth grade English teacher assigned his students to write a story and then read to them one of his stories that contained a vulgar phrase. The school board refused to rehire him for the next year stating that his "coarse and vulgar expression showed extremely poor judgment." Lindros appealed the board's decision on the ground that his nonrenewal violated his first amendment protection of free speech. The California Court of Appeals, in denying Lindros's claim, stated that academic freedom "does not signify the absence of all restraint."[215] The court further distinguished the facts between Lindros and Keefe in that Keefe was a tenured teacher; the article assigned in Keefe was scholarly while while Lindros's article was not, and finally, there was a two-year age difference in the students in the two cases.

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[213] Id. at 362.

[214] 108 Ca. Rptr. 188 (Cal. 1972).

[215] Id. at 40.

Teachers have claimed academic freedom in not only their right to speak on topics of their pleasure in the classroom but also to govern both what is said and done by the students in nonacademic areas. In Russo v. Central School District No. 1, Towns of Rush, Etc., N.Y.[216] Susan Russo was appointed as a probationary art teacher for the Rush-Henrietta School District. As a condition of her employment she signed a loyalty oath affirming her support of the Constitution of the United States and of New York.[217] In the fall of the year the teachers were notified that they were expected to salute the flag and join in the pledge of allegiance to it with their students while it was being spoken over the school's public address system. Refusing to salute the flag or to recite the pledge of allegiance with her students in homeroom, Russo instead stood quietly looking at the flag and kept her hands at her side. The district court noted that at no time did this cause any disturbance in the classroom.[218]

In April some students and parents reported to the principal that Russo was not saluting the flag. The principal observed her the day after the complaint. The following day he called her into his office and asked her why she was not saluting the flag and pledging allegiance to it. She responded that the phrase, "with liberty

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[216] 469 F. 2d 623 (2nd Cir. 1972).

[217] Id. at 625.

[218] Id.

for all" did not, in her mind, reflect the quality of life in America.[219] The following month the principal again observed her during the pledge of allegiance. Russo again failed to salute the flag or to recite the pledge of allegiance. At the observation meeting, Loughlin, her principal, told Russo that he intended to ask the board that her contract be nonrenewed. When asked for his rationale, the principal responded that since Russo was a probationary teacher that he was not compelled to give reasons.

The appeals court, in reversing the district court's decision, cited extensively its decision in James v. Board of Education.[220] The court noted that Mrs. Russo made "no attempt to proselytize her students" and that no disruption resuled from her silence during the pledge. The court concluded with:

> The right to remain silent in the face of an illegitimate demand for speech is as much a part of First Amendment protections as the right to speak out in the face of an illegitimate demand for silence. To compel a person to speak what is not in his mind offends the very principles of tolerance and understanding which for so long have been the foundation of our great land.[221]

Safeguarding academic freedom is fundamental to a democratic society. Yet courts stipulate that such freedom is not absolute and must be determined in a case by case investigation based upon the

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[219] Id. at 626.

[220] Supra.

[221] Id. at 634.

following issues: (1) age and maturity of students; (2) values generally accepted by the community; (3) whether or not the specific technique employed is based upon a legitimate educational objective; and (4) the manner in which the information is presented.

Teacher Appearance and Private Life

Teacher dress and grooming have frequently been claimed to be a right protected by the first amendment guarantee of freedom of expression. Most of the litigation in this area arises out of teachers wearing or not wearing a particular type of clothing and the issue of hair, including facial hair.

Teacher Appearance. Lucia v. Duggan[222] was a massachusetts case involving the dismissal of a nontenured teacher for violating an unpublished rule that all men teachers should be clean shaven. Lucia came to school following Christmas vacation with a beard which prompted the superintendent to advise him that the district had an unwritten rule against beards. Lucia was later advised by both the school principal and the school committee that they found his wearing a beard objectionable. Neither the superintendent, principal nor the school committee advised Lucia that he would be discharged if he failed to shave.[223] The school committee unanimously voted to dismiss

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[222]303 F. Supp. 112 (D. Mass. 1969). See also Finot v. Pasadena City Board of Education, 58 Cal. Rptr. 520 (Cal. App. 1967).

[223]Id. at 117.

Lucia but refused to give any reasons for the dismissal. Lucia appealed his case to the federal district court which found for him. The court found that his dismissal violated constitutional standards under the fourteenth amendment and ordered Lucia's reinstatement with back pay and compensatory damages.[224]

A somewhat similar case involving facial hair can be found in Braxton v. Board of Public Instruction of Duval County, Florida.[225] Braxton, the only black member on the school's faculty, refused to shave off his goatee. Braxton appealed his dismissal to the federal court which held that the school system's insistence on Braxton's shaving off his goatee to be arbitrary, unreasonable and based on personal preference.[226] The court concluded that the order requiring the black teacher to shave his goatee exhibited an intolerance of racial diversity. The court continued by stating that the goatee is considered as a symbol of racial pride and that the defendant board of education's refusal to renew Braxton's contract amounted to "institutional racism."[227]

The requirement of the wearing of ties for all male teachers was the Section 1983 issue in East Hartford Education Association v.

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[224] Id. at 161.

[225] 303 F. Supp. 958 (M.D. Fla. 1969).

[226] Id. at 959.

[227] Id. at 960.

Board of Education.[228] The district court found for the board of education and the teacher's association appealed to the Court of Appeals for the Second Circuit. That court, in reversing the district court remanded the case for consideration, suggesting that a teacher's appearance amounted to a type of method of teaching and, as such, could not be completely regulated by the board. The court wrote:

> A school board may make regulations that help to promote the effective and efficient education of children. It may not, however, make regulations that infringe on constitutional interests while not realistically and significantly furthering the board's proper purposes.[229]

Political Activity. Courts have generally held that the private lives of teachers, including their political activity is constitutionally protected as long as their activities do not have a detrimental effect on the school or pose harm to other teachers or students. A court in Jarvella v. Willoughly Eastlake City School District[230] ruled that the private life of a teacher was protected as long as the conduct was not "hostile to the welfare of the school community."

Because teachers hold a special place in the fabric of American society many courts, through their decisions, have diluted some teacher freedoms by agreeing with certain restrictions imposed by

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[228] 562 F. 2d 838 (2nd Cir. 1977). See also Tardif v. Quinn, 545 F. 2d 761 (1st Cir. 1976) where a teacher charged that her dismissal was based on the length of her skirt.

[229] Id. at 846.

[230] 12 Ohio Misc. 288, 233 N.E. 2d 143 (Ohio court of Common Pleas, 1967).

boards of education on teachers. Courts have held that restrictions concerning the appearance of teachers have been made to help promote traditional values and respect for authority.[231] Similarly, courts have upheld the dismissal of teachers when their political involvement, living arrangements or sexual preferences created a significant educational disruption.

Montgomery v. White[232] involved the nonrenewal of a teacher due to his participation in political activities, conduct prohibited by the board of education. The court ruled that not all political activity is permissible in that a school system "may have legitimate interest in protecting its educational and administrative activities from undue political activity."[233] The court found, however, that a complete ban on the participation of teachers in the political process created a "harmful effect on the community in depriving it of the political participation and interest of some of the most influential citizens."[234] The court wrote:

> Simply because teachers are on the public payroll does not make them second-class citizens in regard to their

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[231] In Stoddard v. School District No. 1., 590 F. 2d 829 (10th Cir. 1979) an elementary teacher was successful in her suit charging that her dismissal was due to (1) recurring rumors that she was having an affair, (2) dissatisfaction of the community with her card playing and not attending church, and (3) because she did not have an attractive physical appearance.

[232] Civ. Action No. 4933, Slip. Op. (U.S.C.C. E.D. Tex. Oct. 24, 1969). See also Holley v. Seminole County School District, 755 F. 2d 1492 (11th Cir. 1985).

[233] Id. at 2.

[234] Id.

> constitutional rights. Even though the governmental purposes are legitimate and substantial, such purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the ends sought can be more narrowly achieved. Laws and official regulations which restrict the liberties guaranteed by the first amendment should be narrowly drawn to meet the specific evil aimed at.[235]

Lifestyles. Boards of education have been upheld in their dismissal of teachers when a teacher's lifestyle, including his or her sexual preference, created an adverse impact on the educational process.[236] Sexual misconduct between teachers and students has been consistently held as just cause for dismissal.

In an unusual Section 1983 case a Massachusetts teacher was dismissed for what the board charged as "conduct unbecoming a teacher."[237] Wishart, a middle school teacher, had been seen on many occasions in his yard both dressing and undressing a mannequin. Wishart filed suit in federal court challenging that his conduct away from school was private and could not be used as basis for dismissal. The district court disagreed, noting that because his "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."[238]

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[235] Id. at 3.

[236] However in Eckmann v. Board of Education of Hawthorn School District No. 17, 636 F. Supp. 1214 (N.D. Ill. 1986), a federal court upheld a teacher who was discharged for her out-of-wedlock pregnancy.

[237] Wishart v. McDonald, 367 F. Supp. 530 521 (D. Mass. 1973).

[238] Id. at 535.

Many courts have held that social or sexual misconduct by teachers must be open and notorious to be used as grounds for dismissal. In Fisher v. Synder[239] a teacher who allowed her son's male and female friends to stay overnight at her apartment was dismissed. Noting that no evidence was presented by the board concerning any adverse community reactions concerning Fisher, the court concluded that "idle speculation certainly does not provide a basis in fact for the board's conclusory inference."[240] However, the Eighth Circuit upheld the dismissal of an unmarried female teacher who lived with a male friend.[241] The court held that the teacher's lifestyle created a significant adverse educational effect on the school community.

Courts have expressed a wide range of interpretations concerning the homosexual or bisexual teacher. Some courts have upheld board of education for dismissing teachers on the knowledge of their sexual preferences.[242] Other courts have suggested that the mere acknowledgment of homosexuality or bisexuality is not sufficient for

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[239]476 F. 2d 375 (8th Cir. 1973).

[240]Id. at 377.

[241]Sullivan v. Meade Independent School District No. 101, 530 F. 2d 799 (8th Cir. 1976). However in Thompson v. Southwest School District, 483 F. Supp. 1170 (W.D. Mo. 1980), a federal district court prevented the dismissal of a teacher who had lived with a man without wedlock.

[242]Gaylord v. Tacoma School District. No. 10, 559 P. 2d 1340 (Wash. 1977), cert. denied, 434 U.S. 879 (1977), also Rowland v. Mad River Local School District, 730 F. 2d 444 (6th Cir. 1984), cert. denied, 105 S. Ct. 1373 (1985).

dismissal. Sexual misconduct that results in criminal convictions has generally be held sufficient for dismissal.

Summary

The freedoms of public school teachers to express themselves, though not absolute, is protected by the first amendment as long as their expressions meet certain criteria. First, their speech must be addressed to matters of public concern. Second, the speech or expression must not be such that it would create a barrier to the smooth operation of the school. Third, public criticisms by teachers of their superordinates must not be made unless based on substantiated facts. Fourth, teachers may conduct their classes as they see fit as long as their classroom speech takes into account the age, sophistication and cultural background of their students. The classroom is not the place for a teacher to expound on his or her personal religious, social, political or sexual beliefs. Finally, teachers may conduct their personal lives as they please as long as their conduct does not create barriers to the educational process.

CHAPTER IV

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

Introduction

The purpose of this study was to examine 42 U.S.C. Section 1983 and to determine how it protects public school teachers in the exercise of their first amendment rights. The study was accomplished by both reviewing the creation of the Act and analyzing state and federal court decisions involving public school teachers that claimed abridgment of the Act through their free speech rights. The study was delimited to examining only litigation involving Section 1983 where public school teachers charged an abridgment of their free speech rights. It was further delimited by treating only cases decided from Pickering v. Board of Education[243] through December 31, 1986. A variety of sources were used to reveal cases based on these delimitations.

Cases based on Section 1983 that involved allegations of free speech violations were analyzed and interpreted to answer the six research questions presented in Chapter I. The research questions were as follows:

1. To what extent does Section 1983 protect teachers in areas of private and public verbal and written criticisms of a superordiante?

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[243] 391 U.S. 563 (1968).

2. To what extent does Section 1983 protect teachers with regards to academic freedom to speak on controversial issues in the classroom?
3. To what extent does Section 1983 protect the rights of teachers to regulate their dress and appearance?
4. To what extent does Section 1983 protect teachers that engage in political and union activity?
5. To what extent are public school teachers protected by Section 1983 in their social lifestyle including their sexual preference?
6. What remedies are available to teachers whose rights have been abridged by their superordinates?

Findings

Findings concerning the six research questions are based on state and federal court decisions

Verbal and Written Cirticisms of a Superordinate

1. Courts have upheld verbal and written criticisms by teachers concerning a superordinate provided that the criticisms addressed matters of public concern and were not outweighed by the state's interest as employer in promoting the efficient operation of the school.

2. To determine the first amendment protections of criticisms of superordinates, courts considered the need for harmony in the workplace, the time, manner and forum used in presenting the speech,

the degree of public interest involved in the speech, and the context in which the criticism was presented.

3. Courts held that teachers, by holding a special place in the fabric of American society, have somewhat less freedom to publically criticize a superordinate than do members of other professions.

4. The rights of teachers to engage in public discussion or debate concerning issues of public interest lessened once decisions are reached by the administration.

5. Teachers enjoy no first amendment protection when their speech is on issues that are not of public concern.

6. Teachers must first prove that their speech was protected by first amendment guarantees and the speech was a substantial and motivating factor in their adverse employment decision. Following that, their employers must then show that they would have reached the same employment decision regardless of the protected speech.

7. Teachers' private verbal and written communications enjoy the same protections as public communications.

8. Teachers who made threats against their superordinates were not protected by the first amendment.

9. Teachers were not protected when they used their classrooms to make personal attacks on the school administration.

Academic Freedom

1. Courts have held that the first amendment does not grant teachers the license of unlimited speech in the classroom.

2. Courts have considered aspects such as the age and maturity of the students, the values generally accepted by the community, the relevancy of the speech to educational objectives and the manner by which information is presented to determine if speech was protected.

3. Courts have rejected the idea that teachers have the right to determine the content of the school's instructional program.

4. Teachers may not omit aspects of the curriculum they object to under the guise of academic freedom.

Teacher Dress and Appearance

1. Courts have held that dress and appearance of teachers have limited protections under the first amendment.

2. School authorities may place restrictions on the personal appearance of teachers provided there is a rational basis for the regulation.

3. The school administration has an interest in regulating the appearance and dress of teachers to help promote traditional values and respect for authority among students.

Political and Union Activity

1. The rights of teachers to participate in political and union activities are protected provided that the state has no compelling interest in limiting these activities.

2. The participation by teachers in political or organizational activities outside the classroom are protected provided their actions do not disrupt job performance, aggravate professional relationships or are expressed in an antagonistic manner.

3. The rights of teachers to engage in union activity are protected provided that personal grievances are not expressed, grievances are not expressed at school, and administrative policies are not questioned after a reasonable time for debate.

4. Teachers may not use the classroom as a forum for political or union purposes.

Social Lifestyle

1. Courts have held that teachers have a right of privacy concerning their personal life choices including marriage and procreation.

2. Courts have upheld boards of education in dismissing teachers whose sexual misconduct resulted in criminal convictions or who engaged in sexual activity with their students.

4. Courts have expressed a wide range of interpretations concerning the homosexual or bisexual teacher. In some areas the mere knowledge of a homosexual or bisexual preference has been sufficient grounds for dismissal while in other areas the teacher's sexual activity must be public and notorious to suffice for dismissal.

Remedies Available for Section 1983 Violations

1. Courts have held that only nominal damages were available under Section 1983 to teachers who failed to prove a significant financial, professional or emotional loss.

2. Compensatory damages were awarded to teachers under Section 1983 to compensate them for their monetary loss. Compensatory damages were also awarded to teachers for their mental or emotional distress. They were also awarded to teachers who suffered professionally due to violations of their first amendment rights.

3. Punitive or exemplary damages were awarded to teachers under Section 1983.

4. Reinstatement to a former teaching position was usually awarded to the teacher that prevailed based on Section 1983 actions.

Conclusions

Based upon the analysis of the data the following conclusions regarding the limits of protected speech under Section 1983 are listed below.

1. Teachers enjoy basically the same degree of freedom of speech as do other citizens. The Supreme Court has noted that neither teachers nor their students shed their constitutional rights on the school house steps. The state, through the administration of a school system, has an interest in promoting the efficient operation of the school.

2. Teachers may comment, either publicly or privately, on matters of public concern as long as their speech is not solely a personal attack on the school system or its superordinates.

3. The speech of teachers in the classroom is protected as long as it contains potential educational value, is relevant to the instructional goals of the school, and takes into consideration the age and maturity of students and community values.

4. The personal appearance of teachers has limited first amendment protection. A school system has a right to place restrictions on the personal appearance of teachers provided there is a rational basis for the restrictions such as helping promote traditional values and respect for authority among students.

5. The private lives of teachers including their political or organizational activity, living arrangements and sexual preferences are protected provided their conduct is not hostile to the welfare of the school community.

6. When teachers have suffered negative employment considerations due to the exercise of protected speech, they may receive both compensatory and punitive damages from their superordinates.

Recommendations for Educators

Teachers, as all citizens, enjoy the basic rights provided through the Constitution and federal laws. These rights include the first amendment guarantee of freedom of speech. These rights are not absolute and are dependent on the public or private nature of the

speech, the degree to which the speech is based on public or private criticisms, and the extent to which the state has a contervailing interest in limiting the speech of teachers to ensure the smooth operations of the public school. Based on these findings and conclusions the following recommendations are made.

1. Boards of education, superintendents, principals and board attorneys should become knowledgeable concerning the rights of teachers in exercising their first amendment rights under 42 U.S.C. Section 1983.

2. Teachers should educate themselves through college and graduate courses, through reading court decisions based on Section 1983 and through professional organizations, such as NOLPE, concerning the limits of protected speech.

3. School districts should have written policies concerning the limits of speech freedoms including areas associated with speech, such as teacher dress, symbolic speech, and academic freedom.

4. Efforts should continue for teachers and their superordinates to keep abreast of future court decisions concerning the restrictions on speech of public school teachers.

Recommendations for Further Study

1. After the passage of a number of years, this study should be replicated.

2. A study should be undertaken of the free speech rights of public school students.

3. A study should be undertaken of the judicial effect of negative statements made by superordinates of their employees.

4. A study should be undertaken of the legal effect of administrative comments on teacher performance instruments.

5. A study should be undertaken to ascertain the knowledge of administrators concerning the degree of freedom of speech for teachers.

6. A study should be undertaken to compare the free speech rights of teachers with the rights of students and administrators.

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