

## **A Darwin Skeptic in Court**

### **The Case of a Very Incompetent Judge: Nicholas J. Walinski**

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#### **Introduction**

After I was openly terminated by Bowling Green State University (BGSU) due to my doubts about Darwinism, the National Education Association evaluated my case and concluded that I had been deprived of required due process and was terminated for illegal reasons, namely religion. They then took the case to court. The district court case was presided over by Judge Nicholas J. Walinski of Toledo, Ohio. To help evaluate his decision of the case, it is very useful to determine just what kind of man this “Judge Walinski” was.

As I will document in detail, his poor judgment, as well as his odd behavior in court, can be partly explained by the fact that the judge was an alcoholic during the time when my case was on trial. According to Kevin Wirth, an observer at the trial, he did not appear to be sober on the bench. Wirth added “My recollection of his demeanor was that he was frequently sluggish and slow to respond to many questions, and almost seemed to fall asleep. At other times he seemed not to be paying attention and on other occasions during the trial seemed to be easily confused over simple matters. I also distinctly recall that he sported a nose that was redder than Rudolph’s.”<sup>1</sup> My review verifies this assessment: at the time of my trial Judge Walinski was determined by the court to be an alcoholic.

#### **Judge Walinski Convicted of Drunk Driving**

Shortly after my trial, on Friday, May 31, 1985, the 64 year old judge was found guilty by Judge Allen Andrews in Toledo, Ohio Municipal Court for driving while intoxicated (DWI) and running a red light – his second drunken driving conviction in just fifteen months.<sup>2</sup> The charges, *The Toledo Blade* reported, stemmed from a two-car injury accident that occurred near

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<sup>1</sup> E-mail from Kevin Wirth to Jerry Bergman dated November 30, 2008.

Judge Walinski's West Toledo home. In lieu of a long jail term, Judge Walinski was ordered by Judge Andrews to complete a twenty-eight day detoxification program and an alcohol rehabilitation program at Hazelden, a well-known alcohol treatment center.<sup>3</sup>

For the DWI, Walinski was fined four hundred dollars, ordered to pay court costs, and his driver's license was suspended for five years. Judge Andrews suspended the fifty-dollar fine and court costs on the red light violation. Walinski was also sentenced to three days in the Toledo House of Corrections, and was fined five hundred dollars plus court costs.

Walinski had previously lost his drivers license for sixty days after a January 1984 drunk driving conviction. That charge also resulted from an accident, this time on Anthony-Wayne Trail in Toledo, Ohio. Eric Nicely, Director of the Toledo Hospital Alcoholism Treatment Center, testified in court that it was his professional opinion that Judge Walinski was an alcoholic and had misused alcohol for a long time.

Walinski at this time sought what is called Senior Status—a position in which he is paid his full salary but does not have to work a full case load—an honor that was later granted. In my judgment, this honor openly rewarded his illegal criminal behavior. It was also clear that Walinski was intoxicated while on the stand during my trial because he repeatedly made illogical and nonsensical statements, such as referring to the jury when, in fact, there was no jury.

### **The Judge Fixes a Ticket**

Judge Walinski's 17-year old son, Nicholas III, was killed in a motorcycle accident in 1980.<sup>4</sup> One of the officers who responded to the accident call personally told me that the younger Walinski was drunk at the time and had been in previous trouble with the law for driving drunk on his motorcycle, obviously suicidal behavior. Young Walinski was previously ticketed for DUI, which was, the officer informed me, fixed by Judge Walinski. As evidence, he showed me a copy of the ticket that he wrote. The officer believed that if the first drunk driving ticket had not been fixed, Walinski's son might still be alive today.

This is all ironic in that the Judge knew I was not a drinker. He knew this because I claimed a hostile work environment at BGSU in the court case he presided over, testifying that "I

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<sup>2</sup> Anonymous. "Judge Walinski Ordered to Enter Treatment Center." *The Toledo Blade*, June 1, 1985 p. 17.

<sup>3</sup> Reedus, Glenn. "Hazelden Called a Leading Center for Alcoholism." *The Toledo Blade*, June, 1, 1985 p. 17.

<sup>4</sup> Clyde Hughes. "Friends and Family Unite in Tribute to Judge Walinski." *Toledo Blade*, December 26, 1992, p. 8.

felt [my colleagues] had no right to criticize my religious beliefs” such as my decision to abstain from drinking alcoholic beverages.<sup>5</sup> Actually one of the first problems that I encountered at BGSU was my abstention from alcohol, and the fact that my colleagues felt that I did not fit in because of my personal decision in this area.

### **Judge Walinski was not Aware in Court**

Aside from referring to the non-existent jury, Walinski repeatedly made mistakes that indicated to me that he was out-of-touch during the trial. A typical situation when the judge was obviously not aware of what was going on in the courtroom was when he stated that “a great deal of testimony was had about his [Dr Bergman] stressing explicit sexual matters that students complained about.”<sup>6</sup> In fact, one will not find this claim in the entire court transcript, nor in any claim made against me by BGSU. It is entirely a figment of the judge’s imagination as shown by the testimony from Dr. Reed, the Chair of my department:

**Attorney:** You said, also, that there was a concern over a survey he was conducting. What was the concern and what was the survey?

**Dr. Reed:** That concern, as I remember, did not come out of faculty, it came out of the secretaries that were typing the survey for him, which was very explicit sexually ...

**Attorney:** Did you call that concern to the attention of Dr. Bergman?

**Dr. Reed:** I am not sure that was a concern, really. Secretaries are there typing that type of material and, obviously, it is going to attract their attention and discussion is going to initiate between secretaries—look what Jerry is doing in his class--

**Attorney:** You can assume if you didn’t pursue it with Jerry, or investigate the matter, you were satisfied there was some legitimate educational reason for the document being in your office and having the secretaries type it?

**Dr. Reed:** He was collecting some data, and I considered the use of his undergraduate classes appropriate for that.<sup>7</sup>

Another example involved Dr. Davidson, who alleged that I claimed a reason given for my tenure denial was because of the way I dressed. Davidson falsely claimed, in contrast to the facts, that no one was actually claiming this, and thus, he inferred, it was irresponsible for me to make this claim. The court responded to Dr. Davidson’s claim as follows, “Excuse me, Mr.

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<sup>5</sup> *Gerald Bergman, Ph.D. vs. Bowling Green State University et. al.*, Case No. 86-3031 Court Transcript, p. 43, here after Transcript.

<sup>6</sup> Transcript p. 938.

<sup>7</sup> Transcript pp. 305-306.

Latanick, [another example of his being out of touch with reality—Walinski meant to say “Dr. Davidson”] we’ve had a lot of talk about how Dr. Bergman dressed. What was wrong with the way he dressed?” Obviously the judge totally misunderstood Dr. Davidson’s comment as referring a reason why *he* objected to my being tenured when Davidson was only claiming that *I* made this claim. In fact, Davidson was wrong—my department chair, Dr. Reed, stated both in writing and in court that I was non-renewed due to “personal appearance.”

One has to wonder just how mentally aware Walinski was during the trial. Yet another example of many where the judge was not listening is obvious in the following exchange:

**Mr. Mattimoe:** And the document you submitted under Miscellaneous No. 83-109, you also submitted.

**Dr. Bergman:** Could I confer with my Counsel?

**Mr. Mattimoe:** It is up to the Judge.

**Judge Walinski:** What?

**Dr. Bergman:** Could I confer with my Counsel?<sup>8</sup>

Next to this exchange on my copy of the transcript when I reviewed it shortly after the trial I wrote “he was not listening,” as he obviously was not aware what was going on in his own courtroom.

Among the many other examples that demonstrate the judge was often not aware of what was going on was his statement “I just thought he said he was *not* at any meetings” in response to the question, “What was discussed at the tenure meeting?” He said this right after Dr. Campbell had just testified that he *was* at my tenure meeting.<sup>9</sup>

Some statements made by the judge were incredible, such as, “If I hear anything more about tenure I’m going to kill myself.”<sup>10</sup> If this was said by a witness on the stand, a judge would seriously question his sanity. The judge’s attitude about the case was stunningly clear before the trial was over when he rudely shot back at my attorney, David Latanick, who was trying to explain the rules of academia stating “I am getting an education in academia, but I would rather not get educated, and I’d rather get rid of the [Dr. Bergman] case. All right?”<sup>11</sup> This is grossly improper behavior coming from a judge who is supposed to be impartial.

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<sup>8</sup> Transcript p. 204.

<sup>9</sup> Transcript pp 442, 437.

<sup>10</sup> This statement was made in between court sessions, thus was not recorded on the official transcript as were the other statements in this paper.

<sup>11</sup> Transcript p. 743.

Walinski was found dead in his home on Christmas Eve 1992 at the age of 72—no doubt in part due to his heavy drinking.<sup>12</sup> His death certificate gave the time of death as 1:00 AM December 24, 1992 and the cause of death as acute myocardial infarction. A well known risk factor for heart attacks is heavy drinking.

My religion was also very much on trial. I was reared as a pacifist, and violation of this rule would have resulted in my strict excommunication, meaning I could no longer associate with most of my friends as well as my family. Yet in court, questions were asked about my Selective Service classification, such as whether I filed for C.O. status.<sup>13</sup> What do my religious beliefs on war have to do with my position as a university professor? I am convinced that this line of questioning by the university's attorney John Mattimoe was designed to produce bias against me.

Mattimoe, as the judge noted, appeared before his court numerous times: "Mr. Mattimoe and I tried a lot of cases together, and Mike Scalzo is the son of a very close friend of mine—we used to office together when I was practicing law."<sup>14</sup> He thus knew the judge's background and military views. Judge Walinski spent "37 years with the U.S. Navy . . ." and his strong interest in the Navy was reflected elsewhere.<sup>15</sup> As noted, the university's attorney John Mattimoe knew the Judge on a personal basis and, I was informed by a law clerk and other sources that, in violation of legal ethics, Mattimoe actually met with the judge in an attempt to influence him to rule against me. Many of the comments he made during the course of my trial and in his ruling support this conclusion.

### **Judge Walinski's Competence**

The major means of proving discrimination is unequal application of academic standards, or disparate treatment. In other words, everyone must be treated alike, and if not, then

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<sup>12</sup> Clyde Hughes. "Friends and Family Unite in Tribute to Judge Walinski." *Toledo Blade*, December 26, 1992, p. 8.

<sup>13</sup> Transcript p. 230.

<sup>14</sup> Transcript p. 928.

<sup>15</sup> Transcript pp. 895, 903-904.

discrimination is likely. The courts have ruled that to

prove in Title VII [42 U.S.C.A. § 2000e et seq.] disparate treatment case that employer's proffered motive for its action is not worthy of belief, evidence of a comparative sort is appropriate; if others were hired or promoted though by same reasoning they ought to have been excluded, then the motive is a "pretext" for discrimination. *Civil Rights Act of 1964*, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq. In a Title VII [42 U.S.C.A. § 2000e et seq.] disparate treatment case alleging discrimination in tenure, comparison evidence is appropriate (although)... such comparisons may be more difficult in ... academic employment decisions...they (are still often)... essential to a determination of discrimination. *Civil Rights Act of 1964*, §701 et sez., as amended, 42 U.S.C.A. § 2000e et seq.<sup>16</sup>

This requires comparisons of the person denied tenure with other faculty granted tenure (a school cannot claim inadequate teaching if the person alleging discrimination had teaching evaluations similar or better than those of non-protected faculty who *were* granted tenure) or if standards traditionally viewed as important would have “strongly suggested a different result.” No comparisons whatsoever on the appropriate criteria were made in court or elsewhere between myself and other faculty members, and all efforts to do so were successfully blocked by Judge Walinski. Jim Davidson, for example, who was granted tenure about the same time I was denied tenure had no publications, less than excellent student ratings and, at best, an average record of service.<sup>17</sup>

My performance must be compared with the performance of other recently tenured faculty members in the same department, as required in cases on sex and race discrimination. This approach is the required standard<sup>18</sup> yet the court seemed unaware that religious discrimination is proved primarily by comparative data, as is evident by comments from Walinski such as “I think we are going too far afield with *what they did with somebody else*. We are talking about Gerald Bergman.”<sup>19</sup> To prove disparate treatment, requires making comparisons as to how similarly situated persons not in the protected class of the claimant were

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<sup>16</sup> *Namenwirth v. U. of Wisconsin* 769 F.2d 1235 (1985).

<sup>17</sup> Transcript p. 777.

<sup>18</sup> *Cussler v. U. of Maryland* 430 F.Supp 602 (1977).

<sup>19</sup> Transcript p. 735.

treated.<sup>20</sup>

Discrimination can be determined only if performance is compared and/or evidence of “inadequate evaluation procedures and provisions for due process, the failure to state reasons for nonreappointment, or the statement of vague reasons” exist.<sup>21</sup> The court refused to enforce these standards in my case, even though race or sex discrimination are proved by focusing on these very factors. Yet the judge refused to allow any comparisons, the only way to prove discrimination.

### **Summary**

That Judge Walinski was clearly not competent nor often very alert during the trial is shown by the few examples given here. He was diagnosed as an alcoholic who displayed some bizarre behavior on the bench, once even openly stated that he did not care to become educated about the case before him but would rather get rid of the case.<sup>22</sup> The judge’s bias was also stunningly clear as is obvious from the statement: “I’d rather get rid of the [Dr. Bergman] case. All right?”<sup>23</sup> This is grossly improper behavior for a judge who must, as a matter of law, be impartial. This judge had no business being on the bench and for this reason was removed soon after my case was tried.

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<sup>20</sup> *Moze v. Jeffboat* 746 F.2d 365; 1984.

<sup>21</sup> American Association of University Professors *Policy Documents & Reports*. Washington, DC. 1984. p. 78-79.

<sup>22</sup> Transcript p. 743

<sup>23</sup> Transcript p. 743.