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Annual Legal Update

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Annual Legal Update[1]

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I. Introduction

Much of the litigation in higher education during the last year continued to focus on employee speech. Whether speech in the classroom, speech related to college and university governance, or research related speech, faculty members saw continuing aggressive challenges to what they are allowed to say publicly or email privately. Many of the cases included in this outline follow up on information provided at this conference over the past two years as cases make their way through the legal system. This outline also contains information on new speech cases filed and a brief look at how state "open records" laws are being used to target faculty members' communications concerning their scholarship and research. In addition, this outline includes cases and information touching on such issues as affirmative action, employment discrimination, intellectual property rights, state collective bargaining laws, and other miscellaneous areas of interest for those in higher education.

II. First Amendment and Speech Rights for Faculty and other Academic Professionals

Free speech in U.S. academia has been challenged since the Supreme Court decision in *Garcetti v. Ceballos*. Faculty members and academic professionals should have the right to freely express themselves, both in the classroom and externally, because they play an important role in providing necessary criticism, insight, and invention in society.

The AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* outlines three fundamental freedoms of faculty: (1) the freedom to research and publish; (2) the freedom

[1]This outline is an illustrative, not exhaustive, list of higher education cases of interest to this audience that have come out over approximately the past twelve months. It is intended to provide general information, not binding legal guidance. If you have a legal inquiry, you should consult an attorney in your state who can advise you on your specific situation.

to discuss their subject in the classroom; and (3) the freedom to speak as citizens, members of the learned profession, and officers of an educational institution.

> The 1940 Statement declares:
> "College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution."

The freedom to speak as citizens is also recognized in the AAUP's *Statement on Extramural Utterances* and the *Statement on Professors and Political Activity*. Recent court decisions, however, have tended towards stifling academic free speech and in discouraging open discussion of matters of public concern.

THE CONTROLLING CASE

Garcetti v. Ceballos, 547 U.S. 410 (2006).

In 2006, the United States Supreme Court ruled that a public employee does not receive First Amendment protection when speech is made pursuant to his or her official duties. This ruling has drastically changed employer-employee relations in the public service sector, as well as the legal landscape related to employee speech rights.

Despite positive language by the Supreme Court majority recognizing that academic speech may need to be treated differently, this case has served as a wake-up call for public employees and faculty members at public institutions in the wake of lower courts' interpretations of *Garcetti*.

Richard Ceballos, a district attorney in California, was demoted and transferred after he wrote a memorandum to his supervisors, criticizing certain practices by the sheriff's department. Ceballos subsequently sued his supervisors, arguing that they had retaliated against him for writing the memorandum and violated his First Amendment right to free speech. After a trial court dismissed Ceballos' claim, ruling that his memorandum was not protected speech because it was written as part of his employment duties, the Ninth Circuit overturned the decision, ruling that First Amendment protections did apply.

On appeal, the Supreme Court reversed the circuit court and held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The Court reasoned that public employers must have the ability to restrict the speech of their employees in order for public institutions to operate efficiently and effectively.

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In its decision, the Supreme Court did acknowledge a concern over how this decision might pertain to academic speech, noting that "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." The majority in *Garcetti* thereby suggested that its employee-speech analysis may not apply to academic settings.

Unfortunately, many lower courts have ignored the apparent academic carve-out and have used *Garcetti* to limit academic freedom and faculty speech rights in higher education. The misuse of *Garcetti* in the courts poses a serious risk to academic freedom and may have far reaching effects on faculty members and academic professionals who teach.

A. Speech Related to Scholarship and Promotion

1. *Adams v. Trs. Of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011)

In this case, Michael Adams, a tenured associate professor in criminology at the University of North Carolina-Wilmington, sued the university, claiming viewpoint discrimination in violation of his First Amendment rights. Specifically, Adams claimed that his application for promotion to full professor was denied because of his public criticism of the university and his politically conservative scholarship.

According to Adams, at the time he started at UNC-Wilmington he was an atheist with liberal political beliefs. Over time, Adams had a change of heart and became a self-described Christian conservative. Problems surfaced between Adams and his colleagues when Adams criticized his colleagues via email for questioning job candidates about their political views and expressing "anti-religious sentiments during the interview process." Adams authored various publications which criticized other members of the faculty and the administration at the university and also began writing a column for a website that showcased his conservative religious beliefs.

In July 2006, Adams formally applied for promotion to full professor. Adams' department ultimately voted 7-2 against recommending promotion; the chair adopted the vote and denied Adams' application, which ended the process. In a letter to Adams, the chair said the decision was based upon Adams' thin record of productivity, his undistinguished teaching, and his insufficient record of service to the university and the profession.

In his lawsuit filed in federal court, Adams based his free speech claims on his columns, publications, and presentations – many of which criticized UNC-Wilmington administrators or staff; others addressed controversial issues and incorporated Adams' conservative views. Adams had either referred to these materials in his promotion packet or explicitly included them in the packet. Citing *Garcetti*, the district court characterized the inclusion of these materials as an "implicit acknowledgement that they were expressions made pursuant to his professional duties – that he was acting as a faculty member when he said them," and, their inclusion thus "marked his speech, at least for promotion purposes, as made pursuant to his official duties." The court made no inquiry as to whether these promotion materials would also constitute the kind of "speech

related to scholarship or teaching" that the *Garcetti* majority indicated might not be governed by its "official duties" analysis.

On appeal, the Fourth Circuit overturned the district court decision and held that *Garcetti* contains a clear reservation of the application of its analysis to academic speech at a public university. The court pointed out that the Supreme Court explicitly left open the question of whether the "official duties" analysis applies where issues of "scholarship or teaching" are in play. The circuit court reasoned that "[a]pplying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment." Choosing to recognize the particular characteristics of a professor's appointment, the court noted that "Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields."

The Fourth Circuit also concluded that "Adams' speech was clearly that of a citizen speaking on a matter of public concern." Such speech is explicitly protected by the First Amendment, and the court rejected the district court's reasoning that Adams' speech should not receive First Amendment protection because he included his publications in his promotion packet. The circuit court held that the district court's decision that protected speech was converted into unprotected speech was an error as a matter of law.

The AAUP filed an amicus brief in support of Professor Adams in this case and is pleased with the court's ruling. It is unclear whether the university will choose to appeal this case to the Supreme Court.

B. Speech Related to University Governance and Administrative Matters

1. *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012)

In this case, Scott Savage, the head reference librarian at Ohio State University at Mansfield, appealed a federal district court ruling, dismissing his claim that his First Amendment rights had been violated and that he was constructively discharged because of his speech. The district court decision appeared to take the view that all speech made as a member of a faculty governance committee would be unprotected under the "official duties" analysis of *Garcetti*.

In 2006, Savage served on a committee choosing a book to assign to all incoming freshman. His suggestion, *The Marketing of Evil* – a book that the Ohio district court found contained "a chapter discussing homosexuality as aberrant human behavior that has gained general acceptance under the guise of political correctness" – led to considerable controversy among campus faculty. Several gay faculty members filed sexual harassment complaints with the university against Savage, and Savage filed his own complaints of harassment against several faculty members. After the university rejected both sides' charges, Savage resigned and then sued, claiming he had been retaliated against in violation of the First Amendment.

The court held that Savage's book recommendation was made "pursuant to his official duties" in serving on the committee, and therefore was not protected speech under *Garcetti*. The

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court decided that "it [made] no difference that [Savage] was not strictly required to serve on the committee." Although noting that several other decisions from the same district court had recognized *Garcetti*'s academic freedom reservation, the court held that Savage's speech did not fall within this category: "The recommendation was made pursuant to an assignment to a faculty committee… [and], without exceptional circumstances, such activities cannot be classified as 'scholarship or teaching.'"

Savage appealed this decision to the Sixth Circuit Court of Appeals. On January 4, 2012, the Sixth Circuit upheld the district court's decision, ruling that Savage's speech was not protected by the First Amendment because it was made pursuant to his official duties as a member of the committee charged with choosing the book assignment. The court further stated that it believed Savage's speech was also not protected by the First Amendment because it was "only loosely, if at all, related to academic scholarship," as mentioned in the Supreme Court's *Garcetti* decision.

2. *Capeheart v. Hahs*, 2011 U.S. Dist. LEXIS 14363 (N.D. Ill. Feb. 14, 2011), *sub nom. Capeheart v. Terrell*, No. 11-1473 (7th Cir. argued Dec. 8, 2011).

Professor Loretta Capeheart has held a position at Northeastern Illinois University (NEIU) since September of 2002 and was awarded tenure in April of 2006. Capeheart teaches and researches social inequality and social change issues in the university's Department of Justice Studies, focusing on the incarceration of Latinos. Capeheart is also the faculty advisor for a student organization called the Socialist Club, which has distributed leaflets opposing efforts by the military to recruit students at campus job fairs.

In 2007, Professor Capeheart and two students protested the presence of CIA recruiters at the university's job fair. The two students were arrested by campus police. Capeheart advocated on behalf of those specific students with several administrators at the university and she sent several emails about the arrests to the campus community. Capeheart also asked the Vice President of Student Affairs about the arrests, and at a NEIU Faculty Council for Students Affairs meeting she criticized the university's use of campus police against peaceful student protesters. In addition, Capeheart spoke out at a campus event featuring the Provost and blamed excessive administrative spending for budget problems that she claimed led to a low number of Latino faculty. Shortly after these events, members of the Justice Studies Department faculty elected Capeheart to be their department chair. The NEIU Provost, however, disregarded the faculty vote and refused to appoint Capeheart to the position.

Capeheart sued the university, alleging that the Provost retaliated against her for speaking up at the faculty council meeting and for advocating on behalf of the arrested students. Relying on *Garcetti*, the district court ruled that Capeheart's statements concerning military recruitment and the arrest of the students were not protected by the First Amendment. The district court stated that "the speech at issue was made pursuant to Capeheart's professional responsibilities." The district court further refused to recognize an exception to *Garcetti* for faculty at public institutions, saying that "since *Garcetti*, courts have routinely held that even the speech of faculty members of public universities is not protected when made pursuant to their professional duties." The district court concluded, therefore, that "Capeheart's speech regarding military and CIA

recruiting on campus and the university's treatment of student protesters is not protected under the First Amendment."

This case has been appealed to the Seventh Circuit, and the AAUP filed an amicus brief in the case. The AAUP's amicus brief in support of Capeheart argues that "the district court arrived at [its] distressing resolution of Professor Capeheart's First Amendment claim by misapplying Garcetti's "official duties" analysis and disregarding the express limits of Garcetti's holding," and urges the appellate court to overturn the district court's holding. The intent of AAUP's brief is to highlight the academic freedom and First Amendment issues implicated by the case and to shine a light on the District Court's harmful and incorrect decision. The filed brief emphasizes that "the message of the district court's ruling is chilling and clear: university administrators need not tolerate outspoken faculty dissent on matters of broad public concern or on the university's institutional response to those concerns."

3. *Demers v. Austin*, 2011 U.S. Dist. LEXIS 60481 (E.D. Wash. June 2, 2011), *appeal docketed*, *Demers v. Austin*, No. 11-35558 (9th Cir. July 1, 2011).

Professor David Demers became a faculty member at Washington State University in 1996 and he obtained tenure in 1999. Demers taught journalism and mass communications studies at the university in the Edward R. Murrow School of Communication. Demers sued the university, alleging that it had retaliated against him for openly criticizing university practices.

Specifically, Demers disagreed with certain practices and policies of the School of Communication. Starting in 2008, Demers began to voice his criticism of the college and authored two publications called *7-Step Plan for Improving the Quality of the Edward R. Murrow School of Communication* and *The Ivory Tower of Babel*. Demers claimed that the university retaliated against him by lowering his rating in his annual performance evaluations and subjected him to an unwarranted internal audit in response to his open criticisms of administration decisions and because of his publications.

The district court dismissed Demers' First Amendment claim, stating, primarily, that Demers made his comments in connection with his duties as a faculty member. Unlike most cases involving free speech infringement at public universities, the district court's analysis did not center on the language from *Garcetti.* Instead, the court started its analysis by using a five part test set out by the Ninth Circuit in a series of public employee speech cases.[2] After applying this analysis, the district court found that Demers was not speaking as a private citizen on matters of public concern, and, therefore, his speech was not protected by the First Amendment.

[2]The following inquiry is made to determine whether an employee's First Amendment rights have been violated: "(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech."

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The district court did briefly mention *Garcetti*, but only used it to state that the "First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." The court then went on to apply a broad interpretation of a faculty member's "official duties" while not considering whether its interpretation is practically applicable to academic settings. The court explicitly stated that a faculty member's duties range widely and include academic, administrative, and personnel functions. The court further explained that speech regarding internal matters of the university is not of public concern, even though the college is a public institution.

Demers has appealed the district court's decision to the Ninth Circuit and the AAUP, jointly with The Thomas Jefferson Center for the Protection of Free Expression, filed an amicus brief, arguing that Demers' speech was related to his scholarship and other academic concerns. The AAUP believes that if the district court's decision is allowed to stand, "it would have a chilling effect on research, innovation, and discourse within a public university – a place whose primary purpose is the development of knowledge through discussion, debate and inquiry."

4. *Sadid v. Idaho State University*, 265 P.3d 1144 (Idaho 2011), *motion to stay denied*, *Sadid v. Idaho State Univ.*, 2012 U.S. Dist. LEXIS 32985 (D. Idaho Mar. 12, 2012).

In 2001, Civil Engineering Professor Habib Sadid published a letter to faculty and administrators, criticizing Idaho State University's plan to merge two colleges, including the College of Engineering. Several years later, he spoke to a state newspaper about the plan. Sadid claimed that in retaliation for his comments, he did not receive faculty evaluations, was not appointed to a chair position, was defamed in an email, and received the lowest possible salary increase. He, therefore, believed that his First Amendment rights had been violated and sued the university in state court.

Invoking the decision in *Hong v. Grant*, the Idaho state trial court concluded that Sadid's letters related to his personal grievances, rather than to a matter of public concern. In addition, relying primarily on cases that arose outside of the academic context, the court reasoned that "government employers need a significant degree of control over their employees' words and actions." The court, therefore, disagreed with Sadid's assertion that because his job description did not include writing letters to the newspaper critiquing the ISU administration, he was writing as a private citizen rather than as a public employee. The court decided that the "tone" of Sadid's letters "is that of an employee of ISU" and added that Sadid "should understand that he has limitations of his speech that he accepted when becoming a state employee." Finally, the court noted that Sadid had identified himself as an ISU employee in the published letters. The court concluded that, "due to the tone and language of the letter," Sadid was speaking as an employee and not as a private citizen and his comments were therefore not protected by the First Amendment.

Professor Sadid appealed the trial court's decision to the Supreme Court of Idaho, and the AAUP and the Thomas Jefferson Center for the Protection of Free Expression filed an amicus brief in support of Sadid. On November 30, 2011, the Idaho Supreme Court upheld the trial court's dismissal of Sadid's case, but rejected the trial court's First Amendment analysis. The Supreme Court concluded that the trial court erred in finding that Sadid's speech was made pursuant to his official duties and that the speech did not address a matter of public concern. The

Supreme Court specifically found that there was "no evidence showing that Plaintiff's official duties included making statements on behalf of the University regarding the subject matter of his letters, nor is there evidence that his employment responsibilities included creating the statements that were published in the newspaper." The court, therefore, concluded that Sadid's speech was made as a private citizen. The court further ruled that Sadid's expressions of unease about the University's treatment of the engineering program was a matter of public concern. As such, Sadid's speech deserved to be protected by the First Amendment.

Unfortunately, the Idaho Supreme Court ultimately ruled that the trial court correctly dismissed Sadid's case because he had failed to prove that the University took any adverse employment actions against him. Professor Sadid is currently pursuing his First Amendment and Due Process claims in the federal courts.

C. Extramural Speech

1. *Wagner v. Jones*, 664 F.3d 259 (8th Cir. 2012)

In this case, Teresa Wagner applied to become a Legal Analysis, Writing and Research (LAWR) instructor at Iowa University College of Law. After failing to be hired as a fill-time instructor and also as an adjunct by the school, Wagner sued the law school's dean, Carolyn Jones, in her official and individual capacities, for violating Wagner's First Amendment right of political association.

Wagner had graduated from Iowa University College of Law in 1993 and moved to Washington, DC shortly thereafter. A self-proclaimed social conservative and registered Republican, Wagner worked with the National Right to Life Committee and the Family Research Council while in Washington. She also taught legal research and writing at George Mason University School of Law for two years. Upon moving back to Iowa, Wagner applied to become an LAWR instructor with the law school and was one of only three candidates interviewed in-person for two open instructor positions. Although receiving significant positive feedback throughout the process, Wagner states that she was told by an Associate Dean to conceal the fact that she had been offered a tenure-track position with the Ave Maria School of Law because it is viewed as a conservative school. Wagner alleges that the faculty voted not to hire her for the instructor position and subsequent adjunct positions over a two year period because of her conservative political beliefs and association.

The district court for the Southern District of Iowa summarily dismissed Wagner's case, finding, primarily, that Dean Jones was reasonable in "accepting the faculty recommendation" and that a "vague message from Assistant Dean Carlson would surely not have" prompted Jones to believe "that a First Amendment…right had been implicated, let alone violated."

Wagner appealed the district court's decision to the Eight Circuit Court of Appeals which overruled the district court and remanded the case for further proceedings. The Eight Circuit's decision states that Wagner "need only prove that the employer's discriminatory motive played *a part* in" the decision not to hire her. The court also expressed that Dean Jones had a responsibility to ensure that the faculty "did not impermissibly consider Wagner's politics in

https://thekeep.eiu.edu/jcba/vol0/iss7/29
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making its recommendation as to whom she should hire…" Therefore, because the facts of the case as alleged should be viewed in a light most favorable to Wagner, the Eight Circuit ruled that the case should be remanded back to the district court for further proceedings to determine whether or not Jones violated Wagner's First Amendment rights by not hiring her as an instructor or as an adjunct.

2. *Heublein v. Wefald, et al*., 784 F. Supp. 2d 1186 (KS 2011).

John Heublein, a tenured professor of mathematics at Kansas State University – Salina, sued the university and several of his colleagues, alleging a number of violations of his protected rights, including his First Amendment free speech rights. Heublein filed his lawsuit after he had been investigated because of a student's complaint of sexual harassment. The student's allegations against Heublein included that he had made "sarcastic remarks" and "jokes about women" in her class. During the course of its investigation, the university received reports from students and administrators that Heublein had "engaged in discourteous behavior towards students and faculty for many years." At the conclusion of the university's investigation, the university ordered Heublein to develop a corrective action plan (CAP), submit student evaluations, seek counseling, and refrain from teaching summer school until the CAP requirement was fulfilled. In response, Heublein filed an internal grievance and subsequently filed this lawsuit when the University ruled against him.

The district court dismissed all of Heublein's claims, finding that he failed to provide sufficient evidence to support them. What is most significant about the court's decision, however, is how the court analyzed Heublein's free speech claims. Since Heublein alleged violations of two types of speech – in class and out of class speech – the district court proposed that each type of speech should be evaluated under a different test. The court indicated that it believes the Tenth Circuit has developed a test for in-class speech, in the case of *Miles v. Denver Public School*, which applies to college and university professors and provides greater protection of speech than *Garcetti*.[3] For Heublein's out of class speech, the district court stated that it would need to apply the *Garcetti* test.

In analyzing Heublein's in-class speech claim, the court noted that the key inquiry of the *Miles* test is "whether the actions taken by the college were reasonably related to [its] legitimate pedagogical interest." The court found that the university's action of mandating a CAP for Heublein was "rationally related to its legitimate interest in the professionalism or conduct exhibited by its professors," and therefore Heublein's claim of retaliation for his in-class speech failed. In analyzing Heublein's out of class speech claim, which primarily related to his interactions with fellow faculty members and administrators, the court found that it did not meet the second prong of the *Garcetti* test in that it related to an internal personnel dispute or working conditions, as opposed to matters of public concern.

[3] *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991) – This case involved a high school teacher who claimed that his school had violated his first amendment rights by taking action against him for comments he made in his classroom.

3. *Appel v. Spiridon*, 463 F. Supp. 2d 255 (D. Conn. 2006), *rev'd*, 531 F.3d 138 (2d Cir. 2008), *sum. judgment granted/denied in part*, 2011 U.S. Dist. LEXIS 92363 (D. Conn. Aug. 18, 2011).

This long-litigated and complex case involves numerous court decisions over a six-year period. In summary, shortly after Rosalie Appel, a tenured professor of art at Western Connecticut State University (WCSU), cooperated in the investigation of a colleague's claim of race discrimination, the university's full-time art faculty signed a petition describing Appel's behavior as "unprofessional," "disruptive," and "accusatory." A Special Assessment Committee (SAC) reviewed Appel's behavior and recommended that she be given an "in-depth psychological assessment" before the next academic semester. Appel refused to undergo the assessment and filed suit against four university administrators, alleging that the administrators' conduct violated the First Amendment and the Equal Protection Clause of the Constitution. The administration notified her that she would be suspended without pay or benefits and banned from teaching if she declined to undergo the assessment; before the suspension took effect, Appel asked the court to prevent WCSU from requiring her to undergo the assessment.

In November 2006, the federal district court in Connecticut issued an injunction prohibiting WCSU from requiring Appel to undergo a psychiatric exam in order to maintain her salary, benefits, or teaching position. The court noted that no other WCSU faculty member had ever been ordered to undergo a psychiatric exam in order to keep teaching and receiving pay and benefits. The court also determined that Appel may have been treated differently from other professors and that she was not given a chance to change her behavior before being required to undergo an evaluation. This decision did not, however, affect other aspects of the remediation plan developed by the SAC, and Appel was informed that she could return to work as long as she complied with the other provisions of the plan.

Appel returned to teaching during the spring semester of 2007, but issues between Appel and the university "rapidly escalated…and resulted in her eventual termination" in the spring of 2008. Prior to being terminated, Appel filed a second lawsuit against the university and various administrators, alleging that they violated her First Amendment speech rights and due process rights by imposing progressive discipline against her and by ordering her to submit to a psychiatric assessment in retaliation for her testimony in support of her colleague's race discrimination claims. After combining the multiple lawsuits, the district court has now ruled in relevant part that Appel's claims for First Amendment retaliation and due process may proceed forward with respect to some, but not all, of the administrators involved in the SAC development and enforcement. Most importantly, the court ruled that Appel's testimony in support of her colleague's racial discrimination case was speech made as a private citizen on a matter of public concern, and she should therefore be protected against retaliation by the First Amendment.

4. *Van Heerden v. Bd. of Sup. of La State Univ.*, 2011 U.S. Dist. LEXIS 121414 (M.D. La. Oct. 20, 2011).

Ivor van Heerden, a coastal geologist and hurricane researcher, began his full-time faculty service at Louisiana State University (LSU) in 1992, when he was appointed as associate professor-research. Van Heerden co-founded the LSU Hurricane Center in 2000 and was serving

https://thekeep.eiu.edu/jcba/vol0/iss7/29
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as its deputy director when Hurricane Katrina hit the Gulf Coast in August 2005. Following the storm, van Heerden was selected to head a group of scientists charged with investigating the causes of the extensive flooding in New Orleans. As a result of his research, van Heerden began speaking out publicly about his concerns that the U.S. Army Corps of Engineers had failed to properly engineer the levees in New Orleans, causing a "catastrophic structural failure" which led to the city's flooding.

In response to these comments, which they challenged, the LSU administration ordered van Heerden to stop making public statements and ultimately removed him from the group of scientists researching the New Orleans flooding. In May 2006, van Heerden published *The Storm* in which he outlined his theories concerning the Army Corps' role in the levee failures and exposed LSU's efforts at silencing him. LSU responded by further stripping him of his teaching duties and finally refused to renew his contract after nearly 20 years of employment with the university. Following the termination of his services, van Heerden sued LSU for a variety of claims including defamation, retaliation based on his protected First Amendment speech, and breach of contract.

Through a series of decisions, the federal district court for the Middle District of Louisiana dismissed many of van Heerden's claims, but on October 20, 2011, the court ruled that van Heerden could proceed with arguing that the administration's action to terminate his appointment was in retaliation for his public comments about the culpability of the Army Corps of Engineers. It is especially important to note that the court expressed particular concern about what it viewed as the misapplication of *Garcetti's* principles to academic speech. Specifically, the court stated that it "shares Justice Souter's concern that wholesale application of the *Garcetti* analysis to the type of facts presented here could lead to a whittling-away of academics' ability to delve into issues or express opinions that are unpopular, uncomfortable or unorthodox. Allowing an institution devoted to teaching and research to discipline the whole of the academy for their failure to adhere to the tenets established by university administrators will in time do much more harm than good."

D. Other Significant First Amendment Cases (not higher education related)

1. *Snyder v. Phelps*, 131 S.Ct. 1207 (2011)

The year's discussion on free speech case law would not be complete without a discussion of *Synder v. Phelps*. This extraordinarily controversial case received extensive media coverage and spurred heated debate and intense emotions. In this case, the Supreme Court was asked to decide whether the First Amendment protects public protestors at a funeral from tort liability.

On March 10, 2006, members of the Westboro Baptist Church picketed the funeral of U.S. Marine Lance Corporal Matthew A. Snyder, who was killed in a non-combat-related vehicle accident in Iraq. The protestors held up signs opposing homosexuals and deploring the "sinful atmosphere" they allege is promoted by the United States government. Matthew Snyder's father sued the church and the protestors, claiming intentional infliction of emotional distress.

Since the protestors had complied with local ordinances applicable to public protests, their First Amendment defense claim was the only issue the courts considered.

A jury awarded Snyder $10.9 million for the intentional infliction of emotional distress claim. Although reducing the award to $5 million, the federal District Court of Maryland upheld the jury's decision, applying a balancing test in considering the First Amendment rights of the Westboro Baptist Church and the interest of Maryland in protecting its citizens against mental injury. The district court concluded that, while signs stating general points of view such as "Don't Pray for the USA" receive First Amendment protection, signs such as "You are going to Hell" specifically aimed at Matthew Snyder and his family created issues of fact for a jury to decide.

The Fourth Circuit Court reversed the lower court's decision holding that it was not the jury's role to decide if the signs received constitutional protection. As a matter of law, Westboro Baptist Church's speech was entitled to protection. This position was affirmed by the Supreme Court who concluded that the church spoke on matters of public concern, and, therefore, its speech was protected by the First Amendment. In the 8-1 decision, the Supreme Court stated that "[w]hile these messages [referring to the church member's signs] may fall short of refined social or political commentary, the issues they highlight – the political and moral conduct of the United States and its citizens… – are matters of public import." The Court went on to note that the fact that the speech occurred at a private funeral did not change how the speech is viewed. The Westboro Baptist Church and its protesting members were afforded "'special protection' under the First Amendment and that protection cannot be overcome by a jury finding that the picketing was outrageous."

The Court concluded with the following words: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and – as it did here – inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate."

III. FOIA/Subpoenas and Academic Freedom

Over the last 18 months, FIOA requests have been rejuvenated as a method for targeting faculty who engage in "controversial" scholarship or research. While this method for obtaining information has a legitimate reason for its existence, certain groups and individuals have been using FIOA requests to intimidate faculty members and deter them from criticizing public policy or conducting research on heated issues. In addition, the power of government subpoenas has been focused on academic research. The Attorney General of Virginia has used his position to pursue his anti-climate change agenda, and the British government has used an international treatise to seek confidential research related to the conflict in Northern Ireland.

The AAUP has taken an active public stance encouraging universities to limit their disclosure of academic information to what may be legally necessary and only if the requests for information are made for justifiable reasons. The AAUP advocates for seeking a balance between the public's right to know information and the protection of the academic freedom of those in higher education.

https://thekeep.eiu.edu/jcba/vol0/iss7/29
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1. *Rector & Visitors of the Univ. of Va. v. Cuccinelli*, 80 Va. Cir. 657 (Va. Cir. Ct. 2010); *aff'd, sub nom. Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 2012 Va. LEXIS 47 (Va. Mar. 2, 2012)

In 2010, Virginia Attorney General Ken Cuccinelli, who publicly opposes the theory of global warming, used his position to formally request emails and other documents relating to former faculty member and climatologist Michael Mann from the University of Virginia (UVA). Cuccinelli submitted the subpoena under authority he believed he held pursuant to the Virginia Fraud Against Taxpayers Act (FATA). On August 30, 2010, a local Virginia judge ruled that while the Virginia Attorney General could investigate state grants awarded to scientists, Cuccinelli and his staff failed to demonstrate that such an investigation was warranted in this case.

Cuccinelli appealed the trial court's decision to the Supreme Court of Virginia, and the University of Virginia cross-appealed on the grounds that the trial court erred in concluding that the university constitutes a "person" under the FATA and is therefore subject to a subpoena under the act. In conjunction with the ACLU of Virginia, the Union of Concerned Scientists, and the Thomas Jefferson Center for the Protection of Free Expression, the AAUP filed an amicus brief in the Supreme Court of Virginia opposing the subpoena.[4] The brief argued, among other things, that Cuccinelli's request was a cloaked attack on academic freedom and raised the concern that if Cuccinelli's request was granted without any basis for suspicion of fraud, it may open the door for future fraud investigations to be directed solely at novel or unpopular scientific theories. The brief pointed out that under the FATA statute, Cuccinelli must have a basis to believe that Mann committed fraud or that his emails while working at UVA would reveal evidence to support a concern of fraud. It also noted that courts have recognized that doubts about the validity of scientific work are not equivalent to fraud. The brief advocated that the Virginia Supreme Court consider First Amendment concerns in determining whether the information sought is sufficiently relevant to a false claims law investigation. Academic freedom has been recognized by many courts as an important part of the First Amendment, and the court should weigh requiring UVA to comply with the subpoena against the importance of protecting academic freedom.

On March 2, 2012, the Supreme Court of Virginia held that state universities, as agencies of the Commonwealth, do not constitute a "person" under the FATA and therefore are not subject to subpoenas. Because the FATA does not give the Attorney General authority to issue subpoenas to state universities, Cuccinelli's appeal was rendered moot.

Further fighting over Professor Mann's records continues; see the short summary below regarding the FOI request made to UVA by the American Tradition Institute.

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[4] *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, Virginia Supreme Court Case No.:102359, Brief for *Amici Curiae* American Association of University Professors, American Civil Liberties Union of Virginia, Union of Concerned Scientists, and Thomas Jefferson Center for the Protection of Free Expression in Support of Affirmance, 4/25/2011; (http://www.aaup.org/NR/rdonlyres/D6CE857A-68C7-432A-BAA2-1F2D1AF1811D/0/AmicusbrieftoVASupremeCourtApril252011.pdf- last accessed 3/21/2012)

2. *IN RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Matters of Criminal Matters in the Matter of Dolours Price,* U.S. M. D. Case No.: 11-MC-91078 (Boston College Subpoena)

In May 2011, Boston College received a federal subpoena for oral-history materials held in its John J. Burns Library. The subpoena was issued on behalf of the British government based on the Mutual Legal Assistance Treaty (MLAT), which allows signing members to assist each other in international criminal investigations without going through diplomatic channels. The materials sought included interviews of people who participated in the Northern Ireland conflict.

Between 2001 and 2006, scholars at the college recorded detailed interviews with former loyalist and republican paramilitary members who fought in Northern Ireland; this project is known formally as the Belfast Project. In order to make the interviewees in this project feel safe (which was necessary to get their cooperation), the researchers promised the interviewees anonymity until the interviewees' death.

Boston College complied with the subpoena for documents relating to Brendan Hughes, who is deceased, as doing so did not conflict with the confidentiality agreements. However, the college asked the United States District Court in Boston to quash the subpoena as to records pertaining to the other still living interviewees on the grounds that release of the information could threaten the safety of interviewees, the continuing peace process in Northern Ireland, and the future of oral history.[5] Boston College also argued that this type of forced disclosure could have a detrimental impact on academic freedom. A major concern is that a lack of protection for interviewees in this type of oral-history project would greatly discourage people from giving future interviews about any controversial topic.

The Justice Department filed a response to the motion to quash, dismissing academic freedom as a legally meaningless "quasi-privilege" and saying the college had offered "no claim of a cognizable federal privilege."[6] The principal interviewers in the project, Ed Moloney and Anthony MacIntyre, together filed a motion to intervene in the case to protect the confidentiality of past and future contributors to the Belfast Project as well as their own safety.

In this case of first impression in the First Circuit, the district court rendered an opinion in December 2011, holding that it had discretion to review a motion to quash a subpoena issued pursuant to an MLAT request under a reasonableness standard. The court also ruled that "the compelling government interests inherent in an MLAT request" suggests that such a request

[5] *IN RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Matters of Criminal Matters in the Matter of Dolours Price,* U.S. M. D. Case No.: 11-MC-91078, Motion of Trustees of Boston College to Quash Subpoenas, 6/7/2011; (http://chronicle.com/items/biz/pdf/ecf_mad_uscourts_gov_doc1_09514330434.pdf - last accessed 3/6/2012).

[6] *IN RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Matters of Criminal Matters in the Matter of Dolours Price,* U.S. M. D. Case No.: 11-MC-91078, Government's Opposition to Motion to Quash and Motion for an Order to Compel, 7/1/2011; (http://www.scribd.com/doc/59191594/Government-s-Opposition-to-Motion-to-Quash-and-Motion-to-Compel-7-1-11 - last accessed 3/6/2012).

https://thekeep.eiu.edu/jcba/vol0/iss7/29
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should "receive deference similar to grand jury subpoenae." The district court then found that while the First Circuit had previously recognized a protection of confidentiality for "academicians engaged in pre-publication research... commensurate to that which the law provides for journalists," it had not decided that such protection is a legal privilege.

The court looked at balancing the government's need for the requested information against the potential harm to the free flow of information. The court ultimately concluded that the government's interest in complying with its treaty obligations as well as the public's interest in legitimate criminal proceedings outweighed Boston College's claims of confidentiality. Despite "credit[ing] Boston College and the Burns Library's attempts to ensure the long term confidentiality of the Belfast project, as well as the potential chilling effects [of enforcing the subpoena] on academic research," the court rejected Boston College's motion to quash but did grant the college's request for in-camera review. The court also concluded that Ed Moloney and Anthony McIntyre's interests were adequately represented by Boston College and denied their motion to intervene.

Within days of this decision, the court conducted its review of thirteen interview transcripts. Following this review, the court issued an order requiring Boston College to turn over the original materials to the federal government and provided that copies of the materials would be made and returned to the library archives. Boston College and Moloney and McIntyre filed respective appeals with the First Circuit and requested a stay of the production of the records pending these appeals, which the district court has granted. The ACLU has filed an amicus brief in support of Moloney and McIntyre, whose case is set for oral argument in April. The Boston College appeal may be heard in June.[7] The AAUP strongly supports the position taken by Boston College.[8]

3. FOI requests in Michigan, Wisconsin, and Virginia

Over the course of spring of 2011, a number of public universities in three states faced Freedom of Information (FOI) or public records requests. In Michigan, a conservative think tank called Mackinac Center for Public Policy submitted FOI requests to public universities, seeking emails sent by employees working at the universities' centers on labor research.[9] Specifically, the FIO requested production of emails containing the words "Madison," "Wisconsin," "Scott Walker" (Wisconsin's governor), or "Maddow" in reference to MSNBC talk show host Rachel Maddow, who reported on the controversy affecting Wisconsin unions. The requests were intended to find evidence that professors had violated a Michigan law barring state employees from using state-funded resources, like their work email, for partisan political purposes.

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[7] http://bostoncollegesubpoena.wordpress.com/

[8] "Oral History ,Unprotected", Scott Jaschik, *Inside Higher Ed (7/5/2011)* (http://www.insidehighered.com/news/2011/07/05/federal_government_questions_confidentiality_of_oral_history - last accessed 3/6/2012)

[9] "Michigan Think Tank Asks 3 Universities for Labor Professors' Emails." Peter Schmidt, *The Chronicle*, (3/29/2011) (http://chronicle.com/article/Michigan-Think-Tank-Asks-3/126922/ - last accessed 3/6/2012)

In Wisconsin, the state Republican Party filed a FOI request with the University of Wisconsin at Madison, seeking emails containing a wide range of terms, including the word "Republican," sent by Professor William Cronon a history professor.[10] Legal counsel for the university wrote a letter in response to the request, noting the overly broad reach and vagueness of the request. The letter explained that the university would not provide the Republican Party with emails that were obviously irrelevant. For example, the request asked for all emails that contained the word "union" but the university did not provide emails that referred to the "European Union" or "Memorial Union." Also, the university stated that it would take into account privacy and other statutory considerations when limiting which materials it would handover and it would balance the public's right to know against academic freedom considerations. The university explained that "[s]cholars and scientists pursue knowledge by way of open intellectual exchange. Without a zone of privacy within which to conduct and protect their work, scholars would not be able to produce new knowledge or make life-enhancing discoveries." The letter further remarked that "[h]aving every exchange of ideas subject to public exposure puts academic freedom in peril and threatens the processes by which knowledge is created."

Finally, the American Tradition Institute served a FOI request on the University of Virginia, mirroring the subpoena filed by Attorney General Cuccinelli. Unfortunately, UVA first agreed to release the requested materials by the middle of August 2012 per court order.[11] In its public statements, the university acknowledged that some of the materials are protected by statutory exemptions and that while the ATI would receive those documents, ATI was prohibited from revealing the contents unless given permission by the court. Subsequent to this decision and public announcement, the university appealed the court order requiring production. Professor Michael Mann sought to intervene in the appeal arguing that the emails in question were his and he therefore should have standing in any litigation relevant to their release. The AAUP submitted a letter to the 35th Judicial Circuit Court of Virginia in support of Mann's intervention, and the court has granted him standing. The appellate court is now considering whether ATI is entitled to see the documents even if protected from disclosure to others.

The AAUP and other interested parties, such as the ACLU and the Union of Concerned Scientists, have sent letters to the relevant institutions, expressing concerns about the impact that these requests could have on academic freedom.[12] The AAUP has applauded the response of the University of Wisconsin at Madison and has urged the other universities to use caution when considering the information requests, warning that releasing emails from professors speaking their minds would produce a chilling effect on the free exchange of ideas in the academic setting.

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[10]"Wisconsin GOP Seeks Emails of a Madison Professor Who Criticized the Governor," Peter Schmidt, *The Chronicle* (3/25/2011) (http://chronicle.com/article/Wisconsin-GOP-Seeks-Emails-of/126911/ - last accessed 3/6/2012)

[11]"Court orders U.Va. to turn over climate scientist records under seal in denialist FOIA harassment request," Climate Science Watch (5/26/2011) (http://www.climatesciencewatch.org/2011/05/26/court-orders-uvirgini-to-turn-over-climate-scientist-records-under-seal-in-denialist-foia-harassment-request/ - last accessed 3/6/2012)

[12]See: http://www.aaup.org/NR/rdonlyres/12187ECD-37AB-4938-8305-17086A59BDA1/0/LettertoUVAApril142011.pdf (last accessed 3/6/2012)

https://thekeep.eiu.edu/jcba/vol0/iss7/29
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IV. Tenure and Due Process

A. Tenure – Breach of Contract

Several tenure cases this year hinged upon the issue of whether faculty handbooks are contracts and to what extent do the provisions of the handbook bind the college or university regarding tenure review processes.

1. *Howard University v. Sybil Roberts-Williams*, --- A.3d ----, 2012 WL 573161 (D.C.)

Professor Sybil Roberts-Williams was hired as a temporary lecturer by Howard University in the Department of Theatre Arts in 1993. In 1998, she assumed a tenure-track position as a probationary instructor. Roberts-Williams was promoted to assistant professor in 2001 and applied for tenure on October 15, 2004. At the direction of the Chairperson of her department's Appointment, Promotion, and Tenure Committee (APT), Roberts-Williams submitted a revised application in November 2004.

Robert-Williams was notified that her application had been rejected by the APT Committee in mid-November and she formally requested reconsideration of her application at that time. On December 16, 2004, Roberts-Williams was notified in writing that the APT Committee denied her application for tenure and recommended that she be granted a special appointment for the 2005-2006 academic year which would be her "terminal" appointment. In its explanatory letter, the APT Committee noted that her application for tenure had been denied due to her lack of publication, some student comments regarding "confusion" about her methodology, and concerns about her "collegiality" due to her limited support for departmental productions other than her own.

After she received her final tenure denial from the university provost in December 2005, Professor Roberts-Williams sued the university in state court, alleging violations of the District of Columbia Human Rights Act (DCHRA) as well as breach of contract. After an eight day trial, the jury rejected Roberts-Williams' DCHRA claims entirely, but ruled in her favor regarding her breach of contract claim. Specifically, the jury found that the university had violated the faculty handbook provisions requiring biennial evaluations of all faculty members (Roberts-Williams had not received any) and that the university had not followed the proper procedure in its handbook for tenure denial reconsideration. The trial court subsequently denied a post-verdict motion by the university and upheld the jury's award of $250,060 for loss of "back pay" and $332,340 for loss of "future pay."

Howard University and Professor Roberts-Williams cross-appealed the jury's award, and the trial court's decisions on various issues to the District of Columbia Court of Appeals. On February 23, 2012, the appeals court upheld the trial court's decision and jury award in Roberts-Williams' favor. In the decision's most relevant part, the court agreed with the trial court that the faculty handbook was a contract that required the university to conduct biennial evaluations. The fact that individual faculty members could seek guidance from their peers or colleagues with

greater experience did not abdicate the university's affirmative responsibility to conduct those required evaluations which could assist faculty in their development for obtaining tenure.

Since the appeals court's decision did not disturb the jury's damages award, it did not address the merits of Professor Roberts-Williams cross-appeal.

2. *Rafalko v. University of New Haven, et al.*, 129 Conn. App. 44, 19 A.3d 215 (2011)

Professor Rafalko, an associate professor in the University of New Haven's department of visual and performing arts and philosophy, sued the university for breach of contract, breach of covenant of good faith and fair dealing, and negligent misrepresentation after he was denied tenure. Rafalko also sued the university and his department chair for defamation in connection with a letter his chair wrote to the tenure and promotion review committee and which Rafalko claimed diminished the value of his academic work-product. The Appellate Court of Connecticut upheld the trial court's dismissal of all of Rafalko's claims on the grounds that he did not present sufficient evidence to support them.

As the primary basis for his first three claims, Rafalko argued that the faculty handbook required his department chair to give him annual reviews to assist him in obtaining tenure, but that his chair failed to do so in the years 1999-2003. The university contended that it denied Rafalko tenure due to his failure to publish an adequate number of scholarly works and that Rafalko did not receive the annual reviews because he failed to timely prepare a self-evaluation, which was the first to step to initiate the annual review process. In affirming the trial court's summary judgment dismissal, the appellate court reiterated the Connecticut supreme court's position that a faculty handbook that "sets forth terms of employment may be considered a binding employment contract," but also concluded that the evidence "unequivocally" showed that Rafalko knew of the publication requirements for tenure and that the annual reviews would not have provided him any additional information on that requirement. Therefore, the court ruled that the lack of annual reviews was not material to Rafalko's claims.

On the issue of defamation, the appellate court found that Rafalko had failed to present evidence of false statements within his chair's letter to the tenure and promotion committee. The court agreed with the trial court's reasoning that the department chair was entitled to his opinion of Rafalko's publications and reiterated that a defendant cannot be held liable for expressing a mere opinion, no matter how "unreasonable the opinion or vituperous the expressing of it may be." The appellate court also concurred with the trial court's reasoning that "[t]o deem such an opinion as defamatory would have the court cross the bounds of academic freedoms that are protected under the *first amendment.*"

3. *Whiting v. Univ. of S. Miss.*, 62 So. 3d 907 (Miss. 2011)

Professor Melissa Whiting, an assistant professor in USM's Department of Curriculum, Instruction and Special Education in the College of Education and Psychology, sued the university after being denied tenure and having her contract "nonrenewed." Whiting sued the university, claiming that she was denied due process under the Fourteenth Amendment because the Board of Trustees of the university refused to rule timely on her application and did not grant her tenure. Whiting also claimed the University violated their contractual obligations by not giving her a fair hearing.

https://thekeep.eiu.edu/jcba/vol0/iss7/29
DOI: 10.58188/1941-8043.1069

A federal district court and the Fifth Circuit both ruled against Whiting regarding her constitutional claims. The Fifth Circuit found that Whiting had failed to meet her burden of showing that she was deprived of constitutionally protected property and liberty interests. The only remaining issues to be resolved were Whiting's claims under state law. Among the many issues involved, the Mississippi Supreme Court considered whether the expectation of tenure creates a property interest for professors and whether a faculty manual provides a contractually guaranteed right to due process for public universities. The faculty handbook of the school provides tenure process and states that "these procedures collectively constitute contractual due process."

In short, the Mississippi Supreme Court ruled against Whiting, finding that under state law and Fifth Circuit precedent no contract was formed between the university and Whiting. The court further ruled that written policies of employers do not, "of themselves, create or confer an expectation of continued employment." The court, therefore, reasoned that the university had not violated Whiting's due process rights as guaranteed by the Mississippi Constitution because she had no "legitimate expectation of employment…that creates a protected interest."

B. Due Process

Two different federal circuit courts looked at whether Due Process protections are implicated regarding the status of Department Chair. In each case, the courts ruled against the faculty member terminated from the position and in favor of the institution taking the action, but for different reasons. Of particular interest is the Eighth Circuit's determination that a faculty member did not have a property interest in his position as Department Chair.

1. *Collins v. University of New Hampshire*, 664 F.3d 8 (1st Cir. 2011)

In the summer of 2007, while tenured Professor John Collins was the Chair of the Department of Biochemistry and Molecular Biology, he was arrested and charged with stalking and disorderly conduct after "unleashing an expletive-filled tirade against a colleague whom he suspected of causing him to receive a parking ticket." Collins self-reported his conduct, observed by multiple witnesses, to the Dean of the College of Life Sciences and Agriculture (COLSA) at approximately the same time as it was reported to the campus police by one of the witnesses. The day after the incident, Collins was arrested by campus police and subsequently banned from campus, placed on paid administrative leave, and suspended as chair.

After being cleared of all charges in December 2007, Collins was reinstated to his tenured faculty position at the university, but he was not returned as chair of the department. Collins subsequently sued the university and several administrators alleging that his due process rights had been violated because the university failed to provide him with a pre-deprivation hearing before he was suspended, banned from campus, and removed as chair of the department. Collins also alleged that the university and the administrators had defamed him when it emailed notification to faculty and staff that he had been banned from campus.

The district court dismissed the case for several reasons. First, the court found that the University had not violated Collins' due process rights in that he was not entitled to a pre-suspension hearing because he was suspended with pay. Second, the court ruled that even if he

had an enforceable liberty interest in access to campus, Collins was not deprived of such interest because the ban was temporary, associated with his suspension, and subject to exceptions that included allowing him access onto campus several times over the fall semester for activities related to his children. Third, the district court found that Collins had not been improperly deprived of his property interest in the position of chair because the university had accorded him adequate due process after his initial suspension, including multiple meetings with the Provost and an opportunity to respond in writing to all of the decisions related to his arrest. Finally, the district court found that the university's email notification to faculty and staff was not defamation because it was substantially true given Collins' actions and statements.

Collins appealed the district court's decision to the First Circuit Court of Appeals which upheld the district court's dismissal of the case, ruling that Collins had been provided with adequate notice and process to respond to his suspension with pay, campus ban, and removal from the position of chair during the two month period following the initial suspension. The court also found that the university acted lawfully and without malice in notifying faculty and staff about Collins' ban from campus and therefore were not liable for defamation.

2. *Mulvenon v. Greenwood*, 643 F.3d 653 (8th Cir. 2011)

Tenured professor Sean Mulvenon sued the University of Arkansas, alleging that his rights under the Fourteenth Amendment were violated when his chaired position was not extended, despite the fact that the university has a procedure for renewing the contract. The Eighth Circuit held that a professor does not hold a property right to a chaired position even if there is a set procedure for renewing a faculty member's position.

Mulvenon had a contract with the university that granted him a five year position as holder of the George M. and Boyce W. Billingsley Chair for Education Research and Policy Studies. According to his contract, if Mulvenon showed interest in renewing his contract, a review committee of faculty members external to the University of Arkansas would evaluate his performance and provide recommendations to the department head and the dean. The Reappointment Guidelines stated that the department head and the dean would make the final decision regarding the reappointment. Despite the fact that his recommendation letters were all favorable, the dean decided to not renew Mulvenon's contract, contending that Mulvenon had not fulfilled the expectations of the position (the department head excused himself from the evaluation process).

Mulvenon argued that his appointment letter, which indicated a process for renewing his contract, created a property interest in the position protected by federal due process. Mulvenon further argued that this expectation of a property interest in the position is supported by the detailed Reappointment Guidelines. The Eighth Circuit rejected Mulvenon's arguments, finding that his appointment letter did not create a valid property interested in his reappointment to the position and that he could not "rely on the procedures governing his possible reappointment to create a property interest where none otherwise existed." The circuit court, therefore, concluded that the university had not violated his due process rights under the Fourteenth Amendment.

V. Discrimination and Affirmative Action

A. Affirmative Action in Admissions

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Last year, two federal circuit courts upheld university admissions programs that, to some extent, considered race as a factor. One of those cases has been appealed to the Supreme Court which has granted certiorari with argument scheduled for the fall.

1. *Fisher v. University of Texas*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 2012 U.S. LEXIS 1652 (U.S. Feb. 21, 2012)

In this case, the Fifth Circuit held that the University of Texas (UT) system's admissions policy which incorporated an affirmative action plan was constitutional. The admission policy was challenged by two Texas residents who were denied undergraduate admission to the University of Texas at Austin. The district court found no legal liability and ruled in favor of the university. The case was then appealed to the Fifth Circuit.

In 1997, the UT system replaced an earlier admissions plan which had explicitly considered race with a "Personal Achievement Index" (PAI). The PAI is produced through a holistic review of applications intended to identify students whose achievements are not accurately reflected by their test scores and grades alone. The PAI includes an evaluation of required written essays and a "personal achievement score" which is made up of factors such as socio-economic status, languages at home, and whether the student lives in a single-parent household. In addition, the state legislature and the university adopted a variety of other initiatives to increase diversity, including scholarship programs, high school outreach and recruitment, and the "Top Ten Percent Law," under which all high school seniors in the top ten percent of their class at the time of application are guaranteed admission to a state university.[13] The top ten percent rule accounts for 92% of the in-state students that are admitted to UT.

The AAUP filed an amicus brief with the Fifth Circuit in support of the UT system. Specifically, the brief focused on the benefits of a diverse student body and pointed out that the University of Texas specifically modeled its admissions policy on a similar policy endorsed by the Supreme Court. The brief also argued that academic freedom depends on the right of universities to freely choose who is admitted to their communities because universities have the educational expertise to design and fulfill their own academic missions.

Relying on the Supreme Court's 2003 decision in *Grutter v. Bollinger*, the Fifth Circuit ruled in favor of the university, pointing out three objectives of promoting diversity among universities in the Texas system: 1) increased perspectives inside and outside the classroom, 2) better preparation to act as professionals, and 3) increased civic engagement.[14] The circuit court

[13] The law was recently been amended to limit the number of freshmen that UT must admit under the law to 75% of its overall freshman class. At the time the plaintiffs applied to UT, however, this change was not yet in effect.

[14]In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Supreme Court upheld the affirmative action admissions policy of the University of Michigan Law School. The law school's admissions policy sought to obtain a "critical mass" of minority students in order to promote a diverse student body. The Supreme Court held that the Equal Protection Clause did not prohibit a university's "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." Under *Grutter*, a university could seek to increase diversity, but only through a holistic, flexible, and individualized program but not via the use of quotas, separate admissions tracks, or a fixed set of points to minority applicants. The *Grutter* court embraced that diversity in educational bodies is a legitimate government interest.

noted that after it previously struck down the university's prior race-based admissions system, minority applications and enrollment plunged, prompting Texas to pass the Top Ten Percent Law.

The Fifth Circuit affirmed that the university has "a compelling interest in obtaining the educational benefits of diversity." The court acknowledged that educational institutions are unique and that courts should review the constitutionality of university admissions methods specifically through an academic prism. The court articulated that universities should be given special deference for two reasons: 1) these decisions are a product of "complex educational judgments in an area that lies primarily within the expertise of the university" and 2) "universities occupy a special place in our constitutional tradition." The court then granted the university deference in this case, stating that it made an "educational judgment that such diversity is essential to its educational mission" because of "its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." The court did caution that while diversity is a legitimate goal, schools may not engage in racial balancing or design admissions policies to achieve a specific percentage of minority students.

The Fifth Circuit's decision has been appealed to the United States Supreme Court which has granted certiorari. The AAUP is now considering submitting an amicus brief to the Supreme Court in support of the UT system's admissions program.

2. *Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich.,* 652 F.3d 607 (6th Cir. 2011)

In this case decided by the Sixth Circuit, the court struck down a voter-initiated amendment to the Michigan Constitution called Proposal 2. The constitutional amendment prohibited the state's public colleges and universities from granting "preferential treatment to [] any individual or group on the basis of race, sex, color, ethnicity, or national origin." The Sixth Circuit held that Proposal 2 was unconstitutional under the Equal Protection Clause of the 14th Amendment to the United States Constitution. Specifically, the court determined that the Equal Protection Clause prohibits the formation of "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."

While courts usually do not interfere with changes in political power made according to neutral principles, such as the creation of voting jurisdictions, they apply a stricter analysis and scrutiny when a law is created with the explicit consideration of race. Indeed, the court noted that "[e]nsuring a fair political process is nowhere more important than in education. Education is the bedrock of equal opportunity and 'the foundation of good citizenship.'" In this instance, Proposal 2 created a situation where proponents of race-conscious admissions practices must not only convince university administrators to adopt and use such policies, but they also must amend the constitution in order for the policies to be legal. Therefore, in analyzing Proposal 2, the court found that the voter-initiated amendment "works as a reallocation of political power or reordering of the political process to place 'special burdens' on racial minorities" in violation of the Equal Protection Clause.

B. Title VII of the Civil Rights Act

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The U.S. Supreme Court handed down several decisions last year that do not necessarily address issues in academia, but still have the potential for affecting faculty and academic professionals in employment cases. In addition to the Supreme Court's decision in *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), which we reported on last year, the Supreme Court also decided the following case concerning Title VII's protection against discrimination.

1. *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011)

In *Staub v. Proctor*, the Supreme Court confirmed that the "Cat's Paw" theory of employer liability applies to some employment discrimination claims. The term "Cat's Paw" is used in employment cases to describe a situation where an employee, without formal authority to alter the terms and conditions of employment of another employee, takes action (such as supplying inaccurate information to a decision-maker) to influence a decision-maker in a manner that results in an adverse employment decision being made. Under this theory, an employee who has been adversely impacted by an employer's decision can prevail in a discrimination suit even if the employer can successfully establish that the actual decision-maker harbored no discriminatory animosity against the employee. The suing employee will prevail if s/he is able to show that the decision-maker's decision was influenced by another employee who did harbor an unlawful discriminatory animosity.

In *Staub*, a hospital employee was a member of the Army Reserve and had to miss work due to military obligations. Staub's immediate supervisors were hostile to his military obligations and placed work requirements upon him that were beyond the policies of the hospital. His supervisor further issued a "corrective action" disciplinary warning against him and then fabricated a report, sent to the hospital's vice president of human resources, that stated Staub had violated this "corrective action." After reviewing his personnel file, the vice president fired Staub in light of his perceived failure to follow directions. Staub sued, claiming the hospital discriminated against him for being a member of the military.

The hospital claimed that the vice president's decision to fire Staub was motivated by the false report and not by Staub's membership in the Army Reserve. The Supreme Court, however, held that the hospital is still liable for unlawful discrimination because the ultimate decision maker's judgment was influenced by the immediate supervisors' animosity towards military personnel. The Court reasoned that even though the vice president of human resources held no grievance against the military, the animosity held by Staub's supervisors was a proximate cause of the vice president's decision because he based his decision on reports written with discriminatory motivation.

C. Age Discrimination

In a recent age discrimination case, a faculty member was not able to prove that he had been discriminated against due to his age, but was able to prove that he had been retaliated against by his institution because he filed a discrimination complaint.

1. *Klebe v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 2011 U.S. App. LEXIS 23182 (5th Cir. 2011).

Professor Robert Klebe, a tenured faculty member in the Department of Cellular and Structural Biology, filed a lawsuit against the University of Texas Health Sciences Center for retaliation after he received negative post-tenure reviews shortly after he filed an age discrimination complaint with the university.

In 1998, the university notified all tenured faculty members in Klebe's department that they would have to secure outside funding for their individual research projects. Klebe objected to this requirement and ultimately failed to secure external funding for his research. As a result, Klebe's salary was reduced by 25%. Less than six months after his salary was reduced, Klebe filed a complaint with the EEOC, alleging that his age was the motivating factor behind the university's actions. Specifically, Klebe alleged that his salary had been reduced in order to fund salaries for younger faculty due to an ongoing budgetary freeze on the funds to hire new faculty. Shortly after filing his age discrimination complaint, Klebe began receiving negative post-tenure review evaluations. In response to all of the above, Klebe filed suit against the university in the U.S. District Court for the Western District of Texas, alleging age discrimination for reducing his salary and retaliation for the negative post-tenure evaluations.

In separate consecutive proceedings, two juries found that while the university had not discriminated against Klebe because of his age, there was sufficient evidence to show that the university would not have given Klebe negative evaluations but for his filing a discrimination complaint. Klebe was awarded $900,000 by the first jury and, after a partial re-trial, a second jury awarded him $400,000. The university appealed those judgments to the Fifth Circuit Court of Appeals where the court upheld the second jury's damage award. In its decision, the court found that there was sufficient evidence to support two juries finding that a causal connection existed between Klebe's discrimination complaint and the negative post-tenure reviews and that there was sufficient evidence of mental anguish to uphold the damages awarded by the second jury.

VI. Intellectual Property

There were many developments this year concerning the legal issues surrounding patent and copyright in academia. Those developments include two significant U.S. Supreme Court decisions and a new federal intellectual property law.

A. Patent and Copyright Cases

1. *Bd. of Trs. v. Roche Molecular Sys.*, 131 S. Ct. 2188 (2011).

Originally filed as a patent infringement lawsuit by Stanford University against Roche Molecular Systems, Inc., this complex case evolved through litigation into a broader battle over the patent rights of faculty members to their inventive work. Specifically, the case ended up centering on the dispute over who owns the patent rights to inventions developed in academia and funded, fully or partially, through federal government grants.

In support of its patent infringement claims, Stanford University asked the Supreme Court to interpret the federal Bayh-Dole Act as automatically taking ownership rights away from inventing faculty members and vesting that ownership interest in the faculty members' college or university whenever federal research funds are involved. Enacted in 1980, the Bayh-Dole Act

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was intended to address concerns about government funding agencies' inability to efficiently transition publicly funded research from development to application for the benefit of society. Thirty years of practice under the Bayh-Dole Act has seen great improvement in moving academic inventions from the research to application phase to enable public use. The act, did not, however, create an automatic assignment or rights as Stanford argued.

Strongly believing that Stanford's interpretation would contradict existing patent law, was counter to the process of patent assignment that has worked successfully under the Bayh-Dole Act during the thirty years of its existence, and would harmfully impact faculty inventors, the AAUP filed a joint amicus brief, written in coordination with the Institute of Electrical and Electronics Engineers (IEEE-USA) and IP Advocate, a non-profit advocacy group. The joint brief endorsed the purpose of the Bayh-Dole Act and argued that it was unnecessary and likely harmful for the law to be reinterpreted to seize ownership rights from faculty researchers. The brief emphasized that the act does not alter the basic ownership rights granted by law to faculty inventors who may then assign rights to their college or university by contract.

In addition, the joint brief strongly rejected an argument made by Stanford and other universities and higher education associations that faculty researchers are employees who have been hired to invent and therefore are not entitled to ownership of the products of their inventive research. As the AAUP's 1915 Declaration of Principles on Academic Freedom and Academic Tenure states, faculty "are the appointees, but not in any proper sense the employees of [the university trustees]." Historically and legally, academic researchers and inventors are, and always have been, much more than mere employees to their institutions. As such, the brief argues, Stanford's attempt to analogize the copyright "work for hire" doctrine fails not only because such a concept does not exist in the Patent Act, but also because faculty are not just employees of the institution.

On June 6, 2011, the Supreme Court, in a 7-2 opinion, held that inventors who create with the aid of federal funding do not automatically give up their patent rights. The Court rejected Stanford's arguments and, instead, chose to follow the plain meaning of the Bayh-Dole Act's terms and emphasized that the Act did not overturn two centuries of patent law which supports the principle that an inventor has a right to retain the patent to his or her invention.

2. *Golan v. Holder*, 132 S. Ct. 873 (2012).

The main issue in this case concerned whether Congress had, through passage of Section 514 of the Uruguay Round Agreements Act, violated the First Amendment's Free Expression Clause by retroactively awarding copyright protection to various foreign works that had previously been in the public domain in the United States.

Section 514 of the Uruguay Round Agreements Act implements Article 18 of the Berne Convention for the Protection of Literary and Artistic Works. Article 18 requires that signatories, which include the United States, provide the same copyright protection to authors in other member countries as it provides to its own authors. Section 514 extended the copyright protection of some foreign works whose copyright protections had not expired in their base country. The result of this provision was to retroactively apply copyright protection to some foreign works that had previously been open for use by anyone in the United States. The ripple effect was felt strongly in academia. Although the plaintiffs in this case represent a wide variety

of organizations and individuals, the named plaintiff is Professor Lawrence Golan from the University of Denver. Golan, an orchestral professor and conductor, often relies on public domain music when teaching his orchestral students and when performing as a conductor with the student orchestra. Golan and the other plaintiffs challenged the constitutionality of the Act, claiming that it violates their First Amendment free expression rights in that it is too broad and unnecessarily undermines their reliance on the previously public domain works. Golan also argued that Congress had exceeded its authority under the Copyright Act when it enacted Section 514 of the Uruguay Round Agreements Act.

The U.S. District Court for the District of Colorado first held that Section 514 of the URAA does not violate the Copyright Clause or the First Amendment. With respect to Golan's First Amendment challenge, the court stated that it saw "no need to expand upon the settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns." The United States Court of Appeals for the Tenth Circuit affirmed the district court's initial decision in part and reversed in part. The court agreed that Section 514 of the URAA does not exceed Congress' authority under the Copyright Clause, but it vacated the district court's First Amendment ruling and remanded for further proceedings. On remand, the district court granted summary judgment for the plaintiffs, holding that Section 514's "constriction of the public domain was not justified by any of the asserted federal interests." On appeal, the Tenth Circuit reversed the district court ruling that Section 514 was "narrowly tailored to fit the important government aim of protecting U.S. copyright holders' interests abroad."

The plaintiffs appealed the Tenth Circuit's decision to the United States Supreme Court. On January 18, 2012, in a 6-2 opinion, the Supreme Court upheld the Tenth Circuit's decision. Specifically, the Court agreed that Congress had not exceeded its authority under the Copyright Clause and that it had not violated the First Amendment by allowing for the copyright restoration authorized by Section 514. The Court emphasized that Section 514 "leaves undisturbed the idea/expression distinction and the fair use defense" which users of "certain foreign works" may continue to use.

The impact of this decision could be significant in higher education. Like Professor Lawrence Golan, many faculty members rely on public domain material for their work. The licensing fees that universities will have to pay in order to use foreign artistic material that was previously in the public domain may be a substantial deterrent to continuing programs that rely on the newly protected material. A likely result will be the stifling of faculty and student creative expression.

B. Legislation

1. *Leahy-Smith America Invents Act*, Public Law 112-29, 124 Stat. 284 (2011)

On September 16, 2011, President Obama signed into law the *Leahy-Smith America Invents Act* (AIA). The published intent of this law is to reduce patent backlog at the U.S. Patent and Trademark Office (USPTO); foster innovation through improved patent quality; and, better harmonize U.S. patent laws with those of other countries.

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Although certain portions of the AIA were effective immediately, most of the provisions will be phased in over the coming year with final implementation occurring in March 2013. The law has the potential to have broad reaching affects to both patent applicants and patent holders. The following summarizes a few of the most significant changes important to the higher education community:

- **First-to-File** – in March 2013, the U.S. will join most other countries in the global community in moving from granting patents in a "first-to-invent" to a "first-to-file" system. Under the existing "first-to-invent" system, deciding whether an invention was new or not obvious involved determining the state of the art at the time the invention was conceived, not at the time the application was filed. Under the AIA's "first-to-file" system, the decision will be based on what is determined to be state of the art when the application is filed. The date of invention will no longer be relevant in determining what is prior art against future applications
    - There is, however, a limited one-year grace period related to public disclosures made by the inventor. Such disclosure evidence could potentially include presentations at an academic conference or the publication of a scholarly article. It remains to be seen how scholarly disclosure will factor into the new patent application process and the granting of rights. There is also the chance that such information could be used to by other researchers to build on the work and file first.
- **Post Grant Review** – There will now be two separate avenues to challenge issued patents. The first process, an "inter partes" review, permits allegations of invalidity over prior art as the basis for a challenge. The second process, a "post-grant" review, permits a patent to be challenged on <u>any</u> ground during the first nine months of the patent's issuance.
- **Filing Fees** – The USPTO will be completely overhauling its fee structure in the coming year. In the meantime, from September 2011 until the new fee structure is in place, virtually all patent fees will carry a 15% surcharge. In addition, certain types of patent applications may receive "Prioritized Review" for an additional fee. This "Prioritized Review" will be granted to a limited number of applications annually.

We anticipate that many institutions will be reviewing and revising their intellectual property and patent filing policies over the next two years as the USPTO develops rules and regulations to implement the new patent system. Considering the implications on both scholarly enterprise and financial remuneration, it is extremely important that faculty be actively involved in the process of reviewing and revising their institutional policies and understanding how their disclosures through scholarly activities may affect their patent rights, both within the U.S. and abroad.

VII. <u>Union/Collective Bargaining Cases and Issues</u>

A. Arbitration

At the same time it partially rejects an arbitrator's decision, the Ohio Court of Appeals rules that there is a high bar to meet in order to overturn an arbitrator's decision.

1. *Kent State Univ. v. Am. Ass'n of Univ. Professors,* 2011 Ohio 5597 (Ohio Ct. App., 2011)

The Kent State Chapter of the AAUP filed grievances on behalf of two faculty members who were denied tenure by the President of Kent State University. Those grievances eventually went before an arbitrator who found in favor of the faculty members and recommended two remedies: 1) that the President "reevaluate" the substantive academic judgment behind his decision to deny tenure to both professors; and 2) that the university provide compensation to the two faculty members "no greater than would have resulted had there been no violation" of the relevant CBA. The university appealed both provisions of the arbitrator's decision to the trial court in Ohio. The trial court affirmed the arbitrator's decision, and the university appealed the trial court's decision to the Court of Appeals of Ohio.

The Court of Appeals of Ohio stated that "[a]n arbitrator is the final judge of law and facts… [and] that judicial intervention should be resisted even where the arbitrator has made "serious" "improvident" or "silly" errors." Using this standard, the appellate court partially upheld and partially rejected the arbitrator's decision in this case. First, the court held that the trial court did not err in finding that the arbitrator's decision was correct as to the interpretation of the procedures set forth in the CBA regarding the President's denial tenure. Specifically, the appellate court ruled that the arbitrator could reasonably conclude that the relevant CBA provision required the President to provide detailed reasons for declining to accept [an internal appeals committee] recommendation to grant tenure. Therefore, the arbitrator's ruling that the President be required to "reevaluate" his decision and provide specific written reasons as to why he does not accept the recommendation of the committee if he again concludes that tenure should not be granted to the two faculty members was appropriate.

With regard to the arbitrator's decision granting compensation to the two faculty members, the appellate court reversed the trial court decision and ruled that the court erred in not acknowledging the material mistake made by the arbitrator in exceeding his authority by granting a monetary remedy. Specifically, the appellate court found that the arbitration process outlined in the section of the CBA under which these grievances were brought provided that the arbitrator's "sole authority" in awarding a remedy was to send the matter back to the level of review in which the procedural error or omission occurred. Since the arbitrator was precluded from granting monetary relief by that section of the CBA (as opposed to other grievance sections of the CBA), the appellate court ordered that portion of the arbitrator's award to be vacated.

B. State Labor Laws

The last year has seen a significant trend towards anti-labor legislation in the states. While some of the proposed bills and enacted laws may not outlaw unions completely, the efforts are definitely targeted at limiting the effects of collective bargaining in many states.

1. *Wisconsin Senate Bill 11*

Following heated debate and difficulty achieving a necessary quorum in the Wisconsin senate, Wisconsin Senate Bill 11 was signed into law by Governor Scott Walker on March 11, 2011. As passed, the law requires state employees to contribute a percentage of their own salaries to their pension and health care premiums and eliminates the ability of public employee

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union members to collectively negotiate anything but wage increases, which would be capped by the Consumer Price Index. The practical implication of this law is that it will be nearly impossible for faculty members to engage in meaningful dialogue with universities about their conditions of employment during the coming years.

The provisions limiting bargaining rights incensed unions and their supporters, sparking protests and court cases. In *Wisconsin v. Fitzgerald*, a lower court judge initially blocked implementation of the legislation, but she was later overruled by the Wisconsin Supreme Court. Once the state, county, and municipal governments were free to implement the provisions of SB 11, tens of thousands of public employees lost access to effective representation; by late September 2011, almost all of Wisconsin's public employee unions had been decertified. In response, Wisconsin voters have collected and submitted petitions containing 1.9 million signatures to the state's Government Accountability Board, triggering recall elections for the Governor, Lieutenant Governor, State Senate majority leader, and three state senators who supported the legislation. A date for the recall election has not yet been confirmed, although legally it could take place as early as May 29, 2012.

2. *Ohio Senate Bill 5*

Similarly, Ohio Senate Bill 5 sought to restrict the manner in which public employees can engage in collective bargaining. The law, which was signed by the Ohio governor on March 31, 2011, and impacted all of the state's 400,000 public workers, restricted public employees' rights to strike and limited collective bargaining about financial issues to only wages and not for other issues such as for health insurance and pensions. The law would have significantly increased the cost of employee contributions for pensions and healthcare over time.

Opponents of the law vowed to put the issue on the November 2011 ballot to give Ohio voters a chance to strike down the law. Ohio activists gathered more than 1.3 million signatures (almost six times the amount needed) to place Senate Bill 5 on the ballot for repeal. SB5 was repealed by Ohio voters in a decisive and historic vote; this marked the first time voters upheld public employee collective bargaining rights on a statewide ballot.

3. *Michigan Senate Bill 971*

On March 13, 2012, Governor Rick Snyder signed into law Michigan Senate Bill 971 which bars the unionization of graduate assistants at Michigan's public universities. The law amends the Michigan Public Employment Relations Act to specifically exclude graduate student research assistants (GSRA) from the definition of "public employees" for the purposes of collective bargaining. SB 971 was introduced as a direct reaction to the efforts of the University of Michigan GSRA's to unionize.

4. *Arizona*

Four anti-union bills are being considered by the current legislative session in Arizona. All four bills target the collective bargaining rights of public workers and are modeled in the spirit of Wisconsin's attack on public workers last March. The Arizona senate passed the first of the four measures in mid-February. That bill would make it impossible for unions to deduct dues

automatically from members' paychecks. The second bill recently approved by the senate would prohibit government employees from performing union work while they're on the clock. Both of these bills target core functions of labor unions – dues collection and member communication.

Arizona has long been a "right to work" state and the current push for additional legislation, funded in large part by the Koch brothers, is intended to reinforce that existence.

VIII. Miscellaneous

The United State Tax Court issued a ruling about the employment status of online faculty as it concerns the filing of personal income tax forms. Although factually specific to one faculty member, the court laid out an analysis that is likely to be used in similar situations.

A. Tax

1. *Schramm v. Com'r*, 102 T.C.M (CCH) 223, (2011)

Professor William Edward Schramm sued the IRS Commissioner, alleging that the IRS had improperly ruled that Schramm was a common law employee of Nova Southeastern University (NSU), thereby preventing him from claiming certain business expenses as an independent contractor or "statutory employee" on his taxes. Such a ruling resulted in an approximate $700 difference in what the IRS deemed Schramm to owe the IRS for his 2006 tax filing.

Professor Schramm began teaching online courses for NSU as an adjunct professor in 1999. Between 1999 and 2006 Schramm taught between 4 and 12 online courses per year for the university. Each course was covered by a separate contract between Schramm and the university, and each contract indicated that he was required to abide by certain university policies as a condition of his employment. In addition, the university withheld federal and state tax obligations on his behalf.

When filing taxes for the 2006 tax year, Schramm reported certain business expenses on a "Schedule C" form indicating that he believed his employment relationship with NSU was that of an independent contractor or "statutory employee" and not that of a "common law" employee. The practical result of this filing is that Schramm avoided applying a 2 percent limitation rule on his expenses. "Common law" employees are allowed to list unreimbursed business expenses as itemized deductions on "Schedule A" of their 1040, but only to the "extent that [those expenses] exceed 2 percent of the [employees'] gross income." "Schedule C," which is available to independent contractors and "statutory employees," does not have the same 2 percent limitation and, therefore, allows business expenses to be deducted in full.

In reviewing the Commissioners decision, the United States Tax Court ruled that it must apply common law rules for determining whether or not Schramm was an employee because the Internal Revenue Code does not define "employee" in the section discussing the tax treatment of business expense deductions. Specifically, the court ruled that the relevant factors in

https://thekeep.eiu.edu/jcba/vol0/iss7/29
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determining employment status includes: 1) degree of control by employer; 2) the parties' investment in the work facilities used; 3) the opportunity for individual profit or loss; 4) whether the employer can discharge the individual; 5) whether the work involved is part of the employer's regular business; 6) the permanency of the relationship; 7) the relationship the parties believed they were creating; and 8) the provision of employee benefits.

Using this analysis, the court found, in pertinent part, that Schramm was a "common law" employee of NSU because, despite the fact that the inherent nature of his position as an adjunct called for him to follow an independent approach to teaching, the university exercised sufficient control over his work as it dictated the textbook he used in his classes, the subjects he was to cover in each, and managed the students enrollment and technical interface for each class. In addition, the court found that NSU had invested a greater amount in the facilities needed for the classes; that Schramm and NSU had maintained "a consistent employment relationship" for many years; and, that NSU has withheld income and employment taxes from Schramm's wages throughout the relationship. All of these factors were judged to be consistent with a finding that Schramm was a "common law" employee of NSU. Therefore, the court upheld the Commissioner's ruling that Schramm must use Schedule A, not Schedule C, to itemize his business expenses as deductions that are subject to the 2 percent limitation (business expenses may only be deductible as itemized deductions "only to the extent that they exceed 2 percent of the taxpayers adjusted gross income).