Legal Issues

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I. **Speech Rights of Faculty Members and Other Employees in the Public Sector**

In 2006, the Supreme Court concluded that when public employees speak “pursuant to their official duties,” they are not speaking as private citizens and therefore do not have First Amendment rights, such that the Constitution “does not insulate their communications from employee discipline” [*Garcetti v. Ceballos*, 547 U.S. 410 (2006)]. The majority in *Garcetti* reserved the question of speech in the academic context, however, 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 the Court’s decision. The Court indicated that it therefore was not deciding whether its “official duties” analysis would apply “in the same manner to a case involving speech related to scholarship or teaching” [*id.* at 425]. Nevertheless, it continues to be the case that most courts faced with First Amendment claims by faculty members at public colleges and universities apply *Garcetti* as though the Supreme Court had never expressed that reservation.

There are, however, a few bright spots this year, and we will begin with those. We also include some cases arising in the K-12 context and in non-education-related public employment, where those cases indicate the direction of the courts on speech issues.

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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.
A. Bright Spots


Elton Kerr, M.D., was an OB/GYN who was hired in 1998 by Wright State Physicians (also known as “UMSA”) as an independent contractor to work part-time as a physician. In 1999, he was hired by Wright State School of Medicine as an assistant professor (at which point he became an employee of UMSA, which was the sole vehicle to employ Wright State faculty to perform medical services). In 2000, William Hurd, M.D., became the chair of the Department of Obstetrics and Gynecology at Wright State and, by extension, the head of the same department at UMSA. In that position, he was Dr. Kerr’s immediate supervisor at both Wright State and UMSA, overseeing Dr. Kerr’s academic and clinical work. Dr. Hurd appointed Dr. Kerr as Director of the Center for Women’s Health at the Miami Valley Hospital (MVH), the hospital at which most of UMSA’s clinical work was done. In 2004, however, Dr. Kerr violated his employment contract by ceasing to maintain “active privileges” at MVH and by accepting employment at a separate clinic, and he moved out of his Wright State offices in late 2004. In 2005, the university terminated his appointment with Wright State School of Medicine, automatically ending his appointment with UMSA as well.

After the termination, Dr. Kerr sued Dr. Hurd and UMSA in federal court on a number of grounds, including the violation of his rights to free expression under the First Amendment. As part of his job, Dr. Kerr taught his students and residents about surgery and delivery techniques, including advocating for vaginal delivery via forceps over Caesarean section and lecturing on the use of forceps. Dr. Kerr alleged that Dr. Hurd, in his capacity as department chair, subjected Dr. Kerr to “harassment, unwarranted disciplinary action, and false allegations of professional misconduct” in retaliation for the substance of Dr. Kerr’s teaching, violating his First Amendment rights to free expression.

The court began by looking at whether Dr. Kerr’s speech about methods of delivery was on a “subject of public concern,” which is determined “by the content, form, and context of a given statement, as revealed by the whole record.” Dr. Hurd had argued that Dr. Kerr’s speech was not on a matter of public concern because Dr. Kerr had characterized forceps delivery as not being “a theory of medicine,” indicated that he had not published on the topic, and said that he had not discussed forceps delivery except with medical professionals “because I don’t discuss things like that with people that wouldn’t even know what we’re talking about.”

Rejecting Dr. Hurd’s argument, the court cited approvingly to *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001), in which the U.S. Court of Appeals for the Sixth Circuit determined that a college professor’s use of disparaging words was protected where they were used in the context of a classroom discussion examining the impact of such words. As the court said in *Hardy*:
Because the essence of a teacher’s role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court’s broad conception of ‘public concern.’ . . . Although Hardy’s in-class speech does not itself constitute pure public debate, it does relate to matters of overwhelming public concern – race, gender, and power conflicts in our society.

The court here concluded that Dr. Kerr’s advocacy of vaginal delivery as opposed to Caesarean section was a matter of public concern, even if “not as overwhelming” as the issues of race, gender, and power discussed in Hardy. The court noted that on the morning it penned its decision, the local newspaper carried an AP story about the backlash against C-sections, and NPR had broadcast a story earlier in the week about the consequences of previous C-sections. The court therefore concluded that while Dr. Kerr may not have published his opinions, “communicating them to his obstetrical students was an important vehicle to further debate on the question,” and his speech to medical students on forceps and vaginal delivery was therefore “on a matter of public concern.”

The next issue for the court was whether Dr. Kerr’s speech on forceps and vaginal delivery was part of his job as an employee of the medical school and, if so, whether it was therefore unprotected under Garcetti.

The court ruled that Dr. Kerr’s speech about delivery was “without doubt . . . within his ‘hired’ speech as a teacher of obstetrics.” Unlike many other courts that have considered Garcetti, however, the court here did not believe that determination ended the matter for Dr. Kerr. Instead, the court pointed to the majority’s acknowledgement in Garcetti that its “official duties” analysis did not necessarily apply “in the same manner to a case involving speech related to scholarship or teaching.” The court here therefore found an “academic freedom exception” to Garcetti:

Recognizing an academic freedom exception to the Garcetti analysis is important to protecting First Amendment values. Universities should be the active trading floors in the marketplace of ideas. Public universities should be no different from private universities in that respect. At least where, as here, the expressed views are well within the range of accepted medical opinion, they should certainly receive First Amendment protection, particularly at the university level. The disastrous impact on Soviet agriculture from Stalin’s enforcement of Lysenko biology orthodoxy stand[s] as a strong counterexample to those who would discipline university professors for not following the ‘party line.’

The court also observed that Dr. Hurd had argued that an academic freedom exception to Garcetti must be limited to classroom teaching. The court did not decide this issue one way or the other, but did note that there was no suggestion that Dr. Kerr’s advocacy for forceps delivery
was “outside either the classroom or the clinical context in which medical professors are expected to teach.”

Because there was an open question about whether Dr. Kerr’s protected speech was one of the reasons for his termination, the court ordered the case to be heard by a jury. The court also concluded that Dr. Hurd did not have “qualified immunity” – that is, that he could be personally liable if Dr. Kerr showed that he had been fired for his speech – because the Hardy case, above, had sufficiently established that the type of speech at issue here should be protected by the First Amendment and Dr. Hurd thus should have known that retaliating against Dr. Kerr for that speech would be unconstitutional.


June Sheldon began teaching biology at California’s San Jose Community College in 2004, after teaching for seven years at a different community college in the same district. During her summer 2007 Human Heredity course, a student filed a complaint about a class discussion regarding homosexuality. During that discussion, a student asked Sheldon about a hereditary connection to homosexuality, on the basis of a quiz Sheldon had administered that day, material in the assigned class textbook, and Sheldon’s previous discussion. Sheldon gave several answers to the question, including that students would learn that both genes and environment affected homosexuality. The anonymous, undated student complaint alleged that during that discussion, Sheldon had also made “offensive and unscientific” statements, including that there “aren’t any real lesbians” and that “there are hardly any gay men in the Middle East because the women are treated very nicely.”

In September, Sheldon met with the dean of the Division of Math and Science and agreed to meet with the full-time biology faculty to discuss the issues raised in the complaint. In October, the dean offered her a teaching assignment for the spring 2008 semester, which Sheldon accepted and which led her not to seek other employment for that semester.

In December 2007, however, the community college’s administration withdrew Sheldon’s offer to teach in spring 2008 on the grounds that she was teaching misinformation as science. Sheldon sued in federal court, alleging that she was fired in retaliation for her in-class answer to a student’s question, and that her classroom instruction was protected by the First Amendment. The community college relied heavily on Garcetti, arguing that classroom speech is not protected by the First Amendment because when a teacher engages in classroom instruction, she is performing her official duties as a public employee, not speaking as a private citizen.

In this decision, the court rejected the college’s reliance on Garcetti, noting that “by its express terms,” Garcetti did “not address the context squarely presented here: the First Amendment’s application to teaching-related speech.” The court observed that prior decisions in the Ninth Circuit, the appeals court that makes federal law for California, had “recognized that
teachers have First Amendment rights regarding their classroom speech, albeit without defining the precise contours of those rights.”\(^2\) The court also noted that the Supreme Court has held that “a teacher’s instructional speech is protected by the First Amendment, and if the defendants acted in retaliation for her instructional speech, those rights will have been violated unless the defendants’ conduct was reasonably related to a legitimate pedagogical concern” [Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988)].

Because the court could not determine at this stage whether the community college terminated her employment on the grounds of reasonable pedagogical concerns, it denied the college’s motion to dismiss, and the litigation continues. The court also denied the college’s motion to dismiss Sheldon’s claim that she has been discriminated against on the basis of viewpoint, on the same grounds.

The court added that as a temporary employee, Sheldon did not have a constitutional property interest in her employment, and the college therefore did not violate her rights to due process in firing her. If she establishes, however, that she was terminated because of her constitutionally protected freedom of expression, she might then have a claim for reinstatement.


In this September 2009 decision, a federal trial court in Northern California gave the green light to a lawsuit by a professor who alleged that her dean had violated her First Amendment rights.

Joanne Fusco was an adjunct faculty member for the Sonoma County Junior College District. She attempted without success to place on the department meeting agenda “issues relating to academic freedom, class assignment procedures, peer evaluations, duties regarding the chair and co-chair, nominations for department chair and procedures for voting on faculty elections day.” She then separately complained to the dean of her department that some students in her class were disruptive and might become violent (indeed, after she made her complaint, the students were removed from other classrooms). She offered to return to the classroom if the dean or a security officer were present, but the dean declined and told her she would no longer be allowed to teach the class. Fusco sued, alleging that she had been constructively discharged in retaliation for complaining about unsafe working conditions and for trying to place various academic-related items on the agenda.

In its decision, the court found that Fusco’s multiple attempts to place items related to academic freedom and governance on the department agenda were not necessarily unprotected

\(^2\) Citing to *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996); *Cal. Teachers Assn. v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001).
speech. The court reasoned that Fusco’s actions were not necessarily related only to her individual employment and could be found, with more information, to be matters of public concern and therefore covered under the First Amendment. Second, the court could not find based solely on the complaint that Fusco was acting pursuant to her official duties when she tried to place matters on the department’s agenda, and the Garcia analysis therefore did not prevent her lawsuit from moving forward. The court observed that the Ninth Circuit had previously required lower courts to make factual determinations when reviewing a public employee’s speech, which meant that the case could not be dismissed before the judge or a jury was able to engage in fact-finding. The court also reasoned that a public professor almost never has an affirmative, official duty to discuss academic freedom and governance as a condition of their employment. Finally, when Fusco’s dean attempted to discipline her by issuing her various letters and emails, he may have caused her to be constructively discharged, adversely affecting her employment and potentially violating the First Amendment. The court therefore allowed the lawsuit to go forward; it remains in litigation.

3. Reinhardt v. Albuquerque Public Schools Board of Education, 595 F.3d 1126 (10th Cir. 2010)

In this case, a federal appeals court reinstated a public employee’s claim of First Amendment protection for her job-related speech. Janet Reinhardt was a speech-language pathologist for the Albuquerque Public Schools (APS). She complained for a number of years to APS that she was not receiving accurate caseload lists of students, and that that failure was effectively denying students speech and language services. After repeated complaints went unaddressed, she hired an attorney and filed an administrative complaint with the New Mexico Public Education Department against APS, alleging that APS was violating the Individuals with Disabilities in Education Act. Her caseload was then reduced, resulting in a reduction to her salary, and she believed she might lose her position entirely.

Reinhardt sued APS, arguing that the reductions in her caseload and her salary were in retaliation for her complaints and violated her First Amendment rights. The federal trial court dismissed her claim under Garcia, ruling that she filed her complaints pursuant to her official duties. In this opinion, the U.S. Court of Appeals for the Tenth Circuit, which covers the states of Utah, Colorado, New Mexico, Wyoming, Oklahoma, and Kansas, unanimously reversed.

The appeals court observed that in the Tenth Circuit, an employee who reports wrongdoing is generally not speaking “pursuant to her official duties” (and is therefore protected under Garcia, as long as the speech is on a matter of public concern) if: (1) the employee’s job responsibilities do not relate to reporting wrongdoing, and (2) the employee went outside his or her chain of command to report the wrongdoing. The court rejected APS’s claim that it was within Reinhardt’s job responsibilities to report APS’s failures simply because she had professional obligations as a speech-language pathologist and was bound to “enforce all laws and rules applicable to” the school district. The court noted that Reinhardt was hired to provide
speech and language services, not to ensure IDEA compliance (though that fact alone would not have been dispositive), and that retaining counsel appeared to be beyond her official job duties (though her initial complaints to administrators and within the internal grievance procedures likely were part of her official duties). The court therefore reversed the district court’s opinion and directed the court to consider the other elements of Reinhardt’s First Amendment claim.


Although the federal trial court here ultimately concluded that a faculty member’s speech was not protected under the First Amendment, it did find that speech on academic issues is a matter of public concern – and to the university’s credit, it did not appear to invoke *Garcetti* as a defense.

Keith Yohn is a tenured associate professor in dentistry at the University of Michigan. In the past decade, he has criticized (through forums including lawsuits) the university and the dental school for what he believes to be the lowering of academic standards for minority dental students and the Board of Regents’ authority over grading, promotion, and graduation of students. Yohn has filed lawsuits against the University of Michigan administration and board of regents, published articles, and sent a number of emails to the dental school faculty regarding his opinions on these issues and regarding his belief that he had the right to communicate about them over email. During one set of interactions in August 2005, the chair of his department, Paul Krebsbach, asked that he stop sending emails to the rest of his department, perhaps because they were irritating or angering his colleagues.

In late 2005, Yohn sent a letter to Krebsbach requesting an equity adjustment in his base salary because of his long career with the school, strong student evaluations, and positive letters from patients. Krebsbach denied the request and later indicated that Yohn’s service and scholarship were below expectations compared with other dental school faculty; Yohn received a 1.5% merit increase for the 2005-2006 school year, as compared to a 1.53% average increase for faculty overall. In January 2006, Yohn filed a grievance charging Krebsbach and the dean of the school of dentistry with violation of Yohn’s right to free speech and retaliation for Yohn’s use of the email server to exercise that right. In September 2006, the Grievance Review Board (GRB) issued its final recommendation, in which it recognized Yohn’s right to publicly discuss academic issues as protected by the First Amendment, but concluded that the August 2005 meeting with Krebsbach did not infringe upon Yohn’s right to free speech. In the court’s description, the GRB found that “Krebsbach, in good faith, had merely sought to prevent defamatory statements based on unproven allegations from being broadcast to all faculty via email.” The GRB also recommended dismissal of the claim of economic retaliation. The dean of the school accepted the recommendations, and in January 2008, Yohn filed suit in federal court. Among other things, he alleged that he had been threatened with censorship and with retaliatory denial of an equity adjustment in his base salary, in violation of his First Amendment rights.
The court first addressed whether Yohn’s criticism of the administration and speech regarding the lowering of academic standards was speech on a “matter of public concern.” The court observed that “a teacher commenting on curricular and pedagogical decisions” is protected by the First Amendment [Evans-Marshall v. Board of Education of Tipp City Exempted Village School, 428 F.3d 223, 230 (6th Cir. 2005)], as are “professors commenting on administrative decisions regarding university resources” [Jackson v. Leighton, 168 F.3d 903, 910 (6th Cir. 1999)]. The court reasoned that “undoubtedly, academic standards for dental students earning graduate diplomas and entering the dental profession is an issue of significant public concern. . . . [T]his Court finds that Yohn’s statements about the administration’s role in grade inflation and academic policy touched on issues ‘about which information is needed or appropriate to enable the members of society to make informed decisions about’ a public university” [Citing Farhat v. Jopke, 370 F.3d 580, 591 (6th Cir. 2004)]. Even though Yohn’s emails also addressed internal matters, like the proper use of university email servers and the administration’s handling of faculty disagreements, “his communications can be considered mixed questions of private and public concern, sufficiently focused on underlying questions of public concern.”

Having reached this finding, the court moved to the question of whether Yohn’s interest in making his statements “outweighs the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees” [Pickering v. Board of Ed. of Township High School Dist. 205, 391 U.S. 563, 568 (1968)]. Because Yohn’s emails had an “adverse impact” on the working relationships within the school of dentistry and Yohn’s department, the court concluded that his interests were outweighed by the interests of the university. As the court noted:

There is no factual dispute as to the rising tension among faculty members during the relevant period of this case, and Yohn’s own pleadings and exhibits indicate that his emails regarding his ongoing litigation against the university were setting off ever greater intra-school antagonism. The Defendants’ interests in maintaining an environment free from hostile email exchanges is sufficient to outweigh Yohn’s interest in sending repeated and possibly defamatory emails to his colleagues.

The court also observed that there was almost no indication that Yohn’s speech was actually suppressed. Yohn did not appear to have been prevented from sending emails to his colleagues, and the university provided sufficient evidence to show that its denial of an equity adjustment to Yohn’s base salary was unrelated to Yohn’s emails and articles. The court therefore denied Yohn’s First Amendment claim.

It is notable that although this case involved the speech of a faculty member at a public institution, the university did not invoke the Garcetti “official duties” analysis in its defense, and the court appears not to have raised it on its own.
5. **Sousa v. Roque**, 578 F.3d 164 (2d Cir. 2009)

In *Sousa*, the U.S. Court of Appeals for the Second Circuit overturned a lower court ruling and found that an employee’s speech may be protected by the First Amendment even if the speech is largely motivated by employment grievances.

Bryan Sousa was employed by the Connecticut Department of Environmental Protection. Following an altercation with another co-worker, Sousa was suspended for three days without pay. Upon his return to work, Sousa made various complaints within the department that, while related to his situation, spoke more generally about workplace intimidation and harassment. Following an order that he undergo a fitness-for-duty evaluation, Sousa was put on a substantial period of leave, and he was eventually terminated for two instances of unauthorized absences. Sousa filed a lawsuit complaining that the defendant’s various actions, eventually leading to his termination, were all acts of retaliation against him for his exercise of his First Amendment right to free speech. Specifically, he noted that the First Amendment should protect him from retaliation since his complaints were about workplace violence and the hostile work environment within the Department of Environmental Protection, which should be matters of public concern. The lower court concluded, however, that “[t]here is no First Amendment protection for speech calculated to redress personal grievances in the employment context.”

On appeal, Sousa argued that his speech was on a matter of public concern and that the fact that it arose within the context of his employment did not, alone, eviscerate his First Amendment right to free speech. The appeals court, which makes law for New York, Vermont, and Connecticut, noted that the question of whether a public employee’s speech addresses a matter of public concern must be determined by “the content, form, and context of a given statement, as revealed by the whole record” [*Connick v. Myers*, 461 U.S. 138 (1983)]. The court observed that “although [Sousa’s] overall motivation was personal, that fact was not dispositive.”

After looking to other federal courts, the court noted that the majority of courts have agreed that motive alone does not determine whether a person’s speech is on a matter of public concern and therefore protected by the First Amendment. The court further observed that “a person motivated by a personal grievance” can nevertheless be “speaking on a matter of public concern.”

Because the lower court’s conclusion that Sousa did not have a First Amendment claim rested solely on the finding that his speech occurred in the context of his employment, and the appeals court rejected that as a basis for automatically depriving a speaker of First Amendment protection, the appeals court sent the case back for further review. Specifically, it directed the lower court to review Sousa’s speech and to determine whether it addressed a matter of public concern as determined by the “content, form, and context” of the speech.

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3 *Coifii v. Averill Park*, 444 F.3d 158 (2d Cir. 2006).
B. More Bad News


In a very recent federal case, a trial judge for the United States District Court in North Carolina suggested that promotion packet materials are not protected by the First Amendment. Reiterating the traditional deference courts give to internal tenure and promotion review procedures, the court also found that the decision of a department not to promote a tenured faculty member to full professor was not motivated by any religious bias against the professor’s conservative viewpoint.

Michael Adams, a tenured associate professor at the University of North Carolina-Wilmington, began his career at the university in 1993 when he was hired as an assistant professor of criminology. In 1998, he was promoted to associate professor and received tenure from the department. According to Adams, at that time he started at the UNC-Wilmington he was an atheist with liberal political beliefs. During this time, he won multiple teaching and scholarship awards, with peer faculty members calling him “outstanding” and a “master,” “gifted,” “accomplished,” and “natural” teacher. In addition, he was the Faculty Member of the Year twice.

In 2000, Adams became a self-described Christian conservative. Problems surfaced between Adams and his colleagues when Adams criticized his colleagues via e-mail for questioning job candidates about their political views and expressing “anti-religious sentiments during the interview process.” Another faculty member responded that “[everyone] know[s] our country allows discrimination on the basis of political orientation.”

On September 15, 2001, a student sent an email to various members of the student body and the faculty, including Adams, blaming the September 11 attacks on U.S. foreign policy. Adams responded to the student, calling her email “bigoted, unintelligent, and immature.” Following a lengthy period of back and forth between the student and the university, the university internally investigated Adams’ email records in response to the student’s complaint that his message constituted defamation, intimidation, and/or communication of threats. Adams was eventually cleared of wrongdoing.

In 2003, Adams began writing for a website on “issues of academic freedom, constitutional abuses, discrimination, race, gender, homosexual conduct, feminism, Islamic extremism, and morality.” The column showcased Adams’ conservative religious beliefs, and the university was flooded with complaints from upset readers, including potential donors. Various publications by Adams were also critical of other members of the faculty and the administration at the university.
At the end of July 2006, Adams formally applied for promotion to full professor. After discussion and conferral, Adams’ department voted 7-2 against recommending promotion; the chair adopted the vote and denied Adams’ application for promotion, 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.

Adams filed suit in federal court claiming religious discrimination in violation of Title VII, viewpoint discrimination in violation of his First Amendment rights, and a denial of equal protection in violation of the Fourteenth Amendment.

The court stated at the outset that “federal courts review university tenure and promotion decisions ‘with great trepidation,’ consistently applying ‘reticence and restraint’ in reviewing such decisions.” The court’s review was therefore “limited to deciding only ‘whether the appointment or promotion was denied because of a discriminatory reason.’”

In response to Adams’ claim of religious discrimination, the court found that he could not connect the denial of promotion to the fact that he was the only Christian conservative in the department. The department had provided “legitimate, non-discriminatory reasons for the denial,” including his “sparse publications record” and his “low number of refereed publications with significant scholarly merit.” The court concluded on this claim:

Federal courts shun opportunities to second-guess determinations like these, which deal entirely with the scholarly merit of professors’ publications . . . . The question courts ask instead is ‘whether the . . . promotion was denied because of a discriminatory reason.’ Finding no evidence in the record to support plaintiff’s allegations of religious discrimination, the court grants summary judgment in defendants’ favor.

Adams’ free speech claim rested on his columns, publications, and presentations, many of which criticized UNC-Wilmington administrators or staff, others of which addressed controversial issues and incorporated Adams’ conservative views. Adams either referred to these materials in his promotion packet or explicitly included them in the packet (the opinion is unclear); as the court said, “the novelty of this claim (and the entire case) comes from the fact that plaintiff included these materials in his application seeking promotion, this forcing the very people he criticized to make professional judgments about this speech.”

4 Citing to Jimenez v. Mary Washington College, 57 F.3d 369 (4th Cir. 1995).

5 Citing to Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980).

6 Id. at 346.
The court characterized the inclusion of the 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.” The court continued, “plaintiff’s inclusion of the speech in his application for promotion trumped all earlier actions and marked his speech, at least for promotion purposes, as made pursuant to his official duties” under Garcetti. The court made no inquiry, however, as to whether these promotion materials would constitute the kind of “speech related to scholarship or teaching” that the Garcetti majority indicated might not be covered by its “official duties” analysis. Indeed, the court went one step further and suggested that any materials included in a faculty member’s promotion packet would be unprotected under Garcetti; as the court said, it found “no evidence of other protected speech (i.e., speech not presented by plaintiff for review as part of his application) playing any role in the promotion denial,” thus conflating “protected speech” with materials not presented for peer review. The court therefore dismissed Adams’ claim that his First Amendment rights were violated during the promotion review process.

On Adams’ final claim of equal protection violations, the court found that Adams had presented no evidence that he was treated any differently than a similarly situated professor, and reiterated that the court defers to faculty determinations of tenure and promotion standards. In closing, the court found that Adams had not proven that he was discriminated against due to his political or religious beliefs.

Adams plans to appeal the court’s decision.


In Munn-Goins, a federal trial court in North Carolina found that when a community college professor requested and distributed current salary information for each college employee, the professor’s acts were not protected by the First Amendment because they did not involve a “matter of public concern.” The court ruled that the nonrenewal of her contract in response to her speech was therefore not a violation of the Constitution.

Ophelia Munn-Goins was a full-time instructor on a year-to-year contract with the North Carolina Community College System. From 2002-2004, Munn-Goins routinely requested and received the current salary of each college employee and the amount of each person’s most recent salary adjustment. In 2006, changes in personnel at the college led Munn-Goins to ask the President of the College, Dr. Page, for the salary information. When Dr. Page asked why she wanted the information, Munn-Goins stated that it was for “personal reasons” and she wanted to let friends who were applying for jobs have a “ballpark” estimate of what they could expect to earn.

Dr. Page eventually gave Munn-Goins the requested information, which she copied and gave to three other members of the faculty. Later that day, the Vice-President for Continuing
Education found the salary information stuffed into various faculty mailboxes with “UNFAIR!” and “INEQUITY IS AMAZING!” written upon the copies. The letters were removed by the Vice-President of Curriculum and Instruction, Dr. Kathryn Geisen, who later investigated the distribution of the salary information with the written comments. While Munn-Goins denied having any connection to the comments or their general distribution, she was later reprimanded by Dr. Geisen for providing the salary information to her four colleagues, which contributed to the widespread circulation and was characterized as “an attempt to inflame and incite members of the staff and to create a hostile workplace environment.” Munn-Goins was placed on probation, had her salary frozen for a year, did not receive a bonus she was otherwise entitled to, and had a letter of reprimand placed into her file.

After being reprimanded during the spring of 2006, Munn-Goins returned to teach at the college. During the course of the 2006-2007 academic year, Munn-Goins was involved in disputes with the administration regarding a request she made for academic leave and her failure to implement a particular student withdrawal policy. Although the two sides attempted to come to a legal settlement, they were unable to arrive at an agreeable resolution. In April of 2007, Munn-Goins was notified that her contract would not be renewed due to a “mutual loss of confidence.” Munn-Goins filed suit, claiming she was terminated in violation of her rights under the First Amendment (free speech) and Fourteenth Amendment (due process and equal protection).

The federal trial court dismissed Munn-Goins’ case, concluding that her decision to distribute the salary information was not protected speech under the First Amendment. The court suggested that her action did not promote any “issue of social, political, or other interest to a community,” noting that there was no evidence that Munn-Goins acted as a citizen and that her own stated reason for requesting the information was strictly a personal one. “Thus, all three factors – content, form, and context - weigh against a finding that Munn-Goins’ activity involved a matter of public concern.” The court also relied on the fact that Munn-Goins had denied writing the critical messages on the salary report. The court concluded that because Munn-Goins’ activity did not involve a matter of public concern, “her First Amendment claim fails.” The court also rejected Munn-Goins’ other claims.


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, and that his First Amendment rights were therefore violated. Invoking the decision by a federal trial court in California in Hong v. Grant, 516 F.Supp.2d 1158 (C.D. Cal. 2007), the Idaho state trial court concluded that Sadid’s letters related to his personal grievances rather than
to a matter of public concern. The court was not persuaded by Sadid’s assertion that his grievances were on a matter of public concern because they discussed a plan to merge two colleges at a public university, a plan Sadid asserted was done without public knowledge or input. Instead, the court found that the letters contained only personal grievances in relation to Sadid’s employment, and “simply because it involves a matter that may have occurred behind close governmental doors does not make it a 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 (whose expressions would be protected under the First Amendment from governmental restriction) 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 did not appeal the decision.


Although this case arose in the context of K-12 rather than higher education, it vividly demonstrates the disturbing consequences of *Garcetti’s* application to teaching professionals. David Weintraub was a fifth grade teacher in the Brooklyn public school system. After a student threw a book at him in class and was then returned to Weintraub’s classroom instead of being suspended, Weintraub complained to the assistant principal, told his fellow teachers about the incident, and filed a grievance with his union representative. Weintraub alleged in a federal lawsuit against the Board of Education that he was then retaliated against in a variety of ways in violation of his First Amendment rights, including receiving bad performance reviews, being wrongfully accused of sexual abuse, and ultimately getting fired.

The trial court agreed that under *Garcetti*, his conversations with other teachers were not pursuant to his official job duties and were therefore protected. The court ruled, however, that his complaints to the assistant principal and his filing of a union grievance were pursuant to his job duties, because he was “proceeding through official channels to complain about unsatisfactory working conditions.” The court concluded that those activities therefore were not protected by the First Amendment.
Weintraub appealed, and the U.S. Court of Appeals for the Second Circuit addressed the issue of whether filing a union grievance is protected by the First Amendment. Over a strong dissent, a two-judge majority of the court concluded that it is not.

The court relied on the fact that the majority in *Garcetti* defined speech that is made “pursuant to” a public employee’s job duties as “speech that owes its existence to a public employee’s professional responsibilities.” The court further noted that this is a “practical” inquiry. In this case, even though Weintraub wasn’t required to file a union grievance as part of his job, it was “part and parcel” of his attempts to carry out his job duties as a public school teacher, including maintaining discipline in his classroom. The court relied heavily on the fact that filing a union grievance doesn’t have a “citizen analogue” to other types of speech – i.e., writing a letter to a newspaper or filing a complaint with an elected representative. Because Weintraub never made his complaints public and because they were related to his job, the court concluded that the First Amendment did not protect him from employer retaliation for filing the grievance. (The opinion does not address whether he might be protected by New York state labor law or other statutes.)

The dissent urged that the inquiry required by *Garcetti* should not be a “practical” inquiry, but instead should simply focus on whether or not the speech in question was made “pursuant to official duties.” Specifically, the dissent believed that for *Garcetti* to apply “it must be possible to say that that employer has ‘commissioned or created’ the speech.” The dissent continued, “when an employee’s speech is not part of the implementation of the employer’s business operations, the employer does not depend on ‘substantive consistency and clarity’ . . . in that speech. Instead, employers may well benefit from a narrowly defined exception to First Amendment protection, for an exception that sweeps more broadly than necessary will likely encourage employees to make complaints publicly when they might otherwise be handled internally.” While the majority ruled that Weintraub’s duties included informing the administration of school violence, the dissent believed that “grieving the administration’s response through his union is quite another matter.”


In this case, a federal trial court in New York ruled that a public school principal acted within the scope of her official duties when she was interviewed by news media, and that she therefore, she was not speaking as a private citizen and was not protected by the First Amendment.

Debbie Almontaser was the interim principal at the Khalil Gibran International Academy, the first public Arabic dual language school in New York City. During an interview with the *New York Post*, Almontaser was asked what she thought about a non-affiliated youth group’s creation of T-shirts that stated “Intifada NYC”. She replied by giving an accurate description of
the word “Intifada” and said that she had never affiliated herself with a group that condoned violence. Her remarks sparked a public controversy, leading Almontaser to turn in her resignation as the school’s interim principal. When the New York City Department of Education advertised for candidates to fill a permanent principal position, Almontaser applied and was not selected. Almontaser sued, claiming that the Department of Education violated her First Amendment right to free speech and her Fourteenth Amendment right to due process.

On Almontaser’s free speech claim, the court referred to Garcetti, stating that any speech made by a public employee pursuant to their official duties is not covered by the First Amendment and subjects the employee to discipline. The court focused both on the active role played by the Department of Education in setting up and conducting the interview, as well as Almontaser’s concession that speaking with media was part of her job as interim principal. From the start the department acted as the go-between for Almontaser and the media, setting up the interview and aiding Almontaser in answering the media’s preliminary questions. During the interview itself, the department’s communications staff was included in the conversation and even interjected to clarify Almontaser’s comments. As the court said “when the DOE’s press office arranged, guided, and directly participated in Almontaser’s interview, which she conducted in her role as interim acting principal of KGIA . . . Almontaser spoke to the Post pursuant to her official duties.”

The court was not persuaded by Almontaser’s claim that her speech during the course of her interview should have been parsed out into speech related to her position as principal and her own unrelated personal speech. Since both the department and Almontaser agreed that her official duties included speaking with the press, the interview was arranged primarily for Almontaser to speak on behalf of her role as principal of KGIA, and the idea of courts parsing apart protected and unprotected pieces of speech would present an unmanageable task, the court found Almontaser did not speak as a private citizen and therefore was not protected under the First Amendment.

Almontaser also claimed that by forcing her to resign and by not considering her for the permanent principal position, the department violated her substantive due process rights under the Fourteenth Amendment. To establish a protected property interest, a person must have a legitimate claim of entitlement to the property under the law. Almontaser conceded to the court that as an interim principal she was only employed at will, and that she understood that she could be removed at anytime by the department for any reason. Given her concession, the court found that she had no legitimate property interest in her employment. The court similarly dismissed her claim under the Fourteenth Amendment.

In this case, a federal trial court in Mississippi concluded that an elementary school special education teacher who complained to the school’s principal about another teacher’s use of corporal punishment on an autistic student was not protected by the First Amendment. The court observed that in the Fifth Circuit, the federal appeals court that covers Mississippi (as well as Texas and Louisiana), “activities undertaken in the course of performing one’s job are activities pursuant to official duties and not entitled to First Amendment protection.” Because the teacher was the student’s primary teacher and considered it within her role to deal with his behavioral issues, she “spoke as an employee in expressing her view that corporal punishment was not an effective means of discipline for an autistic child.” Because the court concluded that Lamb had spoken pursuant to her official duties and that the First Amendment did not prohibit the school from non-renewing her contract in retaliation for her speech on that ground, it did not even inquire whether she spoke on a matter of public concern.


In this non-higher-education-related case, the Second Circuit concluded that a New York Thruway Authority employee who relayed concerns to a supervisor about her co-workers’ possible illegal activity was not protected by the First Amendment under *Garcetti*. The court noted that the employee, Huth, had related her concerns to the head of her division and had done so at the daily meetings on which they discussed the other employees in the division. As the court said, “we have no difficulty concluding that such speech was made not as a ‘citizen’ but, rather, pursuant to Huth’s official duties as a Thruway Authority employee and supervisor.”

On the question of whether Huth had spoken on a matter of public concern, the court noted that “Huth’s original complaint . . . alleged only that defendants retaliated against her for specific statements she made to her supervisor and for the union activities of [a subordinate]. Much like other public employee speech that we have held not to be protected from retaliation by the First Amendment, Huth’s lawsuit was ‘personal in nature and generally related to her own situation.’” She therefore had no First Amendment protection for her speech.

II. Tenure, Due Process, and Breach of Contract


In this case, the Washington State Court of Appeals ruled that a university illegally closed the disciplinary hearing of a tenured faculty member, and remanded the case back to the school for a new hearing. The court also held that academic freedom does not protect harassing and degrading language with no pedagogical purpose.
Professor Perry Mills is a tenured faculty member in the theater department of Western Washington University. Shortly after he was granted tenure, the school began receiving complaints about Professor Mills’ conduct towards students and colleagues. Professor Mills was denied promotion to the rank of full professor after the chair of his department recommended against promotion, citing behavioral concerns. According to the findings of fact of the Board of Trustees, these concerns included the use of extremely foul and berating language towards students, a combative teaching style, and treating students and other members of the faculty in a demeaning manner. Mills allegedly frequently made disparaging or threatening comments toward women, gay students, and minorities, expressing a desire to kill those who offended him. These comments included Mills’ calling faculty and staff “faggot” or “bitch” and telling a student cancer survivor in his class that “if you can’t even put up your piece [of art] for class then you should have just died of cancer.” In addition, Mills was known for brandishing a large knife in class, and carrying a registered firearm on campus.

In 2004, two of his departmental colleagues filed formal complaints against him with the university. In response to these complaints, in addition to a number of complaints from students and faculty already in Mills’ file, the provost of Western Washington University requested that the Faculty Senate appoint a hearing committee to “attempt to ‘effect an adjustment’” in Professor Mills’ conduct. After these efforts failed, the provost issued a formal statement of charges against Professor Mills alleging that he had violated several sections of the Faculty Code of Ethics. The University then convened a Hearing Panel to address these formal charges. Over the objections of Professor Mills and a newspaper reporter, the hearing was closed to the public. At the end of the hearing, the panel recommended that Professor Mills be suspended without pay for two academic quarters, and Mills filed suit seeking review by the courts.

After losing at the trial court, Professor Mills appealed to the Supreme Court of Washington, which transferred the case to the state court of appeals. In his appeal, Professor Mills argued that: 1) the University’s actions violated his employment contract; 2) the Faculty Code of Ethics was unconstitutionally vague; 3) his suspension violated his constitutional free speech rights; and 4) the closure of his disciplinary hearing was unlawful.

The court of appeals rejected Professor Mills’ first three arguments. First, because the university had followed its own procedures, it had not violated Mills’ employment contract. Second, the court found that Professor Mills had been repeatedly warned about the precise type of conduct considered unacceptable under the Faculty Handbook; the Faculty Code of Ethics therefore was not unconstitutionally vague as applied to him. Finally, the court ruled that while academic freedom is a “special concern of the First Amendment,” academic freedom in itself is “not a license for … activities which are internally destructive to the proper function of the university or disruptive to the education process” [Stastny v. Bd. of Trustees of Cent. Wash. Univ., 32 Wn. App. 239, 647 P.2d 496 (1982)]. The court found that the vast majority of conduct for which Professor Mills was disciplined occurred outside of the classroom and was entirely unrelated to any pedagogical purpose and therefore was not protected speech. In those
few instances where the conduct did occur in the classroom, the court concluded that the University’s interest in “maintaining a safe classroom environment … and harmonious relations among the Theatre Arts faculty” outweighed Professor Mills’ free speech interest in promoting his discipline “by deliberately harassing and degrading certain groups of students, and by playing on the insecurities of less assertive students generally.” Therefore, the University had not unconstitutionally disciplined Professor Mills for his conduct.

The court did, however, agree with Professor Mills that the university unlawfully closed the hearing to the public. The court determined that Washington State’s Administrative Procedures Act requires that agency adjudications be open to the public except in certain limited circumstances not present in this case. Furthermore, the court ruled that the Faculty Handbook’s presumption that hearings are to be private in most circumstances was an internal policy that did not trump the Administrative Procedures Act. The court therefore concluded that the university had unlawfully conducted the hearing in secret and that Professor Mills was entitled to a new disciplinary hearing.


In a detailed opinion, a court in North Carolina found that Dr. Linda Martin, a tenure-track professor at North Carolina State University (NCSU), was denied her right to a proper tenure review procedure when the head of her department and the Provost both committed procedural irregularities that culminated in her colleagues’ voting to deny her tenure.

Dr. Martin started as a research associate at NCSU in 1995. In 2001, she was hired as a tenure-track assistant professor within the Molecular Biomedical Sciences department, and in 2006, she submitted her tenure dossier for review. At a point during the course of that review, her department head, Dr. McGahan, unilaterally ordered that information about manuscripts submitted for publication and previously submitted grant applications be removed from Martin’s dossier prior to its distribution to members of the voting faculty. During the course of her tenure review, faculty within the department gave her positive marks for every component of her tenure dossier with the exception of the research component of her tenure file, specifically indicating concern about her ability to fund her own research. Based on her incomplete file, her colleagues voted to deny her tenure.

Although the University Reappointment, Promotion, and Tenure Committee expressed concern about the procedural problems of Dr. Martin’s review, the Provost upheld her colleagues’ recommendation and decided not to reappoint her to another year at the university. Dr. Martin appealed the Provost’s decision to the university’s Grievance Committee seeking review of her denial of reappointment and asserting that it was in violation of university policy and procedure.

During the course of the Grievance Committee’s investigation, various irregularities came to light. For instance, Dr. Martin submitted evidence showing that the Provost had
provided, on two separate occasions, incomplete versions of the university’s policy on the official format and content of Tenure Dossiers. Specifically, the Provost printed the policy in order to leave off the part of the policy that would have included Dr. Martin’s submitted publications and submitted grant proposals. It also came to light that, at some point during the course of Dr. Martin’s appeal, the Provost changed the published tenure procedures in order to include language that would have excluded submitted publications from any faculty member’s tenure dossier. The Provost did this without any consultation of the Faculty Senate at the university. When presented with conflicting testimony on Dr. McGahan’s personal malice towards Dr. Martin, the Grievance Committee found Dr. McGahan’s testimony to be at times unreliable and scripted. The committee concluded that it was “reasonable to conclude that it was more likely than not that factors such as demonstrated personal malice, affected the departmental vote.”

The Grievance Committee therefore found that “(1) the improper removal of information from Dr. Martin’s tenure dossier by McGahan constituted a material procedural irregularity in the re-appointment process, including tenure and promotion, which cast substantial doubt on the validity of Provost Nielsen’s decision; and, (2) personal malice by McGahan towards Dr. Martin at the department level informed the decision of Provost Nielsen to deny reappointment, including promotion and tenure.” The committee stated that in order to mitigate the circumstances surrounding such irregularities, Dr. Martin should be re-appointed as an assistant professor for three years, at the end of which she would be reconsidered for tenure. Nevertheless, her denial of reappointment was affirmed by the Chancellor of the University and finally by the Board of Governors, each of whom found the removal of information from her dossier to have been a harmless error during the course of the tenure review process. Dr. Martin’s employment at the university thus ended.

Dr. Martin sued the university, and the court, in an order reversing the university’s decision not to reappoint Dr. Martin, found that “the Grievance Committee’s findings of fact are supported by substantial evidence of record. The Chancellor had no authority to reweigh the testimony of Dr. McGahan . . . in making his decision.” The court went further to find that the removal of materials from the tenure dossier constituted a material procedural irregularity and “as a matter of law the removal of the material from Petitioner’s tenure dossier . . . cast doubt and impacted the review process at all levels.” The court concluded that it was a violation of university policy for the Chancellor or the Board of Governors to revisit the review of Dr. Martin’s materials, as the grant of tenure should be a professional judgment determined solely at the department level “by the candidate’s immediate colleagues and supervisors, who are in the best position to make such judgments.” In summary:

[T]he evidence shows that the existence of material procedural irregularities, including the removal of materials from Petitioner’s tenure dossier, in Petitioner’s tenure review process at the Departmental level was aggravated by personal
malice of the Department head which cast doubt on the vote of Petitioner’s peers such that the integrity of the entire review process was affected.

The court reversed the final decision of the Board of Governors, and sent Dr. Martin’s tenure application back to her department with an order that she be re-evaluated by her colleagues within an “unbiased, malice-free, procedurally fair process.”

C. Saxe v. Board of Trustees of Metropolitan State College of Denver, No. 04CV3017 (Dist Ct. Denver Co. June 1, 2009).

In this case, a Colorado court concluded that provisions in a faculty handbook covering faculty priority and relocation were “vested” and therefore could not be unilaterally changed by the college’s Board of Trustees.

In 2003, the board of trustees for the Metropolitan State College of Denver unilaterally adopted a new faculty handbook, superseding the previous faculty handbook passed in 1994. Five tenured faculty members and the Colorado Teachers Federation sued, arguing that the 2003 handbook provisions "establish conditions under which employment of tenured faculty members can be terminated or their compensation reduced," thus eviscerating the meaning of tenure in the academic community. Among other things, the 1994 Faculty Handbook had established a hearing process for terminations for cause that put the burden of proof on the administration. In addition, faculty members received protections in the event that the college terminated faculty for financial reasons, including priority over part-time and probationary employees, relocation, and preferential rehiring. The unilateral changes made to the Faculty Handbook in 2003 shifted the burden of proof to the faculty member in terminations for cause and established new rules pertaining to reductions in force that eliminated the protections previously granted in cases of financial exigency.

After a series of decisions spanning four years, the state trial court ruled in June 2009 that when the board of trustees unilaterally revised the tenure provisions relating to faculty priority and relocation, the revisions affected “vested rights,” and the changes were therefore unconstitutional under the Colorado Constitution.

In deciding whether the rights in the 1994 handbook were vested (and therefore could not be unilaterally changed), the court used a three-factor test: (1) whether the public interest was advanced or retarded by the modifications; (2) whether modification of the rights as embodied in the 1994 handbook gave effect to or defeated the bona fide intentions or reasonable expectations of the affected individuals; and (3) whether the 2003 handbook “surprised” individuals who had relied on contrary provisions of the 1994 handbook.

With respect to the first point, the court found that the public interest was damaged by the handbook modifications and emphasized the public interest in tenure and academic freedom over an interest in “flexible” hiring and firing policies:
The public interest is advanced more by tenure systems that favor academic freedom over tenure systems that favor flexibility in hiring and firing. By its very nature, tenure promotes a system in which academic freedom is protected. Further . . . inherent in a tenure system is inflexibility in firing decisions; if the College wanted a more flexible system of employment, the College should not have utilized a tenure-based system. This weighs the public interest strongly in favor of academic freedom. The Court recognizes that the public interest is served by a public college with flexible hiring and firing policies. However, such policies are in direct conflict with the fundamental tenets of a tenure system. Indeed, a tenure system that allows flexibility in firing is oxymoronic.

On the second point, although there was no specific evidence regarding the intentions of the affected faculty members, the court determined that it is reasonable to consider “industry-wide” standards in higher education, and that the expectation in higher education is that tenure will be abrogated only as a matter of last resort. This was the case even though the college did not actually adopt AAUP policies establishing a presumption in favor of tenure. Relying heavily on the testimony of expert witness Matthew Finkin, a University of Illinois law professor, long-time AAUP member, and expert on tenure and governance issues, the court held:

Evidence of industry standards may be used to demonstrate the parties’ intent. . . . Mr. Finkin testified that the core notion of tenure is that the tenured faculty member will be terminated only as a last resort after all other avenues of reductions in force are exhausted. Mr. Finkin testified that questions of reductions in force are central to the notion of tenure, and tenured faculty members should be retained in preference to probationary appointees. Mr. Finkin testified that if termination is unavoidable, relocation, if possible, is an inherent expectation. Finally, Mr. Finkin concluded by testifying that the 2003 Handbook provisions regarding priority and relocation did not give effect to the reasonable expectations of tenured faculty.

Because no other evidence regarding the plaintiffs’ expectations was produced by the faculty or the college, the court concluded that the 1994 handbook, not the revised 2003 handbook, gave effect to the reasonable expectations of the faculty members.

Finally, although there was no direct evidence that the faculty members were surprised by the changes in the 2003 handbook, the court concluded that there was enough circumstantial evidence to suggest surprise. Among other things, the court pointed again to Finkin’s testimony regarding the reasonable expectations of tenured professors, and inferred that the plaintiffs must have been surprised by the 2003 handbook changes.

The court therefore concluded that the changes in the 2003 Handbook pertaining to priority and relocation were “retrospective changes of vested rights” and were invalid under the
Colorado Constitution. It is expected that the Metropolitan State College will appeal this decision.


In this case, the Superior Court of Pennsylvania upheld a trial court’s decision awarding the University of Pennsylvania’s former Chair of Pediatric Dentistry, who also directed a University of Pennsylvania dental clinic, more than $4 million in damages after he was removed from his position and transferred to a new clinic. In its decision, the court held that an offer letter was an enforceable contract and that voluntarily leaving a position could be construed as “constructive termination,” allowing the Chair to sue and obtain monetary damages.

Dr. Mark Helpin was hired by the University of Pennsylvania in 1989 to take over the University’s dental clinic at the Children’s Hospital of Philadelphia (CHOP). Dr. Helpin accepted an offer letter outlining his proposed compensation and ran the clinic at CHOP for thirteen years before he was removed from the position and transferred to a less active clinic by the new Dean of the School of Dental Medicine. In light of his transfer, his significantly decreased earnings, and other intolerable conditions surrounding his reassignment, Dr. Helpin left his position with the University of Pennsylvania and eventually sued the school for breach of contract and “constructive termination.”

Following a jury verdict for Dr. Helpin, the University of Pennsylvania appealed the verdict and the damages award, arguing, among other things, that the “offer letter” was not an enforceable contract. The appeals court rejected the University’s arguments, finding that the university had compensated Dr. Helpin during his entire period of employment as outlined in the “offer letter.” Therefore, the court found the jury had appropriately found the “offer letter” to be an enforceable contract. The university also argued that Dr. Helpin was not entitled to damages because he chose to leave the school and that he was not terminated. Again, the appellate court rejected the university’s arguments and ruled that the jury had reasonably concluded that Dr. Helpin had been “constructively terminated.” As such, the appellate court found the facts of the case legally sufficient to sustain the jury’s finding that Dr. Helpin’s contract had been breached and that he was “constructively terminated” and therefore entitled to damages.

III. Collective Bargaining and Agency Fee

A. **Utah Education Association v. Shurtleff**, 565 F.3d 1226 (10th Cir. 2009) (en banc)

This case involved a constitutional challenge to a Utah law prohibiting state and local public employers from making automatic deductions from their employees’ paychecks for political activities. Originally found to be unconstitutional by a district court, the law was upheld
as constitutional by the U.S. Court of Appeals for the Tenth Circuit in the wake of the Supreme Court decision in *Ysursa v. Pocatello Education Association et al.*, 129 S. Ct. 1093 (2009), in which the Supreme Court ruled that it is constitutional for states to prohibit payroll deductions for the political activities of local public-sector unions.

In *Shurtleff*, the state of Utah passed a law almost identical to the Idaho law that was upheld in *Ysursa*. Under the Utah Voluntary Contributions Act, public employers are prohibited from withholding voluntary political contributions from their employees’ paychecks. After the law was passed, five Utah labor unions and an association of labor unions filed a lawsuit asking the court to declare that the law was unconstitutional as applied to all public employers other than the state itself (similar to the question in *Ysursa*). Following the Supreme Court’s decision in *Ysursa*, the full court of the Tenth Circuit ruled that Utah’s law was constitutional as applied to all public employers in Utah.

Specifically, the court ruled that as in *Ysursa*, the law in Utah merely prevented the government from subsidizing political activities and therefore did not infringe on any individual’s First Amendment rights. Because there were no First Amendment rights at stake, the state’s interest in avoiding disruption of governmental workplaces by partisan politics was sufficient justification for the law. Furthermore, the law was constitutional as applied to all government entities in the state, including local and county governments, under the Supreme Court’s reasoning in *Ysursa*.


In a short opinion, a New York State Court (the New York Appellate Division for the First Department) found that the Fashion Institute of Technology (“FIT”) violated the Public Employees’ Fair Employment Act by unilaterally changing wage computation for day adjunct professors. FIT violated the Public Employees’ Fair Employment Act when it unilaterally reduced the computation period for day adjunct professors’ pay-per-semester from 16 weeks to 15 weeks. The state appeals court found that the practice of computing per-semester pay was subject to collective bargaining, that the past practice of a 16-week computation period was unequivocal and had continued uninterrupted for a period of time sufficient to create a reasonable expectation that the practice would continue, and that FIT had actual and constructive knowledge of the practice.


In this case, a federal court in Pennsylvania rejected a local teamsters union’s request to allow the union to withhold fees from its non-members’ wages before the union began complying with federal law regarding classification of charges.
In 2009, the Teamsters Local Union No. 250 (“Local 250”) and the plaintiffs, an independent group of non-union members, entered into a consent agreement barring Local 250 from withholding any fees from the Plaintiffs’ wages until the union complied with various laws as prescribed by the United States Supreme Court. Here, Local 250 had filed a motion asking the court to lift the prohibition, stating that the union had complied with the legal requirements and should be able to withhold fees from the Plaintiffs. The plaintiffs challenged this contention on various legal fronts and objected, in the union’s categorization of its expenses, to the advance reduction of “organizing expenditures,” charges for the “maintenance of membership status,” and charges related to “legislative activities” and “work-related issues.” The plaintiffs contended that such categories were both insufficiently limited and unconstitutionally vague, violating Supreme Court precedent. Plaintiffs also alleged that, by only using five categories to describe union expenditures within the audit provided to the court for the Pennsylvania Conference of Teamsters (“PCT”), the financial disclosures provided by Local 250 were not broken into sufficiently descriptive categories, again in violation of Supreme Court precedent.

Ruling on the Plaintiffs’ first claim, the court found that Local 250’s statement claiming fair share fees for “organizing” expenditures rendered the union’s accounting practices constitutionally invalid. Because unions cannot charge non-union members for fair share fees that are specifically related to the union’s membership activities, “[t]he definitions of chargeable expenses contained in the . . . notices violate Plaintiffs’ First Amendment rights.” The union’s allocation of expenses “incurred in communicating with community groups, governmental agencies and the media” did not “comply with [the] rule” prohibiting unions from charging fair share fees to non-members for activities other than collective bargaining activity.

Considering the plaintiffs’ second claim, the court compared various financial disclosures provided by Local 250 and noted that each of the other financial documents provided to the court by Local 250 included seventeen, nineteen, and thirty-seven categories of expenditures respectively. The court concluded, however, that the disclosures by the PCT were “inadequate” because “the PCT breaks down its expenses into only five (5), very broadly defined categories.” While the court did not indicate how many categories the audit should have included, the significant difference led the court to find that the chargeables audit of the PCT did not meet the requirements of the constitution.

In sum, Local 250 failed to establish that the court should have lifted the prohibition on collecting fair share fees before it could comply with constitutional standards. The court also rejected the union’s attempt to impose its legal costs for defending this case upon the plaintiffs. Because Local 250 couldn’t charge non-members for legal fees unconnected to the activities of its bargaining unit, charging the plaintiffs for the legal fees incurred in defending this case would be unconstitutional.
IV. Discrimination


This complicated affirmative action case arose out of a test that the city of New Haven, Connecticut developed and administered to determine which city firefighters would be promoted to vacant lieutenant and captain positions. When the results of the test came back, they showed that white candidates had outperformed minority candidates. At risk of being sued for discrimination because of the “disparate impact” that the test had on minority candidates, the city threw out the results of the test. As a result, white and Hispanic firefighters who had passed the test sued in federal court, alleging that discarding the test results discriminated against them on the basis of race.

The trial court ruled in favor of the city on the ground that if the city had certified the test results, it might have been liable under Title VII of the Civil Rights Act of 1964 for adopting a practice that had a disparate impact on minority firefighters. The appeals court affirmed that decision. In this opinion, a five-person majority of the Supreme Court reversed and remanded the appeals court’s ruling.

Title VII prohibits two types of discrimination on the basis of race, color, religion, sex, and national origin: intentional acts of discrimination, and policies or practices that are not intended to be discriminatory but that nevertheless disproportionately affect people on the basis of one of those characteristics. If a person shows that an employment policy or practice disproportionately affected him or her on the basis of race, color, religion, sex, or national origin, the burden is on the employer to show that the policy or practice is “job related” for the position and that there is a “business necessity” for the policy. If the employer does show that, then the employee or prospective employee can prevail only if he or she can show that there is some alternative practice that has less of a disparate impact, that meets the employer’s needs, and that the employer failed to adopt.

In its ruling here, the Supreme Court observed that the city was essentially caught between imposing a differential impact on the minority firefighters (by certifying the results of the test, which unintentionally favored the white firefighters) and engaging in discriminatory treatment of the white firefighters (by throwing out the results of the test under which they would have been promoted). The question for the Supreme Court, therefore, was whether the intent to avoid disparate-impact liability under Title VII on the one hand excused the disparate-treatment discrimination on the other.

After looking for a “strong basis in evidence” to support the city’s decision to throw out the test results that favored the white firefighters, the Court decided that there wasn’t sufficient evidence that the city would have been liable under Title VII for certifying the test results and concluded that the city therefore was not justified in throwing them out. The care that the city had taken in developing the test suggested that the minority firefighters would not have been able
to show that the test wasn’t job related and consistent with business necessity or that there was an equally valid, less discriminatory alternative that satisfied the city’s needs but that the city failed to adopt. The Court ordered the city to reinstate the test results, scolding that “fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions.” The Court suggested that if the city is sued for disparate-impact discrimination after it certifies the test results, it can defend itself and avoid liability based on the “strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.”