Annual Legal Update

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

For many years the Supreme Court has considered the free speech claims of public employees under what has become known as the Pickering-Connick balancing test. Under this test, the Court first asks whether the employee is speaking “as a citizen on a matter of public concern,” a necessary prerequisite to receiving First Amendment protection for his speech. Second, the Court weighs the employee’s interest in speaking against the government’s interest in maintaining an efficient workplace; if the Court finds the speech not disruptive and important to the public, the employee will win his free speech claim.

But in 2006, the Supreme Court created a categorical exception to the Pickering-Connick test, concluding 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 many courts faced with First Amendment claims by faculty members at public

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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.
colleges and universities apply *Garcetti* as though the Supreme Court had never expressed that reservation.

We start this presentation by reviewing cases that have invoked *Garcetti* in the higher education context over the last year. 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.

A. In-Class Speech Related to Scholarship and Promotions


In this complex case, currently on appeal, a federal trial court in North Carolina suggested that materials in a promotion packet would not be protected by the First Amendment after *Garcetti*.

Michael Adams was a tenured associate professor in criminology at the University of North Carolina-Wilmington. According to Adams, at the time he started at UNC-Wilmington (in 1993) 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. He was also named the Faculty Member of the Year twice.

In 2000, 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 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.”

In 2003, Adams began writing a column 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. Adams’ department ultimately 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, among other things, viewpoint discrimination in violation of his First Amendment rights. 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 therefore limited its review to “deciding only ‘whether the appointment or promotion was denied because of a discriminatory reason.’”

Adams’ free speech claim rested on his columns, publications, and presentations, many of which criticized UNC-Wilmington administrators or staff, and 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 facts are unclear); in the court’s words, however, his including the materials in his promotion application (as the court believed he did) “forc[ed] the very people he criticized to make professional judgments about this speech.”

Citing to *Garcetti*, 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 reasoned that Adams’ “inclusion of the speech in his application for promotion . . . marked his speech, at least for promotion purposes, as made pursuant to his official duties” under *Garcetti*.

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. Indeed, the court went one step further and seemed to suggest that any materials included in a faculty member’s promotion packet would be unprotected under *Garcetti*. Specifically, the court stated that 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” (emphasis added). The court thus appeared to conflate “protected speech” with any materials not presented for peer review, and materials presented for peer review with unprotected speech – a truly chilling suggestion for any faculty member engaging in controversial research or study. The court therefore dismissed Adams’ claim that his First Amendment rights were violated during the promotion review process.

Adams has appealed the court’s decision to the U.S. Court of Appeals for the Fourth Circuit, and the AAUP submitted an *amicus* brief in the case – in concert with the Thomas Jefferson Center for the Protection of Free Expression and the Foundation for Individual Rights

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2 Adams also claimed that he had been denied his rights under the Equal Protection Clause of the Fourteenth Amendment and been discriminated against on the basis of his religion; this outline does not address those claims.
in Education – urging the Fourth Circuit to recognize an academic freedom exception to \textit{Garcetti}.

\textbf{B. Faculty Speech as Part of University Governance or Committee Service}


In this case, a federal district court in New York relied on the “official duties” holding in \textit{Garcetti} to dismiss the First Amendment claims of two faculty members who complained about the way their department chair was utilizing university governance procedures. Anthony Isenalumhe and Jean Gumbs are tenured nursing professors at Medgar Evars College of the City University of New York (CUNY). In 2001, Georgia McDuffie was hired as an associate professor and chairperson of the Nursing Department. Isenalumhe and Gumbs opposed McDuffie’s appointment, and began to complain that she was bypassing faculty committee processes and was biased in her handling of faculty evaluations. They alleged that McDuffie retaliated against them for these complaints by subjecting them to extra evaluations, assigning their usual courses to other teachers, and assigning Gumbs to a non-teaching, administrative position. Isenalumhe and Gumbs filed suit in federal court, alleging that these actions were in retaliation for their free speech, in violation of the First Amendment.

The court decided that their complaints about committee matters were not protected speech under \textit{Garcetti} because the complaints “involved employee, as opposed to citizen, speech” that was “‘part and parcel’ of plaintiffs’ concerns about their ability to properly execute their duties as faculty members elected to, and serving on, various committees.” In other words, the court found that acting as members of the various committees was part of Isenalumhe’s and Gumbs’s “official duties” as faculty members. The court also held that the plaintiffs’ other complaints were not protected by the First Amendment because they were about personnel decisions that did not involve matters of public concern; instead, the court said Isenalumhe and Gumbs “were complaining about matters affecting them, and them alone” and their motivation in complaining “was plainly to redress personal grievances.”

This approach is very different than the Second Circuit’s decision in \textit{Sousa v. Roque}, 578 F.3d 164 (2d Cir. 2009) (discussed in last year’s outline), in which the court held that an employee’s speech motivated by personal grievances might still be on a “matter of public concern” and therefore protected by the First Amendment.

See also \textit{Davenport v. Board of Trustees of the University of Arkansas at Pine Bluff}, 2011 U.S. Dist. LEXIS 25707 (E.D. Ark. Mar. 14, 2011), in which the federal district court ruled, in the context of allegations by a long-time employee of the university’s department of public safety, that “allegations of unethical conduct by the chancellor of a public university is a matter of public concern.”

In this case, a federal district court in southern Ohio dismissed the First Amendment claim of a faculty member, and 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*.

Scott Savage was the head reference librarian at Ohio State University at Mansfield. 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 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.’”


This case has been reviewed in prior outlines; it is mentioned again here because a federal appeals court recently ruled on Dr. Hong’s appeal.

In brief, a federal trial court in California ruled that where a faculty member in the engineering department at the University of California-Irvine (UCI) made critical comments about various hiring and promotion decisions – simply as part of his role as a tenured faculty member, not as a member of an official faculty committee – his speech was not protected, because of the University of California system’s robust system of shared governance, which invites “expansive faculty involvement in the interworkings of the University.” As the court went on to say, “UCI ‘commissioned’ Mr. Hong’s involvement in the peer review process and his participation is therefore part of his official duties as a faculty member. The University is free to regulate statements made in the course of that process without judicial interference.”
The court also found that Dr. Hong’s criticism of his department’s use of lecturers was unprotected, characterizing the speech as addressing “only . . . internal departmental staffing and administration.” The court held broadly that “UCI is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities.”

Finally, the court ruled that Dr. Hong’s comments did not implicate matters of public concern under the First Amendment. “Each of Mr. Hong’s statements – regarding faculty performance reviews, departmental staffing and faculty hiring – involved only the internal personnel decisions of his department. In no way did they implicate matters of pressing public concern such as malfeasance, corruption or fraud.” The court therefore ruled in favor of the university.

Dr. Hong subsequently appealed the decision to the U.S. Court of Appeals for the Ninth Circuit. (The AAUP, along with the Thomas Jefferson Center for the Protection of Free Expression, filed an amicus brief in support of his appeal, asserting that the lower court badly misconstrued the application of Garcetti to cases involving academic-related speech.) In November 2010, the appeals court issued a brief, unpublished decision. With respect to the First Amendment issues, the court decided to “leave the question of whether faculty speech such as Hong’s is protected under the First Amendment for consideration in another case.” The decision therefore suggested that the district court’s reasoning, while not overturned, would not necessarily prevail in a subsequent similar case.


In this case, a federal district judge in Illinois ruled that when a faculty member speaks in her role as a student adviser, her speech is pursuant to her “official duties” and is therefore unprotected under Garcetti.

Loretta Capeheart was a faculty member in the Department of Justice Studies at Northeastern Illinois University, where she taught and researched social inequality and social change, particularly in the context of Latino incarceration. She served on the Faculty Council for Student Affairs (FCSA), was a faculty advisor to the Student Socialist Club, and was vice-chair of the Faculty Senate. Capeheart was vocal about various issues on campus, often in concert with students protesting the same issues.

After Capeheart was denied the chair of the Justice Studies Department even though her colleagues had elected her, was denied appointment as department coordinator, and was denied a Faculty Excellence Award for a book (though she received the award the following year), she filed suit against the university, alleging that these actions were retaliation in violation of her First Amendment rights.
Specifically, Capeheart said she was retaliated against for three incidents: (1) her participation with two students, including a member of the Socialist Club, in a protest over military recruiting on campus; (2) her comments during a meeting of the Illinois Latino caucus about the university’s failure to attract more Latino students and faculty; and (3) her criticism of the university’s use of campus police to arrest peacefully protesting students, including members of the Socialist Club.

The court ruled that “the speech at issue was made pursuant to Capeheart’s professional responsibilities. . . . Her involvement in protests over recruiting and her advocacy on behalf of student protesters were part of her role as advisor to the Socialist Club.” The court did note that Capeheart had argued that her speech should be protected “because Garcetti does not apply to teachers at public universities,” but the court disposed of that argument in one sentence, 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 court therefore concluded 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.”

With respect to her criticism of the university’s failure to hire more Latino faculty members, the court concluded that that speech was not pursuant to her professional responsibilities. As the judge said, “the defendants have presented no evidence that Capeheart had any responsibilities to oversee or advise on hiring Latino faculty. Although her job required her to conduct research, her research involved the social inequalities faced by Latino inmates, not Latino faculty members.” Capeheart lost on that issue as well, however; since that speech occurred nearly a year before the supposed retaliation, the court did not believe it was a cause of the retaliation.

Capeheart intends to appeal the decision to the U.S. Court of Appeals for the Seventh Circuit.

C. Speech Related to Employment or Administrative Matters


In this case, the U.S. Court of Appeals for the Second Circuit concluded that a faculty department chair was not protected by the First Amendment when he relayed a subordinate’s accusations of sexual harassment to the university administration.

Chukwumieziri Ezuma was a professor and Chair of the Department of Accounting, Economics, and Finance at the City University of New York (CUNY). While he was chair, Evelyn Maggio, a faculty member in his department, reported that another faculty member, Dr. Emmanuel Egbe, was sexually harassing her. Ezuma relayed the complaints to administration officials; after Maggio sued Egbe and CUNY, Ezuma also recounted Maggio’s accusations to
lawyers and police investigating the complaints. Ezuma was then removed from various academic committees and as department chair, to which Egbe was appointed in his stead. Ezuma sued, claiming that these actions were unconstitutional retaliation for his speech about the sexual harassment.

The Second Circuit ruled that Ezuma’s speech, including his discussions with lawyers and the police, was “pursuant to his official duties” because, as department chair, he was obliged to report accusations of sexual harassment. Therefore, the court held, the speech was not protected under *Garcetti*. Although noting that *Garcetti* had exempted speech concerning “academic scholarship or classroom instruction,” the court decided that this case had “nothing to do with academic freedom or a challenged suppression of unpopular ideas… The speech at issue here could have occurred just as easily in a private office, or on a loading dock.”

2.  **Fox v. Traverse City Area Public Schools Bd. of Educ.**, 605 F.3d 345 (6th Cir. 2010)

In this K-12 education case, the U.S. Court of Appeals for the Sixth Circuit dismissed a teacher’s First Amendment claim and took a broad view of what speech “owes its existence to” a teacher’s professional responsibilities under *Garcetti*.

Susan Fox was a Michigan elementary school special-education teacher who complained to her supervisors that her teaching load exceeded the legal limit. In 2007 the school decided not to renew her probationary teaching contract, citing her failure to complete required student Medicaid reports on time, her unauthorized delegation of responsibilities to teaching assistants, and her failure to provide the minimum required instructional time to students. Fox sued, claiming the non-renewal was retaliation for her speech in violation of the First Amendment.

The Sixth Circuit held that Fox’s complaints were not protected speech under *Garcetti*, noting that “speech by a public employee made pursuant to ad hoc or de facto duties not appearing in any written job description is nevertheless not protected if it ‘owes its existence to [the speaker’s] professional responsibilities.’” It determined that Fox’s complaints about class size “owe[d] [their] existence to” her teaching responsibilities and were therefore not protected. The court also relied on the fact that Fox’s complaints were directed solely to her supervisor, rather than the general public, thereby distinguishing other cases where plaintiffs had made complaints “outside the ordinary chain of command.”


In another non-higher-education related case, a federal district court in Maine took a similarly broad view of a teacher’s “official duties” for the purposes of the *Garcetti* analysis.

Ellen Decotiis is a speech language therapist who taught disabled children for Maine’s Child Development Services (CDS) agency. In 2008, the Maine legislature passed a rule that summer teaching services would be available only to those students for whom it was “necessary
to comply with federal law.” Because one CDS office for which Decotiis worked provided no information about how students would be chosen to receive summer teaching services, Decotiis urged her students’ parents to contact advocacy groups for the disabled to determine “their rights under state and federal laws,” posting contact information for these groups in her office. The director of the local CDS office complained that Decotiis was “out to get her,” and a few months later Decotiis’s annual contract was not renewed. Decotiis sued, alleging that she had been illegally retaliated against in violation of the First Amendment.

The court dismissed Decotiis’s First Amendment claim, holding that her speech was “pursuant to her official duties” under Garcetti. The court reasoned that “providing therapy” was Decotiis’s official duty, and the speech at issue was sufficiently related to that duty because it involved whether her students would be receiving therapy, it occurred during Decotiis’s therapy sessions, and it was directed only to parents of her students (rather than the general public). Further, the court decided that the speech was “influenced and informed by her position as a therapist” because she had asked her superiors about the summer teaching policy.

D. Faculty Speech on Curriculum and Student Discipline


In this case, the U.S. Court of Appeals for the Sixth Circuit upheld the termination of a high-school English teacher who claimed her employment was unconstitutionally terminated by an Ohio school district in retaliation for her choice of student reading selections (including Herman Hesse’s Siddhartha) and teaching methods – ironically enough, when teaching a unit on government censorship and banned books. In so doing, the Court ruled that First Amendment retaliation cases arising in the employment context require a three-part analysis – under Connick (for the matter of public concern inquiry), Pickering (for the balancing requirement), and Garcetti (for the “pursuant to official duties” analysis) – and that “a First Amendment claimant must satisfy each of these requirements.”

The court found that “Garcetti’s caveat offers no refuge” where the teacher is at the secondary level rather than at a public college or university. As the court explained, “As a cultural and a legal principle, academic freedom ‘was conceived and implemented in the university’ out of concern for ‘teachers who are also researchers or scholars – work not generally expected of elementary and secondary school teachers’” (quoting J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment", 99 YALE L.J. 251, 288 n.137 (1989).) The court also opined – though in non-binding dicta, since the issue before it did not actually relate to university-level faculty – that academic freedom belongs to the university rather than to the individual professor.
E. Extramural Speech


In this case, a federal district court in western Pennsylvania held that a school administrator’s testimony at a teacher disciplinary hearing was protected by the First Amendment.

Tammy Whitfield was an assistant superintendent in the Pennsylvania Chartiers Valley School District who testified at the disciplinary hearing of a teacher in the district. Two board members attended the hearing and loudly expressed their disapproval of her testimony. After the board failed to renew her 5-year contract, Whitfield filed suit alleging that she had been retaliated against for her testimony, in violation of her free speech rights.

The defendants argued that Whitfield’s speech was not protected under *Garcetti*, but the court applied *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), in which the U.S. Court of Appeals for the Third Circuit ruled that a public employee’s courtroom testimony was protected by the First Amendment even after *Garcetti*. The court distinguished *Garcetti* on the grounds that the school board had no right to control the content or manner of Whitfield’s testimony. Indeed, such control would violate the due process rights of Whitfield and the teacher being investigated, said the court. Then the court applied the *Pickering-Connick* test to Whitfield’s speech, finding that: (1) her testimony was a matter of public concern both because of its setting in front of an official government adjudicatory body and because it was a local controversy that divided public opinion and prompted several newspaper articles; and (2) the balancing of interests favored Whitfield because the defendants failed to show that her testimony damaged any government interest in efficiency or effectiveness.

F. Union- or Organization-Related Speech


In these two related cases decided on the same day, a federal district court in Michigan ruled that the *Garcetti* “official duties” analysis does not apply when public employees speak on a matter of public concern on behalf of a union or another organization, rather than in their capacity as public employees.

In *Petrich*, a police officer for the City of Flint, Michigan, was also the president of the Flint branch of the African-American Police League (AAPL). After a new acting police chief was appointed, Officer Petrich strongly criticized the appointment in a local newspaper interview in which he was identified as the president of the AAPL. He was then disciplined under a new policy preventing police officers from speaking to the media without prior permission. He sued,
claiming that the policy was unconstitutional and that the city had violated his First Amendment free speech rights.

The court first ruled that Officer Petrich had spoken on a matter of public concern; in the court’s view, “public safety concerns require a well-run police force, and [Petrich] expressed his view that this expectation would not be met under [the acting chief’s] leadership. Nothing in [Petrich’s] comment indicates a purely personal vendetta . . . .” The court also ruled that *Garcetti* did not strip Officer Petrich’s speech of protection: because the City of Flint had “no interest in controlling the speech of the AAPL” where Officer Petrich “spoke to the media in his capacity as president of the AAPL, rather than as a police officer, *Garcetti* does not bar his First Amendment claims.”

Finally, the court ruled that the City failed to show that Officer Petrich’s comments interfered with the operations of the police department or caused disharmony among his co-workers. The AAPL’s interest in expressing its views was therefore greater than the City’s in maintaining police discipline. As the court further noted, “Plaintiff’s statements as head of the AAPL do not undermine the authority of the police chief. Although the AAPL’s views may conflict with Defendant’s, this does not constitute insubordination.” The court did emphasize that Officer Petrich was authorized to speak on behalf of the AAPL, and suggested that that was a critical element of its decision.

*Speer* also involved a police officer for the City of Flint, who was president of the Flint Police Officers’ Association (FPOA), the police officers’ union. Officer Speer spoke to the media – as he had frequently done in the past in his capacity as union president – about his dissatisfaction with the appointment of the new acting police chief. Pursuant to the new media policy, he was disciplined, and he sued, alleging that his First Amendment rights had been violated.

The court first concluded that Speer’s speech was on a matter of public concern, observing that “Flint residents have a strong interest in the correct operation of the Flint Police Department because of its central role in maintaining public safety. They therefore have an interest in Defendant’s attempts to silence the police union.” The court also noted that Speer’s comments were “particularly relevant to outsiders, as they would be most affected by Defendant’s decision to restrict statements to the media.”

The court next ruled that Speer’s speech remained protected after *Garcetti*. As the court reasoned, quoting *Garcetti*, “the City’s interest in ‘controlling speech’ and ensuring ‘substantive consistency’ is considerably reduced in connection with the speech of a union official, due to the inherent tension between the union and the administration. The collective bargaining system envisions a dynamic between employer and union [that] is unlike the relationship between employer and employee; this includes the expression of sometimes conflicting opinions. An
employer cannot expect to control the union’s speech in the same way it would control an employee’s.”

Finally, the court ruled that Speer’s speech did not interfere with the performance of his duties or cause disharmony among his coworkers. As the court drily noted, “given the actions taken just prior to Plaintiff’s discipline, such as closing the jail and laying off police officers, some discord between the police officers’ union and the administration could be expected.” Because the City did not exercise authority over Speer when he spoke as the president of the FPOA, his statements on behalf of the FPOA did not undermine the police chief’s authority. As the court put it, “although the union’s views may conflict with Defendant’s, this does not constitute insubordination.”

G. Other First Amendment Issues (Not Garcetti-Related)

1. Rodriguez v. Maricopa County Community College District, 605 F.3d 703 (9th Cir. 2010)

In this case, the U.S. Court of Appeals for the Ninth Circuit ruled that a professor’s use of his college’s e-mail system was protected by the First Amendment. The court also held that the professor’s college could not be liable under Title VII – a federal anti-discrimination statute – for failing to discipline him for his speech.

Professor Walter Kehowski, a math teacher in the Maricopa County Community College District, sent several e-mails to all district employees in which he criticized the district’s endorsement of Dia de la Raza (a holiday that some Hispanics celebrate instead of Columbus Day) and linked to articles that argued for the “superiority of Western Civilization.” After the e-mails caused protests on campus and in the wider community, the president of the college and the chancellor of the district condemned Kehowski’s e-mails. But they refused to sanction him, stating that doing so “could seriously undermine our ability to promote true academic freedom.” Hispanic employees of the district sued, claiming that the district’s failure to discipline Kehowski led to a hostile work environment, violating the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution and Title VII of the Civil Rights Act.

The Ninth Circuit held that Kehowski’s e-mails were not harassment because they were not directed at one person, but instead were the “effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot.” The court reasoned that the government could not silence such public speech based on the viewpoint of the speech, which was what the plaintiffs were arguing the district should have done. The court declared:

The right to provoke, offend and shock lies at the core of the First Amendment. This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular.
Colleges and universities – sheltered from the currents of popular opinion by tradition, geography, tenure, and monetary endowments – have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale.

The court also afforded substantial deference to the college’s decision not to discipline Kehowski because “[t]he academy’s freedom to make such decisions without excessive judicial oversight is an essential part of academic liberty and a special concern of the First Amendment.”

2. *Depree v. Saunders*, 588 F.3d 282 (5th Cir. 2009)

In this case, the U.S. Court of Appeals for the Fifth Circuit partially dismissed a professor’s free speech and retaliation claims because it found that his First Amendment rights were not “clearly established” at the time that the university administrators he was suing supposedly retaliated against him.

Chauncey DePree was a tenured professor in the University of Southern Mississippi (USM) business school. In August 2007, the dean of DePree’s college sent a letter to Martha Saunders, the USM president, complaining that DePree was acting in a negative and disruptive manner and creating “an environment in which faculty members and students do not feel safe to go about their usual business.” The letter also maintained that DePree was the only faculty member in his department that USM’s accrediting agency had failed to find academically or professionally qualified. Enclosed with the dean’s letter were eight other letters from professors complaining of DePree’s behavior.

President Saunders referred the complaints to the university provost for further investigation. In the meantime, she relieved DePree of his teaching functions and told him to stay out of the business school, except to retrieve personal items. However, he was instructed to continue his research activities, and was allowed uninterrupted access to the USM computer system and library. His salary and benefits remained the same.

Soon after, DePree sued the president, the dean, and other administrators in both their personal and official capacities, alleging that they had retaliated against him in violation of the First Amendment. He claimed that the suspension of his teaching duties was retaliation for his website, on which he criticized USM, and for his complaints to USM’s accrediting agency about the school. He also alleged that USM had denied him due process rights guaranteed by the constitution and violated certain state laws. A federal district court granted the defendants’ motion for summary judgment, and DePree appealed to the U.S. Court of Appeals for the Fifth Circuit.

On DePree’s First Amendment claim, the Fifth Circuit ruled that at the time that Saunders disciplined DePree, it was not clear in the Fifth Circuit whether Saunders’ removal of
DePree’s teaching duties would “dissuade a reasonable worker from making or supporting a charge of retaliation.” Under rules of qualified immunity for governmental officials, Saunders therefore could not be held liable in her personal capacity.

The court also held that the other administrators could not be liable in their personal capacities because only final decision-makers – in this case, Saunders – can be held liable for First Amendment retaliation in employment. However, determining that DePree might have a valid claim against USM administrators in their official capacities, the court sent those claims back to district court for further fact-finding.

Interestingly, USM appears not to have argued that DePree’s speech was “pursuant to his official duties” under Garcetti v. Ceballos. In a footnote, the court observed: “Whether DePree's speech would receive protection following Garcetti v. Ceballos, supra, is not clear on the incomplete record before us, but we do not go behind the parties’ current positions.”

On DePree’s Due Process claim, the Fifth Circuit found no violation because DePree had no “unique property interest in teaching.” Finding DePree’s “reliance on the faculty handbook…inapposite,” the court compared Saunders’ removal of DePree’s teaching duties to a reassignment or transfer, actions that would implicate no property interest “absent a specific statutory provision or contract term to the contrary.”


In this case, a Washington state appeals court held that a professor had violated a state ethics law when she used her school e-mail for political purposes.

Teresa Knudsen was a part-time adjunct academic advisor at Spokane Community College (SCC) who taught classes in the English Department. In February 2005, Knudsen sent an e-mail from her SCC computer to all SCC faculty, asking them to encourage Washington state legislators to approve two bills that would provide tenure-like protections for part-time faculty. The e-mail provided legislators’ e-mail address, a sample letter that the recipients could send, and tips about how to best influence the legislator, including: “[T]ell any of your personal problems with lack of job security. You can mention as well that this bill has no cost associated with it.”

SCC informed Knudsen that her e-mail constituted lobbying unrelated to her official duties and was therefore illegal under the state ethics in public service act, which forbids state employees from using state property “for private benefit or gain” of themselves or another. The Washington State Executive Board (“the Board”) also adopted rules interpreting this statute, which allowed de minimis private use of state property. The Board heard Knudsen’s case and agreed that she had violated the act, as did a state trial court. Knudsen appealed her case to the state court of appeals.
Knudsen made several arguments invoking her free speech rights and her rights as a union member. With respect to her rights as a union member, the court rejected her argument because (1) Knudsen admitted she had sent the e-mail because she thought the union’s lobbyists were not doing enough to promote the bills and (2) she “failed to establish that she was a union representative.”

With respect to her free speech rights, the court decided that the school’s internal e-mail and computer system were “nonpublic forums…because members of the public do not have in-person access to the computers or e-mail accounts.” Because the system was nonpublic, rules restricting speech through SCC’s e-mail needed only to be “reasonable and viewpoint neutral.” The court found that the Board’s rules and the state law met this test and thus affirmed the lower court.

II. Tenure, Due Process, and Breach of Contract

A. Bernold v. Board of Governors of the University of North Carolina, 683 S.E. 2d 428 (N.C. App. 2009)

In this case, a North Carolina state appeals court upheld a university’s decision to fire a tenured professor based solely on the finding that the professor had rendered “incompetent service.”

Leonhard Bernold had been a tenured professor at North Carolina State University (NCSU) since 1996. In 2002, NCSU adopted post-tenure review regulations, which provided that “unsatisfactory reviews in two consecutive years or any three out of five years ‘will constitute evidence of the professional incompetence of the individual and may justify… discharge for cause.’” Bernold received post-tenure review findings of “does not meet expectations” in 2002, 2003, and 2004. He was then discharged for incompetent teaching and incompetent service.

After his discharge, Bernold requested a hearing before the faculty hearing committee. The committee found unanimously that he was a competent teacher, but found, by a 3 to 2 vote, that he had provided incompetent service. The university’s Chancellor upheld these findings, but sent the matter back to the committee for a recommendation on whether to discharge Bernold based solely on the finding of incompetent service.

After holding an additional hearing on the issue of petitioner’s service, the committee changed its mind and found, by a 4 to 1 vote, that petitioner was actually “not incompetent in the area of service.” This time, however, the chancellor reversed the committee’s decision, and decided to discharge Bernold. Both the university Board of Trustees and the university Board of Governors affirmed the chancellor’s decision. Bernold sued, but the trial court upheld the university’s right to discharge him. On appeal, Bernold made three arguments.
First, Bernold argued that tenured professors have a substantive due process right to protection from discharge for any reason other than incompetence, misconduct or neglect of duty. However, the appeals court upheld Bernold’s discharge for incompetence because it found his three years of unsatisfactory reviews were sufficient evidence of professional incompetence. The court then noted that the university based its ultimate discharge on “incompetence of service” which rendered him unfit to continue as a member of the faculty. The school specifically alleged that “his interactions with colleagues had been so disruptive that the effective and efficient operation of his department was impaired.” Because a College of Engineering regulation stated that “each faculty member is expected to work in a collegial manner,” the court found that his unsatisfactory post-tenure reviews constituted “sufficient evidence of his professional incompetence to justify his discharge for cause.”

Second, Bernold argued that the university violated his procedural due process rights in its use of the review process to discharge him. Bernold cited to language from the University Policy Manual, which states one purpose of post-tenure review process is to “provide for a clear plan and timetable for improvement of performance of faculty found deficient.” Because the University did not provide a clear plan or timetable, Bernold alleged that his due process rights had been violated. However, the court found that the policy manual was not a set of due process requirements but rather a “list of principles to guide the post-tenure review process.” Whether or not the University followed the policy manual, it did follow the university regulatory requirements and thus did not violate Bernold’s due process rights.

Finally, Bernold argued that the trial court erred in finding substantial evidence in the record to support his discharge for incompetence. However, the court rejected this argument because of the limited role appellate courts play in assessing evidence. The court noted:

Petitioner relies on his argument that “lack of collegiality” cannot constitute incompetence; however, he cites no authority that disruptive behavior cannot constitute incompetence. Petitioner then draws our attention to evidence in the record showing petitioner’s positive interactions with some colleagues and explaining the reasons behind his negative interactions with others. Our task is not to comb the record for evidence that would support a different outcome from that reached by the Board, but rather to look for substantial evidence to support the decision. Here there is ample evidence that petitioner was disruptive to this point that his department’s function and operation were impaired.


In this case, the New Hampshire Supreme Court upheld a university’s decision to reassign a professor’s course offerings because the reassignment did not constitute a “major change” under university policy.
Mara Sabinson is a professor in the Dartmouth College Theater Department. In July 2001, disputes within the Theater Department caused the Associate Dean for the Faculty of Humanities to assume the role of department chair. The Dean reassigned one of Sabinson’s classes and her directorship of the 2005-2006 main stage production. In May 2005, a faculty committee concluded that “the Theater Department has suffered grievously from the presence of Mara Sabinson,” with “faculty and students alike” complaining “of her harsh treatment of students” and “of her uncollegial behavior in Department meetings” and towards “junior and adjunct colleagues.” The committee recommended that Dartmouth offer Sabinson a retirement package and limit her course offerings. After administrators did so, Sabinson filed a grievance, filed complaints with the EEOC and the New Hampshire Commission on Human Rights, and eventually filed suit in federal district court, alleging age, gender, and religious discrimination, retaliation, breach of contract, and wrongful discharge and demotion.

The district court dismissed or granted Dartmouth summary judgment on all claims except breach of contract, over which it declined to exercise jurisdiction. The U.S. Court of Appeals for the First Circuit affirmed, and Sabinson then filed a breach of contract claim in New Hampshire state court, which also ruled against Sabinson.

On appeal to the New Hampshire Supreme Court, Sabinson made several arguments regarding the contract rights she believed she had in specific course offerings. First, she argued that her course reassignment constituted a “major change in the conditions of employment” under Dartmouth’s Agreement Concerning Academic Freedom, Tenure, and Responsibility of Faculty Members, and that the reassignment therefore should have triggered the disciplinary procedures outlined in that agreement. The New Hampshire Supreme Court disagreed, upholding the trial court’s finding that the reassignment was not “major” because it was neither a reduction in employment nor in benefits. Assuming (without deciding) that the Agreement was a contract between Dartmouth and Sabinson, the court relied on the “plain meaning” – that is, the literal dictionary definitions – of the words “major” and “change.” It also relied on examples of “major changes” listed in the Agreement, which involved cessation of employment and/or compensation.

In addition, Sabinson argued that “she had substantive rights to teach her preapproved, published courses.” The court quickly dismissed this argument because Sabinson had cited no authority for this proposition. The New Hampshire Supreme Court therefore affirmed the lower court’s grant of summary judgment for Dartmouth College.


This case involved a university’s creation of a tenure-like teaching position for the spouse of an incoming dean. A Rhode Island state court found that a legally enforceable employment contract existed between the spouse and the university, even though the terms of the contract
existed only in a series of letters from various university officials (rather than in one cohesive document).

In the spring of 2000, Brown University asked Paul Armstrong to be the Dean of the College at Brown. Both Armstrong and his wife Beverley Haviland were tenured professors at the State University of New York at Stony Brook (SUNY), and Armstrong told Brown that he would not accept the position unless the university also offered Haviland a tenured teaching position. Because there were no tenured positions open in Haviland’s specialties, the university offered Haviland a position combining that of a Senior Lecturer and a Visiting Associate Professor. Instead of drawing up one cohesive contract, the university offered Haviland the job and described its scope and benefits through a series of letters.

The first letters, dated October 16 and 18, 2000, stated that Haviland’s appointment would be renewed every five years except for “adequate cause.” The letters stated that adequate cause:

shall be understood to be substantially equivalent to adequate cause for dismissal of a tenured faculty member…which is defined in the Faculty Rules and Regulations as the following: demonstrated incompetence, dishonesty in teaching or research, substantial and manifest neglect of duty, or personal conduct which substantially impairs fulfillment of institutional responsibility.

After these terms were approved by Haviland, Armstrong, and members of the Brown administration, Armstrong accepted the job as dean. On November 6, 2000, however, Haviland received a letter from the Dean of Faculty noting that her appointment as Senior Lecturer had been approved by the Committee on Faculty Reappointment and Tenure, as well as an attached note that said “this supercedes my letter to you of October 18.” Concerned that the university was attempting to renege on the initial agreement, Haviland contacted the Dean of Faculty, who assured her in a letter dated November 17, 2000 that “the use of the term ‘supercedes’ was unfortunate” and that her appointment was as both a Senior Lecturer and a Visiting Associate Professor.

In 2004, Haviland was reviewed for reappointment, and a faculty committee recommended against reappointing her because she had failed to satisfy the department standard of “sustained excellence in teaching,” a different standard than what had been outlined in the October letters. She was eventually reappointed to the position, but in 2009 was again reviewed under the department’s “sustained excellence in teaching” standard. Although her current appointment lasts through 2015, Haviland thought that her reappointment should have been governed by the tenure review standards outlined in letters of October 16 and 18. She filed suit in the Superior Court of Rhode Island asking for a declaratory judgment to define the enforceability and terms of her employment agreement with Brown.
Initially, Brown argued that Haviland could not sue because she had not suffered any legal injury. But the court disagreed, finding that Brown’s “alleged failure to abide by the promised protections has led to ongoing uncertainty with regard to [Haviland’s] future employment” and with regard to the standards the university would use in deciding whether to reappoint her. This uncertainty was sufficient legal injury allowing Haviland to sue, the court ruled.

The court further ruled that, despite the lack of an “integrated document” defining Haviland’s employment status, there was a “meeting of the minds on the terms of the offer” and therefore a valid and enforceable contract. Even if a valid contract had not existed, the court held that there was an “independent equitable basis for finding the terms of the agreement enforceable” because Haviland had reasonably relied on the promise of employment when resigning from her SUNY position and moving her family to Rhode Island.

As to the terms of the contract, the court held that the terms of the October letters were binding. This meant that Haviland’s appointment must be renewed for additional five-year terms unless Brown presented her with written proof of adequate cause, defined as “demonstrated incompetence, dishonesty in teaching or research, substantial and manifest neglect of duty, or personal conduct which substantially impairs fulfillment of institutional responsibility.” The court also ruled that Haviland was entitled to the same due process rights as tenured faculty members.

D. *Mills v. Western Washington University*, 170 Wn. 2d 903 (Wash. 2011)

In this case, the Washington Supreme Court held that a university did not engage in unlawful procedure by closing a professor’s disciplinary procedure to the public and that the state constitution does not apply to university administrative hearings.

Professor Perry Mills, a tenured professor at Western Washington University (WWU), was suspended without pay for two academic quarters for violating the faculty code of ethics. The suspension followed a university administrative hearing that was, despite his objections, closed to the public and press. The Washington Court of Appeals ruled that the university violated Washington’s Administrative Procedure Act (APA) by closing the hearing to the public and reversed the university’s disciplinary order and remanded for a new hearing. In this decision, the Washington Supreme Court reversed the state court of appeals decision.

The court first concluded that because the WWU faculty handbook was developed under a delegation of authority from the state legislature to the Board of Trustees, and because a section of the handbook allowed for closure of the hearing, that section constituted an exception to the state Administrative Procedure Act’s requirement that hearings otherwise be public.

Professor Mills also argued that even if the closure of his disciplinary hearing was acceptable under the APA, it was unconstitutional under the Washington State Constitution,
which states that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” The court determined that the authors of the constitution were referring only to courts in the judicial branch, not to the “quasi-judicial proceedings” of a university administrative hearing.

III. Faculty and Institutional Authority and Governance


In this case a federal district court reinforced the discretion and authority of faculty over clearly educational matters.

Ayal Rosenthal was a part-time MBA student at NYU’s Stern School of Business. He also worked for Pricewaterhouse Coopers, and he tipped off his brother to nonpublic securities information, which his brother used to make trades. The federal government initiated an investigation upon learning of his activities. Rosenthal pled guilty to conspiracy to commit securities fraud shortly after completing his Stern course requirements, but before receiving his degree. The school decided not to grant him his degree, based in part on a recommendation from the faculty, and Rosenthal sued.

NYU and Rosenthal wrangled over whether the school had provided him with the precise procedural requirements guaranteed by various handbooks and sets of rules. The court, however, took a more holistic approach. As the court observed:

As an initial matter, Rosenthal proposes an elaborate jurisdictional and procedural argument that cherry picks from NYU's various rules and regulations. Defendants have risen to the bait, framing the case largely in those terms. But this is a misconception. The University Bylaws expressly confer upon the faculty of each school the authority to determine “the standards of academic achievement to be attained for each degree offered” and “to certify to the President, for recommendation to the Board, qualified candidates for degrees and certificates.” While the Stern faculty’s decision to withhold Rosenthal's degree followed the form of a disciplinary proceeding, it determined pursuant to its duly-conferred authority that Rosenthal was not fit to receive a degree on the basis of his admitted felonious conspiracy to commit securities fraud. That decision was fully within the faculty’s power and discretion. It was neither arbitrary nor capricious. Thus, Rosenthal’s contentions are entirely without merit on that ground alone.

The court went on to examine the University Bylaws, which also appear in the NYU Faculty Handbook. The NYU Bylaws state:

Subject to the approval of the Board and to general University policy as defined by the President and the Senate, it is the duty of each faculty to determine . . .
standards of academic achievement to be attained for each degree offered, . . . to make and enforce rules for the guidance and conduct of the students, and to certify to the President, for recommendation to the Board, qualified candidates for degrees and certificates.

The Bylaws also state that “[t]he power of suspending or dismissing a student of any school is lodged with the voting faculty of that school” (as opposed to the University Senate, which has jurisdiction over “educational matters and regulations of the academic community”).

The court concluded that the Bylaws “grant the Stern faculty exclusive jurisdiction and authority to determine Stern’s standards of academic achievement, confer degrees, and dismiss students. The Stern faculty’s decision to withhold Rosenthal’s degree was an exercise of the authority delegated to it” under the Bylaws.


In this state court case, the Appeals Court of Massachusetts reversed and remanded most of an arbitrator’s decision regarding reinstatement of a former tenured faculty member, on grounds of institutional authority over hiring decisions.

Elizabeth Hebert was a former tenured faculty member at Holyoke Community College who applied for a position at the college that required a master’s degree. When she was not hired for the position, she filed a grievance with the union on the grounds that she was a “retrenched” faculty member who was owed certain rights under the collective bargaining agreement. The arbitrator ruled in her favor and ordered the community college to hire her for the position and pay her back pay, or to pay her the full salary for the position as long as the position continued to exist.

The appeals court concluded that the arbitrator had exceeded his authority in ordering Hebert’s reinstatement. As the court observed, “[f]ew issues are as central to setting educational policy as choosing which faculty members to hire or promote,” and “specific appointment decisions cannot be delegated to an arbitrator” (citations and internal quotation marks omitted). Although some of the precedent on which the court relied arose in the K-12 context, the court added:

These principles apply with at least equal force in the context of higher education. The need for college administrators to be able to exercise judgment in conducting faculty searches is reinforced by the discretionary nature of evaluating the candidates. Hiring faculty, like granting tenure, “necessarily hinge[s] on subjective [judgments] regarding the applicant’s academic excellent, teaching ability, creativity, contributions to the
university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measurement.”

(Quoting Berkowitz v. President & Fellows of Harvard College, 58 Mass. App. Ct. 262, 269 (Mass. Ct. App. 2003).) Accordingly, the court ruled, even if the scope of a collective bargaining agreement appears to include a college’s judgment regarding candidates for a faculty appointment, such matters are not in fact within the authority of an arbitrator.

On a related issue, however, the court sided against the college. The union had alleged that the person who was hired instead of Hebert did not have a master’s degree and therefore could not be chosen in her stead. The college argued in response that because the successful candidate was “ABD,” and therefore had a credential that was equivalent to or greater than a master’s degree, she was an appropriate hire. The court rejected this argument, reasoning that “having drafted its posting expressly to require that candidates have a master’s degree, the college was not free to determine that a candidate who had obtained neither a master’s degree nor a higher degree nevertheless possessed ‘better’ credentials than one with a master’s degree.” The arbitrator therefore did have the authority to determine whether the college had, in good faith, utilized the minimum job requirements that the college itself had established.

Finally, the court held that the arbitrator did not have the authority to reappoint Hebert, “because it would directly intrude upon the appointment authority left to the exclusive purview of the college administration.” Because it was not clear that the college wanted to hire Hebert, but it could not hire its preferred candidate because she did not have a master’s degree, the court directed the college to begin a new search (if it still wanted to fill the position), “using whichever criteria the college administration determines best serve the college’s needs.” The court also remanded the case to the arbitrator to award monetary compensation to Hebert that did not rise to the level of the “full-scale damages” the arbitrator originally awarded, which exceeded his authority.

IV. Union/Collective Bargaining Cases and Issues

A. State Labor Laws

1. Fort Hays State University v. FHSU AAUP Chapter, 228 P.3d 403 (Kan. 2010)

In this case, the Kansas Supreme Court found that the state agency enforcing Kansas’s labor laws had no authority to grant monetary awards for labor law violations.

Frank Gaskill was an associate professor at Fort Hays State University (FHSU), hired on the tenure track for the 2000-2001 academic year. In May 2001, FHSU informed him that it would not renew his appointment for the 2001-2002 academic year. At that time, the local AAUP was the certified bargaining representative for FHSU faculty but had yet to enter into a memorandum of agreement with FHSU. In 2001, the AAUP filed a prohibited practices
complaint with the state Public Employee Relations Board (PERB), alleging that FHSU had violated the Kansas Public Employer-Employee Relations Act (PEERA) by shutting the AAUP out of Gaskill’s grievance process and unilaterally changing terms and conditions of employment without bargaining in good faith with the AAUP.

Initially a PERB hearing officer found that the university violated PEERA. It ordered the university to cease and desist, to post notices advising FHSU employees of their rights under PEERA, and to pay Gaskill – who was not actually a party to the administrative proceeding – $142,013.62 in damages. The university appealed, and PERB, while affirming that the university had violated the act, determined that monetary damages were improper in this case.

The AAUP chapter appealed PERB’s decision, and the state trial court reversed PERB’s conclusion that monetary damages were improper. On remand, PERB reduced Gaskill’s award to $12,772.80, and also outlined the scope of PERB’s power to award monetary damages under PEERA: it declared that its power to award monetary damages derived from PEERA’s broad remedial purpose, but that PERB did not have the power to award punitive damages or anything resembling a “windfall.” This finding was appealed up through the Kansas state court system and eventually reached the Kansas Supreme Court.

During the litigation process, PERB and the AAUP chapter argued that although PEERA did not explicitly grant PERB the power to award monetary damages, this power could be inferred from: (1) PERB’s quasi-judicial functions and PEERA’s broad purpose; (2) a previous version of PEERA, which included a broad grant of authority; and (3) analogy to other labor laws.

The Kansas Supreme Court was not persuaded by those arguments and determined that PERB does not have the power to grant monetary remedies for PEERA violations. First, the court found that “any connection between the monetary damages ordered in this case and PEERA’s statutory purposes to encourage discussion of grievances and improving relationships is tenuous at best.” The court concluded that a monetary remedy could only serve these purposes if it were viewed as a punitive remedy, which PERB had conceded it was without authority to impose.

Second, the court held that the legislature’s decision to change the previous version of PEERA might have indicated its intent to remove this power from PERB. Even if this was not the legislature’s intent, the court declared that “the legislature alone must remedy the mistake.”

Finally, the court refused to analogize PEERA to the National Labor Relations Act (NLRA) because of the “distinctions between private employment, covered by the NLRA, and public employment under PEERA.”
2. **AAUP, Lincoln University Chapter v. Lincoln University, 41 PPER 120 (2010)**

The AAUP CB chapter at Lincoln University in Pennsylvania claimed that the university engaged in an unfair labor practice (ULP) and violated the Public Employee Relations Act by reprimanding a faculty member who failed to use the required form in submitting information about his outside activities. The university and the chapter had entered into a settlement agreement several years earlier giving the university the right to discipline faculty members who didn’t use a particular form in reporting those activities. Specifically, the agreement stated that “Lincoln University has the right, within its managerial prerogative, to require all faculty members to submit an outside remunerative activity form, whether the faculty member has any activity or not... Lincoln University has the right... to discipline faculty members for failure to submit the form...” A faculty member submitted the required information, but in letter form, and the university formally reprimanded him.

In considering the ULP charge, the Hearing Examiner for the Pennsylvania Labor Relations Board reasoned: “That settlement clearly, and unequivocally, allows Lincoln to discipline any bargaining unit member who does not use the proper form from when reporting outside remunerative activity to Lincoln... Williams, a bargaining unit member, did not submit the proper outside-remuneration form; the settlement agreement gives Lincoln the right to discipline a bargaining unit member who does not submit the proper outside remuneration form. That ends the analysis.” The Hearing Examiner went on to note: “Williams’ September 8, 2009, letter to Lincoln does set forth, with specificity, his outside employment... Nevertheless, the Union agreed that bargaining unit members could be disciplined if they do not file the proper form, and Williams did not do so. Lincoln, evidently, wants to hold the Union to that specific performance. If the Union wanted to be able to simply have bargaining unit members write a letter, it could have bargained that. But, it didn’t.” The Examiner therefore dismissed the charge of unfair practices in its entirety.

3. **University of Oakland v. AAUP, Oakland University Chapter, 23 MPER 86 (2010)**

Oakland University in Michigan attempted, as part of a response to a pending grievance, to renege on a settlement agreement that the university (through the president and vice provost) and the AAUP chapter had signed a decade earlier. The university’s justification for reneging on the agreement was that the Board of Trustees had not ratified the agreement, and that it therefore was not binding.

The Michigan Employment Relations Commission concluded that because the union was never informed that Board ratification was necessary, and because it was reasonable for the union to believe that signatures from the president and vice provost were sufficient, the agreement was valid, and the university’s attempt to renege constituted unlawful repudiation under the Public Employee Relations Act.
As the Commission panel stated, “To allow one party to renege on a lawful agreement would negate the stability and reliability that is the goal of good faith bargaining. It is central to the stability of labor relations that such agreements be enforced, for if they can be unilaterally revoked, the stability and the possibility of future good faith bargaining is undermined. . . . For the stability of labor relations, a party must be able to rely on the apparent authority of those representatives entering into settlements on behalf of their principal.” (citations omitted). The panel also concluded that the repudiation was not insubstantial, endorsing the Administrative Law Judge’s observation that “the issue of compliance with the University constitutional processes was seen by both parties as sufficiently significant to craft language in the collective bargaining agreement protecting their respective rights and to also enter into a high-level settlement agreement further interpreting that contract language.”

Accordingly, the panel ordered the university to revoke its repudiation of the settlement agreement.

B. Agency Fee

1. International Association of Machinists and Aerospace Workers, AFL-CIO, et al., 2010 NLRB LEXIS 319, 355 NLRB No. 174 (Aug. 27, 2010)

The National Labor Relations Board overturned an annual Beck objection requirement under Section 8(b)(1)(A) of the National Labor Relations Act (NLRA), holding, however, that it might reach a different conclusion under other circumstances.

In this case, several AFL-CIO affiliates had a process in place, pursuant to Communications Workers of America v. Beck, 487 U.S. 735 (1988), by which non-member objectors were required to renew their objections to union membership every year. The Supreme Court held in Beck, as described by the Board, that objectors cannot be required to pay for “activities unrelated to collective bargaining, contract administration, and grievance adjustment.”

The Board observed that while this was the first time it had an opportunity to address whether an annual renewal requirement was legitimate, it “[did] not . . . approach this question with a blank slate.” The Board had previously held in California Saw v. Knife Works, 320 NLRB 224 (1995), that a union’s Beck objection procedures were to be analyzed under a duty-of-fair-representation standard, which involves balancing the interests of the collective bargaining chapter as a whole in obtaining appropriate fees without undue cost or difficulty against the interests of the objectors in easily objecting. As the Board described it, “this is precisely the type of discretionary trade-off subject to the duty of fair representation.”

There are three ways for a union to violate its duty of fair representation: by acting arbitrarily, by acting discriminatorily, or by acting in bad faith. The Board concluded here that although the unions had acted arbitrarily, they had not acted discriminatorily or in bad faith.
The unions had offered three rationales for the annual objection requirement: the unions used it to get up-to-date addresses to send the required financial information to objectors; the annual renewal requirement gave employees a chance to change their mind about objecting; and other court decisions had approved of an annual objection requirement and there was no guidance from the Board itself.

The Board concluded that none of those rationales was sufficient, at least in light of the evidence provided by the unions. With respect to the addresses, the unions had agreed at trial that they had other methods to get addresses for both members and nonmembers, including from their local lodges and from employers. The Board signaled that under other facts, it might have upheld the requirement:

The Unions advance no argument that suggests their administrative burdens or costs are less under the Unions’ chosen method for insuring accurate addresses than under available, alternative methods. Nor do the Unions assert that significantly greater efficacy is achieved. These factors would be accorded weight in our analysis if they were present and, in our view, would readily justify the minimal burden imposed here. In their absence, however, the Unions have not provided a rational explanation for choosing among admittedly available alternatives.

In response to the unions’ argument about giving objectors an opportunity to change their minds, the Board noted that they could do so whether or not there was an annual objection requirement. And with respect to the previous supportive guidance, the Board noted that it came from the Board’s General Counsel and other cases, but not from the Board itself, which has the “primary responsibility to establish national labor policy.”

Finally, the Board concluded that the objection requirement was not discriminatory, because there was no evidence of animus by the union, and the distinction between objectors and nonobjectors was rational.

The Board closed by saying:

For the reasons we have explained above, we hold that, absent a more compelling rationale or other procedures that minimize the burden of annual objection not present in this case, a union violates its duty of fair representation if it declines to honor nonmember employees’ express, written statement to the union that they object on a continuing basis to supporting union activities not related to collective bargaining and contract administration. If a union provides a written explanation of the consequences of submitting a simple objection in contrast to a continuing objection, the union does not violate its duty by honoring simple objections for only 1 year. In addition, a union need not honor requests to object for periods of time other than 1 year and continuously.
The Board’s opinion therefore provides additional guidance to unions assessing how best to establish an objection procedure: a union could require an objector to make either a year-long objection or a continuing objection, but would not have to entertain, say, a request for a three-year-long objection.

Because of the previous guidance suggesting that an annual objection requirement might be reasonable, the Board’s order requiring the unions to permit objectors to lodge ongoing objections was forward-looking only, not retroactive.

2. **Knox v. California State Employees Association, Local 1000**, 628 F.3d 1115 (9th Cir. 2010)

In this case, the U.S. Court of Appeals for the Ninth Circuit held in a 2-1 opinion that a union is not required to issue a second notice to agency fee payers when it adopts a temporary, midterm fee increase, even if the fees are used in part for political activity.

Service Employees International Union Local 1000 (SEIU Local 1000), the bargaining agent for California state employees, levied a special assessment to mount campaigns to defeat two measures on a November 2005 ballot, but did not issue a second agency fee notice for the year. Agency fee payers challenged the special assessment, arguing that it violated their First, Fifth, and Fourteenth Amendment rights under the U.S. Constitution because it seized their money for non-chargeable political expenses. The district court denied the plaintiffs’ motion for a preliminary injunction against the union, but ruled that the union must give 28,000 agency fee payers a chance to ask for a refund on the special dues. The union appealed the district court’s decision and the Ninth Circuit overturned the decision, holding that the union’s notice complied with the procedural requirements for agency fee notices set out in **Chicago Teachers Union v. Hudson**, 475 U.S. 292 (1986).

SEIU Local 1000 issues a *Hudson* notice to all non-members each June with an explanation of the agency fee based on the union's expenditures for the most recent audited year. The *Hudson* notice categorizes expenses as either “chargeable” or “non-chargeable” depending on whether or not the expense relates to the union's representational functions. Non-members may be charged for non-chargeable expenses; however, they have the option to object and be charged a reduced agency fee based on the percentage of the union's total expenditures that can be classified as chargeable.

The union’s 2005 *Hudson* notice explicitly stated that dues and fees were subject to change without further notice to fee payers. The union approved a temporary assessment later that year, effective September 2005, to fund a “Political Fight Back Fund.” The fund was to be used for a “broad range of political expenses” in response to several anti-union measures on the California special election ballot. The court found that although the union claimed the fund was to be utilized for political action, “the assessment itself included no spending limitations and the
money was actually used for a range of activities, both political and not, and both chargeable and not.”

The *Hudson* standard of review calls for a balancing test to determine whether the agency fee notice “prevents compulsory subsidization of ideological activity” on the part of objecting employees “without restricting the union’s ability to require every employee to contribute to the cost of collective bargaining activities.” Applying this balancing test, the Ninth Circuit held that calculating the present year’s objector fee based on the prior year’s total expenditures – rather than predicting actual expenditures for the remainder of the year – is expressly permitted under *Hudson*. The court also rejected the plaintiffs’ argument that the assessment could not be constitutionally collected from members because it was to be used for political purpose, noting that the union had “already reduced the fee for objecting non-members” and had “demonstrated that the assessment was not purely non-chargeable.”

Additionally, where the district court held that a union must issue a second *Hudson* notice when it intends to “depart drastically from its typical spending regime and to focus on activities that are political or ideological in nature,” the Ninth Circuit found such a system to be “practically unworkable” because union spending “may vary substantially from year to year.” The Ninth Circuit pointed to years in which a union may have higher chargeable costs because it is negotiating a new collective bargaining agreement. The appeals court held that “*Hudson*’s prior year method assumes and accepts that a union has no ‘typical spending regime,’ and that even though spending might vary dramatically, a single annual notice based upon the prior year’s audited finances is constitutionally sufficient.”

C. Salary Negotiations

1. *Board of Trustees of the Nebraska State Colleges v. State College Education Association*, 787 N.W. 2d 246 (Neb. 2010)

In this case, the Nebraska Supreme Court upheld a public-sector faculty union’s offer on proposed salary increases, which predicted increases on the basis of the AAUP’s salary survey, and its proposal to treat all faculty categories the same.

The Board of Trustees of the Nebraska State Colleges bargained to impasse over salary increases for the 2009-2011 contract year with the State College Education Association (SCEA), the exclusive bargaining agent for professors, associate professors, assistant professors, and instructors at the three Nebraska state colleges (Chadron State, Peru State, and Wayne State). The SCEA based its final offer on a national array of public institutions, and it predicted increases in future faculty salaries on the basis of the AAUP’s salary survey. The SCEA also proposed across-the-board increases, with no distinctions among the various categories of faculty. The Board of Trustees based its offer on a more regional array of colleges and universities, and relied on Integrated Post-Secondary Data System (IPEDS) data. The Board of Trustees also distinguished among the various categories of faculty and (not surprisingly)
proposed much lower increases. Overall, the SCEA proposed a salary increase of about 11% and the Board proposed an increase of about 4.33%.

The issue went to a Special Master, who disliked both offers (but had to choose one). He did his own calculations and ultimately concluded that an increase of about 10% was needed to maintain comparability during the contract period. Because that number was closer to the SCEA’s final offer, and because faculty had typically all been treated uniformly, he ruled in favor of the SCEA’s offer on both the proposed salary increases and the equal treatment of all faculty categories. The Commission of Industrial Relations (CIR), which is required to give significant deference to the Special Master’s reasoning, upheld the Special Master’s decision, and the Nebraska Supreme Court upheld the CIR’s decision.

V. Discrimination and Affirmative Action

A. Affirmative Action in Admissions

1. *Fisher v. University of Texas*, 631 F.3d 213 (5th Cir. 2011)

In this case, the U.S. Court of Appeals for the Fifth Circuit upheld the University of Texas’ race-conscious admissions system. That system was instituted in 2004 following the Supreme Court’s holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003) that universities have a compelling governmental interest in “obtaining the educational benefits that flow from a diverse student body,” and that they may therefore consider race as a plus factor in order to enroll a “critical mass” of minority students. In *Grutter*, the Supreme Court approved of the University of Michigan Law School’s use of a “highly individualized, holistic review of each applicant’s file, giving consideration to all the ways an applicant might contribute to a diverse educational environment,” including race.

In this case, two Caucasian applicants who were denied admission to the University of Texas at Austin (“UT” or the “University”) challenged the University’s admissions policies and practices, claiming that they are discriminatory on the basis of race, and that UT violated their equal protection rights under the Fourteenth Amendment of the U.S. Constitution. The plaintiffs argued that UT’s admissions policy with respect to race is unrelated to the educational benefits of a diverse student body that *Grutter* recognized, and that UT already has a critical mass of minority students. The district court dismissed the claims, reaffirming the principles laid out in *Grutter*. The district court noted that UT uses a holistic and individualized review of each application, much like the University of Michigan Law School’s policy upheld in *Grutter*, and concluded that UT does have a compelling state interest in achieving a diverse student body and that the admissions program is narrowly tailored to reach that goal.

The Fifth Circuit upheld the district court’s decision, relying heavily on the reasoning in *Grutter* to assess the constitutionality of Texas’s admissions plan. The appeals court distilled three educational objectives that the *Grutter* court believed were served by diversity in higher
education: increased perspectives inside and outside the classroom, better preparation to act as professionals, and increased civic engagement. Under Grutter, a university could seek to increase diversity, but only through a holistic, flexible, and individualized program, not via the use of quotas, separate admissions tracks, or a fixed set of points to minority applicants.

The Court observed that in the wake of Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), in which Fifth Circuit district court struck down UT law school’s use of race-based criteria in admissions, minority applications plunged, and the following year the legislature implemented a policy called the Top Ten Percent Law to enroll more underrepresented minority students. This law allows Texas high school students in the top 10% of their high school classes to enter the university without reference to standardized testing. The increase in minority enrollment after passage of the Top Ten Percent Law reflected a tradeoff, however – namely, that because those students could enter the university without relying on standardized testing, test scores for other students became even more critical, with the result that African-American and Hispanic students (who traditionally performed less well on standardized tests) below the top 10% of their class were admitted in lower numbers while Caucasian students were admitted in higher numbers.

Soon after Grutter was decided, the university determined that minority students still had low representation, and in 2004 it therefore added race as one of many factors that could be considered in admissions decisions for applicants who weren’t automatically admitted via the Top Ten Percent Law or their “Academic Index.” In addition, the university installed a formal review process for its admissions procedures every five years (and it informally reviews the procedures annually).

The Fifth Circuit agreed that UT has “a compelling interest in obtaining the educational benefits of diversity,” and ruled that “UT has made an ‘educational judgment that such diversity is essential to its educational mission,’ just as Michigan’s Law School did in Grutter.” The Court indicated that “a university's educational judgment in developing diversity policies is due deference.” The Court articulated two reasons to defer to “a university's academic decisions”: first, that the decisions are a product of “complex educational judgments in an area that lies primarily within the expertise of the university,” and second, that “universities occupy a special niche in our constitutional tradition,” with educational autonomy grounded in the First Amendment.

The Court also rejected the appellants’ argument that the holistic admissions plan was unnecessary in light of the Top Ten Percent Law. In fact, the Court criticized the Top Ten Percent Law as potentially insufficient, suggesting that it “does not perform well in pursuit of the diversity Grutter endorsed and is in many ways at war with it.” Evidently the minority students admitted to the university remain clustered in certain programs, which a holistic review (but not the Top Ten Percent Law) would allow the university to rectify. In addition, because the Top Ten Percent effectively uses geographic diversity as a proxy for any other kind of diversity, “the Top Ten Percent Law crowds out other types of diversity that would be considered under a
Grutter-like plan . . . [and] restricts the University’s ability to achieve the maximum educational benefits of a truly diverse student body.” The Court also invoked Justice Ginsburg’s observation in Grutter that percentage plans like the Top Ten Percent Law “depend for their effectiveness on continued racial segregation at the secondary school level,” “encourag[ing] parents to keep their children in low-performing segregated schools, and discourag[ing] students from taking challenging classes that might lower their grade point averages,” while creating a strong incentive to avoid magnet schools and other competitive schools. The Court concluded that “while the Top Ten Percent Law appears to succeed in its central purpose of increasing minority enrollment, it comes at a high cost and is at best a blunt tool for securing the educational benefits that diversity is intended to achieve.”

The court’s final approval of the Top Ten Percent program therefore came with a warning that it was not blessing the race-conscious admissions system “in perpetuity.” As the court put it, “it is more a process than a fixed structure that we review,” and the Top Ten Percent law risks eventually appearing to incorporate a racial quota rather than an individual focus.

B. Title VII of the Civil Rights Act


In this case, the Supreme Court allowed the Title VII claims of a group of Chicago firefighter applicants to go forward. The plaintiffs were African-Americans who took the City of Chicago’s firefighter exam in 1995. Based on the scores from this exam, the City created a list dividing over 26,000 firefighter candidates into three categories: “not qualified,” “qualified,” and “well qualified.” The City announced that it would only hire candidates from the “well qualified” category, and it used the list at least 10 times over the next 5 years. White test-takers were 5 times more likely to be identified as “well-qualified” than African-American test-takers; as a result, 77% of the hired firefighters were white and only 9% were African-American. Petitioners, African-American firefighters who were categorized as “qualified” and were not hired, claimed that the City’s use of the list to hire firefighters had a disparate impact on African-Americans in violation of Title VII.

Before bringing suit for employment discrimination, a Title VII plaintiff must file a claim with the Equal Employment Opportunity Commission (EEOC) within 300 days after the alleged unlawful employment practice occurred. The petitioners in Lewis filed their EEOC claim within 300 days of the first use of the list to hire candidates. The City of Chicago argued, however, that the firefighters’ EEOC claim was untimely because it was filed more than 300 days after the creation of the list.

In May 2010, the U.S. Supreme Court unanimously concluded that the City’s use of the list (not just its creation of the list) could be a discriminatory act under Title VII. The Court distinguished between intentional discrimination and the disparate impact created by an
apparently neutral policy. As the court explained, a plaintiff alleging that he or she has suffered employment discrimination in violation of Title VII must demonstrate a “present violation” within the 300-day limitations period. Where a plaintiff is alleging that he or she has experienced intentional discrimination, then such deliberate discrimination within the 300-day period must be shown. Where a plaintiff is claiming that a policy has had a disparate impact on the basis of race, however, he or she need only point to evidence of the application of that policy within the 300-day period.

The court acknowledged that either interpretation could produce “puzzling results” – that its interpretation could make employers liable after many years of using a practice, and that the opposite interpretation would allow employers to discriminate indefinitely if no claim were brought within the period. The court believed that its conclusion was mandated by the language of Title VII, however, and called on Congress to change the statute if it disagreed with the outcome.


In this case, a federal district court in Mississippi applied the Lilly Ledbetter Fair Pay Act to uphold a professor’s discrimination claim, finding that a Title VII violation can occur each time a discriminatory paycheck is issued.

In 2004, Dr. Laverne Gentry, a professor at Jackson State University (JSU), was denied tenure and a corresponding pay raise. In 2006, she filed a discrimination claim with the Equal Employment Opportunity Commission (EEOC), alleging that she was denied tenure because of her gender. She later filed suit in the U.S. District Court for the Southern District of Mississippi, alleging that the denial of tenure, and consequent lower pay, violated Title VII. She also claimed that the university retaliated against her for filing the EEOC claim, a further violation of Title VII.

JSU argued that Gentry’s Title VII claim was untimely and therefore invalid because she had filed her EEOC claim 2 years after she was denied tenure; according to Title VII, a plaintiff must file an EEOC claim within 180 days of a Title VII violation. Gentry argued, however, that her claim was timely because the denial of tenure was a compensation decision under the Lilly Ledbetter Fair Pay Act.

Congress passed the Lilly Ledbetter Fair Pay Act in 2009 to overturn **Ledbetter v. Goodyear Tire & Rubber Co.**, 550 U.S. 618 (2007), in which the Supreme Court denied a Title VII claim of unequal pay because the plaintiff had filed her EEOC claim more than 180 days after the employer had adopted the discriminatory pay policy. The Act extends the time in which a claim can be filed to 180 days after each discriminatory paycheck, not just 180 days after the employer put the discriminatory pay structure in place. The court agreed with Gentry that her denial of tenure counted as compensation discrimination for these purposes, and denied the defendants’ summary judgment motion, thus allowing the case to proceed.
JSU also sought summary judgment on the Gentry’s claim of gender discrimination on the basis of pay disparity because it said Gentry was unable to identify male employees “nearly identical” to her that were given the raise. The court refused to grant the university’s request, citing factual disputes in the record that would have to be resolved later in trial. The court also denied JSU summary judgment on Gentry’s retaliation claim, despite the fact that the Gentry did include that allegation in her EEOC complaint, because it found the claim grew out of the earlier charge of unequal pay, giving the court ancillary jurisdiction.

JSU appealed the district court’s decision to the Fifth Circuit; JSU eventually settled with Gentry, however, and the appeal was dismissed.


In this case, the U.S. Court of Appeals for the Fourth Circuit dismissed a professor’s discrimination claim as untimely, holding that a pending internal appeal did not stop Title VII’s statute of limitations from running.

Rose Ure Mezu, an African-American woman of Nigerian origin, began teaching at Morgan State University (MSU) in 1993 as a non-tenure-track lecturer. By 1998 she had earned a position as tenured associate professor, and in 2002 she applied for a promotion to full professor. After she was denied the promotion, she filed a complaint with the EEOC – alleging that the school had discriminated against her based on race and national origin, in violation of Title VII – and then filed suit in federal court on the same grounds. The district court dismissed her claim, however, and the Fourth Circuit affirmed.

Mezu applied again for the position of full professor in 2004, but was again denied. In 2005, Mezu applied for a third time, and the Departmental Promotion Committee recommended promoting her to full professorship. Her department chair recommended that she engage in additional publishing, however, and recommended against promoting her. On April 6, 2006, the MSU president informed her by letter that she would not be promoted, but informed her of her right to appeal the decision.

Although she appealed the decision within a few days, MSU administrators took no further action, and Mezu came to believe that they were not going to comply with MSU’s published procedures on appointment, promotion and tenure. On March 25, 2007, Mezu filed her second EEOC claim, and eventually sued again in federal court.

The district court dismissed Mezu’s claim as untimely, finding that she had filed her EEOC claim beyond the statutory deadline of 300 days – a deadline that applies (instead of the 180-day deadline discussed above) if a plaintiff institutes actions in a state agency. On appeal, the Fourth Circuit agreed, finding that the president’s letter of April 6, 2006 triggered the 300-day limitations period, “despite the pendency of her internal appeal with the University.” Further, the court held that MSU’s “alleged failure to complete the internal appeal process did
not constitute [an] independently discriminatory act[]” that would re-trigger or suspend the running of the limitation period.

This decision suggests that professors who believe they have a federal or state employment claim must watch the calendar very carefully to be sure they are not shut out of court while waiting for the university’s processes to run.

4. **Leibowitz v. Cornell University, 584 F.3d 487 (2d Cir. 2009)**

In this case, the U.S. Court of Appeals for the Second Circuit upheld a non-tenured professor’s discrimination claim, holding that the non-renewal of a teaching contract could form the basis of a Title VII claim even if the teacher was not tenured.

Peggy Leibowitz taught at the Ithaca campus of the New York State School of Industrial and Labor Relations (ILR), a “contract college” of Cornell University that received funding through the State University of New York (SUNY). ILR has two divisions: a Resident Division for undergraduate and graduate students located in Ithaca, and an Extension Division for working practitioners with regional offices throughout New York, including New York City and Long Island.

Leibowitz began as an Extension Associate in the New York City office in 1983; in 1987, after completing the Extension Division’s peer review process, she was promoted to the position of Senior Extension Associate II. Although Senior Extension Associates were not tenured and each appointment letter stated that their employment was “contingent upon funding,” Cornell had never terminated, laid off, or failed to renew the contract of a Senior Extension Associate II without cause. Leibowitz’s contract was renewed in 1992 and 1997. In 1998, she began teaching a full class schedule for the Resident Division in Ithaca, as well as continuing to teach and develop Extension programs. Between 2000 and 2003, Leibowitz won several teaching accolades.

Because she was based in New York City, ILR reimbursed Leibowitz for her travel to Ithaca. In 2001, though, a shift in Cornell policy changed the way ILR paid Leibowitz for travel, and she told the dean that the new amount she was being given was not enough to cover her costs. After several months of conversation between the dean and Leibowitz about travel expenses, the dean and associate dean began to discuss whether it was financially wise to retain her, given that the SUNY system had recently reduced the Extension Division’s budget.

In June 2002, Cornell and ILR informed Leibowitz that they would not be renewing her contract due to fiscal reasons. Leibowitz initially planned to retire, but in December she asked to take a position in the Long Island office, where the director was “eager” to hire her. Cornell denied the request, citing “fiscal circumstances.” After the director of the Long Island office wrote to Leibowitz to “confirm his offer to her” of a recently vacated position, Cornell informed Leibowitz that the offer was not valid and fired the director for making it.
Leibowitz filed suit in the U.S. District Court for the Southern District of New York, claiming, among other things, that Cornell’s non-renewal of her contract and its refusal to consider her for the Long Island position were based on gender and age discrimination in violation of Title VII.

After several earlier decisions by the district court and the Second Circuit, the Second Circuit ruled in this decision that non-renewal of an employment contract when the individual is seeking continued employment – regardless of tenure status – constitutes an “adverse action” under Title VII. The court reasoned that the statute makes it unlawful for an employer to discriminate against a new applicant seeking employment, so it is equally unlawful to discriminate against a current employee who is seeking continued employment.

The court of appeals also found that the district court erred in finding that the circumstances did not give rise to an inference of age or gender discrimination. Leibowitz presented evidence that during the relevant time period, defendants laid off five other employees, all of whom were females over the age of fifty; reassigned Leibowitz’s duties to at least three male instructors; and did not consider Leibowitz for any vacant positions and attempted to fill one such position with a younger, male employee.

The court of appeals also rejected the district court’s reasoning that the defendants “had proffered a legitimate, non-discriminatory reason for the non-renewal” – namely, budgetary concerns – and that Leibowitz had failed to show that justification was pretextual. There was evidence that the budgetary concerns that existed in early 2002 diminished during the 2002-2003 school year and that the ILR hired twelve new employees during the relevant time period. Combined with the evidence discussed above, this was enough to suggest that the defendants’ reason was pretextual and therefore enough for Leibowitz’s lawsuit to survive.

The appellate court sent the case back to the district court for trial; however, the jury found for the ILR.


In this case, a federal district court in Tennessee allowed a former graduate student’s retaliation claim to go forward, finding that she had presented enough evidence to show that her former thesis advisor’s criticism of her work may have been illegal retaliation under Title VII.

Brigitte Kovacevich was a graduate student at Vanderbilt University from 1997 to August 2006, seeking a doctorate in anthropology. Between 1999 and 2004, Kovacevich worked closely with Dr. Arthur A. Demarest, her doctoral thesis advisor, and accompanied him to an archeological excavation in Cancuen, about which she wrote her doctoral thesis. In 2004 or 2005, Kovacevich and other graduate students filed a complaint accusing Demarest of sex discrimination, sexual harassment, and retaliation; Kovacevich later filed a charge with the
federal Equal Employment Opportunity Commission (EEOC) and sued in federal court alleging violations of Title VII, Title IX and the Tennessee Human Rights Act.

During this time, Kovacevich and Demarest agreed that Demarest could continue to be involved in her doctoral candidacy, as long as his comments and suggestions to her were screened by others in the department. Demarest began to suggest that some of the assertions in Kovacevich’s thesis were not supported by the most recent evidence at Cancuen (which she had stopped visiting in 2004). However, in 2006 Kovacevich successfully defended her thesis and was granted a doctorate. In January 2008, Kovacevich, Demarest, and the university settled her harassment and retaliation claims with an agreement that included a non-disparagement clause stating:

[D]efendants and their representatives… shall not publicly criticize, denigrate or make disparaging remarks concerning [Kovacevich]… [but this section] shall not restrict Plaintiff or Demarest from making reasonable, good faith, and professional academic critiques or criticisms of the other’s research, interpretations, or published work in the context of scientific and academic discourse and peer evaluation.

The agreement also provided that Vanderbilt itself would be liable for disparagement only if “the alleged remarks can be shown to have been made with Vanderbilt’s advance knowledge of, and express consent to, or knowing ratification of, such remarks.”

In March 2008, Kovacevich’s husband attended a lecture by Demarest, in which Demarest disputed Kovacevich’s interpretations of the Cancuen findings. During the same conference, Demarest complained to a Vanderbilt Press representative that Kovacevich did not have permission to use certain illustrations in her chapter of a book Vanderbilt Press was publishing. After Demarest again spoke unfavorably of Kovacevich’s interpretations at another conference, Kovacevich filed a new charge with the EEOC against Vanderbilt, alleging that Demarest’s remarks were illegal retaliation under Title VII. Kovacevich then filed suit in federal district court, and Vanderbilt asked the court to grant it summary judgment and dismiss the lawsuit.

Vanderbilt argued that Kovacevich was not protected by Title VII or the Tennessee Human Rights Act because she was a graduate student, which was primarily an educational rather than professional position. The university further argued that her complaints related solely to her academic activities. While noting that the U.S. Court of Appeals for the Sixth Circuit – the federal appeals court covering Tennessee, Kentucky, Michigan, and Ohio – has not ruled on this topic and that some courts “have considered the dual role of graduate students,” the district court side-stepped the question of whether a current graduate student would be protected by the statute. Instead, the court held that dismissing the lawsuit because Kovacevich was no longer a graduate student assistant at Vanderbilt in 2008, having received her Ph.D., would “undermine the objectives” of Title VII.
The court also rejected Vanderbilt’s argument that Kovacevich had not suffered a “materially adverse” employment action. The court observed that an adverse action for Title VII retaliation purposes might include “retaliatory conduct that does not relate to employment or which occurred outside the Vanderbilt graduate student assistant workplace.” Kovacevich had presented sufficient evidence that Demarest and Vanderbilt may have engaged in conduct “that could well dissuade a reasonable Vanderbilt graduate student, TA, or research assistant from making or supporting a charge of discrimination, such that the conduct would qualify as material adverse action.”

The court therefore denied Vanderbilt’s motion for summary judgment and decided the case should continue to be tried before a jury.


In this case, the Supreme Court held that when an employer fired the fiancé of an employee who filed a sex discrimination charge against the employer, the employer had unlawfully retaliated against the employee who filed the charge and the terminated employee could therefore sue under Title VII.

Miriam Regalado and her fiancé Eric Thompson were both employed by North American Stainless (NAS). Three weeks after NAS was notified by the EEOC that Regalado had filed a sex discrimination charge against the company, NAS fired Thompson, who sued. After decisions by the district court and the Sixth Circuit Court of Appeals, the Supreme Court ruled in Thompson’s favor, stating that NAS’s termination of Thompson violated Title VII. Under Title VII, a range of retaliatory actions are prohibited – not just actions affecting the “terms and conditions” of the employee who initially filed a charge with the EEOC, but also any action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination” (quoting *Burlington Northern & Santa Fe Railroad Co. v. White*, 548 U.S. 53, 68 (2006)). The court thought it was “obvious” that an employee might be discouraged from filing a charge with the EEOC “if she knew that her fiancé would be fired.”

The court refused to identify “a fixed class of relationships” for which it would be unlawful to fire one employee in retaliation for the protected activity of another; the court noted, however, that “firing a close family member will almost always” meet the standard for a Title VII retaliation claim, but “inflicting a milder reprisal on a mere acquaintance will almost never do so.”

Once the Court determined that NAS’s actions against Thompson violated Title VII, it turned to the question of whether Thompson could actually sue. According to the Court, a plaintiff alleging a violation of a federal statute can sue only if he “falls within the zone of interests” that the statute is intended to protect. Under this test, a plaintiff cannot sue if his interests “are so marginally related to or inconsistent with the purposes” of the statute that it does not appear that Congress, in passing the statute, intended to allow the plaintiff to sue.
The Court applied the “zone of interests” test to Thompson’s claim and concluded that because he was an employee and the purpose of Title VII is to protect employees from their employers’ unlawful actions, he “falls within the zone of interests protected by Title VII.” Assuming that the facts as Thompson described them were accurate, he was not an “accidental victim” of retaliation by NAS; instead NAS intended by terminating him to punish Regalado, who had engaged in protected activity by filing the initial EEOC claim. Thompson was therefore an “affected” person with standing to sue.

B. “Mixed Motive” Instructions and Discrimination Statutes


In this case, the U.S. Supreme Court imposed a heightened standard of proof upon employees who sue their employers for age discrimination.

Jack Gross sued his employer under the Age Discrimination in Employment Act (ADEA), alleging age discrimination after he was demoted and his former duties were assigned to a younger employee whom he had previously supervised. During the trial, the judge read the jury members a “mixed-motive” instruction, telling them that if Gross showed that his age was *one* motivating factor in his demotion, the burden shifted to his employer to show that it would have demoted him *anyway*, regardless of his age. This type of burden-shifting framework is used in Title VII discrimination cases where a plaintiff has shown *direct* (as opposed to *indirect* or *circumstantial*) evidence of discrimination. After the jury ruled in Gross’s favor, Gross’s employer appealed on the grounds that the burden-shifting instruction should not have been given because Gross had presented no *direct* evidence of discrimination.

Eventually the appeal reached the Supreme Court, which decided to tackle a broader question: whether this burden-shifting framework should be used in ADEA cases at all (regardless of whether the evidence of discrimination is direct or indirect). The court held that this mixed-motive instruction – which originated in Title VII case law – was never appropriate in ADEA cases because Title VII and ADEA are “materially different.” Congress had explicitly amended Title VII to incorporate this burden-shifting framework, but it had failed to similarly amend the ADEA. Because of this, and because of its analysis of the statute’s “plain language,” the Court refused to apply prior Title VII precedents about burden-shifting to the ADEA. This means that ADEA plaintiffs have a higher burden of persuasion than Title VII plaintiffs: instead of proving that age was *one* motivation for an adverse employment decision, they must show that age was the “but-for” or *main* cause of the decision.

The Supreme Court’s decision in *Gross* is having an impact on a number of kinds of cases, not just active ADEA cases. In January 2010, the U.S. Court of Appeals for the Seventh Circuit – which covers Illinois, Wisconsin, and Indiana – applied the logic of *Gross* to an Americans with Disabilities Act (ADA) claim, holding that the “mixed motive” or “burden-shifting” framework of Title VII also does not apply in those cases. See *Serwatka v. Rockwell*
VI. Miscellaneous

A. Subpoenas and Access to Faculty Research

1. Virginia Attorney General Ken Cuccinelli and the University of Virginia

In April 2010, the Attorney General of Virginia, Ken Cuccinelli, served a civil subpoena on the University of Virginia (UVA). The subpoena sought e-mails and a variety of other materials and documents relating to Michael Mann, a climate scientist who was a faculty member at UVA until 2005, when he left for Pennsylvania State University (Penn State). Professor Mann was one of the scientists involved in 2009’s “Climategate,” an episode at the University of East Anglia in which a leaked e-mail from Mann referenced a “trick” he used to create the “hockey stick” graph of global warming. Although some observers suggested that the e-mails proved that global warming was essentially a hoax, investigations by the National Academies of Science, Penn State, and an independent British review panel concluded that no research misconduct had occurred, and that Mann’s reference was to statistical methods rather than to fraudulent manipulations of the data.

Despite these conclusions, Attorney General Cuccinelli – who, a week before serving the subpoena, filed suit challenging the U.S. Environmental Protection Agency’s fuel standards on the grounds that the East Anglia e-mails constituted “after-discovered evidence” regarding global warming – apparently concluded that the actions reflected in Mann’s e-mails might constitute fraud under Virginia’s Fraud Against Taxpayers Act (FATA). Accordingly, he served the University of Virginia with an extremely broad subpoena that asked for Mann’s communications with any of 39 other scientists, his communications with administrative assistants at UVA, and all materials related to five grants for which he applied while at UVA.

After public pressure from the AAUP and other organizations, UVA filed a petition in Virginia court to set aside the subpoena, invoking academic freedom concerns and arguing that Cuccinelli’s subpoena does not satisfy the requirements of FATA. The AAUP and several other groups filed an amicus brief in support of UVA’s petition, arguing that the requested items were protected by the First Amendment and that the attorney general’s actions could seriously chill academic freedom, university scholarship, and intellectual debate. The brief also argued that the political controversy surrounding Professor Mann’s work did not rise to the level of fraud under FATA (or federal law).

In late August 2010, the Virginia state court set aside the attorney’s general subpoena, holding that Mann’s grants could be the subject of a request under FATA but that the attorney general had failed to show any reason to believe that fraud had occurred and that the scope of
any information request must be more limited. The decision did allow Cuccinelli to try again with a more narrowly drawn subpoena, and in October 2010, Cuccinelli served another information request on UVA.

Because Cuccinelli also appealed the judge’s decision, the university asked the court to stay its decision on the follow-up subpoena pending the outcome of the appeal, which the Virginia Supreme Court agreed in March 2011 to consider. The AAUP expects to file an amicus brief with the Virginia Supreme Court in support of the university and the principles of academic freedom and scientific inquiry.


In this case, a New York state trial court refused to enforce a subpoena that would have forced a university to turn over a professor’s research notes and correspondence.

Kentile Floors, Inc., a company involved in asbestos litigation, served a subpoena on the Mt. Sinai School of Medicine. Kentile claimed that the subpoena forced Mt. Sinai, which was not a party to the litigation, to produce documents written by Dr. Irving Selikoff, a Mt. Sinai faculty member who had performed research on the dangers of asbestos and asbestos exposure. Kentile sought Dr. Selikoff’s private correspondence with asbestos manufacturers and his unpublished research notes. Mt. Sinai claimed that this demand was overly broad and beyond the language of the subpoena, and a New York state trial court agreed, finding that Kentile could just as easily rely on Dr. Selikoff’s published materials. Furthermore, the court thought that forcing Mt. Sinai to produce the materials “could well discourage other institutions from conducting vital health and safety research,” both because of the costs involved in producing the materials and because other scholars “may fear that their unpublished notes, observations and ideas could be released to the public as a result of litigation.”

B. **Medical Faculty and Malpractice Lawsuits**


In this case, an Ohio appeals court found that a medical professor could not be liable for medical malpractice because performing surgery was part of his duties as a public employee.

Dr. Stewart Dunsker was a full professor of clinical neurosurgery at the University of Cincinnati (UC) College of Medicine between 1984 and 2002, when he retired. He performed surgery on James Schultz’s spine in 1997 at Christ Hospital, where Dunsker saw patients through both the UC College of Medicine and his private practice group, the Mayfield Clinic. Schultz sued Dunsker for medical malpractice in the Ohio Court of Claims in May 2008, claiming that
the surgery had injured his laryngeal nerve and permanently affected his ability to speak in a normal tone of voice.

Dunsker argued that he was immune from a malpractice lawsuit under Ohio state law because while performing the surgery he was a state employee – that is, a professor at a public university – acting within the scope of his professional duties. The Court of Claims agreed, as did an Ohio Court of Appeals.

Ohio law states:

[N]o officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

The appellate court noted that the “dual nature of a physician’s employment as both private practitioner and employee of a state medical institution has posed problems for courts,” and that “in many instances, the line between these two roles is blurred.” Although in the past, Ohio courts had focused on financial factors – such as the whether the medical practitioner or the university made more money from the allegedly negligent treatment – the Ohio Supreme Court recently rejected this approach in favor of “focus[ing] upon the purpose of the employment relationship, not on the business or financial arrangements between the practitioner and the state.” The appellate court determined that Dunsker was personally immune because a medical resident was present during Schultz’s surgery. Because Dunsker testified that part of his duties as a professor was to educate residents at the hospital, the court held that he was acting within the scope of his employment duties when he operated on Schultz.

The appellate court also rejected Schultz’s other procedural and statute of limitations arguments, and affirmed the lower court.