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**Annual Legal Update**

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**I. Faculty Speech and Grading**

a. *Hong v. Grant*, 2007 WL 2730282 (C.D. Cal. Sept. 19, 2007)

Juan Hong was a full professor in the engineering department at the University of California-Irvine, a public university, where he had taught since 1987. In 2002, he challenged the university on a number of issues relating to hiring, promotions, and staffing; these confrontations with the university culminated in the university's denying him a merit salary increase, which led Dr. Hong to file suit against the university for violating his First Amendment right to free speech. In this decision, the federal trial court in California concluded that because Professor Hong's criticisms were made in the course of his job and were not of "public concern," they were not protected by the First Amendment.<sup>1</sup>

The University of California system, of which UC-Irvine ("UCI") is a part, is governed by principles of shared governance among the faculty, the Board of Regents, and the system's president. As the court noted, "participation in UCI's governance is a professional right of the faculty. Faculty exercise their right of self-governance through involvement in a wide array of academic, administrative and personnel functions including departmental governance . . . ." The faculty "advises the administration on academic appointments, promotions and budgets under the auspices of the Academic Senate. . . . Accordingly, as a member of the UCI faculty, Mr. Hong participates in a peer review process that evaluates faculty members seeking appointment and promotion within his department."

The court reviewed four confrontations that Dr. Hong had with the university's administration. First, in 2002, Dr. Hong took part in the mid-career review of one of his colleagues, Dr. Ying Chang. During the review, Dr. Hong learned of a rumor that Dr. Chang had previously failed to divulge a financial conflict of interest. Dr. Hong

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<sup>1</sup> Dr. Hong has appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, and the AAUP filed a joint amicus brief with the Thomas Jefferson Center for the Protection of Free Expression.

complained to a faculty meeting and his department chair, Stanley Grant; although Dr. Chang resigned her candidacy soon after, Dr. Hong prepared a letter of dissent for Dr. Chang's file and asked that it be forwarded to the Dean of the School of Engineering.

Next, in March 2003, Dr. Hong complained to Dr. Grant that six of the eight classes in his department were being taught by lecturers rather than by available tenured faculty members, redirecting departmental resources and ill-serving students. After looking into the matter, Dr. Grant informed Dr. Hong that the Dean's office (rather than the department) funded the bulk of the lecturers' compensation, and that he intended for lecturers to teach at most one course per department.

Third, Dr. Hong participated in the review of a colleague, Dr. Mohammed, for an accelerated merit promotion in October 2003. He voted against the application and provided a letter of dissent, based primarily on two parts of the application that he believed were improper; he also raised his concerns at a faculty meeting. Dr. Mohammed's promotion was ultimately approved, and he sent an email to all faculty in the department thanking them; in a reply to all faculty, Dr. Hong asserted that Dr. Grant, as well as the Vice Provost for Academic Personnel and additional people in the Dean's office, had improperly influenced the review process, and Dr. Hong requested that an investigation be launched.

Finally, in May 2004, Dr. Grant announced that an assistant professor candidate had accepted an informal offer of employment, to be voted on at an upcoming faculty meeting. Dr. Hong opposed the offer, believing that such an informal offer before full faculty approval violated the faculty's right to self-governance, including the right to determine "who can teach, who can do creative research, [and] who can serve in the community and university." Dr. Hong faulted Dr. Grant and the Engineering Chair for the offer; he urged the university's Executive Vice Chancellor, Michael Gottfredsen, to investigate the hiring, stating that "participation in the governance of the University including appointment and promotion of faculty is professional right of faculty [sic]."

In 2003, Dr. Hong was scheduled for a routine merit increase, but asked for a one-year deferral because of his unsatisfactory research performance; in September 2004, he submitted his application, in which he ranked himself low in several areas. Accordingly, in January 2005, the faculty recommended that he be denied a merit increase. In March, Dr. Gottfredsen told the Chair of Engineering that he was disappointed with Dr. Hong's research progress, asked Dr. Grant to initiate a remediation plan with Dr. Hong, and asked that Dr. Hong be assigned an increased teaching load due to his decreased scholarly contributions. After filing several internal complaints with the university, Dr. Hong filed suit, alleging that he was retaliated against for exercising his First Amendment rights to speak as a citizen on a matter of public concern.

The court rejected his claim and found in favor of the university, in a decision that could lay the foundation for further infringement of faculty speech. The judge relied on *Garcetti v. Ceballos*, the 2006 Supreme Court decision ruling that when public employees speak "pursuant to their official duties, the employees are not speaking as

citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline,” even if the speech implicates matters of public concern. Thus, the traditional First Amendment tests for speech no longer apply in the public employment context – as long as a public employee speaks pursuant to his or her “official job duties,” the employer is free to take action against the employee based on the speech.

The Supreme Court set aside, however, the question of whether its new test applies to speech by a public employee in the academic context, acknowledging that “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests.” The Court therefore concluded that “we need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving scholarship or teaching.” Since then, lower federal courts have weighed *Garcetti* when considering First Amendment claims of retaliation from public school teachers – generally with discouraging results. See, e.g., *Mayer v. Monroe County Community School Corporation*, 2007 U.S. App. LEXIS 1469 (7th Cir. Jan. 24, 2007) (opining, in a case involving an elementary school teacher, that “employers are entitled to control speech from an instructor to a student on college grounds during working hours”). This case, however, is one of the first that squarely addresses faculty speech in the higher education context. See also *Payne v. University of Arkansas Fort Smith*, 2006 U.S. Dist. LEXIS 52806 (W.D. Ark. July 26, 2006) (upholding termination of tenured professor for email complaining to university administrator that new university policy “was a “huge disservice to the community,” because “crux” of email was “dissatisfaction with an internal employment policy and not an issue of public concern”).

The judge considering Dr. Hong’s case reviewed *Garcetti* and subsequent cases construing *Garcetti*, and concluded – without acknowledging that speech in the academic context may be treated differently – that “an employee’s official duties are construed broadly to include those activities that an employee undertakes in a professional capacity to further the employer’s objectives.” The key question for the court was whether Dr. Hong’s critical statements were made “pursuant to his official duties” as a UCI faculty member. The court noted that in the University of California system

a faculty member’s official duties are not limited to classroom instruction and professional research. . . . Mr. Hong’s professional responsibilities . . . include a wide range of academic, administrative and personnel functions in accordance with UCI’s self-governance principle. As an active participant in his institution’s self-governance, Mr. Hong has a professional responsibility to offer feedback, advice and criticism about his department’s administration and operation from his perspective as a tenured, experienced professor. UCI allows for expansive faculty involvement in the interworkings of the University, and it is therefore the professional responsibility of the faculty to exercise that authority.

The court concluded that Dr. Hong's criticisms about Dr. Chang's mid-career review were unprotected by the First Amendment, because "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 disregarded the fact that while Dr. Hong was participating in review of a colleague, he was not part of an official peer review faculty committee. The court also failed to recognize that UC-I's Academic Personnel Manual distinguished between professional *rights* and professional *responsibilities* – and that participation in institutional governance is a core right, but not (unlike preventing conflicts of interest, for instance) a responsibility.

Dr. Hong's criticism of the use of lecturers, which spoke "only to internal departmental staffing and administration," was also unprotected, because Dr. Hong was under a "professional obligation to actively participate in the interworkings and administration of his department, including the approval of course content and manner of instruction. . . . The form, content, and context of Mr. Hong's statements all indicate he was fulfilling a professional obligation and not acting as a private citizen." The court made a similar determination about Dr. Hong's criticisms about Dr. Mohamed, stating that Dr. Hong's "feedback and criticism was 'commissioned' by UCI when it established the faculty's integral role in peer evaluations."

The court also decided that Dr. Hong's statements about administrative manipulation of the promotion process were unprotected; citing to an email to the Executive Vice Chancellor in which Dr. Hong stated that he had a "duty" as a member of the UCI community to report "inequitable conducts [sic] by the Dean and two faculty members," the court declared that "internal complaints about supervisory mismanagement are within an employee's official duties and not subject to First Amendment protection." Finally, the court ruled that Dr. Hong's criticisms of Dr. Grant's handling of the informal employment offer were made pursuant to his official duties and therefore were unprotected because "they were the result of his professional obligation to participate in departmental self-governance." The court concluded that "UCI is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities."

Characterizing Dr. Hong's criticisms overall as "internal administrative disputes which have little or no relevance to the community as a whole," the court added that it had "great difficulty" viewing Dr. Hong's comments "as a matter of such public concern that protection under the First Amendment is deserved. . . . 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.

- b. *Stronach v. Virginia State University*, 2008 U.S. Dist. LEXIS 2914 (E.D. Va. Jan. 15, 2008)

In this case, the federal court for the Eastern District of Virginia considered a complaint from Carey Stronach, a long-time tenured faculty member at Virginia State University (VSU) who alleged that the administration's exercise of authority over the grades he gave to a student violated his academic freedom. Stronach and the student had a dispute over whether the student received a 16 and 21 on two physics quizzes, which would have resulted in a final grade of F (though Stronach gave him a D), or 95 on both of them, which would have resulted in a final grade of A. Stronach told the student that copies of the quizzes showing the higher grades were doctored, and declined to change the D to an A. The student appealed to the department chairman, who sided with the student and changed the student's final grade on file to an A. Stronach appealed to the dean of the school of engineering and, ultimately, the provost, who ratified the chair's decision to change the grade. Stronach then sued, arguing that the decision violated his constitutionally protected academic freedom.

However, the court noted that most other federal courts reviewing a professor's freedom to grade have held that the academic freedom to grade encompasses the right to *assign* a grade, but not the right to have that grade protected from *change* by the administration, and the district court here adopted that line of reasoning. The district court concluded that "however definite the university's right to academic freedom is . . . it is clear that it is the *university's* right and not the *professor's* right. . . . [T]he Court finds that no constitutional right to academic freedom exists that would prohibit senior VSU officials from changing a grade given by Stronach to one of his physics students against his will."

- c. *Bowers v. Rector & Visitors of the University of Virginia*, 478 F. Supp. 2d 874 (W.D. Va. 2007)

Bowers worked in the human resources department for the University of Virginia when the university was trying to persuade the state legislature to pass a bill that would allow the school to restructure its pay scale system. Bowers attended a meeting of the NAACP to discuss her and the NAACP's opposition to the proposed legislation, and she was asked by a friend, fellow university employee, and fellow NAACP member to forward the research information she received at the meeting. She sent the documents before work hours but used her university email account, which contained her official email signature. Her co-worker forwarded the email and NAACP documents to dozens of other people, one of whom sent the email out to "hundreds" of people because he believed the documents were official university materials. Bowers asked him and others to clarify that the documents were from the NAACP, rather than from the HR department; subsequently, she used her university email to send him a proposed letter to the governor in opposition to the legislation.

After being questioned about the circumstances surrounding the email, Bowers was fired. She sued the university, alleging that her termination was in retaliation for

engaging in protected speech about the proposed legislation using her work computer but before the work day began. In her notice of termination, the university stated:

Ms. Bowers knowingly used her university title in conjunction with the dissemination of information by use of her University email account. That information was, in part, not factual, nor did it represent a University position statement on the issues addressed. Following the sending of the email, Ms. Bowers expressly declined the opportunity to clarify the fact that the information disseminated in the email did not emanate from her in her official capacity as a University employee, and collaborated in the further dissemination of the information.

The court acknowledged that “the law on the use of office email systems is in its infancy.” The court noted that because Bowers was speaking about bills being debated by the state legislature, her speech was on a “matter of public concern,” and was not obviously willfully wrong. On the other hand, the court was troubled by her use of university resources to send an email that was not part of her job. “The Court’s most serious concern arises from the use of the signature or ‘stamp’ at the end of the email that identified the sender as an employee of the University’s Human Resources department.” The court characterized this behavior as “unauthorized use of official titles and channels of communication,” and analogized her use of official email to use of official letterhead, which would be “inconsistent” with a claim that she was speaking as a citizen, not a public employee, for First Amendment purposes.

The court concluded that because her email confused others (even if unintentionally) into thinking she was sending materials in her position as an HR employee on behalf of the university, her speech would face special scrutiny, and was ultimately unprotected by the First Amendment.

Although Plaintiff was not officially authorized to speak for the University, her email misled others into thinking that she was. For that reason, this Court will hold her to the standards of those who are actually permitted to speak for government agencies: she must stick to the party line or face discipline. . . . Plaintiff’s statements, by purporting to be Human Resources statements, lose the cloak of First Amendment protection. The Court concludes therefore that Defendants did not violate Plaintiff’s First Amendment rights because Plaintiff’s activity was not protected under the First Amendment.

## II. Duty to Bargain or Engage in Collegial Consultation

- a. *California Faculty Association v. PERB*, 2008 Cal. App. LEXIS 291 (Cal. Ct. App. Feb. 28, 2008)

In this case, the California Court of Appeals concluded that the terms and conditions on which an employer makes parking available to its employees “involve the employment relationship,” and ordered the state Public Employment Relations Board (PERB) to determine whether the California State University (CSU) had engaged in an unfair labor practice in excluding members of the bargaining unit from parking in new parking structures and refusing to bargain over the decision.

The California Faculty Association (CFA) is the exclusive bargaining representative for faculty coaches, librarians, and academic counselors at CSU. CFA and CSU did not traditionally bargain over parking location, but they did traditionally bargain over parking fees, and the “Benefits” section of the 2002-04 collective bargaining agreement (CBA) contained a provision governing parking fees. In 2000-01, the university decided to build new parking structures at the Northridge and Sacramento campuses, and requested that CFA reopen the CBA to negotiate increased parking fees, which CFA refused. Subsequently, the university prohibited members of the bargaining unit from parking in the new structure at Northridge, while the university designated the new parking structure at the Sacramento campus as student parking only. The CFA filed unfair practice charges with respect to both campuses, alleging that the university had “effectively changed the . . . parking fee structure by de-valuing faculty parking permits sold at the contractually permissible rate and limiting the use of said permits in violation of previous practices on campus,” in violation of California Government Code § 3571(c), which makes it illegal for the university to “refuse or fail to engage in meeting and conferring with an exclusive representative.”

The administrative law judge (ALJ) considering the case issued a proposed decision in 2004 concluding that the university had violated that statute by unilaterally prohibiting employees from parking in the new parking structures, reasoning that parking location was an issue within the CFA’s scope of representation. In 2006, however, the PERB decided that parking location was not within the scope of representation, and that the university therefore had no duty to bargain.

The Higher Education Employer-Employee Relations Act (HEERA) requires the university to “engage in meeting and conferring with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation.” “Scope of representation” generally means “wages, hours of employment, and other terms and conditions of employment.” Cal. Gov. Code § 3562(r)(1). As the court here noted, “an employer’s unilateral change in the terms and conditions of employment within the scope of representation is . . . a per se refusal to negotiate and a violation of HEERA.” (quoting *California State Employees’ Ass’n v. PERB* (“CSEA”), 51 Cal.App.4th 923, 934 (Cal. Ct. App. 1996)). To show an illegal unilateral change, an aggrieved employee organization must establish that: “(1) the

employer breached or altered the parties' written agreement, or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy, i.e., the change has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment; and (4) the change in policy concerns a matter within the scope of representation." 2008 Cal. App. LEXIS 291 at \*7-8 (quoting *CSEA* at 935).

The PERB determined that the university's unilateral parking decision did not involve the employment relationship because "parking at both locations is not a condition of employment. Employees are not required to drive to work. However, in the event they choose to drive . . . [t]hey may, like student[s] and members of the public, park in 'daily use' spaces . . . or, alternatively, park off campus." The court of appeals concluded that the PERB's analysis was clearly erroneous.

In reaching its conclusion, the court relied on two cases. First, in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), the U.S. Supreme Court ruled that the prices for an in-plant cafeteria and vending machines were "terms and conditions of employment" subject to mandatory collective bargaining. The Court based its decision in part on the difficulty for employees in leaving the plant to eat lunch because of the location of restaurants and the large number of other industrial plants in the area.

Subsequently, in *Statewide University Police Association v. Regents of the University of California*, Cal. PERB Dec. No. 356-H (1983), the state PERB concluded that the University of California had violated HEERA "by refusing to negotiate and by unilaterally raising the fees paid by its police officer employees for parking in lots operated by" the university. The state board analogized between the increases in in-plant food prices in *Ford* and the increases in parking fees, concluding that parking fees were within the scope of representation under HEERA because "[t]he availability of parking and its costs are matters of concern to employees" and the "[t]erms and conditions under which parking is available [are] plainly germane to working conditions."

The Board also rejected the University of California's argument that parking fees were not a term or condition of employment because "alternative modes of transportation exist for employees." The Board reasoned that although the Supreme Court in *Ford* did point to the absence of reasonable lunch alternatives, it did not indicate that the obligation to bargain "would *only* be affirmed in those cases in which it was shown that there existed no reasonable alternative to in-house culinary services, and in which employees were thus 'captive consumers' of such services." The Board in *Statewide University Police Association* therefore found that "the amount of fees charged to employees for employer-provided parking is a subject within the scope of representation under HEERA, *whether or not alternative methods of commuting are available to employees.*" (emphasis added)

In this case, the PERB tried to embrace the same argument – known as the "captive consumer--no reasonable alternative" rationale – that it rejected in *Statewide*

*University*. The state appeals court repudiated that effort, noting that in *Ford*, the Supreme Court relied not on the fact that the employees were “captive consumers,” but on the fact that the lunch issue was a “matter[] of deep concern to workers” and was “plainly germane to the working environment.”

Instead, the first question for determining if a subject is within the scope of representation with respect to the terms and conditions of employment is whether the subject “*involves* the employment relationship,” not whether it is “*integral* to the employment relationship.” As the appeals court put it here, “The question here is not whether food and parking are of equal importance to maintaining human life, or even of equal importance to an employer’s relationship with its employees; the question is whether the terms and conditions on which an employer chooses to provide parking to its employees (like the terms and conditions on which it chooses to provide food) ‘involve the employment relationship.’” The court continued:

Just as the terms and conditions on which an employer makes food available for its employees are germane to the working environment, so are the terms and conditions on which an employer makes parking available. Indeed, the availability of parking may have a significant impact on whether an employee can get to work in the first place. The fact that driving (unlike eating) is not a necessity of life – and that employees are not required to drive to work, not required to park on campus if they do drive, and not required to park in permitted spaces if they do park on campus – makes no difference to whether the terms and conditions on which the university provides parking to its employees ‘involves the employment relationship.’ [citing *Board of Trustees v. ILRB*, 224 Ill. 2d 88 (Ill. 2007)]

The court also emphasized that the employees’ parking fees are included as a benefit of employment in the collective bargaining agreement.

Because there were still a number of issues to be resolved before concluding that the university violated the California Government Code, the court remanded the case back to the PERB for additional fact-finding. The PERB must determine: whether the terms and conditions of university-provided parking are “of such concern” to both the CFA and the university that “conflict is likely to occur” and collective bargaining would be appropriate; whether the university’s obligation to negotiate would encroach on its managerial freedom; whether the university breached or altered the collective bargaining agreement or its own past practices; whether the CFA received notice or an opportunity to bargain over the change; and whether the change amounts to a change of policy.

- b. *Diablo Valley College Faculty Senate v. Contra Costa Community College District*, 148 Cal. App. 4th 1023 (Cal. App. Ct. 2007)

In *Diablo Valley*, the California Court of Appeals determined that a decision by Diablo Valley College (DVC) to hire professional deans, rather than filling managerial

positions on a part-time basis with faculty members, did not relate to “academic and professional matters” and therefore did not require “collegial consultation” with DVC’s academic senate.

Diablo Valley College is one of three community colleges managed by the Contra Costa Community College District. Beginning in about 1968, faculty “division chairs” managed academic divisions within the college; division chairs were nominated by faculty and appointed by the university president to serve a maximum of two three-year terms. Division chairs, who continued to teach part-time, acted as “first-line managers for their divisions,” facilitating faculty-administration communications and managing the faculty’s involvement in DVC administration. In 1977, this system was put into the District’s administrative procedures manual, but it was unclear whether this action, or the subsequent movement of the procedures into other manuals, was accompanied by collegial consultation or was formally adopted by the District’s governing board. A description of the division chair selection procedure was subsequently added to the collective bargaining agreement between the District and United Faculty, the faculty union; the CBA identified division chairs as “management positions.”

In 2001, however, the District Chancellor decided that because of the growth of the college, it was no longer feasible for faculty serving part-time on a nine-month schedule to act as deans, and therefore decided to have all three colleges in the District managed by full-time professional administrators. The DVC Faculty Senate objected, arguing that the reorganization was an “academic or professional matter” that required collegial consultation under California regulations because it would alter faculty roles in governance, and the District was required under Board policy to reach “mutual agreement” with faculty before the change could be made. After an interim review, the Chancellor concluded that the regulations required collegial consultation only for “matters that go to the heart of faculty expertise,” based on “their expertise as teachers and subject matter specialists and their professional status;” because the Chancellor’s office had already developed a rule that management reorganizations did not require collegial consultation, the Chancellor decided to continue to adhere to that rule, and also found that collegial consultation on division chairs was precluded because the issue was included in the CBA.

The state trial court rejected several of the Chancellor’s arguments, finding that collegial consultation regulations applied to both practices and policies and that the CBA did not preclude collegial consultation on the issue because neither side had intended the CBA to be binding on this subject. The trial court upheld the Chancellor’s final decision, however, because the change did not implicate “district and college governance structures, as related to faculty roles.” As the state appeals court put it, “the court interpreted the regulations as requiring collegial consultation only when a change in a college’s governing structure diminishes the faculty’s ability to perform their unique ‘faculty roles,’ as opposed to roles they might serve in management.”

The appeals court here – ultimately upholding the trial court’s decision – observed that the state regulations requiring local community colleges to consult collegially on

academic and professional matters defined those exclusively as curriculum matters, degree and certificate requirements, grading policies, student preparation standards, district and college governance structures as related to faculty roles, accreditation, professional development, program review, and institutional planning and budget development. The District's Board had therefore adopted a policy stating that the Board would consult collegially with the District's Academic Senate "when adopting policies and procedures on academic and professional matters" as defined in the regulations. The policy specifically provided that the Board would "rely primarily upon the advice and judgment" of the academic senate with respect to curriculum, degree requirements and grading, and would "reach mutual agreement" with the Academic Senate on other matters. The issue for the court, therefore, was whether the reorganization constituted a "district and college governance structure[], as related to faculty roles," which would require collegial consultation.

The court reasoned that whether or not division chair management constituted a "district or college governance structure," the management system was not "related to faculty roles." The court went on to say: "only when a district seeks to change aspects of such governance structures that are related to 'faculty roles' – such as, for example, curriculum or faculty hiring committees – must it consult collegially with the faculty. The regulations do not define 'faculty roles.' However, all other 'academic and professional matters' defined in [the law] concern subjects that are within the unique expertise of faculty members, as opposed to administrators or any other specialists." Consistent with the other "academic and professional matters" defined in the regulations, the court construed "faculty roles," as used in the statute, to refer to the "traditionally understood roles faculty members play in a college. Faculty members are uniquely qualified to instruct students and assess their work, to design and implement curriculum, to develop the college's educational offerings, and to address broader institutional issues such as accreditation and budgeting to the extent these issues depend upon or impact student instruction. No evidence in the record, however, suggests faculty members at DVC are uniquely qualified to manage their peers, or to decide which management structure the college should use."

The court also rejected the faculty senate's argument that past practice regarding the division chair policy mandated collegial consultation, reasoning that that would make the definition of "faculty roles" "entirely contextual, dependent in any given case on the faculty's history of involvement in a particular area." "In short," the court ruled, "the faculty's past participation does not convert the District's reorganization of purely managerial positions into an 'academic or professional matter' requiring collegial consultation." In addition, the court concluded that although the state regulations were intended to increase faculty members' involvement in college matters, that increased responsibility was meant to focus on duties "incidental to [faculty members'] professional duties," not administrative decisions. Accordingly, the court upheld the trial court's decision holding that the Chancellor was not required to engage in collegial consultation over the change in the division chair system.

### III. Agency fee and Beck objection procedures

#### a. *Davenport v. Washington Education Association*, 127 S. Ct. 2372 (2007)

Last year, the United States Supreme Court decided a case that could have implications for all unions that collect agency fees from non-members. In *Davenport v. Washington Education Association*, the Supreme Court upheld a 1992 Washington state statute prohibiting unions from using non-members' agency fees to "make contributions or expenditures to influence an election or to operate a political committee, *unless affirmatively authorized by the individual.*" (emphasis added)

In 2001, the state of Washington and several non-members of the Washington Education Association sued the WEA, an 80,000-person union with about 1,200 members in higher education and approximately 4,000 non-members total. Twice a year, the WEA sent each nonmember a "*Hudson* packet," which informed non-members of their right not to pay for political expenditures that were unrelated to the union's collective bargaining services. The fees of objecting nonmembers were set aside and not used for political purposes. The lawsuits challenged this system, claiming that the WEA's procedure failed to obtain the required affirmative authorization from non-members who did not object to the political use of their agency fees. The WEA argued in response that the statute violated the First Amendment to the United States Constitution by making it difficult for the union to exercise its own rights of political expression.

The Supreme Court ruled against the WEA. The Court described the statute as a "modest limitation" on "the union's extraordinary state entitlement to acquire and spend other people's money." The Supreme Court reasoned that to the extent the WEA had a right to collect non-members' fees, that right came from state law and not the federal constitution, and it was therefore constitutionally permissible for the state to impose restrictions on how those fees could be spent. The Court added that because of "current technology," it would not be difficult for a nonmember to affirmatively authorize the political use of his or her agency fees. The Supreme Court concluded that the statute did not stifle the union's expression because the union could use the rest of its funds to participate in elections. While the Court limited its decision to public sector unions, it noted that the same reasoning could apply in the private-sector context.

There is an interesting coda. While the U.S. Supreme Court was considering the case, the Washington state legislature revised the statute. Today, unions in the state are permitted to use agency fees for political expenditures as long as they have enough revenue from other, non-agency fee sources to fund the expenditures. Essentially, the statute now has a safeguard to ensure that the union isn't *dependent* upon agency fees to make the contributions. Because the Supreme Court concluded that states *may* impose stringent requirements upon unions' use of nonmember agency fees, however, the decision could still have a negative impact on unions—public sector as well as private sector—in states permitting agency shop fees.

- b. *Seidemann v. Bowen*, 2007 U.S. App. LEXIS 18243 (2nd Cir. Aug. 1, 2007), amended Aug. 28, 2007

David Seidemann, a tenured professor at Brooklyn College/CUNY, was an agency fee payer who objected to certain charges he claimed were not related to the collective bargaining process. Under PSC's procedures for collecting agency fees, the union sent agency fee payers an annual notice letter with a copy of the agency fee procedure and objection procedure, and agency fee payers then had a one-month window to send in their objections. Objectors were also required to identify the specific expenditures to which they objected, in order to obtain arbitration on the classification of the disputed expenditures. Seidemann sued CUNY's union, the Professional Staff Congress ("PSC"), claiming that PSC's procedures violated the First Amendment and the duty of fair representation.

The U.S. Court of Appeals for the Second Circuit – which makes federal case law for Connecticut, New York, and Vermont – held that an annual window period for objections violates the objector's First Amendment rights, in the absence of a "legitimate need for disallowing continuing objections." The court noted that some federal appeals courts (including the D.C. Circuit and the Sixth Circuit, which covers Kentucky, Michigan, Ohio, and Tennessee) have held that an annual objection window is sufficient to protect objectors' rights. The court also observed that the Supreme Court has held, in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), that employees must "identify themselves as opposed to political uses of their funds." The court concluded, however, that "nothing in *Street* or the subsequent decisions of the Supreme Court suggest that merely because an employee must initially make his objection known, a union may thereafter refuse to accept a dissenter's notice that his objection is continuing." For unions in areas covered by the Second Circuit, therefore, an annual window period for objections will likely not be sufficient, at least in the absence of "a legitimate need for disallowing continuing objections."

Second, the court held that PSC's requirement that an objector "indicate to the union local president the percent of agency fees that s/he believes is in dispute," in order to obtain arbitration of a disputed fee, violated Seidemann's First Amendment rights. The court noted that "the Supreme Court has specifically and consistently rejected the notion that dissenters must object with particularity." Notably, the appeals court relied in part on *Davenport*, suggesting that even though the state statute in that case was amended and no states have enacted identical statutes, the Supreme Court's decision may have some significant ramifications.

This decision is controlling only in Connecticut, New York, and Vermont, but when taken in combination with cases from the D.C. Circuit and the Sixth Circuit, as well as the Supreme Court's *Davenport* case and *Colt's Manufacturing*, described below, it suggests that courts may be becoming increasingly hostile to the collection of agency fees, or at least increasingly attentive to the mechanisms by which those fees are collected.

- c. *Colt's Manufacturing Company, Inc.*, 34-CB-2631 (NLRB, NY Branch Office) (decided March 3, 2008)

This decision addressed the issue of what might constitute a “legitimate need for disallowing continuing objections,” but concluded that the rationales offered by the union here failed to meet that standard. The case consolidated two complaints against local units of the UAW – one at Colt’s Manufacturing Company, and one composed of adjunct faculty members at New York University. Both complaints challenged the UAW’s method of permitting *Beck* objections to be made to the UAW’s agency fee calculations. Under the UAW’s procedures, *Beck* objectors were required to renew their objection every year. The UAW communicated extensively with *Beck* objectors, notifying the objectors of the union’s receipt of their objection, copying them on the union’s request that the employer reduce the amount deducted from their paychecks, and (as of October 2007) sending objectors a reminder letter 15 days before their objection was due to expire. In addition, the UAW did not impose a window period on objections – objectors could object at any time and renew their objection at any time after it expired.

Nevertheless, the Administrative Law Judge (ALJ) in this consolidated case concluded that the UAW’s practice violated section 8(b)(1)(A) of the National Labor Relations Act, which states that it is an “unfair labor practice” for a union to “restrain or coerce employees in the exercise of the rights guaranteed” by section 7 of the NLRA, which outlines the “rights of employees.” The judge limited his analysis to two questions: whether the UAW had established a “valid business justification” for its annual objection renewal requirement, and whether the annual obligation substantially burdened objectors.

The UAW offered a number of defenses in support of its annual renewal requirement. The UAW noted that in 1988, the NLRB’s General Counsel issued *Beck* guidelines that stated in part: “a union can require non-members to file new objections . . . each year.” In addition, in 2001, during testimony before a committee of the U.S. House of Representatives, the Board’s General Counsel observed: “Generally, a union may require that objections be sent to the union during a specified annual ‘window period.’” The UAW also argued that because its member base had shifted to casinos, hospitals, and universities, which offered a lower pay scale than the automobile and similar industries, its members had a high rate of turnover. The union maintained that it would be easier to track and locate its members if they were obligated to renew their *Beck* objections annually.

The judge rejected the UAW’s first two grounds, ruling that old General Counsel statements were not Board law and were not binding. The judge reviewed various court decisions on yearly renewal requirements for *Beck* objections, observing that the decisions “go both ways.” Among the cases upholding an annual objection requirement were *Tierney v. City of Toledo*, 824 F.2d 1497, 1506 (6th Cir. 1987) (calling requirement “not . . . unreasonable”); *Abrams v. CWA*, 59 F.3d 1373, 1381-1382 (D.C. Cir. 1995); and *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 774 (1961) (“[D]issent is not to be presumed – it must affirmatively be made known to the union by the dissenting

employee.”). On the other hand, several courts have rejected an annual renewal requirement: *Shea v. Int’l Ass’n of Machinists*, 154 F.3d 508, 515 (5th Cir. 1998) (holding, in a Railway Labor Act case, that “the procedure that least interferes with an employee’s exercise of his First Amendment rights is the procedure by which an employee can object in writing on a continuing basis”); *Lutz v. Int’l Ass’n of Machinists*, 121 F.Supp.2d 498, 506 (E.D. Va. 2000) (opining that the union imposed an annual objection requirement because the union hoped to “collect more money as a benefit of the decision maker’s inertia”); *Seidemann v. Bowen, supra*; *General Truck Drivers, Local No. 952 (Albertson’s)*, JD(SF)-30-60 (NLRB ALJ May 30, 2006) (finding, in the absence of an explanation for the requirement, that the yearly renewal was “arbitrary and designed only to discourage the exercise of a right protected by the Act,” and that “if employees have an unencumbered right to resign from membership, so too should they have an unencumbered right to file *Beck* objections”).

The ALJ found that the annual requirement did not impose a heavy burden on objectors, because the UAW “operate[s] a system that keeps the objectors well informed of the expiration date of their objection,” and objectors can renew their objection at any time without being bound by a window period. Nevertheless, the judge overruled the objection procedure on the grounds that the UAW had not demonstrated a valid business justification. The judge reasoned that the UAW’s rationale “appears to be principally record keeping.” Noting that the *Beck* objectors numbered approximately 300 out of the UAW’s 600,000 members, the judge observed that “it is unclear . . . why it is so important to require yearly renewals in order to keep track of these *Beck* objectors and not the other 99.9% of their members. Further, [the UAW does] not require yearly renewals of union membership cards, dues authorization checkoff cards or notice of resignation from the union. Yearly renewals are only required of *Beck* objectors, and the [UAW has] not satisfactorily explained this inconsistency.”

The Board will adopt the ALJ’s decision unless the union appeals, which the union is expected to do.

c. ***Katter v. Ohio Employment Relations Board***, 492 F. Supp. 2d 851 (D. Ohio 2007)

Carol Katter was a public school teacher in St. Mary’s, Ohio, who was represented by the St. Mary’s Education Association/Ohio Education Association/National Education Association. However, she objected to joining the teachers’ union because she was a devout Catholic and the union supported abortion rights; she believed that if she were a member of the union, she would potentially lose her chance for eternal life.

Beginning in August 2005, all persons represented by the bargaining unit were required either to join the union or pay an agency fee. Katter filed an application for a religious exemption from the agency fee requirement with the State Employment Relations Board (SERB or Board), pursuant to Ohio Rev. Code. Ch. 4117. Ohio Rev. Code § 4117.09(C) allows the SERB to excuse a member of the bargaining unit from

payment of agency fee if the member is a “public employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion or religious body which has historically held conscientious objections to joining or financially supporting an employee organization.” The SERB denied Katter’s application, because although she was able to verify her membership in the Catholic Church, she was not able to verify that the church “has historically held conscientious objections to joining or financially supporting an employee organization.” Katter then sued the Board in federal court, alleging that the Board discriminated against her on the basis of religion under the establishment clause and the free exercise clause of the First Amendment, as well as the equal protection clause of the Fourteenth Amendment.<sup>2</sup>

The federal district court agreed with Katter that her First Amendment rights had been violated, pursuant to the establishment clause; that clause states that “Congress shall make no law respecting an establishment of religion,” and the prohibition applies to the states as well. The court noted that the Ohio statute implicated here was “virtually identical” to a provision of the National Labor Relations Act that was struck down nearly two decades ago by *Wilson v. National Labor Relations Board*, 920 F.2d 1282, 1286 (6th Cir. 1990). Section 19 of the NLRA, 29 U.S.C. § 169, provided in part:

Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees’ employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund.

The court observed that because of that similarity, the court “could hold without further analysis that § 4117.09(C) is unconstitutional.” The court pointed, however, to another issue: section 4117.09(C) requires an objecting employee to be a “*member of*” and “*adhere[nt] to*” a religion that has “*historically held conscientious objections.*” (emphasis added)

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<sup>2</sup> After Katter filed her complaint, the union granted her requested accommodation retroactively, agreeing to send her agency fees to a mutually agreed-upon charity, beginning on the date she requested an exemption. The court did not dismiss the case on this basis, however, because while the union had given her the remedy she requested, the union was now in violation of Ohio code § 4117.09(C), which prohibits SERB from granting agency fee exemptions to public employees who hold sincere religious objections to joining or financially supporting employee organizations but are not members and adherent of religions that historically have held conscientious objections to that support. “Thus,” the court held, “Plaintiff is still subject to an overarching allegedly unconstitutional statutory scheme. The existence of this statute allegedly discriminates against her on the basis of her religion. Moreover, it creates the possibility that [the Board] may attempt to enforce the statute and deny Plaintiff an exemption despite the Union’s efforts to accommodate her.”

Where a statute has a “denominational preference,” it must be struck down as unconstitutional “unless it is justified by a compelling governmental interest.” *Wilson*, 920 F.2d at 1287. The court reasoned that the section 4117.09(C) “facially differentiates between religions” because it distinguishes between members and non-members of the same church, and between members of churches that have the same doctrine but adopted it at different times. “It then creates a denominational preference by providing special treatment to members of the religious organizations described in the statute. Specifically, the statute . . . has the effect of increasing the advantages of membership in religions such as Seventh-day Adventist and Amish Mennonites that have previously received exemptions.” The court therefore subjected the statute to “strict scrutiny,” and concluded that the union had failed to show how the statute furthered a compelling governmental interest. The court also determined that the statute would fail strict scrutiny anyway because it could be “more closely tailored” to the governmental interest of protecting religious freedom in the workplace, “by providing protection to all employees who hold bona fide religious beliefs without regard to membership in a particular religious organization.”

The court therefore deemed the portion of section 4117.09(C) described unconstitutional<sup>3</sup> – leaving open the significant question of whether anyone can apply for a religious exemption to the agency fee requirement, as the entire provision permitting such an application was struck down.

#### IV. Intellectual Property

- a. *PSU/KNEA v. Kansas Board of Regents/Pittsburgh State University*, Case No. 75-CAE-23-1998, Kansas Public Employee Relations Board (Feb. 9, 2007), *aff’d* Aug. 16, 2007

This case was included in the session at last year’s conference, but some important developments have occurred since then. For a recap of the background: This case involved a challenge by the Kansas National Education Association (KNEA) to the Kansas Board of Regents’ (KBR or Regents) proposed policy giving ownership of faculty intellectual property to the universities at which the faculty members work, rather than to the faculty members themselves. The Regents had agreed to *discuss* implementation of

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<sup>3</sup> The entire portion of section 4117.09(C) declared unconstitutional was:

Any public employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion or religious body which has historically held conscientious objections to joining or financially supporting an employee organization and which is exempt from taxation under the provisions of the Internal Revenue Code shall not be required to join or financially support any employee organization as a condition of employment. Upon submission of proper proof of religious conviction to the board, the board shall declare the employee exempt from becoming a member of or financially supporting an employee organization. The employee shall be required, in lieu of the fair share fee, to pay an amount of money equal to the fair share fee to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code mutually agreed upon by the employee and the representative of the employee organization to which the employee would otherwise be required to pay the fair share fee.

*Katter*, 492 F. Supp. 2d at 864.

the intellectual property policy, which would have dictated that ownership and control of intellectual property would be “retained and managed” by the university, but refused to *meet and confer* regarding the policy. The KNEA filed a prohibited practice complaint with PERB, and in 2004, a Kansas appellate court ruled against the KNEA, stating that the Regents were not required to engage in bargaining with the union on copyright ownership issues because such a practice would conflict with federal law’s provision that an author *may* negotiate away his or her intellectual property rights but cannot be *required* to do so. The state appeals judge reached this decision by assuming that the faculty members’ intellectual property was work-for-hire, and thus the property of the University.

The KNEA appealed the case to the Kansas Supreme Court – supported by an amicus brief filed by the AAUP on the issue of faculty members’ ownership of their own copyrights – and in November 2005, the Kansas Supreme Court ruled that intellectual property rights are not simply assumed to be work-for-hire belonging to the university and can be a subject of collective bargaining. Finding the appellate court’s reasoning to be an “incorrect application of federal copyright law,” the Kansas Supreme Court concluded that to assume universities’ blanket ownership of faculty intellectual property was “too big a leap.” Instead, the court recognized that the question of ownership of faculty work is a complex one, depending on a careful analysis of the employment relationship and the reason for and method of creation of the work itself. The court cited the AAUP Statement on Copyright, and recognized that faculty intellectual property ownership cannot be treated simply as the work of an employee belonging to an employer, but rather “will necessarily involve not just a case-by-case evaluation, but potentially a task-by-task evaluation.” The court therefore returned the case to the district court, which returned it to the PERB “for additional findings regarding whether ownership of intellectual property is a condition of employment” and therefore mandatorily negotiable under the Public Employer-Employee Relations Act (PEERA), or an “inherent management prerogative” and therefore not mandatorily negotiable under an exception in the state law.

In a rousing victory for the KNEA and faculty members, the PERB concluded that ownership of intellectual property was a mandatory subject of bargaining. The PERB therefore found that the university and Regents had engaged in various prohibited bargaining practices and ordered that the Regents and university withdraw the unilateral implementation of the intellectual property policy and meet and confer in good faith with the KNEA on intellectual property rights (a decision that the PERB subsequently upheld after an appeal). The PERB noted that under Kansas law, an employer is prohibited from willfully refusing to meet and confer with the exclusive representative of employees in a bargaining unit over “conditions of employment,” which include (but are not limited to) such matters as salaries, wages, hours of work, leave, benefits, and grievance procedures. To determine whether intellectual property rights, which are not expressly included in the list of conditions of employment, are mandatorily negotiable, the PERB weighed the interests of the employer and employees “by considering the extent to which the meet and confer process will impair the determination of governmental policy.” To appropriately balance those interests, the PERB looked to three criteria, two of which are relevant here: whether the intellectual property policy “intimately and directly affects the work and

welfare of public employees,” and if so, whether the policy “is a matter on which a negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives.” As the PERB noted, the basic inquiry “must be whether the dominant concerns involves an employer’s managerial prerogative or the work and welfare of the public employee.”

On the first question, the PERB concluded that “the topic of intellectual property ‘intimately and directly affects the work and welfare of’ the public employees” of the university. (Because the PERB based its conclusion primarily on the reasoning of the district judge that had considered the matter earlier, but without explaining that reasoning, and because that decision is not available, it is not clear whether there are circumstances under which the PERB would consider intellectual property matters not to “intimately and directly affect” the employees’ work and welfare.) The PERB also ruled that there was no “inherent managerial prerogative” that would “suffer significant interference by negotiating in regard to intellectual property rights.” The PERB dismissed the Regents’ and university’s argument that a meet and confer requirement with respect to intellectual property rights would interfere with the university’s right “to direct the work of its employees,” responding that the issue in the case was not the university’s right to direct its employees’ work but the union members’ rights “regarding intellectual property *after it has been created*” (emphasis added). Finally, after a long analysis of the meaning of the word “willfully,” the PERB concluded that the Regents and university “intentionally, voluntarily, or deliberately” unilaterally adopted the policy and refused to meet and confer about the policy with the union, and therefore engaged in prohibited practices under Kansas law. The decision, which was an “initial order,” became a final order after consideration by the full PERB on August 16, 2007.

## V. Pending Cases – Supreme Court and others

### a. *Crawford v. Metropolitan Government of Nashville and Davidson County* (Supreme Court docket # 06-1595)

Vicky Crawford was a thirty-one-year employee of the Metropolitan Government of Nashville and Davidson County, Tennessee (“Metro”) working in the employee relations office of the Nashville school system. In 2001, the Metro Human Resources Department learned that employees in the office where Crawford worked had complained about the inappropriate conduct of their manager, Dr. Gene Hughes. The human resources department investigated these complaints, and asked Crawford (who was not one of the original complainants) to report to its legal department for an interview focusing on Hughes’ conduct. Crawford duly reported, and told the Metro investigator that Hughes had sexually harassed her by making sexually explicit remarks and gestures towards her. Two other employees made similar statements regarding Hughes’ conduct.

Ultimately, no disciplinary actions were taken against Hughes, although investigators recommended training and education for the staff. According to Crawford, the two other employees who had accused Hughes of misconduct were immediately investigated on other grounds and all promptly discharged. Crawford herself was

terminated in January 2003 for embezzlement and drug use, although she ultimately proved that these charges were unfounded. Crawford filed a charge with the Equal Opportunity Employment Commission (EEOC) alleging retaliation and, after receiving a right-to-sue letter, filed a lawsuit claiming retaliation in violation of Title VII.

Title VII provides in part that “[i]t shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice [that is] made an unlawful employment practice by this subchapter.” This provision is called the “opposition clause.” Title VII also provides that it is unlawful to discriminate against an employee because he or she has “made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter.” This second provision is called the “participation clause.” 42 U.S.C. § 2000e-3(a).

Crawford claimed that her cooperation in Metro’s internal investigation constituted both opposition to a practice made unlawful by Title VII and participation in a Title VII investigation. Crawford argued that Metro violated both clauses of Title VII when it discharged her for cooperating in its investigation. The U.S. District Court for the Middle District of Tennessee rejected Crawford’s claims, and the Sixth Circuit Court of Appeals affirmed the District Court’s judgment.

The Sixth Circuit first ruled that Crawford’s actions did not constitute “opposition” under Title VII. The court noted that oppositional activities under Title VII – including complaining about unlawful practices or refusing to obey unlawful orders – required the protected employee to take an “active” and “consistent” stance against a discriminatory act. Under this standard, Crawford was not entitled to protection for “opposition” because she merely agreed to answer her employer’s questions pursuant to its investigation.

Second, the Sixth Circuit held that “Crawford’s participation in an internal investigation initiated by Metro in the absence of any pending EEOC charge is not a protected activity under the participation clause.” Thus, the court ruled that the filing of an EEOC charge is required to invoke Title VII protection under the “participation” clause. The panel reasoned that its ruling comported with other courts’ general stance on Title VII actions: “Courts have generally held that the participation clause does not protect an employee’s participation in an employer’s internal, in-house investigation, conducted apart from a formal charge with the EEOC; at a minimum, an employee must have filed a charge with the EEOC or otherwise instigated proceedings under Title VII.” Thus, “[a]ny activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause,” and not the participation clause. Crawford was therefore unprotected by either the opposition or the participation clause of Title VII.

Crawford argued that allowing an employer to utilize an internal grievance mechanism as part of an affirmative defense, as permitted by the Supreme Court case *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), while not protecting an employee’s

interactions with that investigation mechanism, invited abuse and would discourage employees from cooperating with investigations. The Sixth Circuit panel rejected this argument, however, noting that the Supreme Court allowed plaintiffs to challenge whether an employer actually took “reasonable care” – and that dismissing a cooperating employee would not be “reasonable” under *Faragher*. In addition, the court concluded that expanding the participation clause to cover internal investigations would discourage employers from initiating them.

The Supreme Court took the case to decide whether Title VII’s anti-retaliation provision “protect[s] a worker from being dismissed because she cooperated with her employer’s internal investigation of sexual harassment.” The AAUP expects to jointly file an amicus brief in this case.

b. *Engquist v. Oregon Dept. of Agriculture* (Supreme Court docket # 07-474)

Anup Engquist was an employee of the Oregon Department of Agriculture; she angered her supervisor by reporting his abusive behavior to superiors, who required the supervisor to attend anger management classes. The supervisor retaliated by arranging a restructure within the Department that resulted in Engquist being discharged, and Engquist sued the state claiming, among other things, that her Equal Protection rights under the U.S. Constitution had been violated.

Engquist’s claim asserted that the state government had violated her Equal Protection rights by treating her differently from her co-workers without a justifiable rationale; this is known as a “class of one” claim (as differentiated from cases in which the aggrieved person is the member of a “protected” class – i.e., race, sex, national origin, etc.). Engquist won at trial, but the U.S. Court of Appeals for the Ninth Circuit reversed, concluding that the “class of one” Equal Protection claim should not be expanded to the realm of employment decisions.

The concept of an Equal Protection “class of one” claim arises from *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), a zoning case. In *Olech*, the U.S. Supreme Court held that the government cannot arbitrarily or irrationally deprive individual persons – “classes of one” – of their rights (here, the right not to have to satisfy a greater easement requirement than one’s neighbors). The Supreme Court ruled that although the landowner in *Olech* had not raised a claim of discrimination based on a protected class, as a “class of one” she still had the right under the Equal Protection clause not to be treated in an arbitrary or unequal way by the government.

The Ninth Circuit examined *Olech*, but declined to extend the “class of one” doctrine to apply in a state employment case (although a number of other federal appeals courts have done so). The majority noted that when a public officer “comes down hard on a hapless private citizen,” the citizen may have no other recourse against the arbitrary action than a “class of one” claim, while public employees enjoy “a number of other legal protections.” The majority also observed that employment in the United States has

traditionally been “at-will,” allowing employers to fire and discipline employees even for arbitrary reasons, and reasoned that the government should be able to act similarly. The majority also expressed concern that allowing the “class of one” theory in government employment cases would “generate a flood of new cases, requiring the federal courts to decide whether any public employee was fired for an arbitrary reason or a rational one.”

The dissenting judge argued that the general principle of state employment-at-will is not threatened by a rule barring government from “treat[ing] its employees maliciously and irrationally.” In addition, he wrote, government employees “do not give up their rights to be free from hostile, arbitrary and malicious treatment by the government” merely because they accept employment from it.

The Supreme Court accepted review to consider whether “public employers [may] intentionally treat similarly situated employees differently with no rational bases for arbitrary, vindictive or malicious reasons.” The AAUP submitted an amicus brief with the AFL-CIO and the National Education Association, arguing that public employees must have this remedy available to them.

c. *Meacham v. Knolls Atomic Power Laboratory* (Supreme Court docket # 06-1505)

Knolls Atomic Power Laboratory (“KAPL”) is a federally-funded atomic power laboratory. In 1996, KAPL was assigned new work that required it to hire new employees, and at the same time was required to impose stricter limits on staffing levels. KAPL complied with the new staffing limits by ordering an involuntary reduction in force (an “IRIF”). KAPL managers determined the employees to be laid off by numerically ranking employees in a number of performance areas and conducting an analysis on the lowest-ranking employees to determine whether terminating those employees “might have a disparate impact on a protected class of employees.” 75% of the employees ultimately selected for layoff were over 40 years old.

The laid-off employees sued KAPL, arguing that the layoff had a disparate impact on older workers, in violation of the Age Discrimination in Employment Act (ADEA), and asserted that other cost-neutral plans would have achieved the same result for the company without a disparate impact on older workers. A jury awarded the plaintiffs damages and the U.S. Court of Appeals for the Second Circuit upheld the decision. The Supreme Court agreed to review the case, but while it was pending, the Supreme Court handed down a ruling in a case dealing with similar issues, *Smith v. City of Jackson*, 544 U.S. 228 (2005). The Court therefore remanded the case back to the Second Circuit for reconsideration in light of *City of Jackson*.

In *City of Jackson*, the Supreme Court decided that where a plaintiff demonstrates that an employer’s action had a disparate impact based on age – that is, where the employer did not necessarily intend to discriminate based on age but the employer’s actions nevertheless disproportionately affected employees over forty – the plaintiff can receive damages under the ADEA. However, the Court left open the question of

whether, if the employer argues that its otherwise illegal action was based on a “reasonable factor other than age,” the employer must provide evidence of those reasonable factors, or if instead the employee must demonstrate the *absence* of reasonable non-age-based factors.

On its second go-round in *Meacham*, the Second Circuit held that once an employer produces evidence supporting its claim that it relied on “reasonable factors other than age,” the plaintiffs have the “ultimate burden of persuading the factfinder that the employer’s justification is unreasonable.” The Supreme Court agreed to review the case to answer the question of “[w]hether an employee alleging disparate impact under the ADEA bears the burden of persuasion on the ‘reasonable factors other than age’ defense, as held by the Second Circuit in this case in conflict with the decisions of other circuits and a regulation of the Equal Employment Opportunity Commission.” The AAUP filed an amicus brief to the Supreme Court with the AARP and the National Employment Lawyers Association, arguing that the burden to prove the reasonableness of the employer’s justification must fall on the employer itself.

d. ***Smithfield Foods v. United Food and Commercial Workers International Union***, No. 3:07cv641 (E.D. Va.), filed Jan. 31, 2008

In late January, Smithfield Foods filed suit against the UFCW, which has spoken out about conditions at Smithfield’s Tar Heel, N.C., slaughterhouse.<sup>4</sup> Smithfield alleges that the union’s efforts to bring attention to labor, environmental, and safety implications of the corporation’s work – in part to pressure the company to unionize – is a violation of the 1970 Racketeer Influenced and Corrupt Organizations Act (RICO). In the complaint, Smithfield attacks a number of the union’s activities. Smithfield argues that the union’s meetings with local legislatures in New York, Boston, and elsewhere, to try to convince the cities to stop purchasing meat from the Tar Heel slaughterhouse “until the company ends all forms of abuse, intimidation and violence against its workers,” constitute racketeering. (The First Amendment guarantees the right to petition the government.) The company also argues that UFCW “deprived Smithfield of an incomparable marketing opportunity” by convincing talk show host Oprah Winfrey to prevent cooking show host Paula Deen, a Smithfield spokesperson, from promoting Smithfield’s hams on Oprah’s show.

The union asked the federal trial court to dismiss the case; the judge denied the motion, and the case is scheduled for trial in October. In early February, Smithfield’s attorney told the *New York Times* that he was aware of six other racketeering complaints that had been filed against unions for pressuring employers to unionize by conducting public campaigns against the companies; in five of the six, the judge refused to dismiss the case, and the unions settled with the employers.

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<sup>4</sup> See [http://www.nytimes.com/2008/02/05/us/05bar.html?\\_r=1&ref=us&oref=slogin](http://www.nytimes.com/2008/02/05/us/05bar.html?_r=1&ref=us&oref=slogin).

## VI. Pending Legislation

### a. “Intellectual Diversity” bills

A number of states have considered “Intellectual Diversity” bills, which are similar to the Academic Bill of Rights proposals of recent years. However, as with the state ABOR bills, the ID bills are largely dying as well. At the end of February, for example, the sponsor of a Virginia bill pulled the proposal from the state Senate committee because he lacked the votes necessary to get it passed out of committee. Bills in Oklahoma, Colorado, Indiana, and Washington State have all met with significant setbacks as well. However, Missouri’s Emily Brooker Bill, which was nearly passed last year, may have success this year. Most importantly, an ABOR amendment to the federal Higher Education Act, described below, was rejected.

### b. Higher Education Act

The federal Higher Education Act (HEA), last renewed ten years ago, is set to expire on April 30, 2008 (after several previous extensions). While the House and Senate have each passed a version of the bill, the process of resolving competing provisions – which will not happen until sometime after Congress’s March recess – is leading to pitched battles.

The most controversial provision would punish states that decrease spending on higher education compared to the average spent in the previous five years. The pending Act also contains a provision requiring that colleges and universities provide reporting on a multitude of issues, including the price of textbooks.

The Coalition for International Education – consisting of the American Council on Education (ACE) and a number of other higher education-related groups – submitted a letter to House and Senate committees, urging them to strengthen the provisions of Title VI, International Education Programs.<sup>5</sup> Echoing the higher education community’s concerns about the ABOR & IDHEA bills, the letter said in part, “we are concerned that several amendments [in the Senate version] respond to unproven reports of ‘bias’ in Title VI programs in ways that would potentially involve the federal government in instructional content, curriculum or program of instruction . . . . We believe these amendments are unnecessary. Title VI programs are quite diverse and do not promote any one ideology or point of view.” The letter also cautioned against focusing on whether international education programs serve federal agency needs, expressing concern that “these amendments will narrow the focus of Title VI to serving only federal agency needs, which at any point in time may overlook other pressing national needs and reflect a smaller range of foreign languages and world areas than Title VI supports.”

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<sup>5</sup> See [http://www.acenet.edu/AM/Template.cfm?Section=Papers\\_Publications&template=/CM/ContentDisplay.cfm&ContentID=25834](http://www.acenet.edu/AM/Template.cfm?Section=Papers_Publications&template=/CM/ContentDisplay.cfm&ContentID=25834) (last accessed March 19, 2008).

c. Affirmative Action

Ward Connerly, the force behind the successful Proposition 209 in California, which banned “discrimination” and “preferential treatment” on the basis of race, sex, color, ethnicity or national origin, is working to get similar initiatives on the ballot in other states. He has already had victories in Michigan and Washington State, and he will be focusing this spring on getting measures on the November 2008 ballot in Arizona, Colorado, Missouri, Nebraska and Oklahoma – all states in which he has a good shot of ultimately prevailing.

d. Guns on campus

In the wake of the campus shootings at Virginia Tech and Northern Illinois State, state legislatures are grappling with the issue of safety on campus, and some are responding by considering measures that would permit concealed weapons on campus.

Utah is currently the only state with a law in place that extends concealed-weapons permits to college campuses; the statute was passed in 2004 and upheld by the state Supreme Court two years later, over the opposition of the University of Utah faculty. As of early March, fifteen other states had legislation pending that would ease restrictions on carrying guns onto college and university campuses.

In late February, for example, the Arizona State Senate Judiciary Committee approved a bill that would allow people with a concealed weapons permit to carry guns onto public university and college campuses. The bill has been opposed by the president of the Arizona Board of Regents, police chiefs at Arizona’s public universities, several law enforcement groups, and a number of students.

Similarly, in mid-March, the Oklahoma House of Representatives passed a bill that would permit veterans, active-duty military, National Guard, and reserve personnel, and those trained in law enforcement to obtain a permit to carry a concealed weapon on college campuses. The president of the University of Oklahoma strongly opposed the measure, saying: “If it would help of me to get down on my knees to plead with the Legislature for the safety of our students, I would do so.”

e. Ledbetter Bill – Pay Discrimination

In *Ledbetter v. Goodyear*, 127 S. Ct. 2162 (2007), the Supreme Court ruled that when an employee believes he or she has been paid less by his or her employer because of gender, a violation of Title VII of the Civil Rights Act of 1964, the employee must file suit within a certain amount of time after the employer first decides to pay him or her less than other employees, even if the employee does not find out about the discrepancy until years later.

In response to the decision, Congress is considering the Fair Pay Restoration Act, which would alter the statute of limitations so that the clock for filing a claim begins to

tick when the employer adopts the discriminatory practice, OR when the employee becomes subject to the practice, OR when the employee receives a paycheck – so that every paycheck that contains less than her colleague’s check would start the clock anew. The House of Representatives passed the bill last summer, and the Senate held a hearing on the bill in late January. Just before the hearing, Senator Mike Enzi (R-WY), the ranking minority member of the Senate Health, Education, Labor and Pensions (HELP) Committee, issued a press release indicating his opposition to the bill.