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Legal Round-Up: What's New and Noteworthy for Higher Education!

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I. Introduction

The past year has seen significant development in several aspects of higher education law. The most active area of legal interest relates to employee speech. As we have seen in the last few years since the Supreme Court decision in *Garcetti v. Ceballos*, free speech in academia in the United States has been challenged. Faculty members and academic professionals should have a right to freely express themselves, both in the classroom and externally, because they play an important role in providing necessary criticism, insight and invention in society.

The AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* outlines three fundamental freedoms of faculty: (1) the freedom to research and publish; (2) the freedom to discuss their subject in the classroom; and (3) the freedom to speak as citizens, members of the learned profession, and officers of an educational institution.

The 1940 Statement declares:

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

The freedom to speak as citizens is also recognized in the AAUP's *Statement on Extramural Utterances* and the *Statement on Professors and Political Activity*. Recent court decisions,

however, have tended towards stifling academic free speech and in discouraging open discussion of matters of public concern.

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

As mentioned above, the recent turn against academic free speech centers on the Supreme Court case of *Garcetti v. Ceballos*. In 2006, the United States Supreme Court ruled that public employees do not receive First Amendment protection from employment retaliation made in response to speech a public employee makes in pursuit of his or her official duties. This ruling has drastically changed employer-employee relations in the public service sector, as well as the legal landscape related to employee speech rights.

THE CONTROLLING CASE

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

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

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

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

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

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

A. Speech Related to Scholarship and Promotion

1. *Adams v. University of North Carolina-Wilmington*, No. 10-1413 (4th Cir. 2011)

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

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

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

In his lawsuit filed in federal court, Adams based his free speech claims on his columns, publications, and presentations – many of which criticized UNC-Wilmington administrators or staff; others addressed controversial issues and incorporated Adams' conservative views. Adams had either referred to these materials in his promotion packet or explicitly included them in the packet. Citing to *Garcetti*, the district court characterized the inclusion of these materials as an "implicit acknowledgement that they were expressions made pursuant to his professional duties – that he was acting as a faculty member when he said them," and, their inclusion thus "marked his speech, at least for promotion purposes, as made pursuant to his official duties." The court made no inquiry as to whether these promotion materials would also constitute the kind of "speech related to scholarship or teaching" that the *Garcetti* majority indicated might not be governed by its "official duties" analysis.

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

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

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

B. Speech Related to University Governance of Committee Service

1. *Demers v. Austin, Lear, Bayly, and McSweene,* 2011 WL 2182100 (June 2, 2011).

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

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

The district court dismissed Demers' First Amendment claim, stating, primarily, that Demers made his comments in connection with his duties as a faculty member. Unlike most cases involving free speech infringement at public universities, the district court's analysis did not center on the language from *Garcetti.* Instead, the court started its analysis by using a five part test set out by the Ninth Circuit in a series of public employee speech cases.[1] After applying this analysis, the district court found that Demers was not speaking as a private citizen on matters of public concern, and, therefore, his speech was not protected by the First Amendment.

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

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

This case was decided very recently, but it appears as though it may be appealed to the Ninth Circuit.

2. *Abcarian v. McDonald*, 617 F. 3d 931 (7th Cir. 2010).

In August of 2010, the Seventh Circuit affirmed a lower court's dismissal of a professor's First Amendment retaliation claim. Professor Herand Abcarian filed suit against the University of Illinois, claiming that the university retaliated against him for criticizing the university hospital's policies by not giving him fair representation in a medical malpractice lawsuit and by reporting him to a professional review board. Specifically, Abcarian claimed that the university and the patient's family conspired against him in order to tarnish his reputation in retaliation for his criticisms of the teaching hospital's faculty recruitment practices and risk management policies.

The district court dismissed the case in the early stages of litigation, and Abcarian appealed the decision to the Seventh Circuit. Although Abcarian argued in his appeal that *Garcetti* should not apply because he was not acting pursuant to his official duties as a university hospital faculty member, the Circuit Court ruled that his speech was not protected because his criticisms were directly linked to his position at the university hospital. As the court saw it, "Abcarian had significant authority and responsibility over a wide range of issues affecting the surgical departments," and, therefore, his speech was not protected because it was not made as a private citizen on a matter of public concern.

The Seventh Circuit also noted that because Abcarian's criticisms pertained to administrative issues and policies, it would not fall into those matters traditionally considered protected by academic freedom. The circuit court seemed to exclude comments about academic governance from the *Garcetti* "scholarship and classroom instruction" carve-out.

3. *Capeheart v. Northeastern Illinois University and Melvin Terrell,* 2010 WL 894052 (N.D. Ill. March 9, 2010), review by 7th Circuit granted.

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

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

Capeheart sued the university, alleging that the Provost retaliated against her for speaking up at the faculty council meeting and for advocating on behalf of the arrested students. Relying on *Garcetti*, the district court ruled that Capeheart's statements concerning military recruitment and the arrest of the students were not protected by the First Amendment. The district court stated that "the speech at issue was made pursuant to Capeheart's professional responsibilities."

The district court further refused to recognize an exception to *Garcetti* for faculty at public institutions in saying that "since *Garcetti*, courts have routinely held that even the speech of faculty members of public universities is not protected when made pursuant to their professional duties." The district court concluded, therefore, that "Capeheart's speech regarding military and CIA recruiting on campus and the university's treatment of student protesters is not protected under the First Amendment."

This case is being appealed to the Seventh Circuit, and the AAUP is filing an amicus brief in the case.

4. *Hong v. Grant*, 403 Fed.Appx. 236 (9th Cir. 2010)

On November 12, 2010, the Ninth Circuit Court affirmed a federal district court decision in California that rejected a faculty member's First Amendment retaliation claim against his administration. The Circuit Court did not discuss the First Amendment issues in the case because it held that the state and its officials were immune from being sued in federal court under the Eleventh Amendment.

To summarize the background of this case, Juan Hong was a full professor at the University of California, Irvine. Between 2002 and 2004, he challenged the UCI administration on several issues relating to appointments, promotions, and staffing. Hong was subsequently denied a routine merit increase and assigned an increased teaching load. He sued the university, alleging that it had retaliated against him for exercising his First Amendment rights.

Although the federal district court relied on the *Garcetti* decision, to reject Hong's First Amendment claim, the court carefully set aside the question of whether its analysis "would apply in the same manner to a case involving speech related to scholarship or teaching." Specifically, the district court in *Hong* viewed the speech as wholly external to the classroom and held 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 court observed 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. . . . 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 also declared that Hong's comments had "little or no relevance to the community as a whole." In other words, his comments were also not protected because he was not speaking as a private citizen on a matter of public concern.

We do not believe that the Ninth Circuit's decision will be appealed to the Supreme Court, which means that the district court decision regarding the scope of the "official duties" of a faculty member will stand.

C. Speech Related to Employment or Administrative Matters

The news concerning the scope of "official duties" analysis is not all grim, however. The First Circuit recently overturned a district court decision using a practical application of the *Garcetti* analysis.

1. *Decotiis v. Whittemore*, 635 F.3d 22 (1st Cir. 2011).

In this case, the First Circuit reversed a lower court decision that held that a speech therapy teacher was not protected by the First Amendment against retaliation by her employers for informing parents that a day school may not be in compliance with state law concerning the provision of disability services for their children.

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 law that summer teaching services would be available only to those students for whom it was "necessary to comply with federal law." Decotiis worked for a CDS office that provided no information to parents 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," and she posted 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 filed suit against CDS, alleging that her position was not renewed because of her comments to parents about their rights under state and federal law. The district court took a very broad view of a teacher's "official duties" under *Garcetti* and dismissed Decotiis's First Amendment claim. The court held that her speech was made "pursuant to her official duties" reasoning that "providing therapy" was part of Decotiis' job responsibilities and that the speech at issue was sufficiently related to that duty because it involved whether her students would be receiving therapy. In addition, her comments were directed only to the parents of her students (rather than the general public). Further, the district court decided that the speech was "influenced and informed by her position as a therapist."

The First Circuit reversed the district court's decision and applied a much more narrow definition of "official duties." In its decision, the court recognized that public employees "undoubtedly walk a tight rope when it comes to speaking out on issues that touch upon their fields of work and expertise." In light of this noted "tight rope," the circuit court stated that it was important to find out what the employee's "official responsibilities" are and then determine whether the speech in question was made in connection with those responsibilities. In order to figure out what someone's job related responsibilities are, the court stated that "in identifying Plaintiff's official responsibilities, the proper inquiry is 'practical' rather than formal, focusing on 'the duties an employee actually is expected to perform,' and not merely those formally listed in the employee's job description."

Once the "official duties" of an employee have been identified, the next step is to determine whether the speech at issue was related to those duties. The First Circuit stated that there is no one factor dispositive for this determination but several non-exclusive factors may be considered. These factors include: (1) whether the employee was paid to make the speech; (2) whether the speech was to superiors; (3) whether the speech was made at her place of employment; (4) whether the employee gave objective observers the impression she represented the employer when she spoke; (5) whether the employee's speech derived from special

knowledge obtained during the course of her employment; and (6) whether there is a so-called citizen analogue to the speech.[2]

After working through these questions, the First Circuit determined that Decotiis was "not literally authorized or instructed to make the speech at issue." The court further concluded that her speech was not confined to information she had obtained through her employment and that it could plausibly have been made as a citizen in the community troubled by the new regulation and policy.

The court, therefore, rejected the district court decision's dismissing Decotiis' case and remanded the case "for further proceedings consistent with this opinion."

D. Faculty Speech on Curriculum and Student Discipline

1. *Evans-Marshall v. Board of Education of Tipp City Exempted Village School District*, 624 F.3d 332 (6th Cir. 2010)

In this case, Shelley Evans-Marshall, a high-school English teacher, sued her Ohio school district, claiming that she was retaliated against when she was terminated because of her choice of student reading selections (including Herman Hesse's *Siddhartha* and Ray Bradbury's *Fahrenheit 451*) and teaching methods when exploring the theme of government censorship and banned books. The district court dismissed the case against the school district, finding that Evans-Marshall had not provided sufficient evidence of retaliation for the case to proceed. Evans-Marshall appealed the decision to the Sixth Circuit who upheld the district court's decision.

In its ruling, the Sixth Circuit also took the opportunity to delve into the substance of First Amendment retaliation analysis. Specifically, the circuit court stated three Supreme Court cases "define the contours of the free-speech rights of public employees – *Connick* (matter of public concern requirement), *Pickering* (balancing requirement), and *Garcetti* ("pursuant to official duties" analysis)." The court went on to indicate that "a First Amendment claimant must satisfy *each* of these requirements."

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[2] These factors were paraphrased from several federal speech cases including *Garcetti*.

The court found that Evans-Marshall's speech passed both the *Connick* and *Pickering* tests, but then ruled that she could not overcome *Garcetti's* "pursuant to official duties" analysis. The court determined that the school could make curricular decisions, including terminating a teacher who taught subject matter outside of administration approved subjects, because every child is required to attend school and thus curricular decisions were appropriately placed in the hands of public officials who are democratically accountable. The circuit court then went on to state that "*Garcetti*'s [scholarship and instruction] caveat offers no refuge" where the teacher is at the secondary level rather than at a public college or university. As the court explained, "[a]s 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.

This case was appealed to the Supreme Court but the court refused to hear the case.

E. Union/Organizing Related Speech

1. *Speer v. City of Flint*, 2010 U.S. Dist. LEXIS 137228 (E.D. Mich. Dec. 29, 2010)
   Petrich v. City of Flint, Case No. 2:08-CV-13527 (E.D. Mich. Dec. 29, 2010)

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 emphasized 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; he subsequently filed suit, 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."

F. Other Important Speech Cases

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

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

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

Snyder's father sued the church and the protestors, claiming intentional infliction of emotional distress. Since the protestors had complied with local ordinances applicable to public protests, their First Amendment defense claim was the only issue the courts considered.

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

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

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

III. FOIA/Subpoenas and Academic Freedom

FIOA requests and subpoenas are the latest weapons being used against academic freedom. While both of these methods for obtaining information have legitimate and necessary reasons for their existence, certain groups and individuals have been using FIOA requests and subpoenas to intimidate faculty members and deter them from criticizing public policy or conducting research on heated issues. The AAUP has taken an active public stance encouraging universities to limit their disclosure of academic information to what may be legally necessary and only if the requests for information are made for justifiable reasons.

1. *Rector & Visitors of the Univ. of Va. v. Cuccinelli,* 80 Va. Cir. 657 (Va. Cir. Ct. 2010); appealed *Cuccinelli v. Rector & Visitors of the Univ. of Va.,* (Virginia Supreme Court); Amicus brief submitted April 25, 2011

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

Cuccinelli has appealed the decision and the Supreme Court of Virginia will decide whether to grant his request for Mann's emails. In conjunction with the ACLU of Virginia, the Union of Concerned Scientists, and the Thomas Jefferson Center for the Protection of Free Expression, the AAUP filed an amicus brief in the Supreme Court of Virginia opposing the subpoena.[3] The AAUP's amicus brief argues that Cuccinelli's request is a cloaked attack on academic freedom and raises the concern that if Cuccinelli request is granted without any basis for suspicion of fraud, it may open the door for future fraud investigations to be directed solely at

[3] *Cuccinelli v. Rector & Visitors of the Univ. of Va.,* Virginia Supreme Court Case No.:102359, Brief for *Amici Curiae* American Association of University Professors, American Civil Liberties Union of Virginia, Union of Concerned Scientists, and Thomas Jefferson Center for the Protection of Free Expression in Support of Affirmance, 4/25/2011; (http://www.aaup.org/NR/rdonlyres/D6CE857A-68C7-432A-BAA2-1F2D1AF1811D/0/AmicusbrieftoVASupremeCourtApril252011.pdf - last accessed 8/9/2011)

novel or unpopular scientific theories. The brief points out that Cuccinelli must have a basis to believe that Mann committed fraud or that his emails while working at UVA would reveal evidence to support a concern of fraud and notes that courts have recognized that doubts about the validity of scientific work are not equivalent to fraud. The brief also advocates that the Virginia Supreme Court should consider First Amendment protection in determining whether the information sought is sufficiently relevant to a false claims law investigation. Academic freedom has been recognized by many courts as an important part of the First Amendment, and the court should weigh requiring UVA to comply with the subpoena against the importance of protecting academic freedom.

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

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

Between 2001 and 2006, scholars at the college recorded detailed interviews with former loyalist and republican paramilitary members who fought in Northern Ireland. In order to make the interviewees in this project feel safe (which was necessary to get their cooperation), the researchers promised the interviewees anonymity until the interviewees' death. Boston College is currently fighting to protect the interviews from disclosure. It has asked the United States District Court in Boston to quash the subpoena on the grounds that release of the information could threaten the safety of interviewees, the continuing peace process in Northern Ireland, and the future of oral history.[4] Boston College also argued that this type of forced disclosure could

[4] *IN RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Matters of Criminal Matters in the Matter of Dolours Price,* U.S. M. D. Case No.: 11-MC-91078, Motion of Trustees of Boston College to Quash Subpoenas, 6/7/2011; (http://chronicle.com/items/biz/pdf/ecf_mad_uscourts_gov_doc1_09514330434.pdf - last accessed 8/9/2011)

have a detrimental impact on academic freedom. A major concern is that a lack of protection for interviewees in this type of oral-history project would greatly discourage people from giving future interviews.

Unfortunately, on July 1, 2011, the Justice Department filed a response to the motion to quash, dismissing academic freedom as a legally meaningless "quasi-privilege" and saying the college had offered "no claim of a cognizable federal privilege."[5] The AAUP has expressed grave disappointment with the Justice Department's position and strongly supports the position taken by Boston College.[6]

3. *FOIA requests in Michigan, Wisconsin, and Virginia*

Over the course of this spring, a number of public universities in three states have faced Freedom of Information Act (FOIA) or public records requests. In Michigan, a conservative think tank called Mackinac Center for Public Policy submitted FOIA requests to public universities, seeking e-mails sent by employees working at the universities' centers on labor research.[7] Specifically, the FIOA requested production of e-mails containing the words "Madison," "Wisconsin," "Scott Walker" (Wisconsin's governor), or "Maddow" in reference to MSNBC talk show host Rachel Maddow, who has reported on the controversy affecting Wisconsin unions. The requests were intended to find evidence that professors had violated a Michigan law barring state employees from using state-funded resources, like their work e-mail, for partisan political purposes.

In Wisconsin, the state Republican Party filed a FOIA request with the University of Wisconsin at Madison, seeking emails containing a wide range of terms, including the word "Republican," sent by Professor William Cronon a history professor.[8] Legal counsel for the university wrote a letter in response to the request, noting the overly broad reach and vagueness of the request. The letter explained that the university would not provide the Republican Party

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[5] *IN RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Matters of Criminal Matters in the Matter of Dolours Price,* U.S. M. D. Case No.: 11-MC-91078, Government's Opposition to Motion to Quash and Motion for an Order to Compel, 7/1/2011; (http://www.scribd.com/doc/59191594/Government-s-Opposition-to-Motion-to-Quash-and-Motion-to-Compel-7-1-11 - last accessed 8/9/11)

[6] "Oral History ,Unprotected", Scott Jaschik, *Inside Higher Ed (7/5/2011)* (http://www.insidehighered.com/news/2011/07/05/federal_government_questions_confidentiality_of_oral_history -last accessed 8/9/11)

[7] "Michigan Think Tank Asks 3 Universities for Labor Professors' E-Mails." Peter Schmidt, *The Chronicle*, (3/29/2011) (http://chronicle.com/article/Michigan-Think-Tank-Asks-3/126922/ - last accessed 8/9/11)

[8] "Wisconsin GOP Seeks E-Mails of a Madison Professor Who Criticized the Governor," Peter Schmidt, *The Chronicle* (3/25/2011) (http://chronicle.com/article/Wisconsin-GOP-Seeks-E-Mails-of/126911/ - last accessed 8/9/11)

with emails that were obviously irrelevant. For example, the request asked for all emails that contained the word "union" but the university did not provide emails that referred to the "European Union" or "Memorial Union." Also, the university stated that it would take into account privacy and other statutory considerations when limiting which materials it would handover.

Finally, the American Tradition Institute served a FOIA request on the University of Virginia, mirroring the subpoena request filed by Attorney General Cuccinelli. Unfortunately, UVA has agreed to release the requested materials by the middle of August.[9] The university has stated that some of the materials are protected by statutory exemptions and that while the ATI will receive those documents, they are prohibited from revealing their contents unless given permission by the court.

The AAUP and other interested parties, such as the ACLU and the Union of Concerned Scientists, have sent letters to the relevant institutions expressing concerns about the impact that these requests could have on academic freedom.[10] The AAUP has urged the universities to use caution when considering the information requests and warned that releasing emails from professors speaking their minds would produce a chilling effect on the free exchange of ideas in the academic setting.

IV. Tenure

1. *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 hearing 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,

[9] "Court orders U.Va. to turn over climate scientist records under seal in denialist FOIA harassment request," Climate Science Watch (5/26/2011) (http://www.climatesciencewatch.org/2011/05/26/court-orders-uvirgini-to-turn-over-climate-scientist-records-under-seal-in-denialist-foia-harassment-request/ - last accessed 8/9/11)

[10] See: http://www.aaup.org/NR/rdonlyres/12187ECD-37AB-4938-8305-17086A59BDA1/0/LettertoUVAApril142011.pdf (last accessed 8/9/11)

closed to the public and press. Perry sued the university claiming that the hearing was unlawfully closed pursuant to Washington's Administrative Procedure Act (APA). The Washington Court of Appeals ruled that the university had violated the APA by closing the hearing to the public and reversed the university's disciplinary order and remanded for a new hearing.

On appeal, 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 particular section constituted a rule having legal affect and was therefore 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.

V. Institutional Authority and Governance

1. *Rosenthal v. New York University*, 2010 U.S. Dist. LEXIS 95080 (S.D.N.Y. Sept. 13, 2010)

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 and he also worked for Pricewaterhouse Coopers. During his time as a student, he tipped off his brother to nonpublic securities information that his brother used to make trades. Upon learning of his activities, the federal government initiated an investigation. 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 . . . the 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.

2. *Massachusetts Board of Higher Education/Holyoke Community College v. Massachusetts Teachers Association/Massachusetts Community College Council/National Education Association*, 2011 Mass. App. LEXIS 328 (Mass. Ct. App. March 11, 2011)

In this recently decided 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, a former tenured faculty member at Holyoke Community College, 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 had originally awarded, which exceeded his authority.

VI. Civil Rights

A. Affirmative Action

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

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

In 1997, the UT system replaced an earlier admissions plan which had explicitly considered race with a "Personal Achievement Index" (PAI). The PAI is produced through a holistic review of applications intended to identify students whose achievements are not accurately reflected by their test scores and grades alone. The PAI includes an evaluation of required written essays and a "personal achievement score" which is made up of factors such as socio-economic status, languages at home, and whether the student lives in a single-parent household. In addition, the state legislature and the university adopted a variety of other initiatives to increase diversity, including scholarship programs, high school outreach and recruitment, and the "Top Ten Percent Law," under which all high school seniors in the top ten percent of their class at the time of application are guaranteed admission to a state university.[11] The top ten percent rule accounts for 92% of the in-state students that are admitted to UT.

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

Relying on the Supreme Court's 2003 decision in *Grutter v. Bollinger*, the Fifth Circuit ruled in favor of the university pointing out three objectives of promoting diversity among universities in the Texas system: 1) increased perspectives inside and outside the classroom, 2) better preparation to act as professionals, and 3) increased civic engagement.[12] The circuit court noted that after it previously struck down the university's prior race-based admissions system, minority applications and enrollment plunged prompting Texas to pass the Top Ten Percent Law.

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

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

The Fifth Circuit affirmed that the university has "a compelling interest in obtaining the educational benefits of diversity." The court acknowledged that educational institutions are unique and that courts should review the constitutionality of university admissions methods specifically through an academic prism. The court articulated that universities should be given special deference for two reasons: 1) these decisions are a product of "complex educational judgments in an area that lies primarily within the expertise of the university" and 2) "universities occupy a special place in our constitutional tradition." The court then granted the university deference in this case stating that it made an "educational judgment that such diversity is essential to its educational mission" because of "its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."

The court did caution that while diversity is a legitimate goal, schools may not engage in racial balancing or design admissions policies to achieve a specific percentage of minority students. Despite this warning, the Fifth Circuit's decision in *Fisher* represents a positive step in affirming that public universities are unique governmental institutions which benefit from diverse representation in their served population.

2. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, No. 08-1387 (6th Cir. 2011).

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

While courts usually do not interfere with changes in political power made according to neutral principles, such as the creation of voting jurisdictions, they apply a stricter analysis and

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

B. Employment Discrimination

During the last year, the Supreme Court has handed down decisions in several cases that do not necessarily address issues in academia but still have the potential for affecting faculty and academic professionals in employment cases. In particular, the Supreme Court decided two cases concerning Title VII's protection against discrimination.

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

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

In *Staub*, a hospital employee was a member of the Army Reserve and had to miss work do to military obligations. Staub's immediate supervisors were hostile to his military obligations and placed work requirements upon him that were beyond the policies of the hospital. His supervisor further issued a "corrective action" disciplinary warning against him and then

fabricated a report sent to the hospital's vice president of human resources that stated Staub had violated this "corrective action." After reviewing his personnel file, the vice president fired Staub in light of his perceived failure to follow directions. Staub sued, claiming the hospital discriminated against him for being a member of the military.

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

2. *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011)

On March 24, 2011, the Supreme Court ruled that Title VII's anti-retaliation provision forbids an employer from firing an employee in retaliation for a coworker's discrimination claim. In this case, Eric Thompson worked with his fiancée, Miriam Regalado, at North American Stainless. Thompson's fiancée filed a sex discrimination charge against North American Stainless with the Equal Employment Opportunity Commission. The North American Stainless subsequently fired Thompson which led him to sue, alleging that he was fired in retaliation for his fiancée filing a discrimination claim.

North American Stainless argued, and the district court agreed, that Title VII "does not permit third party retaliation claims." Essentially, the district court ruled that Thompson had no standing to sue his employer for retaliation based on actions taken by his fiancée. The Sixth Circuit Court affirmed the district court's decision "reasoning that Thompson was not entitled to sue NAS for retaliation because he [had] not engaged in any activity protected by the statute."

The Supreme Court reversed the lower court decisions and held that Title VII's "anti-retaliation provision must be construed to cover a broad range of employer conduct." Title VII prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court reasoned that an employee might

reasonably be dissuaded "from engaging in protected activity if she knew her fiancé would be fired." The Court recognized that employees may have close connections to others within a company, and cautioned employers against taking adverse action against coworkers in a manner that could be construed as intending to discourage employees from exercising their legal rights.

VII. Patent and Copyright

The AAUP's 1999 *Statement on Copyright* promotes the prevailing academic practice to treat the faculty member as the copyright owner of works that are created independently and at the faculty member's own initiative for traditional academic purposes. Although the AAUP has not published a similar statement regarding patent rights, the AAUP recently filed an amicus brief in a Supreme Court case advocating a similar treatment for faculty inventions.

1. *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc. et al.*, 180 L. Ed. 2d 1, 2011 U.S. LEXIS 4183 (2011)

On February 1, 2011, the AAUP filed a joint amicus brief in the United States Supreme Court, advocating for the rights of faculty inventors. The brief was written in coordination with the Institute of Electrical and Electronics Engineers (IEEE-USA) and IP Advocate, a non-profit advocacy group. It strongly argued against a position taken by Stanford University and other major research universities – that those institutions owned faculty inventions by default under the federal Bayh-Dole Act. The Bayh-Dole Act became law in 1980 and was intended to address concerns about government funding agencies' inability to efficiently transition publicly funded research from development to application for the benefit of society. Thirty years of practice under the Bayh-Dole Act has seen great improvement in moving academic inventions from the research to application phase to enable public use.

This highly fact intensive and complex case focused on the ownership of patent rights to inventions created with at least partial assistance of federal funding. The case involves a dispute over the role of an academic researcher in HIV research that utilized resources from a private enterprise, a research university, and a dose of federal funding. Because there was a dispute over the assignment of rights from the researcher to Stanford and to Roche Molecular Systems, Stanford University asked the Court to interpret the Bayh-Dole Act so as to automatically take

ownership rights away from inventing faculty members and to vest that ownership interest in the members' college or university whenever federal research funds are involved. Stanford's argument promotes the view that researching faculty members are merely employees who have been hired to invent and they are not entitled to patent ownership of their inventions.

The joint AAUP brief opposed this view, arguing, as the AAUP's 1915 *Declaration* states, that "[faculty] are the appointees, but not in any proper sense the employees of [the university trustees]." The brief also argued that the Bayh-Dole Act did nothing to change the historical and legal precedent that ownership rights to inventions vest with the inventor. The inventor may then assign his or her rights contractually to others.

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

2. *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010), *cert. granted* March 7, 2011.

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

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

domain music when teaching his orchestral students and when performing as a conductor with the student orchestra. Golan and the other plaintiffs challenged the constitutionality of the Act, claiming that it violates their First Amendment rights because it is too broad and unnecessarily undermines their reliance on the previously public domain works.

A district court found in favor of the plaintiffs, concluding that Section 514 violated their First Amendment rights in denying their access to use the previously unprotected works. The Tenth Circuit reversed this decision, finding that Section 514 did not violate the First Amendment and that Congress had a legitimate interest in protecting American copyright owners abroad through the reciprocity of the Berne Convention and Uruguay Round Agreements Act. It noted that Congress had "substantial evidence from which it could reasonably conclude that ongoing harms to American authors were real and not merely conjectural," because the United States had not fully complied with the Berne Convention in the past. The court further noted that great deference is granted to Congress in determining how to meet its legitimate interests.

The plaintiffs have appealed the Tenth Circuit's decision, and the case is scheduled to be heard by the Supreme Court in the fall. The impact of the Circuit Court's decision, if upheld by the Supreme Court, could be significant in higher education. Like Professor Lawrence Golan, many faculty members rely on public domain material for their work. The licensing fees that universities would have to pay in order to use foreign artistic material that was previously in the public domain would be a substantial deterrent to continuing programs that rely on the newly protected material. A likely result will be the stifling of faculty and student creative expression.

3. *Falkner Press L.L.C. v. Class Notes, L.L.C.*, 756 F. Supp. 2d (N.D. Fl. 2010).

AAUP policy provides that faculty must hold the copyright to "traditional academic works . . . [where] the faculty member . . . determines the subject matter, the intellectual approach and direction, and the conclusions . . . [T]traditional academic work that is copyrightable—such as lecture notes, courseware, books and articles—cannot normally be treated as work-for-hire." *Statement on Copyright*, AAUP Policy Documents & Reports 183 (9th ed. 2001).

In *Falkner Press v. Class Notes*, a federal court in Florida considered whether a private company had violated the copyright of a professor and his publisher by selling notes taken from

the professor's lecture and hand-out materials. Professor Michael Moulton teaches wildlife issues at the University of Florida. He also co-authored two electronic textbooks, which he requires for his class, and he used Faulkner Press as his publisher. During his class, Professor Moulton showed a film and handed out "film study questions" for students to fill out while watching the film. He also handed out practice questions derived from his textbooks. Class Notes, L.L.C., a business that hires student note takers and sells note packages to college students, hired students to take notes in Professor Moulton's class; the company then sold the notes while explicitly advertising that the notes were for Moulton's class. The package included sound recordings of lectures and answers to the "film study questions."

Faulkner Press and Moulton sued the company, alleging copyright infringement and unfair use of Moulton's name in the sale of the commercial notes. Regarding his claim that his name was unfairly used, the district court dismissed this claim explaining that it was not reasonable to infer that Moulton was promoting or endorsing the commercial notes even though his name was explicitly used in the materials. His name was present in the materials because it was his class. With respect to the copyright infringement claims, Class Notes argued that the materials Moulton handed out and his lectures could not be copyright protected because they are merely fact statements. The district court disagreed with this, concluding that "Dr. Moulton's film study and practice questions are factual compilations that are protected by copyright

Class Notes also alleged that the Fair Use Doctrine would apply to the film study questions, lecture summaries, and practice questions. The district court noted that a factual analysis is required in order to determine whether copyright protected materials are legally being used under the Fair Use Doctrine. As such, the district court ruled that the case should move forward on the copyright protected works and that a jury would determine whether Class Notes' defense of "fair use" is supported.

VIII. Contract Issues

1. *Whiting v. University of Southern Mississippi*, 2011 Miss. LEXIS 170 (March 31, 2011).

Professor Melissa Whiting, an assistant professor in USM's Department of Curriculum, Instruction and Special Education in the College of Education and Psychology, sued the

university after being denied tenure and having her contract "nonrenewed." Whiting sued the university, claiming that she was denied due process under the Fourteenth Amendment because the Board of Trustees of the university refused to rule timely on her application and did not grant her tenure. Whiting also claimed the University violated their contractual obligations by not giving her a fair hearing.

A federal district court and the Fifth Circuit both ruled against Whiting regarding her constitutional claims. The Fifth Circuit found that Whiting had failed to meet her burden of showing that she was deprived of constitutionally protected property and liberty interests. The only remaining issues to be resolved were Whiting's claims under state law. Among the many issues involved, the Mississippi Supreme Court considered whether the expectation of tenure creates a property interest for professors and whether a faculty manual provides a contractually guaranteed right to due process for public universities. The faculty handbook of the school provides tenure process and states that "these procedures collectively constitute contractual due process." In short, the Mississippi Supreme Court ruled against Whiting, finding that under state law and Fifth Circuit precedent no contract was formed between the university and Whiting. The court further ruled that written policies of employers do not, "of themselves, create or confer an expectation of continued employment." The court, therefore, reasoned that the university had not violated Whiting's due process rights as guaranteed by the Mississippi Constitution because she had no "legitimate expectation of employment…that creates a protected interest."

2. *Mulvenon v. Greenwood*, No. 10-1957 (8th Cir. June 10, 2011)

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

Mulvenon had a contract with the university that granted him a five year position as holder of the George M. and Boyce W. Billingsley Chair for Education Research and Policy Studies. According to his contract, if Mulvenon showed interest in renewing his contract, a review committee of faculty members external to the University of Arkansas would evaluate his

performance and provide recommendations to the department head and the dean. The Reappointment Guidelines stated that the department head and the dean would make the final decision regarding the reappointment. Despite the fact that his recommendation letters were all favorable, the dean decided to not renew Mulvenon's contract, contending that Mulvenon had not fulfilled the expectations of the position (the department head excused himself from the evaluation process).

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

IX. Collective Bargaining

1. Wisconsin Senate Bill 11

Wisconsin Senate Bill 11 received a great deal of attention in the media, and the AAUP has also been following the debate surrounding it. Following heated debate and difficulty achieving a necessary quorum in the Wisconsin senate, the bill was signed into law by Governor Scott Walker on March 11, 2011. As passed, the law requires state employees to contribute a percentage of their own salaries to their pension and health care premiums and eliminates the ability of public employee union members to collectively negotiate anything but wage increases, which would be capped by the Consumer Price Index.

The provisions limiting bargaining rights incensed unions and their supporters, sparking protests and court cases. In *Wisconsin v. Fitzgerald*, a lower court judge initially blocked implementation of the legislation, but she was later overruled by the Wisconsin Supreme Court. The practical implication of this law is that it will be nearly impossible for faculty members to

engage in meaningful dialogue with universities about their conditions of employment during the coming years.

2. Ohio Senate Bill 5

Similarly, Ohio Senate Bill 5 sought to restrict the manner in which public employees can engage in collective bargaining. The law, which was signed by the Ohio governor on March 31, 2011, and impacts all of the state's 400,000 public workers, restricts public employees' rights to strike and limits collective bargaining about financial issues to only wages and not for other issues such as for health insurance and pensions. The law is likely to significantly increase the cost of employee contributions for pensions and healthcare overtime.

Opponents of the law have vowed to put the issue on the November ballot, giving voters in the state a chance to strike down the law. It has been reported that more than enough signatures have been collected for the veto referendum to be placed on the November 8, 2011 general election ballot.

3. National Labor Relations Board decision in *GSOC/UAW v. New York University*, 356 NLRB No. 7 (2010)

In May 2011 the UAW filed a petition with the NLRB, seeking to represent a unit of graduate students from New York University as the sole collective bargaining agent. They argued that these graduate students are employed by New York University to teach and conduct research. At issue in this case is whether graduate students should be treated like employees for purposes of permitting them to engage in collective bargaining.

In 2000, the NLRB ruled that graduate assistants at New York University were "employees" for purposes of the NLRA and were therefore eligible to engage in collective bargaining activities protected by the NLRA.[13] This ruling, however, was quickly reversed in 2004 when the Board, in a 3-2 decision, held that graduate students working as teaching assistants or research assistants are *not* employees covered by the Act and that such individuals "have a predominantly academic rather than economic relationship with their school." Specifically, in *Brown University* the NLRB found that the petitioning individuals were all

[13] *New York University*, 332 NLRB No. 111 (2000).

required to be enrolled at the university in order to have their assistant position. Furthermore, the NLRB found that any money these individuals received was akin to financial aid and not "consideration for work."[14]

Although the recent NLRB ruling found for New York University, relying on the precedent set in the *Brown University* decision, the decision does state that "there are compelling reasons for reconsideration of the decision in *Brown University*." If the NLRB eventually overturns *Brown University*, it is possible that tens of thousands of research and teaching assistants will be empowered to unionize in the coming years.

4. *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 state's 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." Accordingly, the panel ordered the university to revoke its repudiation of the settlement agreement and comply with the terms.

[14] 342 NLRB No. 42, 175 LRRM 1089.

5. *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 and the State College Education Association (SCEA) bargained to impasse over salary increases for the 2009-2011 contract year. The SCEA, which is 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), based its final offer on a national array of public institutions and it predicted increases in future faculty salaries using 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 which differentiated among faculty by rank. Overall, the SCEA proposed a salary increase of about 11% and the Board proposed an increase of about 4.33%.

The impasse was heard by a court appointed Special Master, who concluded that both offers were "reasonable." He then conducted his own analysis based on a compilation of 12 Midwestern schools in states near to Nebraska. As a result of the Special Master's calculation, he ultimately concluded that an increase of about 10% was needed to maintain comparability for all faculty during the contract period. Since the SCEA's final offer of 11% "did a better job of moving all unit members toward comparability and keeping them comparable for the duration of the contract than did the Board's offer," the Special Master found the SCEA's offer to be more reasonable.

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.