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

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

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

But in 2006, the Supreme Court created a categorical exception to the *Pickering-Connick* test, concluding that when public employees speak "pursuant to their official duties," they are not speaking as private citizens and therefore do not have First Amendment rights, such that the Constitution "does not insulate their communications from employee discipline." *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The majority in *Garcetti* reserved the question of speech in the academic context, however, noting that "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for" by the Court's decision. The Court indicated that it therefore was not deciding whether its "official duties" analysis would apply "in the same manner to a case involving speech related to scholarship or teaching." *Id*. at 425. Nevertheless, it continues to be the case that most courts faced with First Amendment claims by faculty members at public colleges and universities apply *Garcetti* as though the Supreme Court had never expressed that reservation.

We start this presentation by reviewing cases that have invoked *Garcetti* in the higher education context over the last year. We also include some cases arising in the K-12 context and in non-education-related public employment, where those cases indicate the direction of the courts on speech issues.

A. In-Class Speech

1. ***Kerr v. Hurd***, 2010 U.S. Dist. LEXIS 24210 (S.D. Ohio Mar. 15, 2010)

In this case, a federal trial court in Ohio ruled that a medical professor's speech to his students was protected by the First Amendment, explicitly declaring that in-class faculty speech should fall within an academic freedom exception to *Garcetti*.

Dr. Elton Kerr is an OB/GYN who was hired by Wright State School of Medicine to teach as an assistant professor and to work part-time as a physician at Miami Valley Hospital (MVH), where the school's clinical work was done. Several years later, in 2000, Dr. William Hurd became the chair of the Department of Obstetrics and Gynecology at Wright State, overseeing Dr. Kerr's academic and clinical work. Dr. Hurd appointed Dr. Kerr as Director of the Center for Women's Health at MVH. In 2004, however, Dr. Kerr violated his employment contract by ceasing to maintain "active privileges" at MVH and by accepting employment at a separate clinic, and he moved out of his Wright State offices in late 2004. In 2005, the university terminated his appointment with Wright State School of Medicine, automatically ending his employment at MVH as well.

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

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

Rejecting Dr. Hurd's argument, the court cited approvingly to *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001), in which the U.S. Court of Appeals for the Sixth Circuit determined that a college professor's use of disparaging words was protected where they were used in the context of a classroom discussion examining the impact of such words. As the court said in *Hardy*:

> Because the essence of a teacher's role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court's broad conception of 'public concern.' . . . . Although Hardy's in-class speech does not itself constitute pure public debate, it does relate to matters of overwhelming public concern – race, gender, and power conflicts in our society.

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

The next issue for the court was whether Dr. Kerr's speech was part of his job as an employee of the medical school and, if so, whether it was therefore unprotected under *Garcetti*. The court ruled that Dr. Kerr's speech about delivery was "without doubt . . . within his 'hired' speech as a teacher of obstetrics."

Unlike many other courts that have considered *Garcetti*, however, the court here did not believe that determination ended the matter for Dr. Kerr. Instead, the court pointed to the majority's acknowledgement in *Garcetti* that its "official duties" analysis did not necessarily apply "in the same manner to a case involving speech related to scholarship or teaching." The court therefore found an "academic freedom exception" to *Garcetti*:

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

The court also observed that Dr. Hurd had argued that an academic freedom exception to *Garcetti* must be limited to classroom teaching. The court did not decide this issue one way or the other, but did note that there was no suggestion that Dr. Kerr's advocacy for forceps delivery

was "outside either the classroom or the clinical context in which medical professors are expected to teach."

Because there was an open question about whether Dr. Kerr's protected speech was one of the reasons for his termination, the court ordered the case to be heard by a jury.

2. ***Sheldon v. Dhillon***, 2009 U.S. Dist. LEXIS 110275 (N.D. Cal. Nov. 25, 2009)

In this case, a federal district court in California held that a biology professor's speech in class about the possible scientific causes of homosexuality was protected by the First Amendment, recognizing that the "official duties" analysis in *Garcetti* did not apply to such academic speech.

June Sheldon began teaching biology at California's San Jose Community College in 2004, after teaching for seven years at a different community college in the same district. During her summer 2007 Human Heredity course, a student filed a complaint about a class discussion regarding homosexuality. During that discussion, a student had asked Sheldon about a hereditary connection to homosexuality, on the basis of class materials and discussion. Sheldon gave several answers to the question, including that students would learn that both genes and environment affected homosexuality. The anonymous, undated student complaint alleged that Sheldon also made "offensive and unscientific" statements, including that there "aren't any real lesbians" and that "there are hardly any gay men in the Middle East because the women are treated very nicely." In September, Sheldon met with the dean of the Division of Math and Science and agreed to meet with the full-time biology faculty to discuss the issues raised in the complaint. In December 2007, the community college's administration withdrew a previous offer to teach in spring 2008 on the grounds that Sheldon was teaching misinformation as science.

Sheldon sued in federal court, alleging that she was fired in retaliation for her in-class answer to a student's question, and that her classroom instruction was protected by the First Amendment. The community college relied heavily on *Garcetti*, arguing that classroom speech is not protected by the First Amendment because when a teacher engages in classroom instruction, she is performing her official duties as a public employee, not speaking as a private citizen.

In this decision, the district court rejected the college's reliance on *Garcetti*, noting that "by its express terms," *Garcetti* did "not address the context squarely presented here: the First Amendment's application to teaching-related speech." The court observed that prior decisions in the Ninth Circuit, the appeals court that makes federal law for California, had "recognized that teachers have First Amendment rights regarding their classroom speech, albeit without defining the precise contours of those rights." The court also noted that the Supreme Court has held that "a teacher's instructional speech is protected by the First Amendment, and if the defendants acted in retaliation for her instructional speech, those rights will have been violated unless the

defendants' conduct was reasonably related to a legitimate pedagogical concern." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

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

Sheldon and the defendants eventually reached a settlement, which is currently being finalized in the district court.

B. Faculty Speech as Part of University Governance

1. ***Fusco v. Sonoma County Junior College District***, 2009 U.S. Dist. LEXIS 91431 (N.D. Cal. Sept. 30, 2009)

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

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

In its decision, the court found that Fusco's multiple attempts to place items related to academic freedom and governance on the department agenda might be protected speech. The court reasoned that Fusco's actions were not necessarily related only to her individual employment and could be found, with more information, to be matters of public concern and therefore covered under the First Amendment. Second, the court could not find based solely on the complaint that Fusco was acting pursuant to her official duties when she tried to place matters on the department's agenda, and *Garcetti* therefore did not prevent her lawsuit from moving forward. Finally, when Fusco's dean attempted to discipline her by issuing her various letters and emails, he may have caused her to be constructively discharged, adversely affecting

her employment and potentially violating the First Amendment. The court therefore allowed the lawsuit to go forward; it remains in litigation.

2. ***Isenalumhe v. McDuffie***, 2010 U.S. Dist. LEXIS 24919 (E.D.N.Y. Mar. 17, 2010)

In this case, a federal district court in New York relied on the "official duties" holding in *Garcetti* to dismiss the First Amendment claims of two faculty members who complained about the way their department chair was utilizing university governance procedures.

Anthony Isenalumhe and Jean Gumbs are tenured nursing professors at Medgar Evars College of the City University of New York (CUNY). In 2001, Georgia McDuffie was hired as an associate professor and chairperson of the Nursing Department. Isenalumhe and Gumbs opposed McDuffie's appointment, and began to complain that she was bypassing faculty committee processes and was biased in her handling of faculty evaluations. They alleged that McDuffie retaliated against them for these complaints by subjecting them to extra evaluations, assigning their usual courses to other teachers, and assigning Gumbs to a non-teaching, administrative position. Isenalumhe and Gumbs filed suit in federal court, alleging that these actions were in retaliation for their free speech, in violation of the First Amendment.

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

This approach is very different than the Second Circuit's decision in *Sousa* (discussed below in Part D), in which the court held that an employee's speech motivated by personal grievances might still be on a "matter of public concern" and protected by the First Amendment.

3. ***Savage v. Gee***, 2010 U.S. Dist. LEXIS 61224 (S.D. Ohio June 7, 2010)

In this case, a federal district court in southern Ohio dismissed the First Amendment claim of a faculty member, and appeared to take the view that all speech made as a member of a faculty governance committee would be unprotected under the "official duties" analysis of *Garcetti*.

Scott Savage was the head reference librarian at Ohio State University at Mansfield. In 2006, Savage served on a committee choosing a book to assign to all incoming freshman. His

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

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

C. Speech on Employment or Administrative Matters: Formal Complaints

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

In this case, the U.S. Court of Appeals for the Tenth Circuit reinstated a public employee's claim of First Amendment protection for her job-related speech.

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

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

The appeals court observed that in the Tenth Circuit, an employee who reports wrongdoing is generally not speaking "pursuant to her official duties" (and is therefore protected under *Garcetti*, as long as the speech is on a matter of public concern under *Pickering-Connick*)

if (1) the employee's job responsibilities do not relate to reporting wrongdoing, and (2) the employee went outside his or her chain of command to report the wrongdoing.

The court rejected APS's claim that it was within Reinhardt's job responsibilities to report APS's failures simply because she had professional obligations as a speech-language pathologist and was bound to "enforce all laws and rules applicable to" the school district. The court noted that Reinhardt was hired to provide speech and language services, not to ensure IDEA compliance (though that fact alone would not have been dispositive), and that retaining counsel appeared to be beyond her official job duties (though her initial complaints to administrators and within the internal grievance procedures likely were part of her official duties). The court therefore reversed the district court's opinion and directed the court to consider the other elements of Reinhardt's First Amendment claim.

2. ***Weintraub v. Board of Education,*** 593 F.3d 196 (2d Cir. 2010)

Although this case arose in the context of K-12 rather than higher education, it vividly demonstrates the disturbing consequences of *Garcetti's* application to teaching professionals.

David Weintraub was a fifth grade teacher in the Brooklyn public school system. After a student threw a book at him in class and was then returned to Weintraub's classroom instead of being suspended, Weintraub complained to the assistant principal, told his fellow teachers about the incident, and filed a grievance with his union representative. Weintraub alleged in a federal lawsuit against the Board of Education that he was then retaliated against in a variety of ways in violation of his First Amendment rights, including receiving bad performance reviews, being wrongfully accused of sexual abuse, and ultimately getting fired.

The trial court agreed with Weintraub that under *Garcetti*, his conversations with other teachers were not pursuant to his official job duties and were therefore protected. The court ruled, however, that his complaints to the assistant principal and his filing of a union grievance were pursuant to his job duties, because he was "proceeding through official channels to complain about unsatisfactory working conditions." The court concluded that those activities therefore were not protected by the First Amendment.

Weintraub appealed to the U.S. Court of Appeals for the Second Circuit, which found, over a strong dissent by one of the three judges considering the case, that the filing of a union grievance is not protected by the First Amendment.

The court relied on the fact that the majority in *Garcetti* defined speech that is made "pursuant to" a public employee's job duties (and is therefore unprotected) as "speech that owes its existence to a public employee's professional responsibilities." The court further noted that this is a "practical" inquiry. In this case, even though Weintraub wasn't required to file a union grievance as part of his job, it was "part and parcel" of his attempts to carry out his job duties as a public school teacher, including maintaining discipline in his classroom. The court relied

heavily on the fact that filing a union grievance doesn't have a "citizen analogue" to other types of speech – that is, filing a union grievance is not similar to something a non-employee could do, like writing a letter to a newspaper or filing a complaint with an elected representative. Because Weintraub never made his complaints public and because they were related to his job, the court concluded that the First Amendment did not protect him from employer retaliation for filing the grievance. (The opinion does not address whether he might be protected by New York state labor law or other statutes.)

D. Speech on Employment or Administrative Matters: Informal Complaints

1. ***Sousa v. Roque***, 578 F.3d 164 (2d Cir. 2009), *remanded* 2010 U.S. Dist. LEXIS 26067 (D. Conn. Mar. 19, 2010)

In this non-higher-education-related case, the U.S. Court of Appeals for the Second Circuit overturned a lower court ruling and found that an employee's speech may be protected by the First Amendment even if the speech is largely motivated by the speaker's employment grievances.

Bryan Sousa was employed by the Connecticut Department of Environmental Protection. Following an altercation with another co-worker, Sousa was suspended for three days without pay. Upon his return to work, Sousa made various complaints within the department that, while related to his situation, spoke more generally about workplace intimidation and harassment. Following an order that he undergo a fitness-for-duty evaluation, Sousa was put on a substantial period of leave, and he was eventually terminated for two instances of unauthorized absences.

Sousa filed a lawsuit complaining that the defendant's various actions, eventually leading to his termination, were all acts of retaliation against him for his exercise of his First Amendment right to free speech. Specifically, he argued that the First Amendment should protect him from retaliation since his complaints were about workplace violence and the hostile work environment within the state Department of Environmental Protection, issues that should be matters of public concern. The lower court concluded, however, that "[t]here is no First Amendment protection for speech calculated to redress personal grievances in the employment context."

On appeal, the Second Circuit observed that "although [Sousa's] overall motivation was personal, that fact was not dispositive." After looking to other federal courts, the court noted that the majority of courts have agreed that motive alone does not determine whether a person's speech is on a matter of public concern and therefore protected by the First Amendment; rather, the court held, "a person motivated by a personal grievance" can nevertheless be "speaking on a matter of public concern." The appeals court sent the case back to the trial court for further review.

On remand, the district court again rejected Sousa's free speech claim. Following the suggestion of the appellate court, the lower court assumed for the purposes of argument that

Sousa was speaking on a "matter of public concern," and jumped to the second prong of the *Pickering-Connick* analysis: whether Sousa's interest in speaking outweighed the government's interest in promoting efficiency of public services. While recognizing the appellate court's ruling that Sousa's personal motivation for speaking should not be dispositive, the court relied on this fact in placing "minimal value" on Sousa's speech, which it found "more in the nature of a private personnel dispute rather than an issue in which the public at large would be genuinely interested." The court found that this "minimal value" was easily outweighed by the government's interest in maintaining an efficient workplace, since Sousa's speech and related behavior had significantly disrupted the office.

2. ***Munn-Goins v. Board of Trustees of Bladen Community College***, 658 F.Supp.2d 713 (E.D.N.C. 2009)

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

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

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

After being reprimanded during the spring of 2006, Munn-Goins returned to teach at the college. During the course of the 2006-2007 academic year, Munn-Goins was involved in disputes with the administration regarding a request she made for academic leave and her failure

to implement a particular student withdrawal policy. In April of 2007, Munn-Goins was notified that her contract would not be renewed due to a "mutual loss of confidence." Munn-Goins filed suit, claiming she was terminated in violation of her rights under the First Amendment (free speech) and Fourteenth Amendment (due process and equal protection).

The federal trial court dismissed Munn-Goins' case, concluding that her distribution of employee salary information was not protected speech under the First Amendment. The court suggested that her action did not promote any "issue of social, political, or other interest to a community," noting that there was no evidence that Munn-Goins acted as a citizen and that her own stated reason for requesting the information was strictly a personal one. The court also relied on the fact that Munn-Goins had denied writing the critical messages on the salary report. The court concluded that because Munn-Goins' activity did not involve a matter of public concern, "her First Amendment claim fails." The court also rejected Munn-Goins' other claims.

3. ***Ezuma v. City Univ. of New York***, 2010 U.S. App. LEXIS 3495 (2d Cir. Feb. 22, 2010)

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

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

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

4. ***Fox v. Traverse City Area Public Schools Bd. of Educ.***, 2010 U.S. App. LEXIS 9976 (6th Cir. May 17, 2010)

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

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

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

5. ***Decotiis v. Whittemore***, 680 F. Supp. 2d 263 (D. Maine Jan. 28, 2010)

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

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

The court dismissed Decotiis's First Amendment claim, holding that her speech was "pursuant to her official duties" under *Garcetti*. The court reasoned that "providing therapy" was Decotiis's official duty, and the speech at issue was sufficiently related to that duty because it involved whether her students would be receiving therapy, occurred during Decotiis's therapy

sessions, and was directed only to parents of her students (rather than the general public). Further, the court decided that the speech was "influenced and informed by her position as a therapist" because she had asked her superiors about the summer teaching policy.

E. Faculty Speech on Curriculum and Student Discipline

1. ***Yohn v. Coleman***, 2009 U.S. Dist. LEXIS 20837 (E.D. Mich. Mar. 16, 2009)

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

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

In late 2005, Yohn sent a letter to Krebsbach requesting an equity adjustment in his base salary because of his long career with the school, strong student evaluations, and positive letters from patients. Krebsbach denied the request and later indicated that Yohn's service and scholarship were below expectations compared with other dental school faculty; Yohn received a 1.5% merit increase for the 2005-2006 school year, as compared to a 1.53% average increase for faculty overall.

In January 2006, Yohn filed a grievance charging Krebsbach and the dean of the school of dentistry with violation of Yohn's right to free speech and retaliation for Yohn's use of the email server to exercise that right. In September 2006, the Grievance Review Board (GRB) issued its final recommendation, in which it recognized Yohn's right to publicly discuss academic issues as protected by the First Amendment, but concluded that the August 2005 meeting with Krebsbach did not infringe upon Yohn's right to free speech. In the court's description, the GRB found that "Krebsbach, in good faith, had merely sought to prevent defamatory statements based on unproven allegations from being broadcast to all faculty via email." The dean of the school accepted the recommendations, and in January 2008, Yohn filed suit in federal court. Among other things, he alleged that he had been threatened with censorship and with retaliatory denial of an equity adjustment in his base salary in violation of his First Amendment rights.

The court first addressed whether Yohn's criticism of the administration and speech regarding the lowering of academic standards was speech on a "matter of public concern." The court observed that "a teacher commenting on curricular and pedagogical decisions" is protected by the First Amendment, *Evans-Marshall v. Board of Education of Tipp City Exempted Village School*, 428 F.3d 223, 230 (6th Cir. 2005), as are "professors commenting on administrative decisions regarding university resources," *Jackson v. Leighton*, 168 F.3d 903, 910 (6th Cir. 1999). The court reasoned that "undoubtedly, academic standards for dental students earning graduate diplomas and entering the dental profession is an issue of significant public concern. . . . [T]his Court finds that Yohn's statements about the administration's role in grade inflation and academic policy touched on issues 'about which information is needed or appropriate to enable the members of society to make informed decisions about' a public university." (Citing *Farhat v. Jopke*, 370 F.3d 580, 591 (6th Cir. 2004).)

Having reached this finding, the court moved to the second question of the *Pickering-Connick* analysis: whether Yohn's interest in making his statements "outweighs the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Because Yohn's emails had an "adverse impact" on the working relationships within the school of dentistry and Yohn's department, as evidenced by "the rising tension among faculty members," the court concluded that his interests were outweighed by the interests of the university. The court also observed that there was almost no indication that Yohn's speech was actually suppressed. It therefore denied Yohn's First Amendment claim.

It is notable that although this case involved the speech of a faculty member at a public institution, the university did not invoke the *Garcetti* "official duties" analysis in its defense, and the court appears not to have raised it on its own.

2. ***Lamb v. Booneville School District***, 2010 U.S. Dist. LEXIS 9728 (N.D. Miss. Feb. 3, 2010)

In this case, a federal trial court in Mississippi concluded that an elementary school special education teacher who complained to the school's principal about another teacher's use of corporal punishment on an autistic student was not protected by the First Amendment.

The court observed that under *Garcetti*, "activities undertaken in the course of performing one's job are activities pursuant to official duties and not entitled to First Amendment protection." Because the teacher was the student's primary teacher and she considered it to be within her role to deal with his behavioral issues, she "spoke as an employee in expressing her view that corporal punishment was not an effective means of discipline for an autistic child." Because the court concluded that Lamb had spoken pursuant to her official duties and that the First Amendment did not prohibit the school from non-renewing her contract in retaliation for her speech on that ground, it did not even inquire whether she spoke on a matter of public concern.

F. Extramural Speech

1. ***Sadid v. Idaho State University,*** CV-2008-3942-OC (Idaho Dist. Ct. 2008)

In this case an Idaho state trial court ruled that a professor's public statements criticizing his university were not protected under the First Amendment.

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

Invoking the decision by a federal trial court in California in *Hong v. Grant*, 516 F.Supp.2d 1158 (C.D. Cal. 2007), the Idaho state trial court concluded that Sadid's letters related to his personal grievances rather than to a matter of public concern. The court was not persuaded by Sadid's assertion that his grievances were on a matter of public concern because they discussed a plan to merge two colleges at a public university, a plan Sadid asserted was done without public knowledge or input. Instead, the court found that the letters contained only personal grievances in relation to Sadid's employment, and "simply because it involves a matter that may have occurred behind closed governmental doors does not make it a public concern."

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

Professor Sadid did not appeal the decision.

2. ***Almontaser v. New York City Department of Education***, 2009 U.S. Dist. LEXIS 84696 (S.D.N.Y. Sept. 1, 2009)

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

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

On Almontaser's free speech claim, the court held that Almontaser's speech was not protected by the First Amendment under *Garcetti*, because she spoke to the *New York Post* pursuant to her official duties. The court focused both on the active role played by the Department of Education in setting up and conducting the interview, as well as Almontaser's concession that speaking with media was part of her job as interim principal. From the start the department acted as the go-between for Almontaser and the media, setting up the interview and aiding Almontaser in answering the media's preliminary questions. During the interview itself, the department's communications staff was included in the conversation and even interjected to clarify Almontaser's comments.

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

Almontaser also claimed that by forcing her to resign and by not considering her for the permanent principal position, the department violated her substantive due process rights under the Fourteenth Amendment. To establish a due process violation, a plaintiff must show that the defendants violated either a property or liberty interest protected by the law. Because Almontaser conceded that as an interim principal she was only employed at will – able to be

removed by the department at any time for any reason – the court found that she had no legitimate property interest in her employment. The court similarly found that no valid liberty interest had been violated because Almontaser "suffered [no] loss of reputation coupled with the deprivation of a more tangible interest, such as government employment." It therefore dismissed her due process claims.

3. ***Adams v. University of North Carolina–Wilmington,*** 7:07-cv-00064-H (E.D.N.C. Mar. 15, 2010)

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

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

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

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

In 2003, Adams began writing a column for a website on "issues of academic freedom, constitutional abuses, discrimination, race, gender, homosexual conduct, feminism, Islamic extremism, and morality." The column showcased Adams' conservative religious beliefs, and the university was flooded with complaints from upset readers, including potential donors.

Various publications by Adams were also critical of other members of the faculty and the administration at the university.

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

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

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

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

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

The court characterized the inclusion of the materials as an "implicit acknowledgement that they were expressions made pursuant to his professional duties – that he was acting as a faculty member when he said them." The court continued, "plaintiff's inclusion of the speech in his application for promotion trumped all earlier actions and marked his speech, at least for promotion purposes, as made pursuant to his official duties" under *Garcetti*. The court made no inquiry, however, as to whether these promotion materials would constitute the kind of "speech related to scholarship or teaching" that the *Garcetti* majority indicated might not be covered by its "official duties" analysis. Indeed, the court went one step further and suggested that <u>any</u> materials included in a faculty member's promotion packet would be unprotected under *Garcetti*; as the court said, it found "no evidence of other protected speech (i.e., speech <u>not</u> presented by

plaintiff for review as part of his application) playing any role in the promotion denial," thus conflating "protected speech" with materials not presented for peer review. The court therefore dismissed Adams' claim that his First Amendment rights were violated during the promotion review process.

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

Adams has appealed the court's decision to the Fourth Circuit, and the AAUP has submitted an *amicus* brief in the case urging the Fourth Circuit to recognize an academic freedom exception to *Garcetti*.

4. ***Whitfield v. Chartiers Valley School Dist.***, 2010 U.S. Dist. LEXIS 37545 (W.D. Pa. Apr. 15, 2010)

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

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

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

G. Other First Amendment Issues

1. ***Rodriguez v. Maricopa County Community College District***, 2009 U.S. App. LEXIS 29101 (9th Cir. May 20, 2010)

In this case, the Ninth Circuit ruled that a professor's use of his college's email system was protected by the First Amendment. It also held that the professor's college could not be liable under Title VII for failing to discipline him for his speech.

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

The Ninth Circuit – via a panel that included Chief Judge Alex Kozinski and retired Supreme Court Justice Sandra Day O'Connor – ruled against the plaintiffs. The court held that Kehowski's emails were not harassment because they were not directed at one person, but instead were the "effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot." The court reasoned that the government could not silence such public speech based on its viewpoint, which was what the plaintiffs were alleging the district should have done. The court declared:

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

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

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

In this case, the U.S. Court of Appeals for the Fifth Circuit partially dismissed a professor's free speech and retaliation claims because it found that the university administrators he was suing could not be liable in their personal capacities.

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

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

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

On DePree's First Amendment claim, the Fifth Circuit ruled that the university administrators could not be liable in their personal capacities. The court granted Saunders qualified immunity because it found she had not violated a "clearly established constitutional right." To win his retaliation claim, the court reasoned, DePree would need to show that he suffered an "adverse employment decision." In 1997 the Fifth Circuit had held that "decisions concerning teaching assignment" were not adverse employment decisions. In 2006, the Supreme Court broadened the definition of "adverse employment actions" for Title VII retaliation purposes, including any actions that would "dissuade a reasonable worker from making or supporting a charge of retaliation." But the Fifth Circuit has not applied this definition to First Amendment retaliation claims. The court therefore found that, at the time Saunders disciplined DePree, there was no "clearly established law" on whether Saunders' removal of his teaching duties could constitute First Amendment retaliation. Because this was not "clearly established," Saunders could not be held liable in her personal capacity.

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

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

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

3. ***Knudsen v. Washington State Executive Ethics Board***, 2010 Wash. App. LEXIS 1470 (Wash. Ct. App. July 13, 2010)

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

Teresa Knudsen was a part-time adjunct academic advisor at Spokane Community College (SCC) who taught classes in the English Department. On February 25, 2005, Knudsen sent an email from her SCC computer to all SCC faculty, asking them to encourage Washington state legislators to approve two bills that would provide tenure-like protections for part-time faculty. The email provided legislators' email address, a sample letter that the recipients could send, and tips about how to best influence the legislator, including: "[T]ell any of your personal problems with lack of job security. You can mention as well that this bill has no cost associated with it."

SCC informed Knudsen that her email constituted lobbying unrelated to her official duties and was therefore illegal under the state ethics in public service act, which forbids state employees from using state property "for private benefit or gain" of themselves or another. The Washington State Executive Board ("the Board") also adopted rules interpreting this statute, which allowed de minimis private use of state property. The Board heard Knudsen's case and agreed that she had violated the act, as did a state trial court on appeal. Knudsen next appealed her case to the state court of appeals.

First, Knudsen argued that her email did not violate the statute because it did not result in private benefit or gain to herself or others. The appellate court rejected this argument, finding

that the bills' passage would benefit her and other part-time teachers because they were "designed to give her more job security and a more favorable accounting of her work hours." The court said, "Ms. Knudsen knew that the two bills in question, if enacted, would improve her position."

Second, Knudsen argued that her email fell under the Board's de minimis exception to the statute. Yet the court noted that "[l]obbying is specifically prohibited as an exception to the de minimis rule." Although lobbying was not defined in the current Board's rules, the court relied on a former version of the ethics act, which had defined "lobbying" as: "attempting to influence the passage or defeat of any legislation by the legislature of the state of Washington." The court found that Knudsen's email fit this definition.

Third, Knudsen argued that she was acting as a member of her union when sending the e-mail. She pointed out that the definition of "lobbying" on which the court was relying exempted "an association's or other organization's act of communicating with the members of that association or organization." The court found this unpersuasive, especially since Knudsen admitted she had sent the email because she thought the union's lobbyists were not doing enough to promote the bills. "Moreover," the court held, "[she] failed to establish that she was a union representative."

Lastly, Knudsen contended that the Board's policies violated her free speech rights. The court decided that the school's internal email and computer system were "nonpublic forums…because members of the public do not have in-person access to the computers or email accounts." Because the forum was nonpublic, the court found that rules restricting speech through SCC's email needed only to be "reasonable and viewpoint neutral." It found the Board's rules and the state law met this test, affirming the lower court.

II. Tenure, Due Process, and Breach of Contract

A. ***Martin v. North Carolina State University,*** No. 09CVS7829 (N.C. Super. Ct. Dec. 16, 2009)

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

Dr. Martin started as a research associate at NCSU in 1995. In 2001, she was hired as a tenure-track assistant professor within the Molecular Biomedical Sciences department, and in 2006, she submitted her tenure dossier for review. During the course of that review, her department head, Dr. McGahan, unilaterally ordered that information about manuscripts submitted for publication and previously submitted grant applications be removed from Martin's dossier prior to its distribution to members of the voting faculty. During the course of her tenure

review, faculty within the department gave her positive marks for every component of her tenure dossier with the exception of the research component of her tenure file, specifically indicating concern about her ability to fund her own research. Based on her incomplete file, her colleagues voted to deny her tenure. Although the University Reappointment, Promotion, and Tenure Committee expressed concern about the procedural problems with Dr. Martin's review, the Provost upheld her colleagues' recommendation and decided not to reappoint her to another year at the university.

Dr. Martin appealed the Provost's decision to the university's Grievance Committee, seeking review of her denial of reappointment and asserting that it was in violation of university policy and procedure. During the course of the Grievance Committee's investigation, various irregularities came to light. For instance, the Provost had provided, on two separate occasions, incomplete versions of the university's policy on the official format and content of tenure dossiers. Further, at some point during the course of Dr. Martin's appeal, the Provost changed the published tenure procedures to include language that would have excluded submitted publications from any faculty member's tenure dossier. The Provost did this without any consultation of the Faculty Senate at the university. When also presented with conflicting testimony on Dr. McGahan's personal malice towards Dr. Martin, the Grievance Committee found Dr. McGahan's testimony to be at times unreliable and scripted.

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

Dr. Martin sued, and the court reversed the university's decision not to reappoint Dr. Martin, finding that "the Grievance Committee's findings of fact are supported by substantial evidence of record. The Chancellor had no authority to reweigh the testimony of Dr. McGahan . . . in making his decision." The court concluded that it was a violation of university policy for the Chancellor or the Board of Governors to revisit the review of Dr. Martin's materials, as the grant of tenure should be a professional judgment determined solely at the department level "by the candidate's immediate colleagues and supervisors, who are in the best position to make such judgments." In summary, the court said:

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

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

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

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

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

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

After holding an additional hearing on the issue of petitioner's service, the committee changed its mind and found, by a 4 to 1 vote, that petitioner was actually "not incompetent in the area of service." This time, however, the chancellor reversed the committee's decision, and decided to discharge Bernold. Both the university Board of Trustees and the university Board of Governors affirmed the chancellor's decision. Bernold sued, but the trial court upheld the university's right to discharge him. On appeal, Bernold made three arguments.

First, Bernold argued that tenured professors have a substantive due process right to protection from discharge for any reason other than incompetence, misconduct or neglect of duty. However, the appeals court upheld Bernold's discharge for incompetence because it found his three years of unsatisfactory reviews were sufficient evidence of professional incompetence. The court then noted that the university based its ultimate discharge on "incompetence of service" which rendered him unfit to continue as a member of the faculty. The school specifically alleged that "his interactions with colleagues had been so disruptive that the effective

and efficient operation of his department was impaired." Because a College of Engineering regulation stated that "each faculty member is expected to work in a collegial manner," the court found that his unsatisfactory post-tenure reviews constituted "sufficient evidence of his professional incompetence to justify his discharge for cause."

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

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

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

C. ***Sabinson v. Trustees of Dartmouth College***, 2010 N.H. LEXIS 68 (N.H. June 30, 2010)

In this case, the New Hampshire Supreme Court upheld a university's decision to reassign a professor's course offerings because it found this did not constitute a "major change" under university policy.

Mara Sabinson is a professor in the Dartmouth College Theater Department. In July 2001, disputes within the Theater Department caused the Associate Dean for the Faculty of Humanities to assume the role of department chair. The Dean reassigned one of Sabinson's classes and her directorship of the 2005-2006 main stage production. In May 2005, a faculty committee concluded that "the Theater Department has suffered grievously from the presence of Mara Sabinson," with "faculty and students alike" complaining "of her harsh treatment of students" and "of her uncollegial behavior in Department meetings" and towards "junior and adjunct colleagues." The committee recommended that Dartmouth offer Sabinson a retirement

package and limit her course offerings. After administrators did so, Sabinson filed a grievance, complaints with the EEOC and the New Hampshire Commission on Human Rights, and eventually filed suit in federal district court, alleging age, gender, and religious discrimination, retaliation, breach of contract, and wrongful discharge and demotion.

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

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

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

D. ***Haviland v. Brown University***, 2010 R.I. Super. LEXIS 30 (R.I. Sup. Ct. Feb. 11, 2010)

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

In the spring of 2000, Brown University asked Beverly Haviland's husband, Paul Armstrong, to be the Dean of the College at Brown. Both Armstrong and Haviland were tenured professors at State University of New York at Stony Brook (SUNY), and Armstrong told Brown that he would not accept the position unless the university also offered his wife a tenured teaching position. Because there were no tenured positions currently open in Haviland's specialties, the university proposed an "outside the box" solution by offering Haviland a position combining that of a Senior Lecturer and a Visiting Associate Professor. Instead of drawing up

one cohesive contract, the university offered Haviland the job and described its scope and benefits through a series of letters.

The first letters, dated October 16 and 18, 2000, stated that Haviland's appointment would be renewed every five years except for "adequate cause," which it said:

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

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

In 2004, Haviland was reviewed for reappointment, and a faculty committee recommended against reappointing her because she had failed to satisfy the department standard of "sustained excellence in teaching," a different standard than what had been outlined in the October letters. She was eventually reappointed to the position, but in 2009 was again reviewed under the department's "sustained excellence in teaching" standard. Although her current appointment lasts through 2015, Haviland thought that her reappointment should have been governed by the tenure review standards outlined in letters of October 16 and 18. She filed suit in the Superior Court of Rhode Island asking for a declaratory judgment to define the enforceability and terms of her employment agreement with Brown.

Initially, Brown argued that the Haviland could not sue because she had not suffered any legal injury. But the court disagreed, finding that Brown's "alleged failure to abide by the promised protections has led to ongoing uncertainty with regard to [Haviland's] future employment" and with regard to the standards the university would use in deciding whether to reappoint her. This uncertainty was sufficient legal injury allowing Haviland to sue, the court ruled.

The court further ruled that, despite the lack of an "integrated document" defining Haviland's employment status, there was a "meeting of the minds on the terms of the offer" and therefore a valid and enforceable contract. Even if a valid contract had not existed, the court held that there was an "independent equitable basis for finding the terms of the agreement

enforceable" because Haviland had reasonably relied on the promise of employment when resigning from her SUNY position and moving her family to Rhode Island.

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

III. Union/Collective Bargaining Cases and Issues

A. National Labor Relations Board (NLRB) Appointments

Because of political wrangling over nominees, the five-member NLRB had been operating with only two members, Wilma Liebman (D) and Peter Schaumber (R), since January 2008. In March 2010, President Obama made fifteen recess appointments to administrative posts, including two NLRB members: Craig Becker (D) and Mark Pearce (D). Becker, Associate General Counsel to the SEIU and staff counsel to the AFL-CIO, was vehemently opposed by numerous Congressional Republicans, partly based on arguments that his legal writings have suggested that employers have no role in union representation cases and that NLRB rulemaking might force employers to recognize unions based on card check majorities. In June 2010, the Senate refused to confirm the appointment of Becker, meaning that he will only serve through the end of 2011 (rather than a normal five-year term). However, the Senate did confirm Pearce, as well as President Obama's third nominee to the NLRB, Brian Hayes (R). This means that the Board will have a full five-member contingent - with a 3-2 Democratic majority – for at least the upcoming year.

Because of the vacancies, the two-member Board tried to avoid seriously controversial issues over the last two years, but Liebman and Schaumber still decided over 600 cases. On June 17, 2010, the Supreme Court upheld a challenge to one of the two-member Board's decisions in *New Process Steel v. NLRB*, finding that the Board must have at least three members for a legal quorum. The NLRB has announced that it will seek to rehear all 96 cases that are currently on appeal in federal courts. It is unclear how many of the 600 other cases Liebman and Schaumber decided will also be eligible for rehearing or susceptible to court challenge.

With a full Board now appointed, it is likely that more controversial decisions will wind their way up the NLRB docket. These include a host of cases decided over the past 10 years or so that have tilted in management's favor rather than labor's. The new Board might now address:

> ***Brown University***. 342 NLRB No. 42, 175 LRRM 1089 (2004) where the Board, in a 3-2 decision, reversed its decision in *New York University*, 332 NLRB No. 111 (2000) and

held that graduate students working as teaching assistants or research assistants are *not* employees covered by the Act. The Board majority held that such individuals "have a predominantly academic rather than economic relationship with their school."

Yeshiva University cases. The new appointees may have an impact on questions of faculty managerial authority. Because it is a Supreme Court decision, and not an NLRB case, it is unlikely that *Yeshiva University*, 444 U.S. 672 (1980) will be reversed anytime soon, given the current constituency of the Court. However, *Yeshiva* never stood for the proposition that all private sector faculty members are banned from collective bargaining. The issue of whether faculty members at any particular institution are managerial employees or not is still dealt with on a case by case basis by the NLRB. And, while the Supreme Court gave guidance to all as to what to examine to establish managerial status, a pro-labor board may hold colleges to a subtly higher standard of proof simply in its interpretation of the rich fact patterns that these cases present.

B. State Labor Laws

1. ***Fashion Institute of Technology v. New York State Public Employment Relations Board***, 2009 WL 4909400 (N.Y.A.D. 1 Dept. Dec. 22, 2009)

In a short opinion, a New York State Court (the New York Appellate Division for the First Department) found that the Fashion Institute of Technology ("FIT") violated the Public Employees' Fair Employment Act by unilaterally changing wage computation for day adjunct professors.

FIT unilaterally reduced the computation period for day adjunct professors' pay-per-semester from 16 weeks to 15 weeks. The state appeals court found that the practice of computing per-semester pay was subject to collective bargaining, that the past practice of a 16-week computation period was unequivocal and had continued uninterrupted for a period of time that was sufficient to create a reasonable expectation that the practice would continue, and that FIT had actual and constructive knowledge of the practice. Therefore, FIT's unilateral action violated the Public Employee's Fair Employment Act.

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

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

Frank Gaskill was an associate professor at Fort Hays State University (FHSU), hired on the tenure track for the 2000-2001 academic year. In May 2001, FHSU informed him that it would not renew his appointment for the 2001-2002 academic year. At that time, the local AAUP was the certified bargaining representative for FHSU faculty but had yet to enter into a memorandum of agreement with FHSU. In 2001, the AAUP filed a prohibited practices

complaint with the state Public Employee Relations Board (PERB), alleging that FHSU had violated the Kansas Public Employer-Employee Relations Act (PEERA) by shutting the AAUP out of Gaskill's grievance process and unilaterally changing terms and conditions of employment without bargaining in good faith with the AAUP.

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

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

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

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

Second, the court held that the legislature's decision to change the previous version of PEERA might have indicated its intent to remove this power from PERB. Even if this was not the legislature's intent, the court declared that "the legislature alone must remedy the mistake." Finally, the court refused to analogize PEERA to the National Labor Relations Act (NLRA) because of the "distinctions between private employment, covered by the NLRA, and public employment under PEERA."

IV. Discrimination

A. Title VII of the Civil Rights Act

1. ***Ricci v. DeStefano,*** 577 U.S. __, 129 S.Ct. 2658 (2009)

This complicated affirmative action case ultimately concluded with the Supreme Court ruling that a city had improperly thrown out the results of an employment test where minority candidates had disproportionately underperformed.

The test given by the city of New Haven, Connecticut was used to determine which city firefighters would be promoted to vacant lieutenant and captain positions. When the results of the test came back, white candidates had outperformed minority candidates. At risk of being sued for discrimination because of the "disparate impact" that the test had on minority candidates, the city threw out the results of the test. As a result, white and Hispanic firefighters who had passed the test sued in federal court, alleging that discarding the test results discriminated against them on the basis of race.

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

Title VII prohibits two types of discrimination on the basis of race, color, religion, sex, and national origin: (1) intentional acts of discrimination (known as "disparate treatment"); and (2) policies or practices that are not intended to be discriminatory but that nevertheless disproportionately affect people on the basis of one of those characteristics (known as "disparate impact"). If a person shows that an employment policy or practice disproportionately affected him or her on the basis of race, color, religion, sex, or national origin, the burden is on the employer to show that the policy or practice is "job related" for the position and that there is a "business necessity" for the policy. If the employer does show that, then the employee or prospective employee can prevail only if he or she can show that there is some alternative practice that has less of a disparate impact, that meets the employer's needs, and that the employer failed to adopt.

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

The Court decided that the city's disparate-treatment discrimination would only be justified if there was a "strong basis in evidence" to believe that certifying the test results would have made the city liable for disparate-impact discrimination. After reviewing the record, the Court held that there wasn't sufficient evidence that the city would have been liable for certifying the test results. Because of the care that the city had taken in developing the test, the Court thought it could have successfully shown that the test was "job related" and consistent with "business necessity." The Court also thought that the minority candidates could not identify an equally valid, less discriminatory alternative that would have satisfied the city's needs.

Therefore, the Court ordered the city to reinstate the test results, scolding that "fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions." If the city were later sued for disparate-impact discrimination for certifying the test results, the Court suggested it could avoid liability based on the "strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."

2. ***Lewis v. City of Chicago***, 560 U.S. ___, 176 L. Ed. 2d 967 (May 24, 2010)

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

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

The federal trial court ruled for the plaintiffs, but the Seventh Circuit reversed, declaring the plaintiffs' EEOC claim untimely. According to Judge Richard Posner, the only allegedly discriminatory act was the sorting of candidates into the "well-qualified," "qualified," or "not-qualified" categories. The hiring of candidates, the court held, was "the automatic consequence

of the test scores rather than the product of a fresh act of discrimination." Lewis v. City of Chicago, 528 F.3d 488, 491 (7th Cir. 2008).

Plaintiffs appealed to the Supreme Court, and the AAUP joined 34 other public interest organizations in an amicus brief supporting their appeal. On May 24, 2010, the Supreme Court unanimously reversed the Seventh Circuit. The Supreme Court determined that the City's use of the list (not just its creation of the list) could be a discriminatory act under Title VII. The Court distinguished between claims relying on an intentional discrimination theory and a disparate impact theory: "where, as here, the charge is disparate impact, which does not require discriminatory intent," the Court said, it is irrelevant whether the discrimination alleged is the "present effects of past discrimination." Even assuming discriminatory intent and disparate impact laws are "directed at the same evil," the court said "it would not follow that their reach is therefore coextensive." Justice Scalia, writing for the unanimous court, agreed that the Seventh Circuit interpretation was contrary to the plain language of Title VII, writing that it is "not for us" to "rewrite the statute so it covers only what we think is necessary to achieve what we think Congress really intended."

3. ***Gentry v. Jackson State University***, 610 F. Supp. 2d 564 (S.D. Miss. 2009)

In this case, a federal district court in Mississippi applied the Lilly Ledbetter Fair Pay Act – which was passed in 2007 – to uphold a professor's discrimination claim, finding that a Title VII violation can occur each time a discriminatory paycheck is issued.

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

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

Congress passed the Lilly Ledbetter Fair Pay Act to overturn *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), in which the Supreme Court found a Title VII claim of unequal pay untimely because the plaintiff had filed her EEOC claim more than 180 days after the employer had adopted the allegedly discriminatory pay policy. Congress became concerned that this might bar the claims of employees who found out that their employers' pay structure was discriminatory after 180 days had already passed. Congress therefore passed the Act, which

provides that "with respect to discrimination in compensation," a Title VII violation occurs "each time wages, benefits, or other compensation is paid, resulting in whole or in part from [the allegedly discriminatory] decision or other practice." The Act therefore extends the time in which a claim can be filed to 180 days after *each* discriminatory paycheck, not just 180 days after the employer put the discriminatory pay structure in place. The court agreed with Gentry that her denial of tenure counted as compensation discrimination for these purposes, and denied the defendants' summary judgment motion.

JSU also sought summary judgment on the Gentry's claim of gender discrimination on the basis of pay disparity because it said Gentry was unable to identify male employees "nearly identical" to her that were given the raise. The court refused to grant the university's request, citing factual disputes in the record that would have to be resolved later in trial. The court also denied JSU summary judgment on Gentry's retaliation claim, despite the fact that the Gentry did include that allegation in her EEOC complaint, because it found the claim grew out of the earlier charge of unequal pay, giving the court ancillary jurisdiction.

JSU appealed the district court's decision to the Fifth Circuit, which will receive the parties' legal briefs this month.

4. ***Mezu v. Morgan State University***, 2010 U.S. App. LEXIS 3301 (4th Cir. Feb. 19, 2010)

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

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

Mezu applied again for full professor in 2004, but was again denied. In 2005, Mezu applied for a third time, and the Departmental Promotion Committee recommended promoting her to full professorship. Her department chair, however, recommended that she engage in additional publishing and recommended against promoting her. On April 6, 2006, the MSU president informed her by letter that she would not be promoted, but informed her of her right to appeal the decision. Although she appealed the decision within a few days, MSU administrators took no further action, and Mezu came to believe that they were not going to comply with MSU's published procedures on appointment, promotion and tenure. So on March 25, 2007, Mezu filed her second EEOC claim, and eventually sued again in federal court.

The district court dismissed Mezu's claim as untimely, finding that she had filed her EEOC claim beyond the statutory deadline of 300 days – a deadline that applies (instead of the 180-day deadline discussed above) if a plaintiff institutes actions in a state agency. On appeal, the Fourth Circuit agreed, finding that the president's letter of April 6, 2006 triggered the 300-day limitations period, "despite the pendency of her internal appeal with the University." Further, the court held that MSU's "alleged failure to complete the internal appeal process did not constitute [an] independently discriminatory act[]" that would re-trigger or suspend the running of the limitation period. This means that professors who believe they have a federal or state employment claim must watch the calendar very carefully to be sure they are not shut out of court for waiting for the university's processes to run.

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

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

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

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

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

In June 2002 Cornell and ILR informed Leibowitz that they would not be renewing her contract due to fiscal reasons. Leibowitz initially planned to retire, but in December she asked to

take a position in the Long Island office, where the director was "eager" to hire her. Cornell denied the request, citing "fiscal circumstances." After the director of the Long Island office wrote to Leibowitz to "confirm his offer to her" of a recently vacated position, Cornell informed Leibowitz that the offer was not valid and fired the director for making it.

Leibowitz filed suit in the U.S. District Court for the Southern District of New York, claiming, among other things, that Cornell's non-renewal of her contract and its refusal to consider her for the Long Island position were gender and age discrimination in violation of Title VII. The district court initially granted the defendants' motion to dismiss, but the court of appeals reversed and sent the case back to the district court for further proceedings. The district court then dismissed the action again, this time granting summary judgment for defendants. The court declared that the non-renewal of Leibowitz's contract could not be an "adverse employment action" for the purposes of Title VII because the Senior Extension Associate II position was neither officially nor unofficially tenured, and she therefore had no right to keep the position. The court also found she had not shown circumstances giving rise to an inference of discrimination. Leibowitz again appealed.

The Second Circuit again reversed the lower court and decided that non-renewal of an employment contract when the individual is seeking continued employment – regardless of tenure status – constitutes an "adverse action" under Title VII. The court reasoned that the statute makes it unlawful for an employer to discriminate against a *new* applicant seeking employment, so it is equally unlawful to discriminate against a *current* employee who is seeking continued employment. The court said:

> Were we to accept defendants' arguments here, we would effectively rule that *current* employees seeking a renewal of an employment contract are not entitled to the same statutory protections under the discrimination laws as *prospective* employees . . . We decline to adopt that flawed legal analysis, which is inconsistent with prior decisions of the Supreme Court and this court . . .An employee seeking a renewal of an employment contract, just like a new applicant or a rehire after a layoff, suffers an adverse employment action when an employment opportunity is denied and is protected from discrimination in connection with such decisions under Title VII and the ADEA.

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

discrimination and rejected the district court's reasoning that no inference of discrimination could be drawn because none of the male employees "specifically replaced [Leibowitz]."

The court of appeals rejected the district court's alternative reasoning for granting summary judgment: that the defendants "had proffered a legitimate, non-discriminatory reason for the non-renewal, and [Leibowitz] had failed to provide evidence sufficient for a rational jury to find that the reason was pre-textual." Although the defendants argued they did not renew Leibowitz's contract because of budgetary concerns, there was evidence that the budgetary concerns that existed in early 2002 diminished during the 2002-2003 school year and that the ILR hired twelve new employees during the relevant time period. The court of appeals found that, combined with the evidence discussed above, this was enough to suggest that the defendants' reason was pre-textual and therefore enough to survive summary judgment.

After the appellate court sent the case back to the district court for trial, the jury found for the defendants. Leibowitz has moved for a new trial, but the judge has not yet ruled on whether to grant one.

6. ***Kovacevich v. Vanderbilt University***, 2010 U.S. Dist. LEXIS 36054 (M.D. Tenn. April 12, 2010)

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

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

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

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

The agreement also provided that Vanderbilt – rather than Demarest – would be liable for disparagement only if "the alleged remarks can be shown to have been made with Vanderbilt's advance knowledge of, and express consent to, or knowing ratification of, such remarks."

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

Vanderbilt argued that Kovacevich was not protected by Title VII or the Tennessee Human Rights Act because she was a graduate student, which was primarily an educational rather than professional position; further, the university said her complaints related solely to her academic activities. While noting that the Sixth Circuit has not ruled on this topic and that some courts "have considered the dual role of graduate students," the court side-stepped the question of whether a *current* graduate student would be protected by the statute; instead, the court focused on the fact that "to disallow this suit and any potential remedy at the summary judgment stage on the ground that [Kovacevich] had received her Ph.D. degree and was no longer a Vanderbilt graduate student assistant in 2008 would undermine the objectives of the antiretaliation statutes."

Next Vanderbilt argued that Kovacevich had not shown any evidence of a materially adverse employment action. The court observed that an adverse action for Title VII retaliation purposes might include "retaliatory conduct that does not relate to employment or which occurred outside the Vanderbilt graduate student assistant workplace." Kovacevich had presented sufficient evidence, the court ruled, that Demarest and Vanderbilt may have engaged in conduct "that could well dissuade a reasonable Vanderbilt graduate student, TA, or research assistant from making or supporting a charge of discrimination, such that the conduct would qualify as material adverse action."

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

B. "Mixed Motive" Instructions and Discrimination Statutes

1. ***Gross v. FBL Financial Services, Inc.***, 129 S. Ct. 2343 (2009)

In this case, the U.S. Supreme Court changed the standard of proof for employees who sue their employers based on age discrimination.

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

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

The Supreme Court's decision in *Gross* is having an impact on a number of kinds of cases, not just active ADEA cases. In January 2010, the U.S. Court of Appeals for the Seventh Circuit – which covers Illinois, Wisconsin, and Indiana – applied the logic of *Gross* to an Americans with Disabilities Act (ADA) claim, holding that the "mixed motive" or "burden-shifting" framework of Title VII also does not apply in those cases. *See Serwatka v. Rockwell Automation, Inc.* 591 F.3d 957 (7th Cir. 2010) (holding that "when another anti-discrimination statute lacks comparable language [to Title VII], a mixed-motive claim will not be viable under that statute").

V. Miscellaneous

A. Subpoenas and Access to Faculty Research

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

The Attorney General of Virginia, Ken Cuccinelli, served a civil subpoena on the University of Virginia (UVA) on April 23, 2010. The subpoena seeks emails and a variety of other materials and documents relating to Michael Mann, a climate scientist who was a faculty member at UVA until 2005, when he left for Pennsylvania State University (Penn State). Professor Mann was one of the scientists involved in last winter's "Climategate," the episode at the University of East Anglia in which a leaked email from Mann referenced a "trick" he used to create the "hockey stick" graph of global warming. Although some suggested that the emails proved that global warming was, essentially, a hoax, investigations by the National Academies of Science, Penn State, and an independent British review panel concluded that no research misconduct had occurred, and that Mann's reference was to statistical methods rather than to fraudulent manipulations of the data.

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

After public pressure from the AAUP and other organizations, UVA filed a petition in Virginia court to set aside the subpoena, and the parties have filed briefs in support of their positions. The University of Virginia's brief invokes academic freedom and also argues that Cuccinelli's subpoena does not satisfy the requirements of FATA. The court will hold a hearing on August 20, and the AAUP expects to file an amicus brief in support of UVA prior to the hearing.

2. ***Reyniak v. Barnstead International***, 2010 NY Slip Op. 50689U (N.Y. Sup. Ct. April 6, 2010)

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

Kentile Floors, Inc., a company involved in asbestos litigation, served a subpoena on the Mt. Sinai School of Medicine. Kentile claimed that the subpoena forced Mt. Sinai, which was not a party to the litigation, to produce documents written by Dr. Irving Selikoff, a Mt. Sinai

faculty member who had performed research on the dangers of asbestos and asbestos exposure. Kentile sought Dr. Selikoff's private correspondence with asbestos manufacturers and his unpublished research notes. Mt. Sinai claimed that this demand was overly broad and beyond the language of the subpoena, and a New York state trial court agreed, finding that Kentile could just as easily rely on Dr. Selikoff's published materials. Furthermore, the court thought that the forcing Mt. Sinai to produce the materials "could well discourage other institutions from conducting vital health and safety research," both because of the costs involved in producing the materials, and because other scholars "may fear that their unpublished notes, observations and ideas could be released to the public as a result of litigation."

B. Medical Faculty and Malpractice Lawsuits

1. ***Schultz v. University of Cincinnati College of Medicine***, 2010 Ohio App. LEXIS 1694 (Ohio Ct. App. 2010)

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

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

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

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

The appellate court noted that the "dual nature of a physician's employment as both private practitioner and employee of a state medical institution has posed problems for courts," and that "in many instances, the line between these two roles is blurred." Although in the past Ohio courts had focused on financial factors – such as the whether the medical practitioner or the university made more money from the allegedly negligent treatment – the Ohio Supreme Court

recently rejected this approach in favor of "focus[ing] upon the purpose of the employment relationship, not on the business or financial arrangements between the practitioner and the state." The appellate court determined that Dunsker was personally immune because a medical resident was present during Schultz's surgery. Because Dunsker testified that part of his duties as a professor were to educate residents at the hospital, the court held that he was acting within the scope of his employment duties when he operated on Schultz.

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