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

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The last few years have seen numerous legal decisions touching on various issues connected to academia, public employees, and unions. The cases include a narrowing of faculty members' speech rights and restrictions on the use of agency fees paid by non-union members. This presentation summarizes and highlights a number of significant decisions affecting academic life.

I. Academic Freedom, First Amendment, Governance and Tenure

A. First Amendment Rights After *Garcetti v. Ceballos*

In 2006, the Supreme Court concluded that when public employees speak "pursuant to their official duties," they are not speaking as citizens and therefore do not have First Amendment rights. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The majority in that case reserved the question of speech in the academic context, 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 majority continued, "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 425. The courts applying *Garcetti* in litigation about faculty speech and governance have not, however, generally distinguished between faculty members and other public employees. We start this presentation by reviewing cases that have invoked *Garcetti* in the higher education context over the last two years.

1. *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009)

In this case, a federal appeals court concluded that non-classroom speech by a faculty member was pursuant to his official duties and was therefore not protected by the First Amendment under *Garcetti v. Ceballos*.

Wendell Gorum was a tenured professor who taught at Delaware State University (DSU) from 1989 until he was suspended from the university in 2004. Before his suspension, he had several conflicts with the administration. In 2003, he participated in the faculty senate's search for DSU's president, and spoke out in opposition to the final three presidential candidates, including Allen Sessoms, the final presidential pick. In addition, as an advisor to students with disciplinary problems, he advised a student to retain counsel and sue the university after Sessoms suspended the student for weapons possession. Gorum also acted as an advisor to a student fraternity's annual dinner speaker committee; in the course of planning the dinner, he disinformed

Sessoms from speaking after Sessoms was inadvertently invited by another committee member. Finally, the university discovered in 2004 that Gorum had altered and improved multiple students' grades. When Gorum admitted that he had altered the students' grades in violation of DSU policies, Sessoms initiated termination proceedings. After grieving the termination, which was recommended against by the Grievance Committee but ultimately upheld by the Board of Trustees, Gorum filed suit against President Sessoms and the Board of Trustees, alleging that his termination was in retaliation for his conflicts with the administration and violated his First Amendment rights.

The district court, relying on the *Garcetti* analysis but failing to mention the Supreme Court's reservation of speech related to academic matters, concluded that the three occurrences Gorum alleged were protected were done in Gorum's capacity as a public employee, pursuant to his official duties. Because Gorum was chair of his department and a member of the faculty senate, he was "both privileged and required, as part of his official duties, to participate in the search for a new president;" in addition, Gorum was an "official adviser" to the fraternity, and his involvement in selecting a speaker was therefore "pursuant to his official duties." (Of course, the fact that Gorum had changed students' grades without permission also provided an independent basis for his termination.)

Gorum appealed the district court's decision to the U.S. Court of Appeals for the Third Circuit; the appeals court did not, however, consider Gorum's opposition to Sessoms' appointment, so that occurrence did not form a basis for the appeal's court's decision. The Third Circuit unanimously upheld the district court's decision. The Third Circuit used a broad definition of "pursuant to official duties," noting that "a claimant's speech might be considered part of his official duties if it relates to 'special knowledge' or 'experience' acquired through his job." (quoting *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007)).

The court explicitly recognized that the Supreme Court in *Garcetti* reserved judgment related to speech in the academic context, but it distinguished Gorum's speech here:

In determining that Gorum did not speak as a citizen when engaging in his claimed protected activities, we are aware that the Supreme Court did not answer in *Garcetti* whether the "official duty" analysis "would apply in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. at 425. We recognize as well that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by . . . customary employee-speech jurisprudence." *Id.* But here we apply the official duty test because Gorum's actions so clearly were not "speech related to scholarship or teaching," *id.*, and because we believe that such a determination here does not "imperil First Amendment protection of academic freedom in public colleges and universities." *Id.* at 438 (Souter, J. dissenting).¹

¹ AAUP's policies do assert a connection between academic freedom and shared governance; its 1994 Statement On the Relationship of Faculty Government to Academic Freedom, for instance, states that the "academic freedom of faculty members includes the freedom to express their views . . . on matters having to do with their institution and its policies"

Finally, the court also acknowledged that “[t]he full implications of the Supreme Court’s statements in *Garcetti* regarding ‘speech related to scholarship or teaching’ are not clear. As a result, federal circuit courts differ over whether (and, if so, when) to apply *Garcetti*’s official-duty test to academic instructors.” (The court also noted that his grading-related misconduct provided independent justification for his termination.)

2. *Renken v. Gregory, et al.*, 541 F.3d 769 (7th Cir. 2008)

In this case, a federal appeals court held that a faculty member’s refusal to sign off on grant paperwork was not speech protected by the First Amendment because his objection was pursuant to his official duties.

Kevin Renken, a tenured professor in the College of Engineering at the University of Wisconsin-Milwaukee, applied with some collaborators for a National Science Foundation (NSF) grant. The university and the NSF both approved the grant application, but Renken refused to sign the confirmation letter from the university because of disagreements with his dean, William Gregory, over the administration of the grant; among other things, he asserted that Gregory was violating NSF rules about the use of funds. In the midst of the disagreements, Renken filed a complaint against Gregory with a university committee, citing, among other things, a delay in paying undergraduates who were working on the project.

When Renken did not sign any of the confirmation letters, Gregory told him that the university had started the process of returning the grant funds to the NSF. Soon after that, Renken emailed the secretary of the board of regents, enumerating a number of complaints about Gregory’s administration of the grant. After Renken refused a potential compromise, the university returned the grant to the NSF.

Renken sued the university, claiming the university had reduced his pay and returned the grant in retaliation for his criticism about the university’s use of grant funds. The federal district court concluded that his complaints about the grant funding were made pursuant to his official duties, not as a citizen, and therefore were not protected by the First Amendment under *Garcetti*.

Renken appealed, arguing that his grant-related tasks were conducted "*while* in the course of his job and not as a *requirement* of his job." The U.S. Court of Appeals for the Seventh Circuit agreed with the district court, however, stating:

As a professor, Renken was responsible for teaching, research, and service to the University. In fulfillment of his acknowledged teaching and service responsibilities, Renken acted as a [principal investigator], applying for the NSF grant. This grant aided in the fulfillment of his teaching responsibilities because . . . the grant was an education grant for the benefit of students . . . Moreover, because of his responsibilities as PI, Renken was entitled to a reduction in his teaching course load. In his capacity as PI, Renken administered the grant by filing a signed proposal, including a budget regarding the proposed grant and University funds involved in the project, seeking compensation for undergraduate

participants, applying for course releases, and noting what appeared to be improprieties in the grant administration. Renken complained to several levels of University officials about the various difficulties he encountered in the course of administering the grant as a PI. Thereby, Renken called attention to fund misuse relating to a project that he was in charge of administering as a University faculty member[]. In so doing, Renken was speaking as a faculty employee, and not as a private citizen, because administering the grant as a PI fell within the teaching and service duties that he was employed to perform.

541 F.3d at 773-74.

The court added that administration of the grants did not need to be within Renken's core job functions; the *Garcetti* inquiry simply asked whether the challenged expression was pursuant to official responsibilities. The court therefore concluded that Renken's speech about the grant was not protected by the First Amendment.

3. *Hong v. Grant*, 516 F.Supp. 2d 1158 (C.D. Cal. 2007)

In this case, a federal trial court in California concluded that a faculty member's criticisms of university personnel practices were made in the course of his job and were not on a matter of "public concern." Therefore, the court found that his speech was not protected by the First Amendment. The case is on appeal to the U.S. Court of Appeals for the Ninth Circuit, and the AAUP has filed an amicus brief on behalf of the faculty member.

Juan Hong was a full professor in the school of engineering at the University of California-Irvine ("UCI"). In 2002, he challenged the administration of the engineering school on a number of issues relating to hiring, promotions, and staffing, including the use of lecturers rather than tenured faculty; a colleague's alleged dishonesty; the alleged improper involvement of his department chair in a merit promotion review; and the tendering of an informal offer of employment before full faculty approval in violation of the faculty's right of participation in university governance. These confrontations with the administration culminated in the university's denying him a merit salary increase, and Dr. Hong filed suit against the university in federal court, alleging violations of his First Amendment right to free speech.

The key question before the court was whether Dr. Hong's critical statements were made "pursuant to his official duties" as a UCI faculty member. The court noted that the University of California system, of which UC-Irvine is a part, has a particularly robust system of shared governance. Reasoning that "an employee's official duties are construed broadly to include those activities that an employee undertakes in a professional capacity to further the employer's objectives," the judge observed that in the University of California system,

a faculty member's official duties are not limited to classroom instruction and professional research. ... Mr. Hong's professional responsibilities ... include a wide range of academic, administrative and personnel functions in accordance with UCI's self-governance principle. As an active participant in his institution's self-governance, Mr. Hong has a professional responsibility to offer feedback,

advice and criticism about his department's administration and operation from his perspective as a tenured, experienced professor. UCI allows for expansive faculty involvement in the interworkings of the University, and it is therefore the professional responsibility of the faculty to exercise that authority.

Having characterized classroom instruction, professional research, and involvement in academic governance as "official duties" for which First Amendment protections might be absent, the court concluded that all of Dr. Hong's criticisms were unprotected by the First Amendment. The court took a sweeping approach to UCI's authority over Professor Hong's speech, stating that "UCI 'commissioned' Mr. Hong's involvement in the peer review process and his participation is therefore part of his official duties as a faculty member. The University is free to regulate statements made in the course of that process without judicial interference."

The court also decided that Dr. Hong's statements about administrative manipulation of the promotion process were unprotected; the court declared that "internal complaints about supervisory mismanagement are within an employee's official duties and not subject to First Amendment protection." The court concluded: "UCI is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities."

The U.S. Court of Appeals has not yet scheduled oral argument for this case; the AAUP has requested permission to participate in oral argument.

B. Union-Related Speech

1. *Zellner v. Herrick et al*, 2009 U.S. Dist. LEXIS 8123 (E.D. Wisc. Jan. 22, 2009)

Although this case arose in a high school rather than a college or university setting, it is nonetheless instructive because it illustrates at least one area where the application of *Garcetti* may be limited: a public employee's speech in his or her capacity as a union representative.

Robert Zellner, an active and vocal union member, was dismissed as a high school biology teacher after being accused of viewing pornography at school on his work computer. This accusation and termination followed several years of conflict between teachers at the high school and the district superintendent and school board. The ongoing conflict included numerous instances where Zellner spoke out publicly, in his capacity as a union representative and union president, against actions taken by the Superintendent and school board.

Zellner grieved his termination and the decision was sent to mandatory arbitration. The arbitrator concluded that the school had violated the collective bargaining agreement by terminating Zellner without just cause (evidence indicated that the pornographic website was accessed once as part of a standard screening test of search terms), and ordered that Zellner be reinstated and be given back pay and benefits from the date of his termination of employment, plus interest. The school board and the district superintendent successfully kept the arbitrator's decision from being enforced, however, on the grounds of public policy against immoral conduct in schools.

Zellner then sued in federal court, arguing that he had been retaliated against for criticizing the school's administration in his capacity as a union representative, and that he had been denied his liberty interest in employment without due process of law. The defendants first argued that Zellner had no First Amendment protection for his speech as a union leader commenting on internal personnel decisions, citing to *Garcetti's* "official duties" analysis, among other things. The District Court reviewed examples of Zellner's public statements and found that given the "content, form and context" of many of these examples, Zellner's speech as a union representative or union president could be protected as a "matter of public concern." The district court also opined that Zellner had a constitutional right to speak because his speech occurred in his union capacity and not in his "official duties" as a teacher.

Finally, the District Court dismissed Zellner's claim that he lost his liberty interest in employment without due process. In order to prevail, Zellner needed to prove that the defendants' actions stigmatized him and made it "virtually impossible" for him to find new employment. The court found that while he might have been defamed by the board members and the superintendent, he had not necessarily been foreclosed from finding employment as a teacher.

Because the Defendants' motion to dismiss Zellner's First Amendment claim was denied, the litigation will continue.

2. ***Davignon v. Hodgson***, 524 F.3d 91 (1st Cir.), *reh'g. denied* 2008 U.S. App. LEXIS 14578 (1st Cir. June 30), *cert. denied* 172 L. Ed. 2d 726 (2008)

In this case, five correctional officers filed suit against their employer, the sheriff (in both his official and individual capacities), alleging that they were suspended from their jobs because of their union-related activities. The officers' primary claim was that the sheriff retaliated against them for both speech and association with others that should have been protected by the First Amendment.

After a trial, the jury found that the sheriff had violated the officers' First Amendment rights; the sheriff appealed and the U.S. Court of Appeals for the First Circuit affirmed the jury verdict in full.

Observing that the Supreme Court had held in *Garcetti* that "[a] government employee does not surrender all of her First Amendment rights at her employer's doorstep," the appeals court held that: 1) the officers' speech about an upcoming picketing event and failing contract negotiations were matters of public interest; 2) the speech was conducted in a manner that did not jeopardize the State's interest in efficiency or security; and 3) the sheriff had cited the officers' speech as his reason to suspend them. The court therefore ruled that the sheriff had retaliated against the officers for their constitutionally protected speech.

Additionally, the First Circuit found the sheriff had retaliated against one of the officers because of his close association with the union, in violation of the First Amendment. Although the officer was not suspended because of anything he said at work, the court found that it was

reasonable for the jury to find that the sheriff suspended the officer because he was “very involved” with the union, including taking an active role in collective bargaining negotiations.

C. Academic Freedom, Tenure and Governance

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

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

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

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

With respect to the first point, the court found that the public interest was damaged by the modifications:

[T]he public interest is advanced more by tenure systems that favor academic freedom over tenure systems that favor flexibility in hiring and firing. By its very nature, tenure promotes a system in which academic freedom is protected. Further . . . inherent in a tenure system is inflexibility in firing decisions; if the College wanted a more flexible system of employment, the College should not have utilized a tenure-based system. This weighs the public interest strongly in favor of academic freedom. The Court recognizes that the public interest is served by a public college with flexible hiring and firing policies. However, such policies are in direct conflict with the fundamental tenets of a tenure system.

Indeed, a tenure system that allows flexibility in firing is oxymoronic. (citation omitted)

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

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

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

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

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

2. *Edwin Otero-Burgos v. Inter-American University*, 558 F.3d 1 (1st Cir. 2009)

In this case, a federal appeals court recognized the importance of tenure in preserving academic freedom and the economic security of faculty.

Professor Edwin Otero-Burgos was dismissed in 2002 from Inter-American University (IAU), a private institution in Puerto Rico where he had taught for 28 years, nearly 10 of those as a tenured professor. Professor Otero-Burgos was terminated by IAU after appealing a decision by the administration that he believed violated his academic freedom – namely, his authority to determine the management of his course and the assignment of grades. The university

administration assigned another professor to prepare and administer an additional exam to one of Professor Otero-Burgos's students after the student requested that he receive a special opportunity not provided to other students to raise his grade. Professor Otero-Burgos objected and appealed the decision, alleging a violation of his academic freedom. After rejecting multiple rulings from the faculty appeals committee, the chancellor terminated Professor Otero-Burgos, giving rise to his lawsuit.

In December 2006, the U.S. District Court for the District of Puerto Rico acknowledged that Professor Otero-Burgos's termination may have violated the contractual relationship detailed in IAU's faculty handbook. The Inter-American University Faculty Handbook states that society as a whole benefits "by helping world-class universities attract and retain individuals of high academic promise, who might otherwise choose to enter the private sector," and that attracting and retaining such faculty, "in part, is achieved through the economic security and the professional satisfaction felt by the faculty member who is offered tenure." Nevertheless, the court ruled that the only remedy available to Professor Otero-Burgos came from a Puerto Rico law called Law 80. Law 80 provides that an employer who dismisses an employee without "just cause" need only provide a certain set percentage of the employee's former salary, but is not responsible for any other damages or for reinstatement.

Professor Otero-Burgos appealed the district court's decision to the United States Court of Appeals for the First Circuit, and in February 2009, the First Circuit ruled in favor of Professor Otero-Burgos and vacated the district court's opinion. Citing approvingly to an amicus brief filed by the AAUP and to AAUP policy, the appeals court agreed that Law 80 could not have been intended to apply to tenured faculty members, and that to apply it to Professor Otero-Burgos's case would fatally undermine the meaning of tenure. As the court observed:

[T]enure as described in the Handbook is inherently incompatible with allowing a university to simply "buy" the right to dismiss a tenured instructor for Law 80's modest severance payment. Indeed, that approach would mean that despite his tenured status, Otero-Burgos would, as a matter of law, have only the remedy he would be entitled to if he were an at-will employee serving at the university's pleasure. Such an approach would ignore what we have described as the "substantial commitment" that universities make to their tenured faculty, and that IAU made to Otero-Burgos by granting him tenure. Amicus AAUP warns persuasively that affirming the district court's decision would "subvert the time-honored consensus as to the nature of tenure, undoing a careful balance between the respective interests of professors and universities," effectively "convert[ing] tenured professors into at-will employees . . . to the detriment of society and, indeed, of institutions of higher education."

Importantly, the court affirmed the relationship among tenure, economic security, and academic freedom, concluding that: "Contrary to the provisions of the Handbook, Otero-Burgos's tenure contract simply could not fulfill its function of safeguarding academic freedom and providing economic security if the severance payment were the only consequence faced by the university for firing him in violation of that contract."

3. *Mills v. Western Washington University*, 208 P.3d 13, (Wash. Ct. App. 2009)

In this case, the Washington State Court of Appeals ruled that a university illegally closed the disciplinary hearing of a tenured faculty member; the court therefore remanded the case back to the school for a new hearing.

Professor Perry Mills is a tenured faculty member in the theater department of Western Washington University. Shortly after he was granted tenure, the school began receiving complaints about Professor Mills' conduct towards students and colleagues. In fact, Professor Mills was denied promotion to the rank of full professor after the chair of his department recommended against promotion, citing behavioral concerns. Professor Mills' behavioral problems came to a head in 2004 when two of his departmental colleagues filed formal complaints against him with the university. In response to these complaints, the provost of Western Washington University requested that the Faculty Senate appoint a hearing committee to "attempt to 'effect an adjustment'" in Professor Mills' conduct. After these efforts failed, the provost issued a formal statement of charges against Professor Mills alleging that he had violated several sections of the Faculty Code of Ethics. The University then convened a Hearing Panel to address these formal charges. Over the objections of Professor Mills and a newspaper reporter, the hearing was closed to the public. At the end of the hearing, the panel recommended that Professor Mills be suspended without pay for two academic quarters, and Mills filed suit seeking review by the courts.

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

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

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

4. *Association of Christian Schools International, et al. v. Roman Stearns, et al.*, NO. CV 05-06242 (C.D. Cal. Mar. 28, 2008 and Aug. 8, 2008)

In August 2005, the Association of Christian Schools International (ACSI), along with a Christian high school and several of the high school's students, sued the University of California, alleging that the university's course approval process was unconstitutional. The U.S. District Court for the Central District of California rejected ACSI's arguments ruling in favor of the university system and this case is now on appeal to the United States Court of Appeals for the Ninth Circuit.

The University of California's Academic Senate has had primary authority over undergraduate admissions policies since 1884. Under the current system, a committee of the Academic Senate is tasked with recommending criteria for undergraduate admissions. California high schools must submit their courses for an annual evaluation according to criteria established by the committee. ACSI and the other plaintiffs argued that the university's course review standards were biased against high school courses with any religious viewpoint or content, and that the university rejected a disproportionate number of courses with a religious basis. The plaintiffs therefore asserted that the university's policies were unconstitutional – both as written and as applied to the plaintiffs – in violation of the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the U.S. Constitution, and the Equal Protection Clause of the Fourteenth Amendment.

In two separate decisions, one in March 2008 and one in August 2008, the U.S. District Court for the Central District of California ruled in favor of the university. The court rejected the plaintiffs' argument that the university's admissions policies denied admissions credit to students on the grounds that their courses had religious viewpoints or content. Among other things, the district court observed that the university had in fact approved a number of high school courses that included religious viewpoints and materials, including science textbooks with a Christian concentration.

In January 2009, the plaintiffs appealed both district court decisions, arguing that the university's rejection of more than 150 courses containing a single religious viewpoint was evidence that the university engaged in viewpoint and content discrimination. In response, the university has asserted that its challenged standards do not prevent schools from teaching any course they choose or students from taking any course they wish; that UC has denied course approval based not on the "addition" of a religious viewpoint but on the failure to teach key knowledge and analytical skills; that the university has approved many religious school classes;

and that students can apply for admission on the basis of test scores and not have to show proficiency in approved high school courses.

On April 21, 2009, the AAUP submitted an amicus brief to the United States Court of Appeals for the Ninth Circuit in support of the admissions policies and practices of the University of California. The AAUP's amicus brief urges the Ninth Circuit to affirm the district court's decision that the university's admission process is constitutional and emphasizes that faculty involvement in the university's admissions process is crucial to academic freedom.

5. ***Sussex Commons Associates, LLC, vs. Rutgers, The State University, Rutgers Environmental Law Clinic, and Rutgers University Custodian of Records***, No. MID-L-8465-06 (N.J. Sup. Ct. Oct. 7, 2008)

In 2005 and 2006, the Rutgers Environmental Law Clinic represented a group of New Jersey citizens opposed to a particular commercial development project. The development company behind the project unsuccessfully attempted to pressure the citizens' group and the law clinic through several legal actions before filing an Open Public Records Act (OPRA) request with the university for documents related to the clinic's operation. The university refused to provide most of the requested documents and the development company sued to compel production under the OPRA.

On October 7, 2008, the Superior Court of New Jersey ruled that the clinical programs of Rutgers School of Law are unique hybrid institutions and therefore exempt from New Jersey's open records law. Specifically, the court found "that the unique hybrid nature of the Rutgers School of Law Clinics, as subdivisions of Rutgers the State University, entitles them to an exemption from OPRA, which is necessary to protect the unique and valuable function the law clinic provides in both education and jurisprudence." It is from this decision that the development company has appealed.

In May 2009, the AAUP joined the Clinical Legal Educators Association (CLEA) and the Society of American Law Teachers (SALT) in filing an amicus brief in support of the Environmental Law Clinic. Asking the Appellate Division of the Superior Court of New Jersey court to protect the records of the law clinic, the amicus brief argued that requiring the clinic's records to be released publicly would impinge on the academic freedom of Rutgers faculty as well as on the First Amendment rights of citizens to access legal assistance. The brief urges the court to view legal clinics as the law schools' research laboratories where clinical instructors train their students in developing new legal theories and expanding existing legal doctrine through litigation of actual cases. It argues that requiring law clinics to release documents related to the operation of the clinics risks forces law clinics, and particularly clinical educators, to make case intake or other decisions for non-pedagogical reasons, thereby preventing clinics from using the best means to train students in professional skills and values.

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

In this case, the California Court of Appeals determined that a decision by Diablo Valley College (DVC) to hire professional deans, rather than continuing to fill managerial positions continue to be on a part-time basis by faculty members, did not relate to “academic and professional matters” and therefore did not require “collegial consultation” with DVC’s academic senate.

After decades of having faculty “division chairs” nominated by faculty and appointed by the university president, a system that was put into the District’s administrative procedures manual, the District Chancellor decided in 2001 to have all three colleges in the District managed by full-time professional administrators. The DVC Faculty Senate objected, arguing that the reorganization was an “academic or professional matter” that required collegial consultation under California regulations because it would alter faculty roles in governance; the Faculty Senate ultimately sued the school system. A state trial court found in favor of the school system, finding that the change did not implicate “district and college governance structures, as related to faculty roles.” The California Court of Appeals upheld the state court decision, finding that whether or not division chair management constituted a “district or college governance structure,” the management system was not “related to faculty roles.” In addition, the appeals court concluded that although the state regulations were intended to increase faculty members’ involvement in college matters, that increased responsibility was meant to focus on duties “incidental to [faculty members’] professional duties,” not administrative decisions. Accordingly, the court upheld the trial court’s decision holding that the Chancellor was not required to engage in collegial consultation over the change in the division chair system.

7. *Donahue v. Central Washington University*, 140 Wn. App. 17, 163 P.3d 801 (Wash. App. Ct. 2007).

This Washington state court of appeals case was brought by Barry Donahue, a tenured professor at Central Washington University who contended that his reassignment from the computer sciences department to the humanities department was a violation of his speech and academic freedom rights. A faculty grievance hearing officer concluded that CWU did not violate the faculty code; the Board of Trustees and the state trial court upheld that decision, and the state appeals court in this decision upheld all of the previous decisions.

Dr. Donahue was a tenured faculty member in the computer sciences department who became director of a humanities honors program, resulting in split teaching assignments. After several complaints against Dr. Donahue, resulting in two no-contact orders and a partially successful grievance by Dr. Donahue, he was removed as department chair before the end of his term. Dr. Donahue was eventually reassigned full time to the College of Arts and Humanities, but not a particular humanities department, and with no specified time split between the honors college and the humanities department. The letter from CWU making this change stated: “with this change of assignment, your tenure will be in the university as a whole.”

The CWU’s Faculty Code of Personnel Policy and Procedure, states: “Tenure entitles a faculty member to continuous appointment in a specific department of the university or in the university as a whole, and retention of rank without discriminatory reduction of salary and without dismissal except for adequate reason determined according to the requirements of due

process as set forth in the Faculty Code.” The code also gives the university latitude in determining teaching and departmental assignments. Based on the code and on the fact that Dr. Donahue had already been willing to work in other areas of the university, as evidenced by his work in the humanities honors program, the state appeals court concluded that the Board of Trustees’ order affirming the reassignment was not unreasonable.

The court also determined that the reassignment was not in retaliation for Dr. Donahue’s two earlier grievances, because (among other things) the university did not take an “adverse employment action.” The court reasoned: “He did not lose tenure, he was not demoted, and he did not receive a reduction in pay. At most, Dr. Donahue shows an inconvenient alteration of his job responsibilities resulting from a reassignment for CWU’s needs, an insufficient basis for actionable retaliation.”

Finally, Donahue asserted that the reassignment violated his First Amendment right to free speech; however, because he could not show that the grievances were a “substantial or motivating factor” in the reassignment, and because the university based its decision on “university need” and past performance, the court rejected his claim, quoting previous decisions stating that “the court is generally not the appropriate forum for reviewing the wisdom of a personnel decision taken by the public employer in response to the employee’s speech or behavior.”

II. Union/Collective Bargaining Cases

A. Unit Definition

1. *Point Park University*, NLRB Reg. Dir., No. 6-RC-12276, 7/10/07

In this case, the NLRB Regional Director concluded, for the second time, that full time faculty at Point Park University were not managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and therefore have the right to unionize. The case was on remand from U.S. Court of Appeals for the District of Columbia Circuit. The Court had ruled that the Board had failed to articulate the factors that originally led it to find that the faculty were non-managerial.

The NLRB’s Regional Director noted that the Court “correctly observed that the proper analysis turns on the type of control faculty exercise over academic affairs at the institution.” The key factors under this standard would be “the ability [of the faculty] to determine what undergraduate and graduate programs are offered, as well as changes in degree programs, including structural changes and all other changes in course offerings having effects beyond the academic department, grading, teaching methods and admission, retention and graduation of students.”

In the case of the Point Park faculty, the Regional Director noted a “divergence of the interests of faculty and the administration,” underlining the faculty’s lack of input as to the structure of the institution, including a change from department-based to school-based governance and a decision to seek university status. He explained that a “well-defined

administrative hierarchy” essentially decides on such issues as programs, courses, tuition, enrollment, admissions criteria, grading systems, grades and various academic programs and policies.” The record showed many cases where the administration made academic changes without faculty input or overrode faculty decisions. The Regional Director therefore concluded that the Point Park faculty lacked managerial authority and upheld the faculty union’s prior certification.

2. *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009)

In this case, a federal court declined to order a college in Wisconsin to bargain with a faculty bargaining unit. The college had argued that because it is a religiously-affiliated school, it is exempt from the NLRA under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) and *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

The United Auto Workers (UAW) had been certified as the faculty’s representative, despite Carroll College’s arguments to the NLRB that certification would violate the Religious Freedom Restoration Act of 2000 and that its faculty were managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

On appeal to the U.S. Court of Appeals for the District of Columbia Circuit, Carroll College argued that the United States Supreme Court had ruled in *Catholic Bishop* that the NLRB did not have jurisdiction over church-operated schools for First Amendment reasons. In *Catholic Bishop*, the Court held that ordering collective bargaining at religious institutions may inevitably lead the NLRB into “an examination of the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.” Subsequently, in the *Great Falls* case, the Court of Appeals for D.C. fashioned a three-part test to determine whether or not the NLRB has jurisdiction to impose collective bargaining: 1) Does the school “hold itself out” as providing a religious educational environment?; 2) Is the school organized as a non-profit?; and 3) Is the school “affiliated with, or owned, operated or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion?”

In this case, the Court of Appeals held that Carroll College easily satisfied the *Great Falls* test. The College’s charter documents make clear that it holds itself out to students, faculty and the broader community as providing a religious educational environment. The Articles of Incorporation describe the College’s relationship with the Synod and provide that the College was incorporated “for the purpose of maintaining and conducting itself as a Christian liberal arts college dedicated to God.” The mission statement referred to demonstrating “Christian values by... example.” The Board of Trustees has adopted a “Statement of Christian Purpose,” which declared the college mission is to provide “a learning environments devoted to academic excellence and congenial to Christian witness.” The court found that such objectives and statements “easily satisfy the first element of our test [from *Great Falls*.]”

The second and third tests were easily handled by the Court. Carroll College is a non-profit institution and it is also affiliated with a recognized religious organization.

In summary, the Court wrote:

After our decision in *Great Falls*, Carroll is patently beyond the NLRB's jurisdiction. *Great Falls* created a bright line test of the Board's jurisdiction according to which we ask three questions easily answered with objective criteria. From Carroll's public representations, it is readily apparent that the college holds itself out to all providing a religious educational environment. That it is a nonprofit affiliated with a Presbyterian synod is beyond dispute. From the Board's own review of Carroll's publicly available documents... it should have known immediately that the college was entitled to a *Catholic Bishop* exemption from the NLRA's collective bargaining requirements. The Board thus had no jurisdiction to order the school to bargain with the union....

3. ***Research Foundation of the SUNY Office of Sponsored Programs and Local 1104, Communication Workers of America***, 350 NLRB No.18 (2007)

In this case, the National Labor Relations Board (NLRB) ruled that research project assistants (RPA's) who are employed by an "educational corporation," not by a college or university, but who are also required to be students at a SUNY campus, were employees within the meaning of the National Labor Relations Act (NLRA).

Although the Research Foundation of the SUNY Office of Sponsored Programs was a not-for-profit educational corporation, it was not an academic institution and therefore did not issue academic degrees. The RPAs were employed solely by the Research Foundation and not by SUNY, even though the RPA's were also students in related degree programs at their respective SUNY campus. As the NLRB reasoned:

The undisputed evidence demonstrates the existence of an economic relationship between the RPAs and the employer rather than an educational relationship, as in *Brown [University]*, 342 NLRB 483 (2004)]. Pursuant to an agreement with SUNY, the employer receives, administers and manages government and private donor awards for SUNY's sponsored research programs. Under that agreement, the employer employs research and other personnel, including the RPAs, "who shall be deemed employees of the employer and not the University." The RPAs are employed and received compensation, including benefits, under awards administered by the employer; their compensation is subject to the employer's compensation benchmarks; and they are placed on the employer's payroll by the employer's Human Resources office. In addition, the parties stipulated that the employer's labor and employment policies apply to the RPAs. The RPAs therefore clearly have an economic relationship with the employer.

Even though the RPAs in this case were required to be enrolled at SUNY to work for the Research Foundation, and even though their work bore a relationship to their SUNY dissertations and they ended their RPA careers once they graduated from SUNY, such evidence "demonstrates the RPAs' primarily educational relationship with SUNY, not with the employer." The NLRB panel therefore distinguished this situation from that in *Brown University*, where the NLRB had

determined that the graduate student assistants were not “employees” for the purposes of the NLRA because their relationship with Brown University was primarily educational in nature even though the school provided them with stipends for work they performed related to their degree program.

B. Recognition

1. *Syracuse University and Teamsters Local 317 and Staff Complaint Process*, 350 NLRB No. 63 (2007)

In this case, the National Labor Relations Board was faced with the question of whether Syracuse University’s Staff Complaint Process (SCP) was a labor organization within the meaning of Section 8(a)(2) of the National Labor Relations Act. The Board concluded that it was not.

The SCP was a complaint resolution procedure that was designed to resolve employee relations issues between non-bargaining unit employees and their supervisors. The University introduced the new procedure in 2003, and it began to train volunteer employee participants on the techniques of mediation and problem solving. The SCP operated during working time using facilities and supplies provided by the University, and the Human Resources department played an active role in the SCP. Employees were entitled but not required to use the SCP; at the end, a review panel’s decision would be final and binding.

In the meantime, the Teamsters filed a petition later in 2003 for an election among the University’s parking services employees. The Teamsters were opposed by the University administration, who touted the value of the SCP. The Teamsters filed unfair labor practice charges against Syracuse, claiming the SCP was a labor organization dominated by the employer and thus in violation of Section 8(a)(2) of the NLRA, which states that it is an unfair labor practice for an employer to “dominate or interfere with the formation or administration of any labor organization.”

The NLRB administrative law judge agreed with the Teamsters, concluding that the SCP was a “plan” or “agency” created by the University where employees participate in a bilateral process with management for the purpose of resolving employee grievances with their supervisors. He found that staff employees “deal” with management on the complainant’s behalf and thus perform functions that are representational in nature. All of this, concluded the judge, was in violation of the Act.

The Board panel, however, disagreed and reversed. As the Board noted:

The Board will find a committee is a labor organization under Section 2 (5) [of the NLRA] if (1) employees participate, 2) the organization exists, at least in part, for the purpose of “dealing with” employers, 3) these dealings concern conditions of employment or other statutory objects, such as grievances, labor disputes, wages, rates of pay, or hours of employment, and 4) if an “employee representation committee or plan” is involved, there is evidence that the

committee is in some way representing the employees. Second, if the organization satisfied those criteria, the Board considers whether the employer has engaged in any of the forms of conduct proscribed by Section 8(a)(2), i.e., domination or interference with the organization's formation or administration, or unlawful support of the organization.

In this case, the Board concluded that the SCP is not a labor organization because "its purpose is not to 'deal with' the employer on terms and conditions of employment. Rather, its purpose was limited to an adjudicatory function." The SCP does not make proposals to management of any type on bargainable topics; it simply renders a decision as to the propriety of management's action. While a management official may sit as a member of a three-member panel, there was no evidence that the managerial official "deals with" the two other employees as if they were on opposing sides. Rather, they sit as a panel and make a group decision. Because of the lack of back and forth discussions on the panel's recommendation, the SCP was deemed not to be a labor organization.

2. *Dana Corporation/Metaldyne Corporation*, 351 NLRB No. 28 (Sept. 29, 2007)

While this case is important because it made significant changes to the "recognition bar" doctrine, it is likely that the new NLRB will have an opportunity to reconsider and reverse its decision.

Two corporations (Dana and Metaldyne) entered into neutrality and card check agreements with the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO – meaning that the corporations agreed not to attempt to affect the outcome of the unionization drive and agreed to recognize the union upon a showing of majority support of the unit employees. Each employer subsequently recognized the union, but within five weeks, employees at both companies (over 50% of the Metaldyne employees and 35% of the Dana employees) filed for decertification of the nascent union. NLRB regional directors dismissed the decertification petitions, based on the recognition-bar doctrine, which holds that "an employer's voluntary recognition of a union, in good faith and based on a demonstrated majority status, immediately bars an election petition filed by an employee or a rival union for a reasonable period of time" – generally up to three years of the new contract's term.

The NLRB agreed to reconsider the regional directors' decisions, and in a sweeping decision ruled (over a strong dissent by two members) that the recognition bar does not sufficiently protect employees' ability to exercise their choice in representation through a Board-conducted election and therefore must be overturned.

Practically speaking, if this decision remains good law, any unit achieving voluntary recognition, whether with or without a neutrality agreement or card-check agreement, will be vulnerable to a decertification petition or challenges from a rival union until notice has been posted and 45 days have passed without challenge. Under this decision, the risk to the unit will remain active during the 45-day window even if a collective bargaining agreement is actually executed soon after voluntary recognition.

C. Grievances

1. *Ramos v. Tacoma Community College*, 304 Fed. Appx. 564, (9th Cir. 2008) (unpub.)

In this case, the Ninth Circuit held that a settlement agreement entered into on behalf of an instructor that released a community college from all claims and causes of action relating to the instructor's employment, for purposes of settling her wrongful termination action, was valid and binding because the union had the authority to enter into the agreement on her behalf despite her objections. Since this is an unpublished decision, this decision cannot be cited to or used as precedent.

After the instructor was terminated from the college, the union negotiated a settlement agreement with the college that allowed her to receive pay through the end of her contract term and struck the termination letter from her file. Nevertheless, she had objected to the settlement and then filed suit against the college and also against the union for violating its duty of fair representation. The court held that the union had full authority to settle the matter, despite her objections, because the union had not acted perfunctorily or in bad faith. The court cited to an earlier case in which it reasoned:

Appellants' contemporaneous objections to the settlement do not render the Union's acceptance of it a bad faith act. When employees make their union the sole bargaining representative with the employer, they relinquish the right to control the settlement of their grievances. Unions are free to negotiate and accept settlements even without the grievants' approval.

Shane v. Greyhound Lines, Inc., 868 F. 2d 1057 (9th Cir. 1989).

2. *Luzerne County Community College Association of Higher Education v. Luzerne County Community College*, 916 A.2d 731 (Pa. Cmwlth. Ct. 2007)

A Pennsylvania state court found that when a community college failed to respond in a timely manner to a professor's grievance over the denial of a promotion from Assistant to Associate Professor, the arbitrator was permitted to award the promotion to the faculty member. The CBA read: "If a grievance is not responded to by the President or his/her designee within the time frame prescribed in this Section, then said grievance will be deemed resolved in favor of the grievant and/or the [union]." The court also rejected the university's argument that promotions are a core function of the university and can be granted only by the Board of Trustees, noting that (1) the CBA specifically contemplated a resolution in favor of the grievant when there is no response from the university; (2) the Board of Trustees was bound by the consequences of the university's lack of response to the grievance; and (3) (though the court found this to be the least important element) there were other provisions in the CBA allowing for promotion to be granted automatically rather than by decision of the Board of Trustees.

D. Union Employees' Rights to Use Email

In late 2007, the NLRB held that unionized employees in the private sector have “no statutory right to use [their employer’s] e-mail system for Section 7 purposes” and that “discrimination under the [NLRA] means drawing a distinction *along* Section 7 lines.”² *Guard Publishing Company, d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194*, 351 NLRB No. 70 (2007). This majority decision – against a vigorous dissent – turned on its head decades of NLRB precedent protecting Section 7 communication rights. Since this was such a departure from existing NLRB precedent and because one of the dissenting members is now the Chair of the NLRB, it seems likely that the Board’s decision in *Register-Guard* will be revisited by the new NLRB Board. In addition, a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit, *Guard Publishing Company v. NLRB*, No. 07-1528 (D.C. Cir. July 7, 2009), ruled against the company and remanded the case back to the NLRB for further proceedings. Unfortunately, the court’s decision was primarily technical in nature and did not go to the heart of whether or not the company’s policy barring the union access to email was unlawful; the substance of the NLRB’s decision in *Register-Guard* therefore still stands.

In *Register-Guard*, the majority of the NLRB determined that “an employer has a basic property right to regulate and restrict employee use of company property,” reasoning that Register-Guard’s e-mail system was Register-Guard’s “property.” The majority also asserted that Register-Guard had “a legitimate business interest in maintaining the efficient operation of its e-mail system” as long as any restrictions were non-discriminatory. In this case, Register-Guard employees had “the full panoply of rights to engage in oral solicitation on nonworking time and also to distribute literature on nonworking time in nonwork areas.”

Two members of the NLRB however, vehemently disagreed with this decision, including the current Chair of the Board, Wilma Liebman. In a blistering dissent, Liebman and former member Dennis Walsh excoriated the NLRB for not having recognized how email has revolutionized communications in and out of the workplace. They also cited approvingly to the Supreme Court’s presumption that a rule banning solicitation on employer premises during nonworking time is an unlawful “impediment to self-organization” in the absence of “special circumstances.” *Republic Aviation Corp. v. NLRB*, 324 US 793 (1945).

Following the *Register-Guard* decision, the General Counsel of the National Labor Relations Board asked all NLRB Regional Offices to submit discrimination cases implicating *Register-Guard* to the NLRB’s Division of Advice “in order to assure a consistent approach to the interpretation of that decision.”³ In a report issued by his office in May 2008, the General Counsel noted that in *Register-Guard*, “although the employer permitted personal e-mail solicitation, the employer had not permitted e-mails soliciting support for any outside group or organization in the past.” Under that reasoning, the Board viewed unions as outside organizations, such that employers could lawfully prohibit employees from soliciting support for unions through email communication. The General Counsel made it clear, however, that an employer must be consistent in its prohibition of outside group and organization solicitation,

² Section 7 of the National Labor Relations Act protects employees’ rights to “self-organiz[e], to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining” 29 U.S.C. § 157.

³ Office of the General Counsel Memorandum GC 08-07 (May 15, 2008) (available at http://www.nlr.gov/Research/Memos/general_counsel_memos.aspx (last visited January 12, 2009)).

whether for Mary Kay cosmetics or school fund-raising drives, in order for the action to be non-discriminatory when applied to union solicitation.

E. Political Activities

1. NLRB Guidance on NLRA-Protected Rights and Political Activity

A July 2008 memorandum from the General Counsel of the NLRB provides guidance on the intersection of political activity and employees' rights to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as protected by Section 7 of the National Labor Relations Act.⁴ In the memorandum, the General Counsel advises that where there is a "direct nexus" between the subject of political advocacy and a "specifically identified employment concern of the participating employees," the political advocacy is protected. The General Counsel did recognize, however, that there are instances when political advocacy constituting "mutual aid or protection" under Section 7 still may not be protected because of the means used to carry it out. Thus, when employees leave the workplace during work time to engage in a political demonstration, the activity is not protected because, unlike in the case of strikes (which are protected), the subject of the demonstration is outside of the employer's control.

The memo provides the following guidance based on a survey of NLRB case:

- "non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern, that takes place during the employees' own time and in nonwork areas, is protected;
- on-duty political advocacy for or against a specific issue related to a specifically identified employment concern is subject to restrictions imposed by lawful and neutrally-applied work rules; and
- leaving or stopping work to engage in political advocacy for or against a specific issue related to a specifically identified employment concern may also be subject to restrictions imposed by lawful and neutrally-applied work rules."

The General Counsel therefore directed that in matters involving political advocacy that might be protected under Section 7, the NLRB Regional Director "should first determine the purpose and subject matter of the advocacy." The Regional Director should then investigate the means employed. Political activity related to employment concerns occurring during nonwork time and in nonwork areas is generally protected. On the other hand, on-duty political advocacy is subject to restrictions imposed by lawful, neutrally-applied work rules. As in any case, the Region should also investigate whether any discipline imposed was consistent with or a departure from a neutral, nondiscriminatory policy and the employer's past practice.

⁴ Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy (Memorandum GC 08-10, July 22, 2008). See http://www.nlr.gov/Research/Memos/general_counsel_memos.aspx; click on the first memorandum listed under year 2008.

F. Union Dues, Agency Fee and Restrictions on Union Fees

1. *Davenport v. Washington Education Association*, 551 U.S. 177 (2007)

In June 2007, the United States Supreme Court decided a case that could have implications for all unions that collect agency fees from non-members. In *Davenport*, the Supreme Court upheld a 1992 Washington state statute prohibiting unions from using nonmembers' agency fees to "make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual."

In 2001, the state of Washington and several nonmembers of the Washington Education Association (WEA) sued the WEA, an 80,000-person union with about 1,200 members in higher education and approximately 4,000 nonmembers. Twice a year, the WEA sent each nonmember a "*Hudson* packet," which informed nonmembers of their right not to pay for political expenditures that were unrelated to the union's collective bargaining services. The fees of objecting nonmembers were set aside and not used for political purposes. The lawsuits challenged this system, claiming that the WEA's procedure failed to obtain the required "affirmative authorization" from nonmembers who did not explicitly object to the political use of their agency fees. The WEA argued in response that the 1992 statute made it difficult for the union to exercise its own rights of political expression and for that reason violated the First Amendment to the United States Constitution.

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

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

2. *Locke v. Karass*, 129 S. Ct. 798 (2009)

In this case, the Supreme Court has clarified the circumstances under which unions may collect agency fees from employees who are not members of a bargaining unit, where those charges include fees for extra-unit activities such as litigation by a national union. In a unanimous decision, the Court ruled that fees for national litigation activity could be charged as long as: 1) the subject of the litigation was such that it would be chargeable if the litigation were local (i.e., it was related to collective bargaining rather than political activities); and 2) the litigation charge was reciprocal in nature (i.e., a pooling arrangement existed where the local would have access to the same resource if and when needed).

The case arose when the State of Maine entered into a collective bargaining agreement in 2003 with its designated exclusive bargaining agent, the Maine State Employees Association. The CBA included a new provision requiring non-member employees to pay a “service fee” as a condition of their employment. A group of non-member employees filed a grievance and a lawsuit seeking an injunction against the “service fee” and alleging that the fee violated their First, Fourth, and Fifth Amendment rights under the U.S. Constitution. The district court rejected the plaintiffs’ arguments, finding that the CBA had provided reasonable notice and detail of the fee and that it protected the money by depositing it in an escrow account until any challenges to calculation of the service fee were settled, in accordance with *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

On appeal, the plaintiffs focused their claims on the portion of the proposed fees that was inserted into a national pool to support litigation related to other bargaining units, alleging that this portion violated their First Amendment rights. Relying heavily on the “chargeability test” in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), a three-part test for determining which union expenditures can be charged to nonmembers,⁵ the U.S. Court of Appeals for the First Circuit affirmed the district court’s decision. The appellate court ruled that neither party disputed that the litigation charges were “germane” to collective bargaining activities; the state had an interest in maintaining labor peace; and the fee did not significantly add to the burdening of free speech inherent in an agency or union shop.

In unanimously upholding the First Circuit’s decision, the Supreme Court unveiled the two-part review described above for determining the constitutionality of charging “agency fees,” inclusive of affiliation fees and litigation costs, to nonmembers. That is, fees for national litigation activity could be charged as long as: 1) the subject of the litigation was such that it would be chargeable if the litigation were local (i.e., it was related to collective bargaining rather than political activities); and 2) the litigation charge was reciprocal in nature (i.e., a pooling arrangement existed where the local would have access to the same resource if and when needed).

A concurring opinion written by Justice Alito and joined by Chief Justice Roberts and Justice Scalia appears to invite additional litigation to clarify the definition of “reciprocity” as required by the second part of the review.

⁵ According to the *Lehnert* Court, “chargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free-riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.” 500 U.S. at 519.

3. *Ysursa v. Pocatello Education Association et al.*, 129 S. Ct. 1093 (2009)

In this case, the United States Supreme Court found that a state law prohibiting payroll deduction for union dues was constitutional as applied to local government employees.

In 2003, the Idaho legislature passed the Voluntary Contributions Act (VCA), which, among other things, amended a statute authorizing automatic payroll deductions for union dues. The effect of the VCA was to prohibit payroll deductions for union “political activities.” The VCA prohibited such deductions for state, local and private employees and imposed criminal penalties for violations of the law. Prior to its enactment, several unions filed suit challenging the constitutionality of the VCA, arguing that it infringed upon unions’ First Amendment rights to engage in political speech.

After lower courts upheld the payroll deduction prohibition for state employees but held that it was unconstitutional as applied to private and local government employees, the Supreme Court held that the prohibition was also constitutional as applied to local government employees.

In its analysis, the Court ruled that the VCA does not infringe on a union’s First Amendment right to engage in political speech but merely prohibits the state from subsidizing the speech by paying for the payroll deduction process. Since the law did not infringe on unions’ speech rights, the Court declared that the State was required only to demonstrate a rational basis to justify the ban, which it had: “Idaho does not suppress political speech but simply declines to promote it through public employer checkoffs for political activities.... The ban on such deductions plainly serves the State’s interest in separating public employment from political activities.” *Id.* at 1099.

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

This case involved a constitutional challenge to a Utah law prohibiting state and local public employers from making automatic deductions from their employees’ paychecks for political activities. Originally found to be unconstitutional by a district court, the law was upheld as constitutional by the U.S. Court of Appeals for the Tenth Circuit in the wake of the Supreme Court decision in *Ysursa*, above.

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

Specifically, the court ruled that as in *Ysursa*, the law in Utah merely prevented the government from subsidizing political activities and therefore did not infringe on any

individual's First Amendment rights. Because there were no First Amendment rights at stake, the state's interest in avoiding disruption of governmental workplaces by partisan politics was sufficient justification for the law. Furthermore, the law was constitutional as applied to all government entities in the state, including local and county governments, under the Supreme Court's reasoning in *Ysursa*.

5. ***Tribune Publishing Co. v. NLRB***, 564 F.3d 1330 (D.C. Cir 2009)

In this case, the Tribune Publishing Company appealed a decision by the NLRB finding that the company had engaged in an unfair labor practice when it unilaterally stopped collecting union dues through company direct deposit procedures. In April 2009, the U.S. Court of Appeals for the District of Columbia Circuit upheld the NLRB decision.

The Tribune Publishing Company (Tribune) publishes a daily newspaper in Columbia, Missouri. The Tribune and the employees' union had a collective bargaining agreement that included a provision authorizing the Tribune to withhold union dues through payroll deduction procedures upon written request of the employee. In 2001, when the CBA expired, the company continued withholding union dues through payroll deduction for approximately one pay period and then discontinued the deduction procedures. When the automatic payroll deduction ended, but while negotiations for a new CBA were ongoing, the union members submitted direct deposit authorization forms for payment of union dues. The Tribune accepted the signed direct deposit forms and automatically withheld union dues for one pay period, but then discontinued the direct deposit transactions and sent letters to the union members calling it a "mistake." Based on this discontinuance, the Union filed a charge of unfair labor practices with the NLRB.

After decisions by an administrative law judge and the NLRB, the Tribune appealed the NLRB decision to the U.S. Court of Appeals for the District of Columbia Circuit, making two primary arguments: first, that its use of direct deposit procedures was merely an extension of the automatic payroll deduction provision of the expired CBA which it therefore could cease at anytime; and second, that it was illegal to use its direct deposit procedures because Section 302 of the Labor Management Relations Act requires that any agreement for payroll deduction of union dues must be in writing as part of a signed union agreement.

The Court of Appeals rejected both of the Tribune's arguments. First, the court found that when the Tribune ceased to use payroll deduction upon expiration of the CBA, it unilaterally terminated the practice and could not then "reconstitute" it under the expired CBA. Therefore, when the Tribune agreed subsequently to withhold union dues through its direct deposit procedures, it was establishing a new term and condition of employment with its employees such that it could not unilaterally stop using direct deposit without bargaining with the union.

The Court of Appeals also disagreed with the Tribune's argument that Section 302 requires a signed union contract in order for automatic payroll deduction to be used to collect union dues. Instead, Section 302 merely requires that an employee give written consent for automatic deduction that is revocable after a year. In this instance, the employees had all signed written direct deposit forms that could be revocable at anytime. The direct deposit process was a substitute form of automatic payroll deduction for union dues. Therefore, the direct deposit

procedure met the legal requirements of Section 302. Thus, the court of appeals upheld the ruling of the NLRB finding that the Tribune had engaged in an unfair labor practice.

6. *Seidemann v. Bowen*, 499 F.3d 119 (2nd Cir. 2007).

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

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

Second, the court held that PSC's requirement that an objector "indicate to the union local president the percent of agency fees that s/he believes is in dispute" in order to obtain arbitration of a disputed fee violated Seidemann's First Amendment rights. The court noted that "the Supreme Court has specifically and consistently rejected the notion that dissenters must object with particularity."

When taken in combination with cases from the D.C. Circuit and the Sixth Circuit, as well as the Supreme Court's *Davenport* case, this case suggests that courts may be becoming increasingly hostile to the collection of agency fees.

III. Discrimination

A. New Federal Law – The Lilly Ledbetter Fair Pay Act (Pub.L.No. 111-2)

The recently enacted Lilly Ledbetter Fair Pay Act was specifically designed to reverse the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co*, 550 U.S.618, (2007), where the Court ruled that the time limits for filing a discrimination charge with the EEOC starts

to run when the employer makes a discriminatory decision about the employee's compensation, not each time the employee receives a paycheck affected by discrimination.

The Ledbetter Act amends the Civil Rights Act of 1964⁶ and the Age Discrimination in Employment Act of 1967⁷ to declare that an unlawful employment practice occurs when: 1) a discriminatory compensation decision or other practice is adopted; 2) an individual becomes subject to the decision or practice; *or* 3) an individual is affected by application of the decision or practice, including each time compensation is paid. Thus, plaintiffs are no longer required to file a claim within 180 days of a harmful compensation decision. A victim of compensation discrimination can recover back pay for up to two years preceding the filing of the charge, as long as the unlawful employment practices that occurred during the period for filing a charge are similar or related to practices that occurred outside the time for filing a charge. The act applies the amendments to claims of compensation discrimination under the Americans with Disabilities Act of 1990⁸ and the Rehabilitation Act of 1974⁹.

The term "compensation decision or other practice" as used in the statute certainly covers wages and salaries; consistent with EEOC regulations defining "compensation," it is likely also to cover "overtime, bonuses, vacations and holiday pay; cleaning or gasoline allowances; hotel accommodations; use of company car; medical, hospital, accident, life insurance; retirement benefits; stock options, profit sharing or bonus plans; reimbursement for travel expenses, expense accounts, benefits or some other name."¹⁰

The main purpose of the Ledbetter Act is to clarify that discriminatory compensation decisions or other practices occur "each time compensation is paid."¹¹ With regard to wages and salaries, it is clear that those forms of compensation are paid when an employee receives a paycheck. Ambiguity exists, however, regarding the determination of when other forms of compensation are considered paid for purposes of this legislation.

The law applies to all claims as if it were enacted on May 28, 2007 (the day before *Ledbetter* was decided).

1. ***Gentry v. Jackson State University***, 2009 U.S. Dist. LEXIS 35271 (S.D. Miss. April 17, 2009)

In this case, a federal district court in Mississippi applied the Ledbetter Act when it granted in part and denied in part a summary judgment motion made by Jackson State University (JSU) in an employment discrimination case brought by a female faculty member. Since the motion was partially denied, the case continues to move forward on the faculty member's active claims.

⁶ 42 U.S.C. sections 2000e *et seq*

⁷ 29 U.S.C. sections 621 *et seq*

⁸ 42 U.S.C. sections 12101 *et seq*

⁹ 29 U.S.C. sections 701 *et seq*

¹⁰ *EEOC Compliance Manual: Compensation Discrimination*, No. 915.003 (2000), Section 10-3 n.13

¹¹ Pub. L. No. 111-2.

Professor Laverne Gentry filed suit against her employer, JSU, alleging that she was denied tenure and a related salary increase because of her gender and race. Among other things, Professor Gentry alleged that she had suffered gender discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. The court denied JSU's motion for summary judgment on these claims.

In its decision, the court reasoned that the Ledbetter Act was relevant to Professor Gentry's argument that the denial of tenure negatively affected her salary. Even though Professor Gentry did not file her complaint until almost two years after she was denied tenure, her lawsuit was timely under the Ledbetter Act because the tenure decision negatively affected her compensation.

Furthermore, the court denied JSU's summary judgment motion as to Professor Gentry's claims of retaliation, finding that Professor Gentry had complained to the school about discrimination; that such activity was protected by Title VII against retaliation; and that Professor Gentry had adequately shown a causal connection between her earlier complaints of discrimination and her claims of retaliation.

Professor Gentry may therefore move forward with her Title VII claims of gender discrimination and retaliation.

B. Other Federal Discrimination Cases

There have been several other important federal court decisions in the discrimination arena. In addition to the *Ledbetter* case mentioned at the start of this section, there were four other Supreme Court decisions in the last two years pertaining to discrimination issues.

First, the Supreme Court ruled that Title VII's prohibition against retaliation protects employees who have not filed an EEOC complaint but participate in an internal non-EEOC investigation of a Title VII claim. In *Crawford v. Metropolitan Government of Nashville*, 129 S. Ct. 846 (2009), an employee who was interviewed about inappropriate conduct by her manager was subsequently fired from her job. The employee sued, alleging that she had been terminated in retaliation for her honest participation in the harassment investigation. The Supreme Court unanimously held that the "opposition" clause of Title VII's anti-retaliation provisions protects an employee who testifies in an internal investigation of alleged harassment even before an EEOC complaint has been filed.

Second, the Supreme Court ruled in 2008 that the "class-of-one" Equal Protection theory was not applicable in the public employment context. In *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008), a former employee of the Oregon Department of Agriculture ("ODA") filed suit against the ODA asserting, among other things, that the ODA had violated her rights under the Equal Protection Clause of the Constitution by treating her differently from her co-workers without a justifiable rationale. This theory is known as an Equal Protection "class of one" claim, because it focuses on the employee as an individual rather than as a member of a "protected class" – i.e., a class defined by race, national origin, or gender. In June 2008, the Supreme Court ruled that the "class of one" Equal Protection theory should be

limited to circumstances where the government acts as a regulator (i.e., in zoning decisions) and not where it acts as an employer. Reasoning that there was a “crucial difference . . . between the government exercising ‘the power to regulate or license, as lawmaker,’ and the government acting ‘as proprietor, to manage [its] internal operations,’” the Court found that the government acting as an employer has far broader powers to manage personnel matters than it does as an agent regulating citizen activities.

Third, the Supreme Court also ruled in 2008 that when an employer makes an employment decision that has a disproportionate impact on older workers, and alleges that the decision was based on “reasonable factors other than age,” the employer must both produce the relevant facts and persuade the jury or the judge about those factors; employees are not obligated to show that such factors did not exist. In *Meacham v. Knolls Power Atomic Laboratory*, 128 S. Ct. 2395 (2008), a group of employees sued their employer after being laid off through a layoff plan that had a disproportionate effect, or “disparate impact,” on older workers. In June 2008 the Supreme Court held that employers bear the burden of proving they acted based on “reasonable factors other than age” in disparate impact cases.

Unfortunately, the Supreme Court recently made it more difficult for individual employees to prove they have been discriminated against because of their age. In *Gross v. FBL Financial Services, Inc.*, No. 08-441 (U.S. June 18, 2009), the Court ruled in a 5 to 4 decision that plaintiff employees bear the burden of showing that their employer took an adverse employment action against them *because of* their age. In doing so, the Court rejected the argument that it was sufficient for plaintiffs to show that age was a *motivating* factor in the employer’s decision. The Court stated that a “plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action.” Furthermore, the Court also rejected the notion that the burden of proof should be shifted to the employer to show it would have taken the adverse action anyway, as it is in Title VII “mixed motive” employment discrimination cases.

In addition, in one lower federal court decision of note, the U.S. Court of Appeals for the Second Circuit held that there may be a violation of Title VII where an employer takes action against an employee who is not in a protected category (i.e., race, gender, etc.) but is in a relationship with a person in a protected category, if the termination is due at least in part to that relationship. In *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), an assistant head coach of Iona College’s basketball team was terminated and the coach sued, alleging that his termination was at least in part motivated by the fact that he was white and his wife was African-American. The Second Circuit reasoned that “where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s *own* race.” The coach may therefore move forward with his case at the trial court.

IV. Faculty Members’ Property Interests

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

This case involved a challenge by the Kansas National Education Association (KNEA) to the Kansas Board of Regents' proposed policy giving ownership of faculty intellectual property to the universities at which the faculty members work, rather than to the faculty members themselves. While the Regents had agreed to *discuss* implementation of the intellectual property policy, they ultimately refused to *meet and confer* regarding the policy. The KNEA filed a prohibited practice complaint with the Public Employee Relations Board (PERB), and in 2004, a Kansas appellate court ruled against the KNEA, stating that the Regents were not required to engage in bargaining with the union on copyright ownership issues because such a practice would conflict with federal law's provision that an author *may* negotiate away his or her intellectual property rights but cannot be *required* to do so. The state appeals judge reached this decision by assuming that the faculty members' intellectual property was work-for-hire, and thus the property of the University.

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

In a victory for the KNEA and faculty members, the PERB concluded that ownership of intellectual property was a mandatory subject of bargaining; the PERB therefore found that the university and Regents had engaged in various prohibited bargaining practices and ordered that the Regents and university withdraw its unilateral implementation of the intellectual property policy and meet and confer in good faith with the KNEA on intellectual property rights (a decision that the PERB subsequently upheld after an appeal). The decision, which was an “initial order,” became a final order after consideration by the full PERB on August 16, 2007.

2. *Gunasekera v. Irwin*, 551 F.3d 461 (6th Cir. 2009)

In this case, a faculty member sued his dean and university provost, alleging that they had violated his due process rights by (1) depriving him of his property interest in his Graduate Faculty status without “notice and a meaningful opportunity to be heard” and (2) depriving him of his liberty by “publiciz[ing] accusations about his role in plagiarism by his graduate student advisees” without giving him a “meaningful opportunity to clear his name.” The lower federal court found in favor of the dean and the provost on a variety of grounds but the United States Court of Appeals for the Sixth Circuit reversed and ruled for the faculty member.

Jay Gunasekera was a professor of mechanical engineering at Ohio University; as of 2004, he had worked at OU for more than twenty years, been chair of the department for fifteen, and had Graduate Faculty status, which allowed him to supervise graduate students' thesis work. That year, there was a scandal over plagiarism; after the dean of the engineering college commissioned a report on the plagiarism, the provost of the university held a press conference at which he singled out Dr. Gunasekera for "ignoring [his] ethical responsibilities and contributing to an atmosphere of negligence toward issues of academic misconduct." In response to the report, OU suspended Dr. Gunasekera's Graduate Faculty status for three years and prohibited him from advising graduate students. Following these actions, Dr. Gunasekera sued in federal district court.

After the district court found in favor of the provost and dean, Gunasekera appealed, arguing among other things that (1) he had a property interest in his Graduate Faculty status and was deprived of that interest without due process, and (2) the name-clearing hearing he was offered did not satisfy due process because it was not public.

The Sixth Circuit reversed the district court's decision, ruling that the dean and the provost may have, in fact, deprived Dr. Gunasekera of a protected property interest and that he was entitled to a name-clearing hearing. The appeals court remanded the case back to district court for further proceedings and left it to the district court to determine the "exact parameters of the name-clearing hearing."

The appeals court also held that while the dean and provost were not individually liable for the name-clearing hearing claim, they were individually liable for failing to give Gunasekera a pre- or post-deprivation hearing for his Graduate Faculty status.

3. *Helpin v. Trustees of the University of Pennsylvania*, 969 A.2d 601 (Pa. Super. Ct. 2009)

In this case, the Superior Court of Pennsylvania upheld a trial court's decision awarding the University of Pennsylvania's former Chair of Pediatric Dentistry, who also directed a University of Pennsylvania dental clinic, more than \$4 million in damages after he was removed from his position and transferred to a new clinic.

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

Following a jury verdict for Dr. Helpin, the University of Pennsylvania appealed the verdict and the damages award arguing, among other things, that the "offer letter" was not an

enforceable contract. The appellate court rejected the University's arguments, finding that the university had compensated Dr. Helpin during his entire period of employment as outlined in the "offer letter." Therefore, the court found the jury had appropriately found the "offer letter" to be an enforceable contract. The university also argued that Dr. Helpin was not entitled to damages because he chose to leave the school and that he was not terminated. Again, the appellate court rejected the university's arguments and ruled that the jury had reasonably concluded that Dr. Helpin had been "constructively terminated." As such, the appellate court found the facts of the case legally sufficient to sustain the jury's finding that Dr. Helpin's contract had been breached and that he was "constructively terminated" and therefore entitled to damages.

V. Employment Benefits for Contingent Faculty

1. *Indiana State University v. LaFief*, 888 N.E.2d 184 (Ind. 2008)

In *LaFief*, a split Indiana Supreme Court decided that an adjunct professor who was non-renewed when his one-year employment contract expired was eligible for unemployment insurance benefits.

The plaintiff in this case, William LaFief, was appointed an assistant professor at Indiana State University for the 2004-05 academic year and was reappointed for 2005-06. At the conclusion of his second contract in 2006, the university informed him that he would not be renewed. He subsequently filed for unemployment benefits and the university challenged his eligibility.

After a series of prior decisions, a three-justice majority of the Indiana Supreme Court held that LaFief was entitled to benefits under Indiana's Unemployment Compensation Act. The Court noted that the Act is intended to provide benefits for persons "unemployed through no fault of their own." The Court reasoned that the Act does not require that an employee be "discharged" to receive benefits; an otherwise eligible employee can be disqualified from receiving benefits only if he voluntarily quit his employment without good cause, was terminated for just cause, or failed to accept suitable work offered him. Given the facts of this case, the Court concluded that LaFief was eligible for unemployment insurance.

In a final note, the Court observed that while LaFief was entitled to benefits, this ruling would not apply to persons who contractually agree to mandatory vacation periods or temporary shutdowns with "reasonable assurance" that they will continue to be employed after the mandatory vacation period or shutdown ends. This means that contingent faculty who have no contract for work over the summer months are not entitled to unemployment compensation during the hiatus from work if they have a "reasonable assurance" of continued work in the fall.