AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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

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I. Introduction

Much of the litigation in higher education during the last year continued to focus on employee speech. Whether speech in the classroom, speech related to college and university governance, or research related speech, faculty members saw continuing aggressive challenges to what they are allowed to say publicly or email privately. Some of the cases included in this outline follow-up on information provided over the past two years as cases are making their way through the legal system. This outline also includes new information including new speech cases filed and a brief look at how state "open records" laws are being used to target faculty members' communications concerning their scholarship and research. In addition, this outline includes cases and information touching on such issues as affirmative action, employment discrimination, intellectual property rights, and some other miscellaneous areas of interest for those in higher education.

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

As we have seen since the Supreme Court decision in *Garcetti v. Ceballos*, free speech in academia in the United States has been challenged. Faculty members and academic professionals should have a right to freely express themselves, both in the classroom and externally, because they play an important role in providing necessary criticism, insight, and invention in society.

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

> The 1940 Statement declares:
> "College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution."

The freedom to speak as citizens is also recognized in the AAUP's *Statement on Extramural Utterances* and the *Statement on Professors and Political Activity*. Recent court decisions, however, have tended towards stifling academic free speech and in discouraging open discussion of matters of public concern.

As mentioned above, the challenge to academic free speech began following the Supreme Court case of *Garcetti v. Ceballos*. In 2006, the United States Supreme Court ruled that a public employee does not receive First Amendment protection when speech is made pursuant to his or her official duties. This ruling has drastically changed employer-employee relations in the public service sector, as well as the legal landscape related to employee speech rights.

THE CONTROLLING CASE

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

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

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

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

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

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

A. Speech Related to University Governance and Administrative Matters

Savage v. Gee, 665 F.3d 732 (6th Cir. 2012)

In this case, Scott Savage, the head reference librarian at Ohio State University at Mansfield, appealed a federal district court ruling, dismissing his claim that his First Amendment rights had been violated and that he was constructively discharged because of his speech. The district court decision appeared to take the view that all speech made as a member of a faculty governance committee would be unprotected under the "official duties" analysis of *Garcetti*.

In 2006, Savage served on a committee choosing a book to assign to all incoming freshman. His suggestion, *The Marketing of Evil* – a book that the Ohio district court found contained "a chapter discussing homosexuality as aberrant human behavior that has gained general acceptance under the guise of political correctness" – led to considerable controversy among campus faculty. Several gay faculty members filed sexual harassment complaints with the university against Savage, and Savage filed his own complaints of harassment against

several faculty members. After the university rejected both sides' charges, Savage resigned and then sued, claiming he had been retaliated against in violation of the First Amendment.

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

Savage appealed this decision to the Sixth Circuit Court of Appeals. On January 4, 2012, the Sixth Circuit upheld the district court's decision, ruling that Savage's speech was not protected by the First Amendment because it was made pursuant to his official duties as a member of the committee charged with choosing the book assignment. The court further stated that it believed Savage's speech was also not protected by the First Amendment because it was "only loosely, if at all, related to academic scholarship," as mentioned in the Supreme Court's *Garcetti* decision.

***Sadid v. Idaho State University*, 265 P.3d 1144 (Idaho 2011), *motion to stay denied*, *Sadid v. Idaho State Univ.*, 2012 U.S. Dist. LEXIS 32985 (D. Idaho Mar. 12, 2012).**

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

Invoking the decision in *Hong v. Grant*, the Idaho state trial court concluded that Sadid's letters related to his personal grievances, rather than to a matter of public concern. In addition, relying primarily on cases that arose outside of the academic context, the court reasoned that "government employers need a significant degree of control over their employees' words and actions." The court, therefore, disagreed with Sadid's assertion that because his job description did not include writing letters to the newspaper critiquing the ISU administration, he was writing as a private citizen rather than as a public employee. The court decided that the "tone" of Sadid's letters "is that of an employee of ISU" and added that Sadid "should understand that he has limitations of his speech that he accepted when becoming a state employee." Finally, the court noted that Sadid had "continuously" identified himself as an ISU employee in the published letters. The court concluded that, "due to the tone and language of the letter," Sadid was speaking as an employee and not as a private citizen and his comments were therefore not protected by the First Amendment.

Professor Sadid appealed the trial court's decision to the Supreme Court of Idaho, and the AAUP and the Thomas Jefferson Center for the Protection of Free Expression filed an amicus brief in support of Sadid. On November 30, 2011, the Idaho Supreme Court upheld the trial court's dismissal of Sadid's case, but rejected the trial court's First Amendment analysis. The Supreme Court concluded that the trial court erred in finding that Sadid's speech was made pursuant to his official duties and that the speech did not address a matter of public concern. The Supreme Court specifically found that there was "no evidence showing that Plaintiff's official duties included making statements on behalf of the University regarding the subject matter of his letters, nor is there evidence that his employment responsibilities included creating the statements that were published in the newspaper." The court, therefore, concluded that Sadid's speech was made as a private citizen. The court further ruled that Sadid's expressions of unease about the University's treatment of the engineering program was a matter of public concern. As such, Sadid's speech deserved to be protected by the First Amendment.

Unfortunately, the Idaho Supreme Court ultimately ruled that the trial court correctly dismissed Sadid's case because he had failed to prove that the University took any adverse employment actions against him. Professor Sadid is currently pursuing his First Amendment and Due Process claims in the federal courts.

B. Extramural Speech

Wagner v. Jones, 664 F.3d 259 (8th Cir. 2012)

In this case, Teresa Wagner applied to become a Legal Analysis, Writing and Research (LAWR) instructor at Iowa University College of Law. After failing to be hired as a full-time instructor and also as an adjunct by the school, Wagner sued the law school's dean, Carolyn Jones, in her official and individual capacities, for violating Wagner's First Amendment right of political association.

Wagner had graduated from Iowa University College of Law in 1993 and moved to Washington, DC shortly thereafter. A self-proclaimed social conservative and registered Republican, Wagner worked with the National Right to Life Committee and the Family Research Council while in Washington DC. She also taught legal research and writing at George Mason University School of Law for two years. Upon moving back to Iowa, Wagner applied to become an LAWR instructor with the law school and was one of only three candidates interviewed in-person for two open instructor positions. Although she received significant positive feedback throughout the process, Wagner claims she was told by an Associate Dean to conceal the fact that she had been offered a tenure-track position with the Ave Maria School of Law because it was viewed as a conservative school. Wagner alleges that the faculty voted not to hire her for the instructor position and subsequent adjunct positions over a two year period because of her conservative political beliefs and association.

The district court for the Southern District of Iowa summarily dismissed Wagner's case finding, primarily, that Dean Jones was reasonable in "accepting the faculty recommendation" and that a "vague message from Assistant Dean Carlson would surely not have" prompted Jones to believe "that a First Amendment…right had been implicated, let alone violated."

Wagner appealed the district court's decision to the Eight Circuit Court of Appeals which overruled the district court and remanded the case for further proceedings. The Eight Circuit's decision states that Wagner "need only prove that the employer's discriminatory motive played *a part* in" the decision not to hire her. The court also expressed that Dean Jones had a responsibility to ensure that the faculty "did not impermissibly consider Wagner's politics in making its recommendation as to whom she should hire…" Therefore, because the facts of the case as alleged should be viewed in a light most favorable to Wagner, the Eighth Circuit remanded the case back to the district court for further proceedings to determine whether Jones' repeated decisions not to hire Wagner were in part motivated by Wagner's constitutionally protected First Amendment rights of political belief and association.

***Heublein v. Wefald, et al*., 784 F. Supp. 2d 1186 (KS 2011).**

John Heublein, a tenured professor of mathematics at Kansas State University – Salina, sued the university and several of his colleagues, alleging a number of violations of his protected rights, including his First Amendment free speech rights. Heublein filed his lawsuit after he had been investigated because of a student's complaint of sexual harassment. The student's allegations against Heublein included that he had made "sarcastic remarks" and "jokes about women" in her class. During the course of its investigation, the university received reports from students and administrators that Heublein had "engaged in discourteous behavior towards students and faculty for many years." At the conclusion of the university's investigation, the university ordered Heublein to develop a corrective action plan (CAP), submit student evaluations, seek counseling, and refrain from teaching summer school until the CAP requirement was fulfilled. In response, Heublein filed an internal grievance and subsequently filed this lawsuit when the University ruled against him.

The district court dismissed all of Heublein's claims, finding that he failed to provide sufficient evidence to support them. What is most significant about the court's decision, however, is how the court analyzed Heublein's free speech claims. Since Heublein alleged violations of two types of speech – in class and out of class speech – the district court proposed that each type of speech should be evaluated under a different test. The court indicated that it believes the Tenth Circuit has developed a test for in-class speech, in the case of *Miles v. Denver Public School*, which applies to college and university professors and provides greater protection of speech than *Garcetti*.[1] For Heublein's out of class speech, the district court stated that it would need to apply the *Garcetti* test.

[1] *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991) – This case involved a high school teacher who claimed that his school had violated his first amendment rights by taking action against him for comments he made in his classroom.

In analyzing Heublein's in-class speech claim, the court noted that the key inquiry of the *Miles* test is "whether the actions taken by the college were reasonably related to [its] legitimate pedagogical interest." The court found that the university's action of mandating a CAP for Heublein was "rationally related to its legitimate interest in the professionalism or conduct exhibited by its professors," and therefore Heublein's claim of retaliation for his in-class speech failed. In analyzing Heublein's out of class speech claim which primarily related to his interactions with fellow faculty members and administrators, the court found that it did not meet the second prong of the *Garcetti* test in that it related to an internal personnel dispute or working conditions, as opposed to matters of public concern.

***Appel v. Spiridon*, 463 F. Supp. 2d 255 (D. Conn. 2006), *rev'd,* 531 F.3d 138 (2d Cir. 2008), *sum. judgment granted/denied in part,* 2011 U.S. Dist. LEXIS 92363 (D. Conn. Aug. 18, 2011).**

This long-litigated and complex case involves numerous court decisions over a six year period of time. In summary, shortly after Rosalie Appel, a tenured professor of art at Western Connecticut State University (WCSU), cooperated in the investigation of a colleague's claim of race discrimination, the university's full-time art faculty signed a petition describing Appel's behavior as "unprofessional," "disruptive," and "accusatory." A Special Assessment Committee (SAC) reviewed Appel's behavior and recommended that she be given an "in-depth psychological assessment" before the next academic semester. Appel refused to undergo the assessment and filed suit against four university administrators, alleging that the administrators' conduct violated the First Amendment and the Equal Protection Clause of the Constitution. The administration notified her that she would be suspended without pay or benefits and banned from teaching if she declined to undergo the assessment; before the suspension took effect, Appel asked the court to prevent WCSU from requiring her to undergo the assessment.

In November 2006, the federal district court in Connecticut issued an injunction prohibiting WCSU from requiring Appel to undergo a psychiatric exam in order to maintain her salary, benefits, or teaching position. The court noted that no other WCSU faculty member had ever been ordered to undergo a psychiatric exam in order to keep teaching and receiving pay and benefits. The court also determined that Appel may have been treated differently from other professors and that she was not given a chance to change her behavior before being required to undergo an evaluation. This decision did not, however, affect other aspects of the remediation plan developed by the SAC, and Appel was informed that she could return to work as long as she complied with the other provisions of the plan. The injunction was later vacated in light of a controlling United States Supreme Court decsision.

Appel returned to teaching during the spring semester of 2007, but issues between Appel and the university "rapidly escalated…and resulted in her eventual termination" in the spring of 2008. Prior to being terminated, Appel filed a second lawsuit against the university and various administrators, alleging that they violated her First Amendment speech rights and

due process rights by imposing progressive discipline against her and by ordering her to submit to a psychiatric assessment in retaliation for her testimony in support of her colleague's race discrimination claims. After combining the multiple lawsuits, the district court has now ruled in relevant part that Appel's claims for First Amendment retaliation and due process may proceed forward with respect to some, but not all, of the administrators involved in the SAC development and enforcement. Most importantly, the court ruled Appel's testimony in support of her colleague's racial discrimination case, was speech made as a private citizen on a matter of public concern and she should therefore be protected against retaliation by the First Amendment.

***Van Heerden v. Bd. of Sup. of La State Univ.,* 2011 U.S. Dist. LEXIS 121414 (M.D. La. Oct. 20, 2011).**

Ivor van Heerden, a coastal geologist and hurricane researcher, began his full-time faculty service at Louisiana State University (LSU) in 1992, when he was appointed as associate professor-research. Van Heerden co-founded the LSU Hurricane Center in 2000 and was serving as its deputy director when Hurricane Katrina hit the Gulf Coast in August 2005. Following the storm, van Heerden was selected to head a group of scientists charged with investigating the causes of the extensive flooding in New Orleans. As a result of his research, van Heerden began speaking out publicly about his concerns that the US Army Corps of Engineers had failed to properly engineer the levees in New Orleans, causing a "catastrophic structural failure" which led to the city's flooding.

In response to these comments, which they challenged, the LSU administration ordered van Heerden to stop making public statements and ultimately removed him from the group of scientists researching the New Orleans flooding. In May 2006, van Heerden published *The Storm* in which he outlined his theories concerning the Army Corps' role in the levee failures and exposed LSU's efforts at silencing him. LSU responded by further stripping him of his teaching duties and finally refused to renew his contract after nearly 20 years of employment with the university. Following the termination of his services, van Heerden sued LSU for a variety of claims including defamation, retaliation based on his protected First Amendment speech, and breach of contract.

Through a series of decisions, the federal district court for the Middle District of Louisiana dismissed many of van Heerden's claims, but on October 20, 2011, the court ruled that van Heerden could proceed with arguing that the administration's action to terminate his appointment was in retaliation for his public comments about the culpability of the Army Corps of Engineers. It is especially important to note that the court expressed particular concern about what it viewed as the misapplication of *Garcetti's* principles to academic speech. Specifically, the court stated that it "shares Justice Souter's concern that wholesale application of the *Garcetti* analysis to the type of facts presented here could lead to a whittling-away of academics' ability to delve into issues or express opinions that are unpopular, uncomfortable or unorthodox. Allowing an institution devoted to teaching and research to discipline the whole of

the academy for their failure to adhere to the tenets established by university administrators will in time do much more harm than good."

III. FOIA/Subpoenas and Academic Freedom

Over the last 18 months, FIOA requests have been rejuvenated as a method for targeting faculty who engage in "controversial" scholarship or research. While this method for obtaining information has a legitimate reason for its existence, certain groups and individuals have been using FIOA requests to intimidate faculty members and deter them from criticizing public policy or conducting research on heated issues. In addition, the power of government subpoenas has been focused on academic research. The Attorney General of Virginia has used his position to pursue his anti-climate change agenda, and the British government has used an international treatise to seek confidential research related to the conflict in Northern Ireland.

The AAUP has taken an active public stance encouraging universities to limit their disclosure of academic information to what may be legally necessary and only if the requests for information are made for justifiable reasons. The AAUP advocates for seeking a balance between the public's right to know information and the protection of the academic freedom of those in higher education.

***Rector & Visitors of the Univ. of Va. v. Cuccinelli*, 80 Va. Cir. 657 (Va. Cir. Ct. 2010); *aff'd, sub nom. Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 2012 Va. LEXIS 47 (Va. Mar. 2, 2012)**

In 2010, Virginia Attorney General Ken Cuccinelli, who publicly opposes the theory of global warming, used his position to formally request emails and other documents relating to former faculty member and climatologist Michael Mann from the University ofVirginia (UVA). Cuccinelli submitted the subpoena under authority he believed he held pursuant to the Virginia Fraud Against Taxpayers Act (FATA). On August 30, 2010, a local Virginia judge ruled that while the Virginia Attorney General could investigate state grants awarded to scientists, Cuccinelli and his staff failed to demonstrate that such an investigation was warranted in this case.

Cuccinelli appealed the trial court's decision to the Supreme Court of Virginia, and the University of Virginia cross-appealed on the grounds that the trial court erred in concluding that the university constitutes a "person" under the FATA and is therefore subject to a subpoena under the act. In conjunction with the ACLU of Virginia, the Union of Concerned Scientists, and the Thomas Jefferson Center for the Protection of Free Expression, the AAUP filed an amicus brief in the Supreme Court of Virginia opposing the subpoena.[2] The brief argued, among other

[2] *Cuccinelli v. Rector & Visitors of the Univ. of Va.,* Virginia Supreme Court Case No.:102359, Brief for *Amici Curiae* American Association of University Professors, American Civil Liberties Union of Virginia, Union of Concerned Scientists, and Thomas Jefferson Center for the Protection of Free Expression in Support of Affirmance, 4/25/2011;

things, that Cuccinelli's request was a cloaked attack on academic freedom and raised the concern that if Cuccinelli's request was granted without any basis for suspicion of fraud, it may open the door for future fraud investigations to be directed solely at novel or unpopular scientific theories. The brief pointed out that under the FATA statute, Cuccinelli must have a basis to believe that Mann committed fraud or that his emails while working at UVA would reveal evidence to support a concern of fraud. It also noted that courts have recognized that doubts about the validity of scientific work are not equivalent to fraud. The brief advocated that the Virginia Supreme Court consider First Amendment concerns in determining whether the information sought is sufficiently relevant to a false claims law investigation. Academic freedom has been recognized by many courts as an important part of the First Amendment, and the court should weigh requiring UVA to comply with the subpoena against the importance of protecting academic freedom.

On March 2, 2012, the Supreme Court of Virginia held that state universities, as agencies of the Commonwealth, do not constitute a "person" under the FATA and therefore are not subject to subpoenas. Because the FATA does not give the Attorney General authority to issue subpoenas to state universities, Cuccinelli's appeal was rendered moot.

Further fighting over Professor Mann's records continues; see the short summary below regarding the FOI request made to UVA by the American Tradition Institute.

***The American Tradition Institute and Honorable Delegate Robert Marshall. v. Rector & Visitors of the University of VA & Michael Mann*, Va. Cir. Case No.: CL-11-3236 (Circuit Court, Prince William County)**

The American Tradition Institute served a FOI request on the University of Virginia, mirroring the subpoena filed by Attorney General Cuccinelli. Unfortunately, UVA first agreed to release the requested materials by the middle of August 2012 per court order.[3] In its public statements, the university acknowledged that some of the materials are protected by statutory exemptions and that while the ATI would receive those documents, ATI was prohibited from revealing the contents unless given permission by the court. Subsequent to this decision and public announcement, the university appealed the court order requiring production. Professor Michael Mann sought to intervene in the appeal arguing that the emails in question were his and he therefore should have standing in any litigation relevant to their release. The AAUP submitted a letter to the 35th Judicial Circuit Court of Virginia in support of Mann's intervention, and the court granted him standing.

The Circuit Court is now considering whether ATI is entitled to see the documents even

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(http://www.aaup.org/NR/rdonlyres/D6CE857A-68C7-432A-BAA2-1F2D1AF1811D/0/AmicusbrieftoVASupremeCourtApril252011.pdf- last accessed 7/25/2012)

[3]"Court orders U.Va. to turn over climate scientist records under seal in denialist FOIA harassment request," Climate Science Watch (5/26/2011) (http://www.climatesciencewatch.org/2011/05/26/court-orders-uvirgini-to-turn-over-climate-scientist-records-under-seal-in-denialist-foia-harassment-request/ - last accessed 7/25/2012)

if protected from disclosure to others. AAUP and the Union of Concerned Scientists filed a joint amicus brief on July 24, 2012, in support of UVA and Professor Mann, urging that "in evaluating disclosure under FOIA, the public's right to know must be balanced against the significant risk of chilling academic freedom that FOIA requests may pose." ATI's FOI request, the brief states, seeks unpublished academic research and correspondence between Professor Mann and 39 named scientists and "strikes at the heart of academic freedom and debate." ATI justifies its broad intrusion by claiming that its purpose for obtaining the records is to "open to public inspection the workings of a government employee, including the methods and means used to prepare scientific papers and reports that have been strongly criticized for technical errors." The brief argues, however, that "in the FOIA context, the public's right to information is not absolute and courts can and do employ a balancing test to weigh the interest of the public's right to know against the equally important interests of academic freedom." Further, "this balancing approach counsels in favor of a broad understanding of the Virginia legislature's intent to protect academic research and scholarship from records request—an exception that covers most, if not all, of the materials at issue here. *See* Va. Code § 2.2-3705.4(4). Specifically, the Virginia legislature has demonstrated a desire to protect academic freedom by excluding certain 'educational records and certain records of educational institutions' from Virginia FOIA's reach. To the extent this court finds that Dr. Mann's correspondence with scientists concerning academic research and debate are 'public records' that are not otherwise protected by exclusions to FOIA, Section 2.2-3705.4.(4) should be read broadly to cover that correspondence, thereby avoiding the serious constitutional questions that disclosure under FOIA would cause."

The brief also argues that enforcement of broad FOIA requests that seek correspondence with other academics, as ATI seeks here, "will invariably chill intellectual debate among researchers and scientists." Also, exposing researchers' "initial thoughts, suspicions, and hypotheses" to public scrutiny would "inhibit researchers from speaking freely with colleagues, with no discernible countervailing benefit." The brief further argues that allowing FOIA requests "to burden a university with a broad-ranging document demands based on questions concerning the scientific validity of a researcher's work or on the potential that something might turn up would have the strong potential to 'direct the content of university discourse toward or away from particular subjects or points of view', and will have a significant chilling effect on scientific and academic research and debate."

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

Referred to collectively as the "Boston College Subpoena" case, this complex litigation involves two separate federal subpoenas served on Boston College for oral-history materials held in its John J. Burns Library. The Boston College subpoenas were issued on behalf of the British government based on the Mutual Legal Assistance Treaty (MLAT), which allows signing members to assist each other in international criminal investigations without going through

diplomatic channels. The Boston College subpoenas are part of an investigation by United Kingdom authorities into the 1972 abduction and death of Jean McConville, who was thought to have acted as an informer for the British authorities on the activities of republicans in Northern Ireland.

By way of background, between 2001 and 2006, scholars at Boston College recorded detailed interviews with former loyalist and republican paramilitary members who fought in Northern Ireland; this project is known formally as the Belfast Project. In order to make the interviewees feel safe (which was necessary to get their cooperation), the researchers promised the interviewees anonymity until the interviewees' death. The first interviews from the archive were published in the book, *Voices from the Grave*, and featured in the documentary of the same name, in 2010. These interviews, with former IRA leader Brendan Hughes and former UVF member David Ervine, were made public upon the death of these interviewees as per their agreement with Boston College.
(http://bostoncollegesubpoena.wordpress.com/)

In May 2011, Boston College received the first federal subpoena, seeking Belfast Project materials related to Dolours Price and Brendan Hughes. In August 2011, a second set of subpoenas sought any information contained in any of the other interviews materials that may be related to the death or abduction of Jean McConville. Boston College complied with the subpoena for documents relating to Brendan Hughes, who is deceased, as doing so did not conflict with his confidentiality agreement. Boston College then asked the United States District Court to quash the subpoenas as to records pertaining to the other still living interviewees on the grounds that release of the information could threaten the safety of interviewees, the continuing peace process in Northern Ireland, and the future of oral history.[4] Boston College also argued that this type of forced disclosure could have a detrimental impact on academic freedom. A major concern is that a lack of protection for interviewees in this type of oral-history project would greatly discourage people from giving future interviews about any controversial topic.

The Justice Department filed a response to the motion to quash, dismissing academic freedom as a legally meaningless "quasi-privilege" and saying the college had offered "no claim of a cognizable federal privilege."[5] In addition, the principal interviewers in the project, Ed

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[4] *IN RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Matters of Criminal Matters in the Matter of Dolours Price,* U.S. M. D. Case No.: 11-MC-91078, Motion of Trustees of Boston College to Quash Subpoenas, 6/7/2011; (http://chronicle.com/items/biz/pdf/ecf_mad_uscourts_gov_doc1_09514330434.pdf - last accessed 7/25/2012).

[5] *IN RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Matters of Criminal Matters in the Matter of Dolours Price,* U.S. M. D. Case No.: 11-MC-91078, Government's Opposition to Motion to Quash and Motion for an Order to Compel, 7/1/2011; (http://www.scribd.com/doc/59191594/Government-s-Opposition-to-Motion-to-Quash-and-Motion-to-Compel-7-1-11 - last accessed 7/25/2012).

Moloney and Anthony MacIntyre, together filed a motion to intervene in the district court case to protect the confidentiality of past and future contributors to the Belfast Project.

Noting that this is a case of first impression in the First Circuit, the district court rendered an opinion in December 2011, holding that it had discretion to review a motion to quash a subpoena issued pursuant to an MLAT request under a reasonableness standard. The court also ruled that "the compelling government interests inherent in an MLAT request" suggests that such a request should "receive deference similar to grand jury subpoenae." The district court then found that while the First Circuit had previously recognized a protection of confidentiality for "academicians engaged in pre-publication research... commensurate to that which the law provides for journalists," it had not decided that such protection is a legal privilege.

In its analysis, the district court looked at balancing the government's need for the requested information against the potential harm to the free flow of information. The court ultimately concluded that the government's interest in complying with its treaty obligations as well as the public's interest in legitimate criminal proceedings outweighed Boston College's claims of confidentiality. Despite "credit[ing] Boston College and the Burns Library's attempts to ensure the long term confidentiality of the Belfast project, as well as the potential chilling effects [of enforcing the subpoena] on academic research," the court rejected Boston College's motion to quash but did grant the college's request for in-camera review. The court also concluded that Ed Moloney and Anthony McIntyre's interests were adequately represented by Boston College and denied their motion to intervene.

Within days of this decision, the court conducted its in-camera review of thirteen interview transcripts. Following this review, the court issued an order requiring Boston College to turn over to the federal government the original materials related to Dolours Price and provided that copies of the materials would be made and returned to the library archives. The court further ordered, relevant to the August 2011 subpoenas, that Boston College turn over to the federal government interviews, transcripts, and related records of seven other interviewees. Boston College did not appeal the court's ruling regarding the Dolours Price materials, but did appeal its ruling regarding the August 2011 subpoenas. Boston College and Moloney/McIntyre both requested a stay of the production of the records pending these appeals, which the district court has granted.

Moloney and McIntyre also filed an individual complaint in the district court in December 2011, essentially making the same legal arguments as they did in their petition to intervene in the Boston College lawsuit. The district court summarily dismissed their individual complaint for lack of jurisdiction, and Moloney and McIntyre appealed to the First Circuit, with the ACLU filing an amicus brief in their support. On July 6, 2012, the First Circuit issued its ruling and upheld the dismissal of Moloney and McIntyre's individual lawsuit, citing legal precedent that the US-UK MLAT expressly disclaims the private rights of individuals to "obtain, suppress,

or exclude any evidence, or to impede the execution of a request."[6] The court also analyzed Moloney/McIntyre's First Amendment claim that compelling production of the records violated their individual "constitutional right to freedom of speech, and in particular their right to impart historically important information for the benefit of the American public, without the threat of adverse government reaction." Moloney/McIntyre asserted that production of the subpoenaed interviews is contrary to the confidentiality they promised the interviewees and they asserted an "academic research privilege" to be evaluated similarly as a reporter's privilege. The court noted, however, that the United States Supreme Court has distinguished between "academic freedom" cases (involving government attempts to influence the content of academic speech and direct efforts by government to determine who teaches) on the one hand, from, on the other hand, the question of privilege in the academic setting to protect confidential peer review materials. The court viewed this case as falling into the second category of cases and as such "is far attenuated from the academic freedom issue, and the claimed injury as to academic freedom is speculative." The court relied heavily on the decision in *Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (19782),* in which the Supreme Court rejected a general purpose reporter's privilege for confidential sources and held that the "government's strong interests in law enforcement precluded the creation of a special rule granting reporters a privilege which other citizens do not enjoy." The First Circuit pointed out that the *Branzburg* opinion discussed the situation of reporters who promised confidentiality as well as of informants who had committed crimes and those innocent informants who had information pertinent to the investigation of crimes and found that the interests in confidentiality of both kinds of informants does not give rise to a *First Amendment* interest in the reporters to whom they had given the information under a promise of confidentiality. "These insufficient interests," the court noted, "included the fear, as here, that disclosure might 'threaten their job security or personal safety or that it will simply result in dishonor or embarrassment.'" Thus, the court reasoned, "if the reporters' interests were insufficient in *Branzburg*, the academic researchers' interests necessarily are insufficient here," and therefore Moloney and McIntyre had no *First Amendment* basis to challenge the subpoenas.

Boston College's appeal of the district court decision pertaining to the August 2011 subpoenas is still pending and may be heard in September 2012. The AAUP strongly supports the position taken by Boston College.[7]

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[6] *IN RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Matters of Criminal Matters in the Matter of Dolours Price, 2012 U.S. App. LEXIS 13837 (1st Cir. 2012).* http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=11-2511P.01A (last accessed 7/20/2012)

[7] "Oral History ,Unprotected", Scott Jaschik, *Inside Higher Ed (7/5/2011)* (http://www.insidehighered.com/news/2011/07/05/federal_government_questions_confidentiality_of_oral_history -last accessed 7/25/2012)

***Sussex Commons v. Rutgers*, 2012 N.J. LEXIS 765 (S. Ct. 2012)**

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 with the university an Open Public Records Act (OPRA) request 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 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. In its decision, the court analogized the OPRA request to similar questions about the application of conflict of interest laws and the collection of attorneys' fees in the clinical education setting. In the end, 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."

The development company appealed the decision to the Appellate Division, and AAUP joined in filing an amicus brief in support of the Rutgers University Environmental Law Clinic. The brief argued that requiring the clinic's records to be released publicly would impinge on the academic freedom rights of Rutgers faculty and students as well as the First Amendment rights of citizens to access and use law clinics. The brief urged 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 further argued that requiring law clinics to release documents related to the operation of the clinics risks forcing 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. The brief also asserted that forcing clinics to produce such records would infringe upon the First Amendment rights of the clinic clients by "chilling public participation in government disputes and interfering with modes of expression and association between clients and their attorneys."

The Appellate Division, however, reversed the lower court's decision, finding that the law clinic met the definition of a "public agency" and therefore was subject to OPRA. The court also found that the Legislature had "carefully delineated [21 categorical] exemptions" from disclosure under OPRA, six of which were specifically addressed to higher-education institutions. Those exemptions, the court reasoned, rebutted the defendants' arguments that a judicial exemption for legal clinics was necessary to prevent OPRA from being used to "indiscriminately access" legal clinic records. Further, the court stated that even if it did share the defendants' public policy concerns about the need to specifically exempt legal clinic records from the definition of "government record," it is "not our role to amend this statute by judicial fiat and add a twenty-second exemption category."

Rutgers appealed to the Supreme Court of New Jersey which issued its decision on July 5, 2012, reversing the Appellate Division's decision and held that "records related to cases at public law school clinics are not subject to OPRA." The court found that OPRA seeks to promote the public interest by granting citizens access to documents that record the workings of government in some way; the aim of which is to serve as a check on government action. Legal clinics, however, do not perform any government functions – they conduct no official government business, nor assist in any aspect of State or local government. Therefore, the court reasoned, allowing public access to legal clinic case documents would not further the purposes of OPRA, inasmuch as such records "would not shed light on the operation of government or expose misconduct or wasteful government spending." The court agreed with Rutgers and amici that the "consequences [of applying OPRA to public legal clinics] are likely to harm the operation of public law clinics, and by extension, the legal profession and the public." Further, the court noted, applying OPRA to public legal clinics would lead to the "absurd result" that public legal clinics would be subject to records disclosures while private schools would not, thereby creating two classes of legal clinics at New Jersey's law schools, "with public education programs disadvantaged solely because they are public." That outcome would be contrary to the Legislature's repeated demonstration of its intent to support Rutgers and higher education for the benefit of the citizens of New Jersey.

IV. Tenure and Due Process

A. Tenure – Breach of Contract

Several tenure cases this year hinged upon the issue of whether faculty handbooks are contracts and to what extent do the provisions of the handbook bind the college or university regarding tenure review processes.

***Howard University v. Sybil Roberts-Williams*, --- A.3d ----, 2012 WL 573161 (D.C.)**

Professor Sybil Roberts-Williams was hired as a temporary lecturer by Howard University in the Department of Theatre Arts in 1993. In 1998, she assumed a tenure-track position as a probationary instructor. Roberts-Williams was promoted to assistant professor in 2001 and applied for tenure on October 15, 2004. At the direction of the Chairperson of her department's Appointment, Promotion, and Tenure Committee (APT), Roberts-Williams submitted a revised application in November 2004.

Robert-Williams was notified that her application had been rejected by the APT Committee in mid-November and she formally requested reconsideration of her application at that time. On December 16, 2004, Roberts-Williams was notified in writing that the APT Committee denied her application for tenure and recommended that she be granted a special appointment for the 2005-2006 academic year which would be her "terminal" appointment. In its explanatory letter, the APT Committee noted that her application for tenure had been denied due to her lack of publication, some student comments regarding "confusion" about her

methodology, and concerns about her "collegiality" due to her limited support for departmental productions other than her own.

After she received her final tenure denial from the university provost in December 2005, Professor Roberts-Williams sued the university in state court, alleging violations of the District of Columbia Human Rights Act (DCHRA) as well as breach of contract. After an eight day trial, the jury rejected Roberts-Williams' DCHRA claims entirely, but ruled in her favor regarding her breach of contract claim. Specifically, the jury found that the university had violated the faculty handbook provisions requiring biennial evaluations of all faculty members (Roberts-Williams had not received any) and that the university had not followed the proper procedure in its handbook for tenure denial reconsideration. The trial court subsequently denied a post-verdict motion by the university and upheld the jury's award of $250,060 for loss of "back pay" and $332,340 for loss of "future pay."

Howard University and Professor Roberts-Williams cross-appealed the jury's award, and the trial court's decisions on various issues to the District of Columbia Court of Appeals. On February 23, 2012, the appeals court upheld the trial court's decision and jury award in Roberts-Williams' favor. In the decision's most relevant part, the court agreed with the trial court that the faculty handbook was a contract that required the university to conduct biennial evaluations. The fact that individual faculty members could seek guidance from their peers or colleagues with greater experience did not abdicate the university's affirmative responsibility to conduct those required evaluations which could assist faculty in their development for obtaining tenure.

Since the appeals court's decision did not disturb the jury's damages award, it did not address the merits of Professor Roberts-Williams cross-appeal.

***Rafalko v. University of New Haven, et al.*, 129 Conn. App. 44, 19 A.3d 215 (2011)**

Professor Rafalko, an associate professor in the University of New Haven's department of visual and performing arts and philosophy, sued the university for breach of contract, breach of covenant of good faith and fair dealing, and negligent misrepresentation after he was denied tenure. Rafalko also sued the university and his department chair for defamation in connection with a letter his chair wrote to the tenure and promotion review committee and which Rafalko claimed diminished the value of his academic work-product. The Appellate Court of Connecticut upheld the trial court's dismissal of all of Rafalko's claims on the grounds that he did not present sufficient evidence to support them.

As the primary basis for his first three claims, Rafalko argued that the faculty handbook required his department chair to give him annual reviews to assist him in obtaining tenure, but that his chair failed to do so in the years 1999-2003. The university contended that it denied Rafalko tenure due to his failure to publish an adequate number of scholarly works and that Rafalko did not receive the annual reviews because he failed to timely prepare a self-evaluation, which was the first to step to initiate the annual review process. In affirming the

trial court's summary judgment dismissal, the appellate court reiterated the Connecticut Supreme Court's position that a faculty handbook that "sets forth terms of employment may be considered a binding employment contract," but also concluded that the evidence "unequivocally" showed that Rafalko knew of the publication requirements for tenure and that the annual reviews would not have provided him any additional information on that requirement. Therefore, the court ruled that the lack of annual reviews was not material to Rafalko's claims.

On the issue of defamation, the appellate court found that Rafalko had failed to present evidence of false statements within his chair's letter to the tenure and promotion committee. The court agreed with the trial court's reasoning that the department chair was entitled to his opinion of Rafalko's publications and reiterated that a defendant cannot be held liable for expressing a mere opinion, no matter how "unreasonable the opinion or vituperous the expressing of it may be." The appellate court also concurred with the trial court's reasoning that "[t]o deem such an opinion as defamatory would have the court cross the bounds of academic freedoms that are protected under the *first amendment.*"

B. Due Process

We reported last year on the case, *Mulvenon v. Greenwood*, 643 F.3d 653 (8th Cir. 2011)**,** in which the Eighth Circuit determined that a faculty member did not have a property interest in his position as Department Chair. Later in 2011, the First Circuit also ruled against a faculty member terminated from his position as Department Chair, but for different reasons.

***Collins v. University of New Hampshire*, 664 F.3d 8 (1st Cir. 2011)**

In the summer of 2007, while tenured Professor John Collins was the Chair of the Department of Biochemistry and Molecular Biology, he was arrested and charged with stalking and disorderly conduct after "unleashing an expletive-filled tirade against a colleague whom he suspected of causing him to receive a parking ticket." Collins self-reported his conduct, observed by multiple witnesses, to the Dean of the College of Life Sciences and Agriculture (COLSA) at approximately the same time as it was reported to the campus police by one of the witnesses. The day after the incident, Collins was arrested by campus police and subsequently banned from campus, placed on paid administrative leave, and suspended as chair.

After being cleared of all charges in December 2007, Collins was reinstated to his tenured faculty position at the university, but he was not returned as chair of the department. Collins subsequently sued the university and several administrators alleging that his due process rights had been violated because the university failed to provide him with a pre-deprivation hearing before he was suspended, banned from campus, and removed as chair of the department. Collins also alleged that the university and the administrators had defamed him when it emailed notification to faculty and staff that he had been banned from campus.

The district court dismissed the case for several reasons. First, the court found that the University had not violated Collins' due process rights in that he was not entitled to a pre-suspension hearing because he was suspended with pay. Second, the court ruled that even if he had an enforceable liberty interest in access to campus, Collins was not deprived of such interest because the ban was temporary, associated with his suspension, and subject to exceptions that included allowing him access onto campus several times over the fall semester for activities related to his children. Third, the district court found that Collins had not been improperly deprived of his property interest in the position of chair because the university had accorded him adequate due process after his initial suspension, including multiple meetings with the Provost and an opportunity to respond in writing to all of the decisions related to his arrest. Finally, the district court found that the university's email notification to faculty and staff was not defamation because it was substantially true given Collins' actions and statements.

Collins appealed the district court's decision to the First Circuit Court of Appeals which upheld the district court's dismissal of the case, ruling that Collins had been provided with adequate notice and process to respond to his suspension with pay, campus ban, and removal from the position of chair during the two month period following the initial suspension. The court also found that the university acted lawfully and without malice in notifying faculty and staff about Collins' ban from campus and therefore were not liable for defamation.

V. Discrimination and Affirmative Action

We reported last year on two federal circuit court cases that upheld university admissions programs that, to some extent, considered race as a factor. One of those cases has been appealed to the Supreme Court which has granted certiorari with argument scheduled for the fall 2012.

A. Affirmative Action in Admissions

Fisher v. University of Texas, 631 F.3d 213 (5th Cir. 2011), *cert. granted,* 2012 U.S. LEXIS 1652 (U.S. Feb. 21, 2012)

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

In 1997, the UT system replaced an earlier admissions plan which had explicitly considered race with a "Personal Achievement Index" (PAI). The PAI is produced through a holistic review of applications intended to identify students whose achievements are not accurately reflected by their test scores and grades alone. The PAI includes an evaluation of required written essays and a "personal achievement score" which is made up of factors such

as socio-economic status, languages at home, and whether the student lives in a single-parent household. In addition, the state legislature and the university adopted a variety of other initiatives to increase diversity, including scholarship programs, high school outreach and recruitment, and the "Top Ten Percent Law," under which all high school seniors in the top ten percent of their class at the time of application are guaranteed admission to a state university.[8] The top ten percent rule accounts for 92% of the in-state students that are admitted to UT.

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

Relying on the Supreme Court's 2003 decision in *Grutter v. Bollinger*, the Fifth Circuit ruled in favor of the university, pointing out three objectives of promoting diversity among universities in the Texas system: 1) increased perspectives inside and outside the classroom, 2) better preparation to act as professionals, and 3) increased civic engagement.[9] The circuit court noted that after it previously struck down the university's prior race-based admissions system, minority applications and enrollment plunged, prompting Texas to pass the Top Ten Percent Law.

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

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

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

diversity is a legitimate goal, schools may not engage in racial balancing or design admissions policies to achieve a specific percentage of minority students.

The Fifth Circuit's decision has been appealed to the United States Supreme Court which has granted certiorari. The AAUP is partnering with the American Council on Education and drafting a joint amicus brief in support of the UT system's admissions program. We anticipate the brief will be filed in the next two weeks.

B. Age Discrimination

In a recent age discrimination case, a faculty member was not able to prove that he had been discriminated against due to his age, but was able to prove that he had been retaliated against by his institution because he filed a discrimination complaint.

Klebe v. Univ. of Tex. Health Sci. Ctr. at San Antonio, 2011 U.S. App. LEXIS 23182 (5th Cir. 2011).

Professor Robert Klebe, a tenured faculty member in the Department of Cellular and Structural Biology, filed a lawsuit against the University of Texas Health Sciences Center for retaliation after he received negative post-tenure reviews shortly after he filed an age discrimination complaint with the university.

In 1998, the university notified all tenured faculty members in Klebe's department that they would have to secure outside funding for their individual research projects. Klebe objected to this requirement and ultimately failed to secure external funding for his research. As a result, Klebe's salary was reduced by 25%. Less than six months after his salary was reduced, Klebe filed a complaint with the EEOC, alleging that his age was the motivating factor behind the university's actions. Specifically, Klebe alleged that his salary had been reduced in order to fund salaries for younger faculty due to an ongoing budgetary freeze on the funds to hire new faculty. Shortly after filing his age discrimination complaint, Klebe began receiving negative post-tenure review evaluations. In response to all of the above, Klebe filed suit against the university in the U.S. District Court for the Western District of Texas, alleging age discrimination for reducing his salary and retaliation for the negative post-tenure evaluations.

In separate consecutive proceedings, two juries found that while the university had not discriminated against Klebe because of his age, there was sufficient evidence to show that the university would not have given Klebe negative evaluations but for his filing a discrimination complaint. Klebe was awarded $900,000 by the first jury and, after a partial re-trial, a second jury awarded him $400,000. The university appealed those judgments to the Fifth Circuit Court of Appeals where the court upheld the second jury's damage award. In its decision, the court found that there was sufficient evidence to support two juries finding that a causal connection existed between Klebe's discrimination complaint and the negative post-tenure reviews and that there was sufficient evidence of mental anguish to uphold the damages awarded by the second jury.

VI. Intellectual Property

There were many developments this year concerning the legal issues surrounding patent and copyright in academia. Those developments include a significant U.S. Supreme Court decision and a new federal intellectual property law.

A. Patent and Copyright Cases

***Golan v. Holder*, 132 S. Ct. 873 (2012).**

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

Section 514 of the Uruguay Round Agreements Act implements Article 18 of the Berne Convention for the Protection of Literary and Artistic Works. Article 18 requires that signatories, which include the United States, provide the same copyright protection to authors in other member countries as it provides to its own authors. Section 514 extended the copyright protection of some foreign works whose copyright protections had not expired in their base country. The result of this provision was to retroactively apply copyright protection to some foreign works that had previously been open for use by anyone in the United States. The ripple effect was felt strongly in academia. Although the plaintiffs in this case represent a wide variety of organizations and individuals, the named plaintiff is Professor Lawrence Golan from the University of Denver. Golan, an orchestral professor and conductor, often relies on public domain music when teaching his orchestral students and when performing as a conductor with the student orchestra. Golan and the other plaintiffs challenged the constitutionality of the Act, claiming that it violates their First Amendment free expression rights in that it is too broad and unnecessarily undermines their reliance on the previously public domain works. Golan also argued that Congress had exceeded its authority under the Copyright Act when it enacted Section 514 of the Uruguay Round Agreements Act.

The U.S. District Court for the District of Colorado first held that Section 514 of the URAA does not violate the Copyright Clause or the First Amendment. With respect to Golan's First Amendment challenge, the court stated that it saw "no need to expand upon the settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns." The United States Court of Appeals for the Tenth Circuit affirmed the district court's initial decision in part and reversed in part. The court agreed that Section 514 of the URAA does not exceed Congress' authority under the Copyright Clause, but it vacated the district court's First Amendment ruling and remanded for further proceedings. On remand, the district court granted summary judgment for the plaintiffs, holding that Section 514's "constriction of the public domain was not justified by any of the asserted federal interests." On appeal, the Tenth

Circuit reversed the district court ruling that Section 514 was "narrowly tailored to fit the important government aim of protecting U.S. copyright holders' interests abroad."

The plaintiffs appealed the Tenth Circuit's decision to the United States Supreme Court. On January 18, 2012, in a 6-2 opinion, the Supreme Court upheld the Tenth Circuit's decision. Specifically, the Court agreed that Congress had not exceeded its authority under the Copyright Clause and that it had not violated the First Amendment by allowing for the copyright restoration authorized by Section 514. The Court emphasized that Section 514 "leaves undisturbed the idea/expression distinction and the fair use defense" which users of "certain foreign works" may continue to use.

The impact of this decision could be significant in higher education. Like Professor Lawrence Golan, many faculty members rely on public domain material for their work. The licensing fees that universities will have to pay in order to use foreign artistic material that was previously in the public domain may be a substantial deterrent to continuing programs that rely on the newly protected material. A likely result will be the stifling of faculty and student creative expression.

B. Legislation

Leahy-Smith America Invents Act, Public Law 112-29, 124 Stat. 284 (2011)

On September 16, 2011, President Obama signed into law the *Leahy-Smith America Invents Act* (AIA). The published intent of this law is to reduce patent backlog at the U.S. Patent and Trademark Office (USPTO); foster innovation through improved patent quality; and, better harmonize U.S. patent laws with those of other countries.

Although certain portions of the AIA were effective immediately, most of the provisions will be phased in over the coming year with final implementation occurring in March 2013. The law has the potential to have broad reaching affects to both patent applicants and patent holders. The following summarizes a few of the most significant changes important to the higher education community:

- **First-to-File** – in March 2013, the U.S. will join most other countries in the global community in moving from granting patents in a "first-to-invent" to a "first-to-file" system. Under the existing "first-to-invent" system, deciding whether an invention was new or not obvious involved determining the state of the art at the time the invention was conceived, not at the time the application was filed. Under the AIA's "first-to-file" system, the decision will be based on what is determined to be state of the art when the application is filed. The date of invention will no longer be relevant in determining what is prior art against future applications
    - There is, however, a limited one-year grace period related to public disclosures made by the inventor. Such disclosure evidence could potentially include presentations at an academic conference or the

publication of a scholarly article. It remains to be seen how scholarly disclosure will factor into the new patent application process and the granting of rights. There is also the chance that such information could be used to by other researchers to build on the work and file first.

- **Post Grant Review** – There will now be two separate avenues to challenge issued patents. The first process, an "inter partes" review, permits allegations of invalidity over prior art as the basis for a challenge. The second process, a "post-grant" review, permits a patent to be challenged on <u>any</u> ground during the first nine months of the patent's issuance.
- **Filing Fees** – The USPTO will be completely overhauling its fee structure in the coming year. In the meantime, from September 2011 until the new fee structure is in place, virtually all patent fees will carry a 15% surcharge. In addition, certain types of patent applications may receive "Prioritized Review" for an additional fee. This "Prioritized Review" will be granted to a limited number of applications annually.

We anticipate that many institutions will be reviewing and revising their intellectual property and patent filing policies over the next two years as the USPTO develops rules and regulations to implement the new patent system. Considering the implications on both scholarly enterprise and financial remuneration, it is extremely important that faculty be actively involved in the process of reviewing and revising their institutional policies and understanding how their disclosures through scholarly activities may affect their patent rights, both within the U.S. and abroad.

VII. <u>Union/Collective Bargaining Cases and Issues</u>

A. Collective Bargaining

***Point Park University v. Newspaper Guild of Pittsburgh/ Communication Workers of America Local 38061, AFL-CIO, CLC*, NLRB Case No.: 06-RC-012276 (Private Institution Faculty Organizing)**

In May 2012, the National Labor Relations Board invited briefs from interested parties on the question of whether university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded managers. Point Park University faculty members petitioned for an election and voted in favor of representation by the Communications Workers of America, Local 38061. However, the university challenged the decision to hold the election, claiming that the faculty members were managers and therefore ineligible for union representation.

AAUP submitted an amicus brief in July 2012, urging the NLRB to develop a legal definition of employee status "in a manner that accurately reflects employment relationships in universities and colleges and that respects the rights of college and university employees to

exercise their rights to organize and engage in collective bargaining."[10] AAUP's brief stressed the extent to which the erosion of faculty power that union advocates at Point Park have cited reflects broad trends. "The application of a corporate model of management has resulted in significant changes in university institutional structure and distribution of authority. There has been a major expansion of the administrative hierarchy, which exercises greater unilateral authority over academic affairs," the brief states. AAUP also points out that, "This organizational structure stands in stark contrast to the *Yeshiva* majority's description of the university as a collegial institution primarily driven by the internal decision-making authority of its faculty. Further, university administrators increasingly are making decisions in response to external market concerns, rather than consulting with, relying on, or following faculty recommendations. Thus, university decision-making is increasingly made unilaterally by high-level administrators who are driven by external market factors in setting and implementing policy on such issues as program development or discontinuance, student admissions, tuition hikes, and university-industry relationships. As a result, the faculty have experienced a continually shrinking scope of influence over academic matters."

In addition to AAUP's brief, amicus briefs were filed by Matthew Finkin, Joel Cutcher-Gershenfeld, and Thomas A. Kochan (as impartial employment and labor relations scholars); Dr. Michael Hoerger, PhD, social scientist; Higher Education Council of the Employment Law Alliance; National Education Association; Newspaper Guild of Pittsburgh, CWA, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations; American Council on Education, National Association of Independent Colleges and Universities, Council of Independent Colleges, Association of Independent Colleges and Universities of Pennsylvania, College and University Professional Association for Human Resources, and Association of American Universities; The Center for the Analysis of Small Business Labor Policy, Inc.; Louis Benedict, MBA, J.D., Ph.D. (Higher Education Administrator); and National Right to Work Legal Defense and Education Foundation, Inc.[11]

B. Graduate Assistants Right to Organize

[10] *Point Park University v. Newspaper Guild of Pittsburgh/ Communication Workers of America Local 38061, AFL-CIO, CLC,* NLRB Case No.: 06-RC-012276, Amicus Curiae Brief of American Association of University Professors http://www.aaup.org/NR/rdonlyres/CFE2A35C-44AC-4F87-975D-E405CF5D5209/0/PointParkamicus.pdf (last accessed 7/23/2012)

[11] *Point Park University v. Newspaper Guild of Pittsburgh/ Communication Workers of America Local 38061, AFL-CIO, CLC,* NLRB Case No.: 06-RC-012276 http://www.nlrb.gov/case/06-RC-012276 (last accessed 7/23/2012)

***New York University v. GSOC/UAW*, NLRB Case No.: 02-RC-023481; *Polytechnic Institute of New York University v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW)*, NLRB Case No.: 29-RC-012054 (Graduate Student Organizing)[12]**

In June 2012, the National Labor Relations Board (NLRB) invited briefs from interested parties on the question of whether graduate student assistants may be statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. The NLRB specifically invited parties to address whether the NLRB should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants are not statutory employees because they "have a primarily educational, not economic, relationship with their university," and whether, if the NLRB finds that graduate student assistants *may* be statutory employees, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974).

AAUP co-signed with the AFL-CIO, AFT, and NEA, on an amicus brief which was filed on July 23, 2012, and argues that the NLRB should overrule *Brown University* and return to its prior determination that graduate student assistants who "'must perform work, controlled by the Employer, and in exchange for consideration,'" are statutory employees, "'notwithstanding that they are simultaneously enrolled as students.'" The brief also counters the argument raised in *Brown* that permitting graduate student assistants to collectively bargain will "be detrimental to the educational process," pointing out that graduate student assistants at public universities have often engaged in collective bargaining without such detriment. In fact, the brief, argues, Section 8(d) of the National Labor Relations Act would "virtually certain[ly] … be construed to 'limit bargaining subjects for … academic employees' by 'excluding, from collective bargaining, admission requirements for students, conditions for awarding degrees, and content and supervision of courses, curricula, and research programs.'" The NLRB, the brief admonishes, is charged with "encouraging the practice and procedure of collective bargaining" and protecting workers' rights in organizing and negotiating the terms and conditions of their employment; it "has *not* been assigned the task of determining whether collective bargaining should be encouraged according to the agency's views of sound educational policy."

On the issue of whether the NLRB should continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, the brief distinguishes graduate students pursuing their *own* studies supported by external financial assistance from graduate students performing research duties to further a *professor's*

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[12] *New York University v. GSOC/UAW, NLRB* Case No.: 02-RC-023481 http://www.nlrb.gov/case/02-RC-023481 (last accessed 7/25/2012) and *Polytechnic Institute of New York University v. International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW)*, NLRB Case No.: 29-RC-012054 http://www.nlrb.gov/case/29-RC-012054 (last accessed 7/25/2012)

externally funded research. The former are not performing a "service to the University and thus [would] not [be] employees of the University." The latter, however, are "no different from other university employees, such as the principal investigator, lab techs, and clericals, who are working on the same project," and the source of funding used to pay their wages, "is not relative to, much less determinative of, employee status." The brief also argues that there is no difference between graduate student assistants "assist[ing] on externally funded research projects of their university in return for compensation" from graduate student assistants "employed by a foundation" "established [by their university] to manage its research awards."

Additional amicus briefs have been filed by Michael Hoerger, PhD, Senior Instructor, University of Rochester Medical Center; United Electrical, Radio and Machine Workers of America (UE) and UE Local 896/ Campaign to Organize Graduate Students (COGS); Adrienne Eaton, Department Chair and Professor of Labor Studies and Employment Relations at Rutgers University; James O'Kelly, law student at Rutgers School of Law-Newark; Higher Education Council of the Employment Law Alliance; Unite Here and Graduate Employees & Students Organization; American Council on Education, Association of American Medical Colleges, Association of American Universities, College and University Professional Association for Human Resources, and National Association of Independent Colleges and Universities; The National Right to Work Legal Defense Fund and Education Foundation, Inc.; Committee of Interns and Residents/SEIU Healthcare; and Brown University.

C. Arbitration

At the same time it partially rejects an arbitrator's decision, the Ohio Court of Appeals rules that there is a high bar to meet in order to overturn an arbitrator's decision.

***Kent State Univ. v. Am. Ass'n of Univ. Professors*, 2011 Ohio 5597 (Ohio Ct. App., 2011)**

The Kent State Chapter of the AAUP filed grievances on behalf of two faculty members who were denied tenure by the President of Kent State University. Those grievances eventually went before an arbitrator who found in favor of the faculty members and recommended two remedies: 1) that the President "reevaluate" the substantive academic judgment behind his decision to deny tenure to both professors; and 2) that the university provide compensation to the two faculty members "no greater than would have resulted had there been no violation" of the relevant CBA. The university appealed both provisions of the arbitrator's decision to the trial court in Ohio. The trial court affirmed the arbitrator's decision, and the university appealed the trial court's decision to the Court of Appeals of Ohio.

The Court of Appeals of Ohio stated that "[a]n arbitrator is the final judge of law and facts… [and] that judicial intervention should be resisted even where the arbitrator has made "serious" "improvident" or "silly" errors." Using this standard, the appellate court partially upheld and partially rejected the arbitrator's decision in this case. First, the court held that the trial court did not err in finding that the arbitrator's decision was correct as to the interpretation of the procedures set forth in the CBA regarding the President's denial tenure.

Specifically, the appellate court ruled that the arbitrator could reasonably conclude that the relevant CBA provision required the President to provide detailed reasons for declining to accept [an internal appeals committee] recommendation to grant tenure. Therefore, the arbitrator's ruling that the President be required to "reevaluate" his decision and provide specific written reasons as to why he does not accept the recommendation of the committee if he again concludes that tenure should not be granted to the two faculty members was appropriate.

With regard to the arbitrator's decision granting compensation to the two faculty members, the appellate court reversed the trial court decision and ruled that the court erred in not acknowledging the material mistake made by the arbitrator in exceeding his authority by granting a monetary remedy. Specifically, the appellate court found that the arbitration process outlined in the section of the CBA under which these grievances were brought provided that the arbitrator's "sole authority" in awarding a remedy was to send the matter back to the level of review in which the procedural error or omission occurred. Since the arbitrator was precluded from granting monetary relief by that section of the CBA (as opposed to other grievance sections of the CBA), the appellate court ordered that portion of the arbitrator's award to be vacated.

VIII. Miscellaneous

The United State Tax Court issued a ruling about the employment status of online faculty as it concerns the filing of personal income tax forms. Although factually specific to one faculty member, the court laid out an analysis that is likely to be used in similar situations.

A. Tax

***Schramm v. Com'r*, 102 T.C.M (CCH) 223, (2011)**

Professor William Edward Schramm sued the IRS Commissioner, alleging that the IRS had improperly ruled that Schramm was a common law employee of Nova Southeastern University (NSU), thereby preventing him from claiming certain business expenses as an independent contractor or "statutory employee" on his taxes. Such a ruling resulted in an approximate $700 difference in what the IRS deemed Schramm to owe the IRS for his 2006 tax filing.

Professor Schramm began teaching online courses for NSU as an adjunct professor in 1999. Between 1999 and 2006 Schramm taught between 4 and 12 online courses per year for the university. Each course was covered by a separate contract between Schramm and the university, and each contract indicated that he was required to abide by certain university policies as a condition of his employment. In addition, the university withheld federal and state tax obligations on his behalf.

When filing taxes for the 2006 tax year, Schramm reported certain business expenses on a "Schedule C" form indicating that he believed his employment relationship with NSU was that of an independent contractor or "statutory employee" and not that of a "common law" employee. The practical result of this filing is that Schramm avoided applying a 2 percent limitation rule on his expenses. "Common law" employees are allowed to list unreimbursed business expenses as itemized deductions on "Schedule A" of their 1040, but only to the "extent that [those expenses] exceed 2 percent of the [employees'] gross income." "Schedule C," which is available to independent contractors and "statutory employees," does not have the same 2 percent limitation and, therefore, allows business expenses to be deducted in full.

In reviewing the Commissioners decision, the United States Tax Court ruled that it must apply common law rules for determining whether or not Schramm was an employee because the Internal Revenue Code does not define "employee" in the section discussing the tax treatment of business expense deductions. Specifically, the court ruled that the relevant factors in determining employment status includes: 1) degree of control by employer; 2) the parties' investment in the work facilities used; 3) the opportunity for individual profit or loss; 4) whether the employer can discharge the individual; 5) whether the work involved is part of the employer's regular business; 6) the permanency of the relationship; 7) the relationship the parties believed they were creating; and 8) the provision of employee benefits.

Using this analysis, the court found, in pertinent part, that Schramm was a "common law" employee of NSU because, despite the fact that the inherent nature of his position as an adjunct called for him to follow an independent approach to teaching, the university exercised sufficient control over his work as it dictated the textbook he used in his classes, the subjects he was to cover in each, and managed the students enrollment and technical interface for each class. In addition, the court found that NSU had invested a greater amount in the facilities needed for the classes; that Schramm and NSU had maintained "a consistent employment relationship" for many years; and, that NSU has withheld income and employment taxes from Schramm's wages throughout the relationship. All of these factors were judged to be consistent with a finding that Schramm was a "common law" employee of NSU. Therefore, the court upheld the Commissioner's ruling that Schramm must use Schedule A, not Schedule C, to itemize his business expenses as deductions that are subject to the 2 percent limitation (business expenses may only be deductible as itemized deductions "only to the extent that they exceed 2 percent of the taxpayers adjusted gross income).