

July 2016 AAUP-AAUP-CBC Summer Institute

July 21, 2016

Annual Legal Update¹

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I. Introduction

This year started as one where big, and very bad, changes seemed imminent, yet it ended with the status quo strengthened. In one of the most important cases in decades, the Supreme Court agreed to hear a challenge to whether agency fee was constitutional in the public sector. (*Friedrichs*) After the Court held oral argument it appeared poised to find agency fees unconstitutional. However, before a decision was issued, Supreme Court Justice Antonin Scalia died. Left with only eight justices, the Supreme Court was equally divided on the outcome of the *Friedrichs* case, yielding a one sentence long decision that upheld the lower court's decision, and the status quo on agency fee. In the *Fisher II* case, the Supreme Court surprised observers by taking up the question of affirmative action for the second time in this case alone. While there had been expectations of a significant change in the law on affirmative action, the decision issued reaffirmed and clarified the *status quo*.

We are beginning to see the impact of the Board's seminal decision in *Pacific Lutheran University* which modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities; and second, whether certain faculty members are managers, who are excluded from protection of the Act. The NLRB Regional Directors, who decide election cases in the first instance, have used the new standards to limit which purportedly religious institutions are exempt from coverage (see cases listed under *Pacific Luther University, infra* section VII, A, 2). However, tenure track faculty have not fared well, generally having been found to be managers with no statutory right to unionize (see cases listed under *Pacific Lutheran University, infra* section VII, B, 1).

In addition, there are two pending cases before the Board involving the unionization of graduate students. (*Columbia University, New School.*) In the *Columbia University* case, the Board issued an invitation to file amicus briefs addressing whether the Board should modify or overrule its 2004 decision in *Brown University*, which had found that graduate assistants were not employees and therefore did not have statutory rights to unionize.

This year was also an active one for cases involving the First Amendment Rights of public sector faculty members. The lower courts began to apply the 2014 Supreme Court decision in *Lane* that held that a public employee's speech that may concern their job, but is not ordinarily within the scope of their duties, is subject to First Amendment protection. Interesting decisions were also issued by state courts and labor relations boards in public sector collective bargaining cases.

II. First Amendment and Speech Rights

A. **Garcetti / Citizen Speech**

Lane v. Franks, 189 L. Ed. 2d 312 (U.S. 2014)

In this Supreme Court case the Court held unanimously that a public employee's speech that may concern their job, but is not ordinarily within the scope of their duties, is subject to First Amendment protection. The Court reversed the Eleventh Circuit's holding that Lane did not speak as a citizen when he was subpoenaed to testify in a criminal case, finding that Eleventh Circuit relied on too broad a reading of *Garcetti*. *Garcetti* does not transform citizen speech into employee speech simply because the speech involves subject matter acquired in the course of employment. The crucial component of *Garcetti* then, is, whether the speech "is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."

Edward Lane was the director of Community Intensive Training for Youth (CITY), a program operated by Central Alabama Community College (CACC). Lane in the course of his duties as director conducted an audit of the program's expenses and discovered that Suzanne Schmitz, an Alabama State Representative who was on CITY's payroll, had not been reporting for work. As a result Lane terminated Schmitz's employment. Federal authorities soon indicted Schmitz on charges of mail fraud and theft. Lane was subpoenaed and testified regarding the events that led to the termination of Schmitz at CITY. Schmitz was later convicted. Steve Franks, then CACC's president, terminated Lane along with twenty-eight other employees under the auspices of financial difficulties. Soon afterward, however, Franks rescinded twenty-seven of the terminations, but allowed the terminations of Lane and one other employee to stand. Lane sued alleging that Franks had violated the First Amendment by firing him in retaliation for testifying against Schmitz.

The District Court granted Franks's motion for summary judgment, on the grounds that the individual-capacity claims were barred by qualified immunity and the official-capacity claims were barred by the Eleventh Amendment. The Eleventh Circuit subsequently affirmed, holding that Lane spoke as an employee, not a citizen, because he acted in accordance to his official duties when he investigated and terminated Schmitz's employment.

The Supreme Court granted certiorari to resolve the disagreement among the Courts of Appeals as to "whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities".

The Court held that Lane's speech was entitled to First Amendment protection. The Court explained that under *Garcetti*, the initial inquiry was into whether the case involved speech as a citizen, which may trigger First Amendment protection, or speech as an employee, which would not trigger such protection. In *Lane* the Court provided a more detailed explanation of employee versus citizen speech, and expanded the range of speech that is protected. The Court explained that "the mere fact that a citizen's speech concerns information acquired by virtue of his public

employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.” And the Court found that “Lane’s sworn testimony is speech as a citizen.”

The Court further determined that Lane’s speech was protected under the First Amendment. First, Lane’s speech about the corruption of a public program is “obviously” a matter of public concern and further that testimony within a judicial proceeding is a “quintessential example” of citizen speech. Second, the employer could not demonstrate any interest in limiting this speech to promote the efficiency of the public services it performs through its employees or “that Lane unnecessarily disclosed sensitive, confidential, or privileged information”.

The Court held that Franks could not be sued in his individual capacity on the basis of qualified immunity. Under that doctrine, courts should not award damages against a government official in their personal capacity unless “the official violated a statutory or constitutional right,” and “the right was ‘clearly established’ at the time of the challenged conduct.” Because of the ambiguity of Eleventh Circuit precedent at the time of the conduct, the right was not “clearly established” and thus the test unsatisfied to defeat qualified immunity. Lane’s speech is entitled to First Amendment protection, but Franks is entitled to qualified immunity. As a result of this case the right is clearly established and is now the standard.

B. Faculty Speech

***Cutler v. Stephen F. Austin State Univ.*, 767 F.3d 462 (5th Cir. 2014)**

In this case, the Fifth Circuit Court of Appeals ruled that the termination of a faculty member for stating that a member of congress was a “fear monger” violated the First Amendment. Christian Cutler brought a 42 U.S.C. § 1983 action against university officials at Stephen F. Austin State University, alleging that he was fired in retaliation for exercising protected speech after telling a member of US Representative Louie Gohmert's staff that Rep. Gohmert was a "fear monger." Cutler, the director of the University's art galleries, claimed that a member of Rep. Gohmert's staff called Cutler to invite him to judge a high school art exhibition that would be hosted by Rep. Gohmert in Tyler, Texas. Cutler asked for more details, but never received any. He then researched Rep. Gohmert on the internet, formed a negative impression of him, and decided to decline the invitation to judge the contest. Following an exchange of messages with members of Rep. Gohmert's staff, Cutler told a staff member he was not interested in judging the art show and made the "fear monger" comment. Cutler then received a letter from Rep. Gohmert, copying university president Dr. Baker Pattillo, expressing disappointment that the University would not host the competition. The university then gave Cutler a letter of termination. After Cutler was given the opportunity to resign and did so, he filed suit.

The Fifth Circuit concluded that the law was clearly established and gave Defendants fair warning that terminating Cutler on the basis of his speech to Rep. Gohmert would violate Cutler's First Amendment rights. In reaching that decision, the Court assumed that Cutler alleged a violation of his First Amendment rights because Defendants had effectively abandoned any argument that he did not. Based on the undisputed facts and making all reasonable inferences in Cutler's favor, the Fifth Circuit found that several of its pre-2010 decisions, which applied the general rule announced in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) to new fact patterns, should have given Defendants a clear warning that terminating Cutler because of his speech to Rep. Gohmert's office would violate Cutler's First Amendment rights. Cutler's speech was made externally to a staff member of a public official about participating in an event that was not within his job requirements. The concerns Cutler expressed during those conversations were unrelated to his job and emanated from his views as a citizen.

***Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014)**

In this important decision, the US Court of Appeals for the Ninth Circuit reinforced the First Amendment protections for academic speech by faculty members. (***Important note, a previous opinion by the Ninth Circuit in this case dated September 4, 2013 and published at 729 F.3d 1011 was withdrawn and substituted with this opinion.***) Adopting an approach advanced in the AAUP's amicus brief, the court emphasized the seminal importance of academic speech. Accordingly, the court concluded that the *Garcetti* analysis did not apply to "speech related to scholarship or teaching," and therefore the First Amendment could protect this speech even when undertaken "pursuant to the official duties" of a teacher and professor.

Professor Demers became a faculty member at Washington State University (WSU) in 1996 and he obtained tenure in 1999. Demers taught journalism and mass communications studies at the university in the Edward R. Murrow School of Communication. Starting in 2008, Demers took issue with certain practices and policies of the School of Communication. Demers began to voice his criticism of the college and authored two publications entitled *7-Step Plan for Improving the Quality of the Edward R. Murrow School of Communication* and *The Ivory Tower of Babel*. Demers sued the university and claimed that the university retaliated against him by lowering his rating in his annual performance evaluations and subjected him to an unwarranted internal audit in response to his open criticisms of administration decisions and because of his publications.

The district court dismissed Demers' First Amendment claim on the ground that Demers made his comments in connection with his duties as a faculty member. Unlike most recent cases involving free speech infringement at public universities, the district court's analysis did not center on the language from *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Instead, the court applied a five part test set out by the Ninth Circuit in a series of public employee speech cases and found that Demers was not speaking as a private citizen on matters of public concern. Therefore, the district court found his speech was not protected by the First Amendment.

Demers appealed to the Ninth Circuit. The AAUP joined with the Thomas Jefferson Center for the Protection of Free Expression to file an amicus brief in support of Demers. The amicus brief argued that academic speech was not governed by the *Garcetti* analysis, but instead was governed by the balancing test established in *Pickering v. Board of Education*, 391 US 563 (1968). In two opinions, the Ninth Circuit agreed and issued a ruling that vigorously affirmed that the First Amendment protects the academic speech of faculty members.

In an initial opinion issued on September 4, 2013, the Ninth Circuit held that *Garcetti* did not apply to “teaching and writing on academic matters by teachers employed by the state,” even when undertaken “pursuant to the official duties” of a teacher or professor. *Demers v. Austin*, 729 F.3d 1011 (September 4, 2013). Instead, as argued in the amicus brief, the court held that academic employee speech on such matters was protected under the *Pickering* balancing test. The court found that the pamphlet prepared by Demers was protected as it addressed a matter of public concern but remanded the case for further proceedings. The University filed a petition for panel rehearing and a petition for rehearing en banc.

On January 29, 2014, the US Court of Appeals for the Ninth Circuit issued an opinion denying the petition for panel rehearing and the petition for rehearing en banc and withdrawing and modifying its previous opinion. Originally, the court held that “teaching and writing on academic matters” by publicly-employed teachers could be protected by the First Amendment because they are governed by *Pickering v. Board of Education*, not by *Garcetti v. Ceballos*. In its 2014 superseding opinion, the Ninth Circuit expanded that ruling to hold that *Garcetti* does not apply to “speech related to scholarship or teaching” and reaffirmed that “*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor.”

The Ninth Circuit held specifically that the 7-Step plan was “related to scholarship or teaching” within the meaning of *Garcetti* because “it was a proposal to implement a change at the Murrow School that, if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it.” The court thus considered whether the Demers pamphlet was protected under the *Pickering* balancing test. Academic employee speech is protected under the First Amendment by the *Pickering* analysis if it is a (1) matter of public concern, and (2) outweighs the interest of the state in promoting efficiency of service. The court held that the pamphlet addressed a matter of “public concern” within the meaning of *Pickering* because it was broadly distributed and “contained serious suggestions about the future course of an important department of WSU.” The case was remanded to the district court, however, to determine (1) whether WSU had a “sufficient interest in controlling” the circulation of the plan, (2) whether the circulation was a “substantial motivating factor in any adverse employment action, and (3) whether the University would have taken the action in the absence of protected speech.

C. Union Speech

***Meade v. Moraine Valley Cmty. College*, 2016 U.S. Dist. LEXIS (N.D. Ill. March 3, 2016) on remand from 770 F.3d 680 (7th Cir. 2014)**

In this case the United States district court applied a 2014 US Court of Appeals decision finding in favor of a contingent professor. In the appeals court case, the Seventh Circuit greatly enhanced constitutional protection for outspoken critics of public college and university administrators. It reinforced and enhanced recent and congenial decisions in two other federal circuits in cases from Washington (*Demers*) and North Carolina (*Adams*). The court specifically relied on a sympathetic view of the Supreme Court's judgment in the *Garcetti* case, expressly invoking the justices' "reservation" of free speech and press protections for academic speakers and writers. The three-judge panel unanimously declared that an Illinois community college could not summarily dismiss an adjunct teacher for writing a letter criticizing the administration, at least as long as the issues she had raised publicly and visibly constituted "matters of public concern."

The federal appeals court also noted that even a contingent or part-time teacher had a reasonable expectation of continuing employment at the institution and therefore a protected property interest. The appellate court ruled that Robin Meade, the outspoken critic and active union officer, was "not alone in expressing concern about the treatment of adjuncts." The panel added that "colleges and universities across the country are targets of increasing coverage and criticism regarding their use of adjunct faculty." In this regard, the court broke important new ground not only with regard to academic freedom and professorial free expression, but even more strikingly in its novel embrace of the needs and interests of adjuncts and part-timers.

On remand, the district court denied motions for summary judgment by both the College and Meade. One of the primary arguments advanced by the College was that the letter which prompted the termination addressed private interests and not matters of public concern. However, the court found that the Seventh Circuit had already ruled in favor of Meade on this issue. Since the College pointed to no evidence to show that the content of the letter was any different than it was on appeal, the court rejected its argument. Similarly, on the due process claims, the district court reiterated that the Seventh Circuit had rejected the college's argument that because Meade's classes could be cancelled, she had no property interest in her employment. As the lower court explained, "The mere fact that Meade might not end up teaching anticipated courses does not negate her protected property interest." Therefore, the court rejected the college's motion for summary judgment. The court also rejected Meade's motion for summary judgment finding that there was not sufficient evidence to conclude as a matter of law that she was entitled to prevail on her claims without a trial.

***Meagher v. Andover Sch. Comm.*, 94 F. Supp. 3d 21 (D. Mass. 2015)**

In this case, a US District Court in Massachusetts ruled that speech made by a teacher as a union representative was protected under the First Amendment finding that the *Garcetti* test did

not apply because speech was not a part of her normal employment duties as clarified in *Lane v. Franks*.

This case arose out of the September 2012 termination of the plaintiff, Jennifer Meagher ("Meagher"), from her employment as a tenured teacher at Andover High School ("AHS") in Andover, Massachusetts. Prior to her termination, Meagher and other members of the teachers' union, the Andover Education Association ("AEA" or "Union"), were involved in contentious negotiations with the Andover School Committee over a new collective bargaining agreement. In addition, AHS was engaged in the process of seeking re-accreditation pursuant to the standards established by the New England Association of Schools and Colleges ("NEASC"). The accreditation process centered on a self-study, which required teachers and administrators at AHS to conduct evaluations of the school's programs, prepare separate reports addressing one of seven accreditation standards, and present the reports to the faculty for approval. Under the NEASC guidelines, each report required approval by a two-thirds majority vote of the faculty. It was undisputed that Meagher was discharged from employment, effective September 17, 2012, because she sent an e-mail to approximately sixty other teachers in which she urged them to enter an "abstain" vote on the ballots for each of the self-study reports as a means of putting the accreditation process on hold and using it to gain leverage in the collective bargaining negotiations. Meagher alleged that the decision to terminate her for writing and distributing the e-mail to her colleagues constituted unlawful retaliation for, and otherwise interfered with, the exercise of her First Amendment right to engage in free speech.

The fundamental issue was whether Meagher's e-mail to her colleagues is entitled to protection under the First Amendment. Pursuant to *Garcetti v. Ceballos*, her speech would be protected if she were speaking as a citizen on a matter of public concern rather than pursuant to her duties as a teacher when she distributed the communication, and if the value of her speech was not outweighed by the defendants' interest in preventing unnecessary disruptions to the efficient operation of the Andover public schools.

In reviewing the facts, the court found that Meagher was speaking as a citizen.

The record on summary judgment establishes that Meagher was speaking as a citizen, and not an employee of the Andover School Department, when she distributed the June 10, 2012 e-mail at issue in this case. There is no dispute that Meagher wrote the e-mail on her personal, home computer, and distributed it to her colleagues using her personal e-mail account. Moreover, there is no dispute that she sent the communication during non-working hours, that she contacted the recipients using their personal e-mail accounts, and that the e-mail concerned issues that were addressed in the press and triggered considerable discussion among members of the local community. The substance of the e-mail, in which Meagher advocated use of the "abstain" option on the ballots for the self-study reports as a means of delaying the NEASC re-accreditation process and gaining leverage in the contract dispute between the Union and the ASC, would not have

given objective observers the impression that Meagher was representing her employer when she communicated with her colleagues. . . . Accordingly, the record demonstrates that Meagher was working in her capacity as a Union activist rather than in her capacity as a high school English teacher, when she distributed the communication in question.

The court also found that the value of Meagher's speech outweighed any interest that the defendants had in preventing unnecessary disruptions and inefficiencies in the workplace. Therefore, the court found that Meagher's speech was protected and that her termination violated her rights under the First Amendment. Ultimately, before a trial was held the parties settled Meagher's claim for \$100,000 and the court awarded Meagher's attorney \$183,691 in attorneys' fees and costs. *See Meagher v. Andover Sch. Comm.*, 2016 U.S. Dist LEXIS 1100 (D. Mass. Jan. 6, 2016)

D. Exclusive Representation

***D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. Feb. 5, 2016)**

This was one of several lawsuits in which anti-union plaintiffs challenged the long established rights of unions to exclusively represent employees in public sector bargaining. In a decision written by former Supreme Court Justice David Souter, the Court firmly rejected the plaintiffs' claims. The court explained that non-union public employees have no cognizable claim that their First Amendment associational rights were violated by the union acting as an exclusive bargaining agent with the state. The court explained,

. . . that result is all the clearer under *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984), which ruled against *First Amendment* claims brought by public college faculty members, professional employees of a state education system, who challenged a legislative mandate that a union selected as their exclusive bargaining agent be also the exclusive agent to meet with officials on educational policy beyond the scope of mandatory labor bargaining. The Court held that neither a right to speak nor a right to associate was infringed, *id.* at 289; like the appellants here, the academic employees in *Knight* could speak out publicly on any subject and were free to associate themselves together outside the union however they might desire. Their academic role was held to give them no variance from the general rules that there is no right to compel state officials to listen to them, *id.* at 286, and no right to eliminate the amplification that an exclusive agent necessarily enjoys in speaking for the unionized majority, *id.* at 288.

The Court also rejected the Plaintiffs' attempts to use the recent Supreme Court decision in *Harris v. Quinn*, 135 S. Ct. 1363 (2014) to justify their claims. The Plaintiffs attempted

to appeal the case to the United States Supreme Court. On June 13, 2016, the Supreme Court rejected their appeal. *D'Agostino v. Baker*, 2016 U.S. LEXIS 3782 (U.S. June 13, 2016).

This case was one of a number of cases claiming that exclusive representation in the public sector was unconstitutional. To date these challenges have been rejected with the district courts similarly reading *Knight* as confirming that exclusive representation by a union does not infringe non-members' associational rights. See *Hill v. SEIU*, 2016 U.S. Dist. LEXIS 62734 (N.D. Ill. May 12, 2016); *Mentele v. Inslee*, 2016 U.S. Dist. LEXIS 69429 (W.D. Wash. May 26, 2016); *Jarvis v. Cuomo*, 2015 U.S. Dist. LEXIS 56443 (N.D.N.Y Apr. 30, 2015)(Addressed in the 2015 Legal Update); *Bierman v. Dayton*, No. 14-3021, 2014 U.S. Dist. LEXIS 150504, 2014 WL 5438505 (D. Minn. Oct. 22, 2014).

E. Agency Fee

***Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (March 29, 2016)**

On March 29, 2016, the Supreme Court issued a decision rejecting attempts by anti-union forces to render agency fee unconstitutional in the public sector. The AAUP filed with the American Federation of Teachers an amicus brief arguing that the payment of agency fees by nonmembers in collective bargaining unions to support union representation is constitutional. Ultimately the Court upheld an appellate court decision that found agency fee constitutional without addressing the substantive arguments in the case. Since the Court was equally divided, the Supreme Court decision stated in full “The judgment is affirmed by an equally divided Court.” Thus, the law remains as it has for over forty years. However, since the Court was equally divided, it could revisit the issue in another case once a new justice is appointed to the Court.

Agency fee has been deemed constitutional since the Supreme Court’s 1977 decision in *Abood v. Detroit Board of Education*. In *Harris v. Quinn*, the Supreme Court declined to overrule *Abood*, although the Court raised questions regarding its vitality. Anti-union groups brought the *Friedrichs* case in California and pushed it through the courts. In the Supreme Court, the *Friedrichs* plaintiffs have advanced the argument that all agency fee arrangements in the public sector violate the First Amendment as they compel nonmembers to pay for activities that they believe address matters of public concern. The plaintiffs also argued in the alternative that even if some agency fee system is constitutional, the current opt-out system of charging agency fee payers is unconstitutional.

The Supreme Court accepted two questions for review: (1) Whether *Abood v. Detroit Board of Education* should be overruled and public-sector “agency shop” arrangements invalidated under the First Amendment; and (2) whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions.

On November 13, 2015 AAUP filed with American Federation of Teachers an amicus brief before the Supreme Court arguing that the payment of agency fees by nonmembers in

collective bargaining unions to support union representation is constitutional. The amicus brief supports the charging of agency fees and provides examples from AAUP higher education chapters of the benefits of the agency fee system. The brief provides strong arguments in favor of the agency fee system including that agency fees are an essential component of the states' management of some of their most important institutions; that petitioners' facial, all-or-nothing challenge to all aspects of every agency fee ever charged anywhere, on the basis of no record at all, should be rejected on its face; and that to the extent the court entertains petitioners' facial claim, it must account for petitioners' failure to challenge the underlying regime of exclusive representation in collective bargaining. The brief explains that "fair share fees are . . . used to fund a wide range of . . . activities that promote the state's compelling interest in providing students a high quality education and directly benefit nonmembers." Thus, based on the significant benefits provided by agency fees, compared to the minimal burdens, charging agency fees to nonmembers does not violate the First Amendment.

The Court held oral argument on Monday, January 11, 2016. After the oral argument, the Court appeared poised to overturn *Abood* and to find that agency fees in the public sector were unconstitutional. However, prior to issuing a decision Justice Scalia died, leaving the Court with only eight justices. As the ultimate decision states, the eight justices were equally divided. When there is an equally divided Supreme Court, the lower court decision stands and there is no Supreme Court precedent created. In some such cases, the Justices explain their positions. In this case they did not, limiting their decision to one sentence. The plaintiffs petitioned for a rehearing, which sat pending for a substantial amount of time before finally being denied on June 28, 2016. Thus this case has concluded.

While it is not clear what the respective sides of the Court would have held, it is likely that one side would have upheld *Abood*, and the other would have overturned *Abood* in whole or in large part. While this case is concluded, other challenges to the constitutionality of agency fee are still pending in the lower courts. Therefore this issue could be revisited by the Court, particularly after a new justice is appointed. Since the Court was tied, likely with four justices in favor of finding agency fee constitutional and four opposed, the perspective of the new justice would probably be dispositive.

***Jarvis v. Cuomo*, 2016 U.S. Dist. LEXIS 6218 (N.D.N.Y Jan. 20, 2016)**

This case involved disputes regarding the refund of agency fees collected from non-union members who were partial public employees under the Supreme Court's decision in *Harris v. Quinn*, 189 L. Ed. 2d 620 (U.S. 2014). The plaintiffs were individuals operating home child care businesses. They are covered by the Supreme Court's decision in *Harris* which ruled that collection of agency fees from these individuals violated the First Amendment.

After the *Harris* decision was issued, the Union and the employer negotiated a new collective bargaining agreement that did not require the deduction of agency fees. The union also rebated the plaintiffs' agency fees that were collected after the Supreme Court issued its decision

in *Harris*. The plaintiffs continued to prosecute their suit arguing that the Union was obligated to rebate them for agency fees paid prior to the Court's decision in *Harris*.

The district court found that the Union was not obligated to make such a reimbursement as the union relied in good faith when it collected the agency fees prior to *Harris*. The Court explained,

Plaintiffs' Complaint does not contain any allegations that CSEA acted in bad faith in collecting the fee prior to *Harris*. To the contrary, the record indicates that CSEA acted in good faith when relying on the validly enacted state legislation that authorized the fair share fee as well as prior Supreme Court precedent authorizing a similar payment assessment in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1971). Moreover, the Court finds that Defendants took reasonable measures to make Plaintiffs whole after the *Harris* decision was issued. Accordingly, the Court finds that the good-faith defense applies to the CSEA Defendants and therefore, they cannot be liable for damages based on the collection of fees from Plaintiffs prior to July 1, 2014.

III. FOIA/Subpoenas and Academic Freedom

***Energy & Environment Legal Institute v. Arizona Board of Regents*, Case No. 2CACV-2015-0086 (Ariz. App. Ct., Second App. Div., Dec. 3, 2015) (unpublished)**

In a case in which the AAUP filed an amicus brief, the Arizona Court of Appeals remanded a dispute involving a request for climate scientists' research records so that the trial court could weigh de novo the University's "contention that disclosure of the records would be detrimental to the best interests of the state against the presumption in favor of disclosure." The case arose from a public records request for extensive material from two climate scientists submitted by a legal foundation seeking to use records requests in an attempt to "put false science on trial." The AAUP filed an amicus brief with the Arizona Court of Appeals, and earlier with the trial court, arguing that academic freedom to conduct research is essential to a vital university system, and to the common good, and warranted protecting certain research records from disclosure.

This case arose from a lawsuit filed by Energy & Environment Legal Institute, a "free market" legal foundation using public records requests in a campaign against climate science. E & E, previously known as the American Tradition Institute, brought similar cases involving public records requests of faculty members, including in the case of *American Tradition Institute v. Rector and Visitors of the University of Virginia*, 756 S.E.2d 435 (Va. 2014), in which the AAUP filed an amicus brief successfully opposing the ATI records request.

E & E submitted public records requests that targeted two University of Arizona faculty members, climate researchers Professors Malcolm Hughes and Jonathan Overpeck. E & E sought

e-mails authored by or addressed or copied to them. The e-mails were, in turn, linked to eight other individuals, each of whom is or was then a professor or researcher at another private or public university. As E & E counsel has stated, the suit is supposedly intended to “put false science on trial” and E & E vows to “keep peppering universities around the country with similar requests under state open records laws.” The case was originally heard by the Superior Court in Pima County Arizona in late 2014.

The AAUP filed an amicus brief in the lower court on September 25, 2014. The brief argued, “when public records requests target information that implicates principles of academic freedom, courts must balance the public’s general right to disclosure against the significant chilling effects that will result from forcing scholars and institutions to disclose collegial academic communications and internal deliberative materials.” On March 24, 2015, the court ruled that the University did not have to disclose the records. The decision noted that the argument regarding the potential chilling effect of the disclosures was key to the decision.

E & E appealed this decision to the Arizona Court of Appeals. On October 23, 2015, the AAUP filed a brief in support of the University and the scientists. The brief was drafted by AAUP General Counsel Risa Lieberwitz, with input from AAUP Litigation Committee members, local Arizona Counsel Don Averkamp and others. The brief argued that academic freedom warranted protecting the research records from disclosure. One key consideration under Arizona law is whether disclosure is “in the best interests of the state.” The brief explained that “Courts should consider the best interests of the state to maintain a free and vital university system, which depends on the protection of academic freedom to engage in the free and open scientific debate necessary to create high quality academic research. Where the requests seek prepublication communications and other unpublished academic research materials, as in the case at bar, compelled disclosure would have a severe chilling effect on intellectual debate among researchers and scientists.”

In its decision, the Court of Appeals focused solely on the burden of proof applied by the trial court and did not address the substantive question regarding whether the release of the records was appropriate. The trial court had ruled that the issue was whether the University had abused its discretion or acted arbitrarily or capriciously in refusing to disclose the records. The Court of Appeals determined that this was not the appropriate burden of proof. The Court of Appeals held “the trial court was required de novo to weigh the [University’s] contention that disclosure of the records would be detrimental to the best interests of the state against the presumption in favor of disclosure. Accordingly, we vacate the portion of the court’s order pertaining to e-mails addressing ‘prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary’ and remand so that the court may balance the countervailing interests and determine whether E&E is entitled to access those e-mails.” (Citations omitted.) On remand the trial court will again need to consider the argument that disclosure of such research records is not in the best interests of the state as the disclosure harms academic freedom and would have a severe chilling effect on intellectual debate.

Highland Mining Company v. West Virginia University School of Medicine, 774 S.E.2d 36 (W.V. 2015)

The Supreme Court of Appeals of West Virginia shielded from disclosure a former West Virginia University researcher's records of his work concerning the health effects of mountaintop-removal mining. The order granted in part and denied in part Highland Mining Company's request for documents related to several articles co-authored by a professor from the West Virginia University School of Medicine (WVU). The scholar, Michael Hendryx, led a research project that found that people living near mountaintop-removal mines faced higher risks of cancer and premature death. A mining company had sued the university for access to records of Mr. Hendryx's research.

The court held that pursuant to the West Virginia Freedom of Information Act (FOIA), WVU may use FOIA's "internal memorandum" exemption to withhold documents that reflect the professor's deliberative process. The court explained that the "involuntary public disclosure" of the professor's research documents "would expose the decision-making process in such a way as to hinder candid discussion of WVU's faculty and undermine WVU's ability to perform its operations". However, the court also ruled that the University could not invoke FOIA's "personal privacy" exemption to protect documents containing anonymous peer review comments of the draft articles (although those documents would be exempt from disclosure under the "internal memoranda" exemption). Finally, the court concluded that WVU may not claim an "academic freedom" privilege to avoid the plain language of FOIA because the state does not have an academic-freedom exemption to its public-records law.

IV. Tenure, Due Process, Breach of Contract, and Pay

A. Tenure – Breach of Contract

Langenkamp v. New York University, 628 Fed. Appx. 50 (2nd Cir. Oct. 15, 2015)

A professor was terminated and she argued that the university's offer of employment including an agreement to abide by all university policies including the faculty handbook constituted a breach of contract. The faculty handbook specified procedures for the university to follow before terminating an employee. Although New York has a well-established at-will employment doctrine, the court narrowly ruled that the professor's breach of contract claim be remanded for further proceedings. The policies in a personnel manual specifying the employer's practices with respect to the employment relationship, including procedures or grounds for termination, may become part of the employment contract IF (i) an express written policy limiting the employer's right of discharge exists, (ii) the employer made the employee aware of this policy, and (iii) the employee detrimentally relied on the policy in accepting or continuing employment.

***Salaita v. Kennedy*, 118 F.Supp. 3d 1068 (N.D. Ill. Aug. 6, 2015)**

Professor Salaita was offered, and accepted, a tenured position at the University of Illinois, to begin in August 2014, but on August 1, in response to angry tweets by the professor, he was notified by the university's chancellor that she would not take the ordinarily routine step of submitting the appointment to the board of trustees for approval. Professor Salaita sued arguing that the refusal to appoint him to the tenured position was a breach of contract and violated his constitutional rights. The court denied the university's motion to dismiss and ruled that the professor's contract was not negated by the "subject to approval by the Board of Trustees" language in his letter. The court reasoned that this language was simply a part of the university's performance, since everything else about the letter, and the university's subsequent conduct, indicated that a binding contract had been made once the professor signed a form at the bottom of the letter indicating his formal acceptance. The court noted that, "the University's argument, if applied consistently, would wreak havoc" in academia: "the entire American academic hiring process as it now operates would cease to exist, because no professor would resign a tenure position, move states, and start teaching at a new college based on an 'offer' that was absolutely meaningless until after the semester already started." The court also ruled that the professor had a viable claim for violation of his due process rights, since the contract gave him a "property interest" in his job. The decision is a victory for the AAUP, who censured the university in June 2015.

B. Tenure – Constitutionality

***Vergara v. California*, 246 Cal. App. 4th 619 (Cal. Ct. App. 2016)**

In this case, the Court of Appeal of California overturned a ruling by a California state court judge that found that California statutes providing tenure protections to K–12 teachers violated the equal protection provisions of the California constitution. The case arose from a challenge, funded by anti-union organizations, to five California statutes that provide primary and secondary school teachers a two-year probationary period, stipulate procedural protections for non-probationary teachers facing termination, and emphasize teacher seniority in reductions of force. The AAUP submitted an amicus brief, which argued that the challenged statutes help protect teachers from retaliation, help keep good teachers in the classroom by promoting teacher longevity and discouraging teacher turnover, and allow teachers to act in students' interests in presenting curricular material and advocating for students within the school system. The Court of Appeal reversed the trial court's decision, holding that the statutes themselves did not create equal protection violations, so they are not unconstitutional.

The challenged statutes in the California Education Code establish: a two-year probationary period during which new teachers may be terminated without cause, due process protections for non-probationary teachers facing termination for cause, and procedures for implementing budget-based reductions-in-force. After an eight-week bench trial, Los Angeles

Superior Court Judge Rolf Michael Treu, in a short sixteen-page opinion containing only superficial analysis, adopted the plaintiffs’ theories in full, striking down each challenged statute as unconstitutional. In doing so, Judge Treu improperly used the “strict scrutiny” standard and failed to adequately consider the substantial state interest in providing statutory rights of tenure and due process for K–12 teachers in the public schools.

Instead, Judge Treu accepted wholesale testimony given by the plaintiffs’ expert witnesses. Based on this testimony, the court concluded that “the specific effect of grossly ineffective teachers on students . . . shocks the conscience” and that “there are a significant number of grossly ineffective teachers currently active in California classrooms” who have “a direct, real, appreciable, and negative impact on a significant number of California students . . .” Although he did not cite evidence showing a causal link between the statutes and students’ constitutional rights, Judge Treu held that the statutes unconstitutionally impact students’ fundamental right to equality of education and disproportionately burden poor and minority students. Judge Treu stayed his ruling pending appeal. The State Defendants and Intervenors California Teachers Association and California Federation of Teachers appealed to the Court of Appeal of the State of California for the Second Appellate District.

The AAUP filed an amicus brief in support of tenure. The AAUP has a particular interest in defending the due process protections of tenure at all levels of education. The brief, primarily authored by Professor Charlotte Garden, an expert in labor law and constitutional law and litigation director of the Korematsu Center for Law & Equality at Seattle University, advanced two substantive arguments. First, the brief explained that by helping to insulate teachers from backlash or retaliation, the challenged statutes allow teachers to act in students’ interests in deciding when and how to present curricular material and to advocate for students within their schools and districts. In so doing, the brief recognized the distinction between the academic freedom rights of primary and secondary school teachers and those of professors in colleges and universities. Second, the brief argued that students are better off when good teachers remain in their classrooms, and the challenged statutes promote teacher longevity and discourage teacher turnover.

On April 14, 2016, a three judge panel in the Court of Appeal reversed the earlier judgment, finding that the tenure, dismissal, and layoff statutes themselves did not cause equal protection violations, so they are not unconstitutional. The court reasoned that the negative evidence related to inexperienced teachers and poor and minority students was the result of external factors such as administrative decisions, and were not directly caused by the text of the statutes. In other words, the problems were caused by how people are implementing the statutes, not by the system the statutes create. Additionally, the court decided the evidence showing that ineffective teachers can adversely affect students did not demonstrate that the tenure, dismissal, and layoff system itself creates this problem or leads to an unfair distribution of ineffective teachers.

Plaintiffs have said they intend to appeal, so it is likely that the case will move on to the California Supreme Court.

C. Faculty Handbooks

Report of the NLRB General Counsel Concerning Employer Rules, NLRB GC 15_04, (NLRB General Counsel March 18, 2015)

The General Counsel for the National Labor Relations Board recently published a guidance memorandum that provides specific examples of lawful and unlawful employee handbook rules in the areas of confidentiality, professionalism and employee conduct, use of company logos, copyrights and trademarks, conflicts of interest, photography and recording, and interaction with the media and other third parties.

The NLRB and its General Counsel have aggressively scrutinized many frequently used employee handbook provisions for potentially infringing on the right of employees to engage in concerted activity protected under Section 7 of the National Labor Relations Act (NLRA). In addition to the right to engage in union organizing, Section 7 activity includes the right to discuss, challenge, question, and advocate changes in wages, hours, and other terms and conditions of employment in both unionized and non-unionized work environments. The NLRB will deem an employee handbook provision to violate the NLRA if it specifically prohibits Section 7 activity or if "employees would reasonably construe" the rule as prohibiting such activity. It is this "reasonably construe" language that has resulted in many common employee handbook provisions being declared unlawful by the NLRB.

The guidance section that may be most applicable to faculty members is one that addresses the legality of employer rules regarding the conduct of employees towards the University and supervisors or management. The General Counsel explained.

Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. *See Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014). Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited. *Id.* at 4. On the other hand, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful, because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties.

Similar language may be used in University policies or handbooks, particularly in relation to “civility clauses.” However, employees should be cautious as this is a complicated area, and simply because it appears a portion of the manual may be covered by the above does not mean that a faculty member can avoid termination for violating the manual.

V. Discrimination and Affirmative Action

A. Affirmative Action in Admissions

Fisher v. University of Texas at Austin, 576 U.S. ____ (June 23, 2016)

The US Supreme Court upheld the constitutionality of University of Texas at Austin’s affirmative action program in *Fisher II*, in which the AAUP joined an amicus brief. The brief argued that consideration of race in the admissions process is appropriate and advanced the AAUP’s longstanding view that diversity is essential not only for students but for the entire academic enterprise. In its second consideration of *Fisher’s* challenge to UT’s program, the Court confirmed that universities must prove that race is considered only as necessary to meet the permissible goals of affirmative action. In particular, the university must prove that “race-neutral alternatives” will not suffice to meet these goals. In *Fisher II*, the Court held that since UT had sufficient evidence that its “Top Ten” admissions policy based on class rank was not adequate, by itself, to meet its diversity goals, it could permissibly consider a student’s race as one factor in a broader assessment of qualifications. This opinion now enables universities to adopt affirmative action programs that meet constitutional requirements.

The case arose when Abigail Fisher, a white student, challenged the university’s consideration of race in the undergraduate admissions process when she was denied admission. Fisher argued that UT Austin’s use of race in admissions decisions violated her right to equal protection under the Fourteenth Amendment. In 1996, the Texas Legislature adopted the Top 10 Percent Law. Under this law, seniors in the top 10 percent of their high school class were guaranteed admission to any Texas state university. The primary objective of the law is to draw in the best students from each Texas school, including students from predominantly black or Hispanic areas, in order to achieve higher levels of diversity. Following the Supreme Court upholding a race-conscious admissions program at the University of Michigan Law School in *Grutter v. Bollinger*, 539 U.S. 244 (2003), UT Austin reinstated a consideration of race in admissions decisions for those who didn’t fall within the Top 10 Percent Law.

Fisher filed a lawsuit challenging UT Austin’s decision to deny her admission. The case was first heard by the Fifth Circuit Court of Appeals in 2010, and the AAUP signed onto the American Council on Education (ACE) amicus brief submitted to the Fifth Circuit. The Fifth Circuit ruled in favor of UT Austin and the Fifth Circuit’s first decision was appealed to the Supreme Court in 2012. In that appeal, the question presented was whether the Supreme Court’s

decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter*, permitted UT Austin's use of race in undergraduate admissions decisions. Fisher claimed that either this use of race did not fall into the constitutional parameters of *Grutter* or that *Grutter* must be overturned. In August 2012, the AAUP signed onto an amicus brief authored by ACE with 37 other higher education groups. The brief argued that the educational benefits that come from a diverse student body are a compelling state interest and second, colleges and universities must be allowed to make autonomous decisions when determining the composition of their student bodies.

On June 24, 2013, by a vote of 7 to 1, the Supreme Court followed longstanding precedent and recognized that colleges and universities have a compelling interest in ensuring student body diversity, and can take account of an individual applicant's race as one of several factors in their admissions program as long as the program is narrowly tailored to achieve that compelling interest. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013) (*Fisher I*). The Supreme Court, however, ruled that the court below had not properly applied the "strict scrutiny" standard and remanded the case back to the Fifth Circuit. In November 2013, the AAUP again signed onto ACE's amicus brief to the Fifth Circuit, which reiterated the arguments enumerated above. In July 2014, for the second time, the Fifth Circuit upheld the UT Austin admissions plan. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014). Fisher petitioned to have the Supreme Court review the case (again) and that request was granted on June 29, 2015.

For many years, the AAUP has taken a leadership role in affirmative action debates by emphasizing the educational value of diversity. As early as 1978, the AAUP filed an amicus brief in *Regents of the University of California v. Bakke* to protect the primacy of the faculty role in developing educationally appropriate admissions criteria. In addition, AAUP policy has long supported the value of diversity in education. See "Affirmative Action Plans: Recommended Procedures for Increasing the Number of Minority Persons and Women on College and University Faculties," AAUP, *Policy Documents and Reports*, 157-163 (11th ed. 2015). In continuing this tradition, the AAUP joined the amicus brief in *Fisher II*, authored by ACE and joined by thirty-seven other higher education organizations.

The *Fisher II* amicus brief argued that the interest in a diverse student body is compelling because it is grounded in educational benefit; and that interest is rooted in educational judgment. In *Grutter* and *Fisher I*, the Supreme Court made clear that when an institution sets its educational goals—including a goal of attaining the educational benefit of a diverse student body—it makes an educational judgment that merits judicial regard. That interest can also justify narrowly tailored consideration of race in admissions as part of holistic review of individual applicants. Narrow tailoring should not be interpreted to forbid race-conscious holistic review simply because the review operates concurrently with race-neutral mechanisms. Thus the brief concluded that the Supreme Court has permitted institutions to take race into account as a consideration in the admissions decision, and it should continue to do so.

In 2016, the US Supreme Court upheld the constitutionality of the UT Austin's affirmative action program in *Fisher II*. Due to Justice Kagan's recusal from the case and with the death of Justice Scalia, only seven justices took part, resulting in a 4-3 decision. Justice Kennedy's opinion for the Court is significant in taking a realistic and reasonable approach that should enable universities to adopt affirmative action programs that meet constitutional requirements.

The Court applied the three key criteria from its earlier decision in this case (*Fisher I*): (1) a university must show that it has a substantial purpose or interest in considering race as a factor in its admissions policy and that considering race is necessary to achieve this purpose; (2) courts should defer, though not completely, to a university's academic judgment that there are educational benefits that flow from diversity in the student body; and (3) the university must prove that race-neutral alternatives will not achieve its goals of increasing diversity.

The Court's decision recognizes that judges should give due deference to universities in defining educational goals that include the benefits of increasing diversity in the student body, such as the promotion of cross-racial understanding and the preparation of students for an increasingly diverse workforce and society.

The Court confirmed that universities must prove that race is considered only as necessary to meet the permissible goals of affirmative action. In particular, the university must prove that "race-neutral alternatives" will not suffice to meet these goals. This was the most controversial aspect of the *Fisher I* decision. In *Fisher II*, though, the Court takes a reasonable approach, finding that UT had sufficient evidence that its "Top Ten" admissions policy based on class rank was not adequate, by itself, to meet diversity goals. By adding a "holistic" evaluation of applicants who were not admitted in the "Top Ten" program, UT was able to consider race as one factor in a broader assessment of qualifications.

The Court noted that the "prospective guidance" of its decision is limited to some extent by the particularities of the UT case. Despite this, the Court's decision does provide important guidance to universities concerning the criteria that will be applied in evaluating affirmative action programs. The Court also emphasizes that universities have "a continuing obligation" to "engage [] in periodic reassessment of the constitutionality, and efficacy, of [their] admissions program[s]." While this requires ongoing study and evaluation by universities, the Court's decision creates a significant and positive basis for universities to adopt affirmative action programs that meet constitutional requirements.

B. Sexual Misconduct – Title IX

Letter from Office of Civil Rights, Department of Education, (Feb. 17, 2016)

This letter from the Office of Civil Rights (OCR) responded to an inquiry from Congressman James Lankford who posed several questions regarding OCR's position and the status of its 2010 and 2011 "Dear Colleague" letters. In addressing one important issue, the OCR confirmed that these Dear Colleague letters do not have the force of law or regulation. OCR

explained “it is Title IX and the regulation, which has the force and effect of law, . . . not OCR’s 2011 (or any other)” Dear Colleague letter. “Instead, OCR’s guidance is issued to advise the public of its construction of the statutes and regulations it administers and enforces.” The fact that these “Dear Colleague” letters do not have the force of law could have significant consequences if colleges and universities seek to use the letters to justify abrogating prior agreements or established policies.

Sanning v. Board of Trustees of Whitman College, Case No. 4:15-cv-05055 (E.D. Wa. Dec. 9, 2015)

This case arose from the termination of a Professor by Whitman College as the result of a Title IX investigation. The plaintiff alleged that in terminating the professor, the College violated its own policies and procedures and discriminated against him based on sex. One of the primary arguments advanced by the college was that it was required by law, in the form of the OCR’s “Dear Colleague” letters, to depart from its own policies and procedures. In a short ruling, the court found that there were sufficient allegations that the College treated Sanning differently because of his sex which supposedly “led to a process which violated the Grievance Policy adopted by Whitman and ultimately lead to Sanning’s employment being terminated.” Therefore, the court denied the College’s motion to dismiss the case.

VI. Intellectual Property

A. Patent and Copyright Cases

Digital Millennium Copyright Act (“DMCA”), Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention (Libr. of Congress Oct. 30, 2015)

Section 1201 of the Copyright Act, which was part of the Digital Millennium Copyright Act (DMCA) of 1998, bars the “circumvention” of “technological protection measures” that control access to copyrighted works. Every three years the Librarian of Congress (advised by the Copyright Office) issues a set of exceptions to the 1201 rules to allow for lawful uses that might otherwise be discouraged by the law. Educators have participated in this process, which began in 2000, for many years, and have successfully obtained exceptions that have grown incrementally over time to encompass more uses, more types of media, and more users.

AAUP signed onto Public and Reply Comments submitted to the US Copyright Office authored by the Glushko-Samuels Intellectual Property Clinic at the American University Washington College of Law, and the Intellectual Property, Arts, and Technology Clinic, University of California, Irvine School of Law, which support faculty use of excerpts of certain audiovisual material and research for educational purposes.

On October 30, 2015, the Library of Congress announced its exemptions to DMCA—the new rules allow documentary filmmakers and authors offering film analysis to access encrypted content from DVDs, Blu-ray discs and digitally transmitted video in order to criticize or comment on that content in their works. The previous version of this rule did not permit these creators to access Blu-ray; and the new rules also allow faculty and in some cases students to copy short portions of protected works for use in criticism or commentary where close analysis of the clip is necessary for the following formats: DVD, streaming video delivery and Blu-ray. The prior rules allowed use of DVD and streaming for these purposes, but Blu-ray is new to this cycle.

VII. Collective Bargaining Cases and Issues – Private Sector

A. NLRB Authority

1. Recess Appointments

***Noel Canning v. NLRB*, 189 L. Ed. 2d 538 (2014)**

On June 26, 2014, the U.S Supreme Court unanimously invalidated three appointments to the NLRB because they did not meet the requirements of the Recess Appointments Clause. (See 2014 Legal Update for further details regarding the Court’s decision.)

The case arose when, in January 2012, President Obama filled three vacancies on the National Labor Relations Board (NLRB) through recess appointments, after a Senate minority had used the filibuster rule to block a Senate vote on the nominees. Under the Constitution’s Recess Appointments Clause, “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session.” U.S. Const. art II, § 2, cl. 3. The three NLRB appointments preserved a quorum in the agency, allowing it to conduct business. During this period, from December 17, 2011 to January 23, 2012, the Senate held pro forma sessions during which no business was conducted but the Senate was not adjourned for more than three days. The President asserted that the Senate was in recess despite these pro forma sessions, giving him authority to exercise his recess-appointment power during this period.

The US Supreme Court unanimously invalidated three appointments to the NLRB because they did not meet the requirements of the Recess Appointments Clause. However, the Court divided by a vote of 5-4 on what types of recess appointments are permissible. The majority held in its controlling opinion that recess appointments can be made during any recess of at least ten days, regardless of whether the recess is an intersession recess or an intrasession recess and regardless of when the vacancies being filled arose.

Generally, after the *Noel Canning* decision was issued, the Board issued an order in many of the pending cases setting aside the vacated Decision and Order, and retaining the case on its

docket for further action as appropriate. The Board has subsequently been addressing these cases on an individual basis. In many of the cases, the Board has issued decisions largely concordant with the prior Board rulings in the cases, adopting the reasoning of the vacated decisions, with short summaries of the rationale in the original board decision.

For example in *Grand Canyon Education, Inc. d/b/a Grand Canyon University*, 28-CA-022938, et al.; 362 NLRB No. 13 (February 2, 2015), the Board explained:

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge’s decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge’s rulings, findings, and conclusions and adopt the judge’s recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 164, which is incorporated herein by reference.

In addressing a specific finding, the Board highlighted the issue and adopted the reasoning of the prior decision. “We agree with the analysis in the vacated Decision and Order regarding Human Resources Business Partner Rhonda Pigati’s questioning of employee Gloria Johnson, and we find that it violated Section 8(a)(1) of the Act for the reasons stated therein.”

2. Religiously Affiliated Institutions

***Pacific Lutheran University*, 361 NLRB No. 157 (2014)(With Regional Director decisions.)**

In *Pacific Lutheran University*, the Board modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities; and second, whether certain faculty members are managers, who are excluded from protection of the Act. *See infra*.

The question of whether faculty members in religious institutions are subject to jurisdiction and coverage of the Act has long been a significant issue, with the Supreme Court’s 1979 decision in *Catholic Bishops* serving as the foundation for any analysis. In *Pacific Lutheran University*, the Board established a two-part test for determining jurisdiction. First, whether “as a threshold matter, [the university] holds itself out as providing a religious educational environment”; and if so, then, second, whether “it holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school’s religious educational environment.”

The employer and its supporters argued that only the threshold question of whether the university was a bona fide religious institution was relevant, in which case the Act would not

apply to any faculty members. The Board responded that this argument “overreaches because it focuses solely on the nature of the institution, without considering whether the petitioned-for faculty members act in support of the school’s religious mission.” Therefore, the Board established a standard that examines whether faculty members play a role in supporting the school’s religious environment.

In so doing, the Board recognized concerns that inquiry into faculty members’ individual duties in religious institutions may involve examining the institution’s religious beliefs, which could intrude on the institution’s First Amendment rights. To avoid this issue the new standard focuses on what the institution “holds out” with respect to faculty members. The Board explained, “We shall decline jurisdiction if the university ‘holds out’ its faculty members, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the university’s religious purpose or mission.”

The Board also found that faculty must be “held out as performing a *specific religious function*,” such as integrating the institution’s religious teachings into coursework or engaging in religious indoctrination (emphasis in original). This would not be satisfied by general statements that faculty are to support religious goals, or that they must adhere to an institution’s commitment to diversity or academic freedom.

Applying this standard, the Board found that while Pacific Lutheran University held itself out as providing a religious educational environment, the petitioned-for faculty members were not performing a specific religious function. Therefore, the Board asserted jurisdiction and turned to the question of whether certain of the faculty members were managerial employees.

Following the issuance of the *Pacific Lutheran University* decision, Regional Directors issued decisions finding that university faculty were not exempt from Board jurisdiction in *Loyola University Chicago* (13-RC-164618), Chicago IL (Reg. 13, December 29, 2015), *Loyola University Chicago* (13-RC-168082) Chicago IL (Reg. 13, March 4, 2016), *Manhattan College* (02-RC-023543) New York, NY (Reg. 2 August 26, 2015), *Saint Xavier University* (13-RC-022025) Chicago, IL, (Reg. 13, June 1, 2015), *Duquesne University of the Holy Spirit* (06-RC-080933) Pittsburgh, PA, (Reg. 6 June 5, 2015), *Seattle University* (19-RC-122863) Seattle, WA, (Reg. 19, August 17, 2015) and finding that a Catholic college was exempt from Board jurisdiction in *Carroll College*, (19-RC-165133) Helena MT (Reg. 19, January 19, 2016) and in *Marywood University*, (04-RC-173160), Philadelphia PA (Reg. 4, May 11, 2016), and teachers at an Islamic Academy were exempt from Board jurisdiction in *Islamic Saudi Academy* (05-RC-080474) Alexandria, VA (Reg. 5 Sept. 1, 2015).

In *Carroll College*, (19-RC-165133) Helena MT (NLRB May 25, 2016) the Board denied review stating “we agree that the Regional Director properly declined jurisdiction [based on a finding that the College was exempt as a religious institution] under *Pacific Lutheran*.” The Board did not reach the issue of whether the faculty were managers.

B. Faculty, Graduate Assistants and Players Coverage as Employees Entitled to Collective Bargaining Representation

1. Faculty as Managers

***Pacific Lutheran University*, 361 NLRB No. 157 (2014)(With Regional Director decisions.)**

In *Pacific Lutheran University*, the Board also modified the standards used to determine whether certain faculty members are managers, who are excluded from protection of the Act. This question arises from the Supreme Court's decision in *Yeshiva*, where the Court found that in certain circumstances faculty may be considered "managers" who are excluded from the protections of the Act. The Board noted that the application of *Yeshiva* previously involved an open-ended and uncertain set of criteria for making decisions regarding whether faculty were managers. This led to significant complications in determining whether the test was met and created uncertainty for all of the parties.

Further, in explaining the need for the new standard, the Board specifically highlighted, as AAUP had in its amicus brief, the increasing corporatization of the university. The Board stated, "Indeed our experience applying *Yeshiva* has generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself. Such considerations are relevant to our assessment of whether the faculty constitute managerial employees."

In *Pacific Lutheran University*, the Board sought to create a simpler framework for determining whether faculty members served as managers. The Board explained that under the new standard, "where a party asserts that university faculty are managerial employees, we will examine the faculty's participation in the following areas of decision making: academic programs, enrollment management, finances, academic policy, and personnel policies and decisions." The Board will give greater weight to the first three areas, as these are "areas of policy making that affect the university as whole." The Board "will then determine, in the context of the university's decision making structure and the nature of the faculty's employment relationship with the university, whether the faculty actually control or make effective recommendation over those areas. If they do, we will find that they are managerial employees and, therefore, excluded from the Act's protections."

The Board emphasized that to be found managers, faculty must in fact have actual control or make effective recommendations over policy areas. This requires that "the party asserting managerial status must prove actual—rather than mere paper—authority. . . . A faculty handbook may state that the faculty has authority over or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority *in fact*." Proof requires "specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision making area, and the subsequent review of those

decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed.” Further, the Board used strong language in defining “effective” as meaning that “recommendations must almost always be followed by the administration” or “routinely become operative without independent review by the administration.

Following the issuance of the *Pacific Lutheran University* decision, the Board remanded a number of cases involving whether faculty members are managers under *Yeshiva*. In these cases, the Board generally explained:

On December 16, 2014, the Board issued its decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), which specifically addressed the standard the Board will apply for determining, in accordance with *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), when faculty members are managerial employees, whose rights to engage in collective bargaining are not protected by the Act.

Accordingly, the Board remands this proceeding to the Regional Director for further appropriate action consistent with *Pacific Lutheran University*, including reopening the record, if necessary. . . . [Note 2] Members Miscimarra and Johnson adhere to their separate opinions in *Pacific Lutheran University*. Nevertheless, they agree with their colleagues that a remand is appropriate.

Point Park University, Case No. 06-RC-01226 (February 25, 2015). *See also Seattle University*, Case No. 19-RC-122863 (February 3, 2015).

Applying *Pacific Lutheran*, Regional Directors issued decisions finding that faculty were not managers under *Yeshiva* in *University of Southern California*, (31-RC-164864 and 31-RC-164868) Los Angeles CA (Reg. 31 Dec. 24, 2015) and *Seattle University* (19-RC-122863) Seattle, WA, (Reg. 19, August 17, 2015) and were managers in *Carroll College*, (19-RC-165133), Helena MT (Reg. 19, January 19, 2016), *Marywood University*, (04-RC-173160), Philadelphia PA (Reg. 4, May 11, 2016) and *Tufts University*, (01-RC-166588), Boston MA (Reg. 1, April 5, 2016).

2. Graduate Assistants Right to Organize

Northwestern University and College Athletes Players Association (CAPA), NLRB Case No. 13-RC-121359 (Aug. 17, 2015)

In a highly publicized case in which the AAUP filed an amicus brief, the National Labor Relations Board declined to assert jurisdiction over the Northwestern University football players’ petition seeking union representation rendering the players unable to unionize under the auspices of the NLRB. The Board, however, explicitly limited its decision to the unusual circumstances of

the case, avoiding broader questions involving the unionization of graduate student assistants and others. The Board concluded that asserting jurisdiction over the Northwestern University scholarship football players would not promote stability in labor relations due to the unusual facts of the case, which involved unionizing a single football team rather than teams on a league wide basis, and the fact that the NCAA and the Big Ten conference maintain substantial control over individual teams, the overwhelming majority of which are from public colleges and universities over which the Board cannot assert jurisdiction. The Board emphasized that “this case involves novel and unique circumstances,” repeatedly highlighting the narrow and limited nature of the decision.

While the Northwestern case was pending, the issue of graduate student assistant unionization under the NLRA was proceeding in other cases.

Columbia University, NLRB Case No. 02-RC-143012, review granted (Dec. 23, 2015)

This case appears to be one in which the Board will reconsider its holding in *Brown University*, 342 NLRB 483 (2004) that graduate students were not “employees” for purpose of Section 2(3) of the National Labor Relations Act (NLRA). In particular the NLRB issued an invitation to file amicus briefs addressing whether the Board should modify or overrule its 2004 decision in *Brown University*, which had found that graduate assistants were not employees and therefore did not have statutory rights to unionize. 342 NLRB 483 (2004).

The case arose when the United Autoworkers sought to organize student employees who provide instructional services, including graduate assistants, at Columbia University. In opposing the efforts to unionize, the University argued that graduate assistants are not “employees” under the National Labor Relations Act (NLRA) and therefore do not have statutory rights to choose whether to be represented by a union. In doing so the University relied on a 2004 decision by the Board in *Brown University*, 342 NLRB 483, which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees under the NLRA.

The NLRB Regional Director initially dismissed the election petition, without a factual hearing, finding that it sought an election among graduate students who are not employees pursuant to the Board's decision in *Brown*. The union appealed and the Board remanded the case for hearing so that evidence could be presented that would allow the Board to reconsider the *Brown* decision. A twelve-day hearing was held before an NLRB hearing officer in New York City. The Regional Director issued a decision on October 30, 2015, which included lengthy factual findings regarding the duties and compensation of graduate assistants at Columbia University. Nonetheless, the Regional Director dismissed the election petition, stating “I conclude that I am constrained by *Brown*, which holds that graduate assistants are not ‘employees’ within the meaning of Section 2(3) of the Act. Because the Petitioner seeks to represent individuals employed in classifications which fall within the term, ‘graduate assistants,’ *Brown* is controlling.”

The Union appealed to the National Labor Relations Board, and on December 23, 2015, the Board granted the request for review. On January 13, 2016, the Board issued a Notice and Invitation to File Briefs inviting amici parties to address one or more of four questions. Two of the questions directly addressed the *Brown* decision: “1) Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act? 2) If the Board modifies or overrules *Brown University*, supra, what should be the standard for determining whether graduate student assistants engaged in research are statutory employees, including graduate student assistants engaged in research funded by external grants? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974)).”

The AAUP filed an amicus brief with the National Labor Relations Board arguing that graduate assistants at private sector institutions should be considered employees with collective bargaining rights in keeping with its long history of support for the unionization of graduate assistants. The AAUP has previously filed numerous amicus briefs arguing the graduate assistants are employees with rights to unionize under the NLRA, has issued statements affirming the rights of graduate assistants to unionize, and has an active committee on graduate students and professional employees that represents the interests of graduate students.

The AAUP brief in this case addressed the two questions involving the *Brown* decision. The brief argued that graduate assistants, including those working on federal grant funded research, are employees with the right to unionize under the NLRA and it refuted the *Brown* decision’s speculative claims that collective bargaining would compromise academic freedom and the cooperative relationships between faculty mentors and their graduate student mentees.

The brief cited three reasons why graduate student assistants perform work in return for compensation and are thus employees under the Act. First, when graduate students work as teaching and research assistants, their work is indistinguishable from that performed by university faculty. Second, graduate students teach because they are paid, not because it is at the core of graduate education. Third, universities generally treat any stipend as payment for teaching or supporting the professor’s research, not as general financial support to enable the graduate student to attend class or conduct his or her own dissertation research.

In rebutting the argument that unionization would threaten academic freedom, the brief pointed out that unions, through collective bargaining agreements, often promote the cause of academic freedom.

Local AAUP chapters have successfully established explicit guarantees of academic freedom in their collective bargaining contracts. Some chapters of unionized faculty refer to the AAUP’s 1940 *Statement of Principles on Academic Freedom and Tenure* and quote it extensively in their collective bargaining contracts. Other faculty collective bargaining agreements to which an AAUP chapter is a party incorporate the language of

the 1940 *Statement* to define academic freedom. These contracts make promises of academic freedom legally enforceable.

In refuting the speculative claim that collective bargaining would compromise the cooperative relationships between faculty mentors and their graduate student mentees, the AAUP brief cited real life examples and large empirical studies of unionized campuses. The brief highlighted a recent study that is particularly compelling.

[A] 2013 study comparing student-faculty relationships, academic freedom, and economic well-being across unionized and non-unionized campuses confirmed the findings of prior surveys: unionization does not interfere with faculty-student relationships or harm the education or training of graduate students. See Sean E. Rodgers, Adrienne E. Eaton, & Paula B. Voos, *Effects of Unionization on Graduate Student Employees: Student Relations, Academic Freedom, and Pay*, 66 ILR Review 487-501 (2013). . . . Comparing unionized and non-unionized graduate student employees in terms of faculty-student relations, academic freedom, and pay, the study found that union represented graduate student employees reported higher levels of personal and professional support and unionized graduate student employees fared better on pay.

Therefore, AAUP brief concluded that “the Board should overrule the test of employee status applied in *Brown University* and return to its well-reasoned *NYU* decision, which found collective bargaining by graduate assistants compatible with academic freedom.”

The New School, NLRB Case No. 02-RC-143009, review granted (Oct. 21, 2015)

This case involved a petition for election by graduate students aimed at having the Board reconsider and reverse its holding in *Brown University*, 342 NLRB 483 (2004) that graduate students were not “employees” for purpose of Section 2(3) of the National Labor Relations Act (NLRA). Initially, the Region 2 Director rejected the petition, without a hearing or argument, based on the Board’s decision in *Brown*. The Union appealed, and on March 13, 2015 the Board concluded that the cases raised substantial issues under the NLRA, and cases should not have been decided without a hearing. In so doing, the Board allowed the parties to provide evidence and argument regarding whether the *Brown* case should be reconsidered or reversed. After conducting a hearing following the remand, the Regional Director dismissed the petition a second time. She concluded, based on the factual record, that the Petitioner seeks an election among graduate students who are not “employees” within the meaning of Section 2(3) of the Act under *Brown University*, and that the facts did not warrant finding the instant case distinguishable from *Brown University*. The Union appealed.

On July 30, 2015, based on seven days of hearing, the Regional Director issued a decision in *The New School* case, including extensive discussion of the evidence. While the facts were generally favorable for the unionization of graduate student assistants, the Regional Director concluded that she was bound by the Board’s decision in *Brown* until the Board

reconsiders or overrules that decision. Accordingly, the Regional Director stated, “I conclude that I am constrained by *Brown*, which holds that graduate assistants are not ‘employees.’ . . . Because the Petitioner seeks to represent individuals employed in classifications which fall within the term ‘graduate assistants,’ *Brown* is controlling, and therefore I am dismissing the petition.” On August 13, 2015, the union appealed the Regional Director’s decision, requesting that the Board overrule *Brown University* and hold that graduate student assistants are employees with rights to unionize under the NLRA. On October 21, 2015, the Board voted 3 to 1 to grant a request to review the decision.

C. Employee Rights to Use E-mail

***Purple Communications*, 361 NLRB No. 126 (Dec. 11, 2014)**

The National Labor Relations Board recently issued a decision significantly expanding the right of employees to use their employers' e-mail systems for union organizing and other activities protected by Section 7 of the National Labor Relations Act.

In *Purple Communications* the board explained that “the use of e-mail as a common form of workplace communication has expanded dramatically in recent years.” Therefore the board ruled that “employee use of e-mail for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their e-mail systems.” While the case addressed communications supporting the union during an organizing drive, given the board's expansion of protected activity, this also includes communications critical of the employer's employment-related policies, practices, and management decisions.

Therefore, employees who are given access to their employer’s e-mail system for business purposes now will be able to use that system on non-working time to engage in a wide range of protected communications, including union support and comments critical of the employer's employment-related policies and management decisions. While the board did not directly address other types of electronic equipment and communications, such as instant messaging or texting from employer-owned smartphones and other devices, the board noted that a similar analysis would potentially apply.

However, there are limitations to the decision. First, since the decision was issued by the NLRB, under the statute protecting private-sector employees, it only applies to private-sector employees. Second, the board only addressed employee use of work e-mail, and did not extend the protection to cover use by non-employees. Third, the protected use was limited to non-work time, and absent discrimination against the union it does not give the employees right to use the work e-mail during work time. Fourth, the employer may in certain limited circumstances prohibit or limit the use of work e-mail on non-work time. Finally, this ruling will likely be appealed and could be overturned by the courts.

Nonetheless, this is a major step forward for the rights of faculty members in private institutions. E-mail is one of the primary ways in which faculty speak to each other in the

modern world. The ability to use e-mail to communicate is essential to faculty, particularly contingent faculty, who are often dispersed and may not be able to speak directly to each other regularly. This decision recognizes this reality and provides private-sector faculty members' use of work e-mail to communicate with each other about union matters will be protected.

D. Bargaining Units

Lesley University, NLRB Case No. 01-RC-148228 (NLRB Reg. Dir. April 8, 2015)

On April 8, 2015, NLRB Regional Director Jonathan B. Kreisberg issued a decision and direction of election concerning a representation petition filed by SEIU that seeks to represent a unit of approximately 181 full-time and regular part-time core faculty employed by Lesley University including faculty with titles of Instructor, Assistant Professor, Associate Professor, Professor, and University Professor. In its petition, SEIU seeks to also represent in the proposed unit approximately 14 faculty employed in the same titles but under temporary contracts.

In his decision, Regional Director Kreisberg rejected the objection by Lesley University to the inclusion of the temporary faculty in the proposed unit finding that the temporary faculty had a community of interest with the core faculty because they perform many of the same duties including teaching, curriculum development, advising students, participating in departmental meetings and serving on faculty committees. In addition, the two faculty groups was found to enjoy many of the same terms and conditions of employment. While temporary faculty serve under contracts for a one-year term, Regional Director Kreisberg concluded that they had a reasonable expectation of continued employment noting that 35 percent of temporary faculty have served for a least two consecutive years notwithstanding their one-year temporary appointments.

E. NLRB Elections

NLRB Election Rules, 29 CFR Parts 101, 102, and 103; Guidance Memorandum on Representation Case Procedure Changes Effective April 14_ 2015, NLRB GC 15_06, (NLRB General Counsel April 6, 2015).

In December 2015 the NLRB issued revisions to union election rules that should vastly simplify and expedite the election process. Previously, the results of elections could be tied up for years in pointless litigation, delaying the results of a democratic process, a situation that would be intolerable in any other context. Specifically, the rules include the following: Provides for electronic filing and transmission of election petitions and other documents; Ensures that employees, employers and unions receive timely information they need to understand and participate in the representation case process; Eliminates or reduces unnecessary litigation, duplication and delay; Adopts best practices and uniform procedures across regions; Requires that additional contact information (personal telephone numbers and e-mail addresses) be included in voter lists, to the extent that information is available to the employer, in order to

enhance information sharing by permitting other parties to the election to communicate with voters about the election; and Allows parties to consolidate all election-related appeals to the Board into a single appeals process. Cumulatively, these changes will likely reduce the time from the filing of a representation petition to the holding of an election to between ten and twenty days.

Some of the new provisions are particularly important for faculty members. For example, the new election rules also require that employers provide the union with personal e-mail addresses and phone numbers for employees. This is particularly important for reaching out to contingent faculty, who often perform most of their work off campus. Also, unions must be aware that the NLRB representation hearing and election process is extremely fast paced and the NLRB will rarely grant requests for extensions of time. Therefore, unions should be fully aware of the revised rules and prepared for the hearing and election process prior to filing any election petition with the NLRB.

VIII. Collective Bargaining Cases and Issues – Public Sector

A. Bargaining Units

State of New Jersey v. Council of New Jersey State College Locals, AFT, 2015 N.J. Super. Unpub. LEXIS 322 (Superior. Ct., Appellate Div. 2015)

An intermediate New Jersey appellate court has overturned a decision by the New Jersey Public Employment Relations Commission (PERC) dismissing representation petitions for the unionization of approximately 600 managers at nine New Jersey state colleges and universities. The court concluded that PERC acted arbitrarily by dismissing the representation cases without conducting an investigatory hearing to gather evidence to determine whether the employees in the at-issue positions perform duties and functions that would make them subject to the statutory exclusion of "managerial executives." Unless the court decision is reversed, the cases will return to PERC for a hearing to determine the managerial status of each position. Notably, the New Jersey public sector collective bargaining law, unlike the NLRA includes a specific definition concerning the managerial exemption to the right to unionize for purposes of collective bargaining.

B. Arbitration

Univ. Sys. Of New Hampshire v. Dorfsman, 168 N.H. 450; 130 A.3d 1219 (N.H. Dec. 23, 2015)

The Supreme Court of New Hampshire upheld a lower court's decision to vacate an arbitrator's decision that UNH had violated its collective bargaining agreement (CBA) with the Union by terminating a Professor's employment for engaging in an act of "moral turpitude." In 2012, Marco Dorfsman, an Associate Professor and Department Chair intentionally lowered the

evaluations that students had given a certain lecturer. UNH terminated Dorfsman's employment for this conduct, which UNH determined constituted an act of "moral turpitude" within the meaning of the CBA. Dorfsman and the Union grieved his termination, and, pursuant to the CBA, the parties submitted to binding arbitration. The arbitrator agreed with UNH that Dorfsman's conduct constituted an act of "moral turpitude" (a finding that was not contested by either party on appeal.). The arbitrator determined that, because of several mitigating factors, Dorfsman's termination did not comport with principles of just cause. At the arbitration hearing, the arbitrator remanded the matter so that the parties could negotiate the proper level of discipline; should they fail to agree within thirty days, the arbitrator would determine Dorfsman's discipline. UNH filed a complaint in superior court arguing that the arbitrator had exceeded his authority. The court agreed with UNH and vacated the arbitration award, and the case was appealed to the Supreme Court.

The Supreme Court ruled in favor of UNH on several procedural issues, it then addressed whether the arbitrator had exceeded his authority. The Court highlighted that the parties CBA had a specific provision governing discipline for "moral turpitude" which stated "If charges involving moral turpitude are sustained, the bargaining unit member may be terminated immediately and the bargaining unit member shall not be entitled to receive further pay or benefits." *Id.* at 13. The Court held that having found that UNH disciplined Dorfsman for "moral turpitude," the arbitrator "erroneously applied a further just cause analysis to misconduct that was enumerated in the CBA as a proper basis for discharge" and therefore exceeded the scope of his authority.

C. Agency Fee and Exclusive Representation – See Section II, D and E.