Journal of Collective Bargaining in the Academy

Volume 0 *NCSCBHEP Proceedings 2013* Article 29

April 2013

Annual Legal Update

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40th Annual National Conference

National Center for the Study of Collective Bargaining in Higher Education and the Professions

Hunter College, the City University of New York

April 9, 2013
Annual Legal Update[1]

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I. Introduction

This was a tumultuous year in the field of higher education collective bargaining, with many of the key issues yet to be resolved. The National Labor Relations Board was quite active in the area of academic bargaining in the private sector. In May and June of 2012, the NLRB invited extensive briefing in cases addressing two issues of vital importance to the academic community: whether faculty members are employees who are covered by the National Labor Relations Act (and can therefore unionize) or whether they are managers excluded from coverage (*Point Park University*, *infra* at pg. 26); and whether graduate student assistants are employees under the NLRA (*NYU*, *infra* at pg. 27). The Court of Appeals for the D.C. Circuit threw all of the potential Board decisions into doubt when it ruled that President Obama's recess appointments were unconstitutional, which would render any decisions by the current Board invalid (*Noel Canning, infra* at pg. 25). Nonetheless, the Board has continued to issue decisions, citing conflicting holdings from other circuits. *Id.*

In June 2012, the U.S. Supreme Court signaled that the current agency fee system may be subject to challenge (*Knox*, *infra* at pg. 28). The Court also took up the issue of affirmative action in admissions, with a significant decision expected soon (*Fisher, infra* at pg. 17). Finally, there were a number of significant lower court decisions on issues ranging from First Amendment protections to FOIA requests and tenure contracts. Thus, when the final decisions

[1]This outline is an illustrative, not exhaustive, list of higher education cases of interest to this audience that have come out over approximately the past twelve months. It is intended to provide general information, not binding legal guidance. If you have a legal inquiry, you should consult an attorney in your state who can advise you on your specific situation.

[2] With the assistance of legal intern Bryan Thurmond (J.D. Candidate May 2013, American University Washington College of Law).

are issued in the outstanding cases, this will likely be one of the most significant years in litigation involving higher education employment and bargaining.

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

A. Speech Related to University Governance or Administrative Matters

1. *Capeheart v. Terell*, 695 F.3d 681 (7th Cir. 2012), *vacating Capeheart v. Hahs*, 2011 U.S. Dist. LEXIS 14363 (N.D. Ill. 2011).

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

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

Capeheart sued the university, alleging that the Provost retaliated against her for speaking up at the faculty council meeting and for advocating on behalf of the arrested students. Relying on *Garcetti*, the district court ruled that Capeheart's statements concerning military recruitment and the arrest of the students were not protected by the First Amendment. The district court stated that "the speech at issue was made pursuant to Capeheart's professional responsibilities." The district court further refused to recognize an exception to *Garcetti* for faculty at public institutions, saying that "since *Garcetti*, courts have routinely held that even the speech of faculty members of public universities is not protected when made pursuant to their professional duties." The district court concluded, therefore, that "Capeheart's speech regarding military and CIA recruiting on campus and the university's treatment of student protesters is not protected under the First Amendment."

Professor Capeheart appealed the district court's decision to the U.S. Court of Appeals for the Seventh Circuit. AAUP's brief in support of Capeheart argued that "the district court arrived at [its] distressing resolution of Professor Capeheart's First Amendment claim by misapplying *Garcetti*'s "official duties" analysis and disregarding the express limits of *Garcetti*'s

holding," and urges the appellate court to overturn the district court's holding. The intent of AAUP's brief was to highlight the academic freedom and First Amendment issues implicated by the case and to shine a light on the district court's harmful and incorrect decision. The brief emphasized that "the message of the district court's ruling is chilling and clear: university administrators need not tolerate outspoken faculty dissent on matters of broad public concern *or* on the university's institutional response to those concerns."

The circuit court heard the case on August 29, 2012, and issued a decision vacating the district court's judgment, remanding with instructions to dismiss Capeheart's First Amendment retaliation claims as "unripe," and affirming the dismissal of Capeheart's supplemental claims. In reaching its decision, the circuit court declined to reach the issue of "official duties" under *Garcetti*, but, rather, took up NEIU's argument that the case was moot, as Capeheart had withdrawn her demand to be installed as the department chair, thereby depriving the federal court of jurisdiction. The court disagreed with the "moot" argument, and determined that Capeheart had a "live" dispute because she still sought to enjoin the defendants from (1) instituting a proposed demonstration policy, and (2) retaliating against her by depriving her of future positions and awards to which she is entitled by merit or election. In addressing the issue of enjoining the defendants from instituting the proposed demonstration policy, the circuit court determined that this policy was "indeed too conjectural" and would not decide on the "hypothetical harms of a hypothetical rule." In addition, the court recognized that Capeheart's retaliation claims were "unripe" because the past retaliation against her does not sufficiently demonstrate that she is likely to be retaliated against in the future. Capeheart, however, may bring a federal claim again if she is retaliated against in the future because of her speech. This should provide her some protection from administrative actions against her, including imposition of a punitive demonstrations policy.

Although it is disappointing that the circuit court failed to deal with the essential issue of the faculty exception to *Garcetti's* "official duties," the circuit court's vacating of the district court's decision does imply that the lower court judge's views on *Garcetti* will have no precedential value in that jurisdiction.

2. *Demers v. Austin*, 2011 U.S. Dist. LEXIS 60481 (E.D. Wash. 2011), *appeal docketed*, No. 11-35558 (9th Cir. Nov. 7, 2012).

On February 14, 2012, the AAUP filed an amicus brief, jointly with the Thomas Jefferson Center for the Protection of Free Expression, in support of Professor David Demers, a journalism professor at Washington State University (WSU). Professor Demers became a faculty member at 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. Demers sued the university, alleging that it had retaliated against him for openly criticizing university practices.

Specifically, Demers took issue with certain practices and policies of the School of Communication. Starting in 2008, 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 claimed that the university retaliated against him by lowering his rating in his annual performance evaluations and subjecting him to an unwarranted internal audit in response to his open criticisms of administration decisions and because of his publications.

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

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

Demers appealed the district court's decision to the Ninth Circuit, and AAUP and Thomas Jefferson Center filed an amicus brief, arguing that Demers' speech was related to his scholarship and other academic concerns. The brief expresses the concern that if the district court's decision is allowed to stand, "it would have a chilling effect on research, innovation, and discourse within a public university – a place whose primary purpose is the development of knowledge through discussion, debate and inquiry."

Oral arguments were heard on November 7, 2012, and we are awaiting the court's decision.

3. *Turkish Coalition of America, Inc. v. Bruininks*, 678 F.3d 617 (8th Cir. 2012).

In February 2012, the U.S. Court of Appeals for the Eighth Circuit ruled that the University of Minnesota (the University) did not violate the First Amendment rights of the Turkish Coalition of America (the Turkish Coalition) by labeling its website "unreliable" for the purposes of student research. Because the University did not block students' access to the Turkish Coalition's website, but instead only discouraged reliance on the website's materials, the court ruled that the tenets of academic freedom precluded the Turkish Coalition's First Amendment challenge.

A professor and director of the University's Center for Holocaust and Genocide Studies (the Center) produced a list of "Unreliable Websites," which was published on the Center's

website. As websites contained in the list were considered to contain erroneous material, the professor both recommended that students writing papers not rely on any of the listed websites and "refused to deny there would be academic consequences" if students did not heed this warning. The Turkish Coalition's website, which purportedly denied the facts of the Armenian genocide, was included on the list of "unreliable" websites. The Turkish Coalition filed suit against the professor, the president of the University, and the University itself, alleging defamation and violations of its First Amendment rights.

The district court dismissed the Turkish Coalition's First Amendment claims. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed the lower court's ruling. Noting an "absence of allegations that the challenged actions posed an obstacle to students' access to the materials on the [Turkish Coalition's] website or made those materials substantially unavailable at the university," the court found that academic freedom protected the actions of the defendants.

B. Extramural Speech

1. *Van Heerden v. Bd. of Sup. of Louisiana State University*, 2011 U.S. Dist. LEXIS 121414 (M.D. La. 2011).

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

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

Through a series of decisions, the United States District Court for the Middle District of Louisiana dismissed many of van Heerden's claims, but the court ruled that van Heerden could proceed with arguing that the administration's action to terminate his appointment was in retaliation for his public comments about the culpability of the Army Corps of Engineers. It is especially important to note that the court expressed particular concern about what it viewed as the misapplication of *Garcetti's* principles to academic speech. Specifically, the court stated that

it "shares Justice Souter's concern that wholesale application of the *Garcetti* analysis to the type of facts presented here could lead to a whittling-away of academics' ability to delve into issues or express opinions that are unpopular, uncomfortable or unorthodox. Allowing an institution devoted to teaching and research to discipline the whole of the academy for their failure to adhere to the tenets established by university administrators will in time do much more harm than good."

In February 2013, several days before the federal jury trial was scheduled to begin, van Heerden and LSU settled the dispute out of court. Van Heerden reportedly received $435,000 from LSU. *See* Bill Lodge, *LSU Settles van Heerden Case for $435,000*, THE ADVOCATE (Feb. 27, 2013), http://www.theadvocate.com/home/5294342-125/lsu-settles-van-hererden-case.

C. Other Recent First Amendment Cases

1. *Palmer v. Penfield Central School District*, 2013 U.S. Dist. LEXIS 8531 (W.D.N.Y. 2013).

The U.S. District Court for the Western District of New York found that an elementary school teacher's complaint that her school district discriminates against African American students was not protected speech under the First Amendment. Noting that the teacher's statements (i) were made during a mandatory grade-level meeting and (ii) were "related to a matter that was directly connected to, and arose out of, her duties as a teacher," the court held that the teacher did not speak as a citizen on a matter of public concern. As a result, the teacher's speech was not protected from discipline from the school district.

2. *Huang v. Rector & Visitors of the University of Virginia*, 2012 U.S. Dist. LEXIS 126356 (W.D. Va. 2012).

The U.S. District Court for the Western District of Virginia determined that a University of Virginia researcher was not protected by the First Amendment guarantee of free speech when he alleged that his supervisor misappropriated public grant funds. Finding that the researcher's allegations did not constitute a matter of public concern and that the researcher made the allegations "in the course of his official duties and in his role as an employee" of the University, the court declined to grant the researcher protection from professional retaliation under the First Amendment.

3. *Mpoy v. Fenty*, 2012 U.S. Dist. LEXIS 158323 (D.D.C. 2012).

The U.S. District Court for the District of Columbia held that a teacher's email to the Chancellor of the D.C. public school system, which criticized the "classroom facilities, supplies, teaching assistants, and test scores" at the teacher's school, did not constitute protected speech under the First Amendment. Questioning whether the academic freedom exception outlined in *Garcetti* is applicable outside of the higher education context, the court held that the exception "surely would not apply in a case involving speech that does not relate to either scholarship or

material taught." Further, citing the "form and context" in which the teacher's complaint was made, the court ruled that the teacher's email was speech by a public employee; thus, the teacher was not protected from discipline as the result of his email.

4. *Garvin v. Detroit Board of Education*, 2013 Mich. App. LEXIS 391 (Mich. Ct. App. 2013).

A Michigan Court of Appeals held that a public school teacher's speech, made in the form of a report of student sexual assault to Child Protective Services, was protected by the First Amendment. Finding that (i) the speech involved a matter of public concern, (ii) the speech was not made by the teacher in her professional capacity, and (iii) "the societal interests advanced by [the] speech outweighed the [school district's] interests in operating efficiently and effectively," the court held that the First Amendment protected the teacher from retaliation stemming from her speech.

5. *Dixon v. University of Toledo*, 702 F.3d 269 (6th Cir. 2012).

The U.S. Court of Appeals for the Sixth Circuit held that an associate vice president of human resources for the University of Toledo did not engage in protected speech under the First Amendment when writing an op-ed column criticizing the gay rights movement. Specifically, the court held that, because the employee's op-ed directly contradicted many of the university's policies and the employee's job involved the implementation of university policies, the university did not violate the employee's First Amendment rights by terminating her employment as a result of the column.

6. *Goudeau v. East Baton Rouge Parish School Board*, 2012 U.S. Dist. LEXIS 106144 (M.D. La. 2012).

The U.S. District Court for the Middle District of Louisiana found that an elementary school teacher's objection to her principal's implementation of an illegal grading system was protected speech under the First Amendment. The court held that the teacher's objections to the grading system constituted "mixed speech," which is characterized by "elements of both personal and public concern." The court also determined that the importance of the teacher's speech outweighed the school district's interest in efficiency. As a result of these findings, the court denied the school district's request for summary judgment on the teacher's First Amendment retaliation claims.

III. FOIA/Subpoenas and Academic Freedom

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

In 2011, the American Tradition Institute (ATI) served a FOIA request on the University of Virginia regarding Professor Mann's climate research. This request mirrored the subpoena previously served on the University by Attorney General Cuccinelli. (We previously reported on the conclusion of the *Cuccinelli v. UVA* case which was decided by the Virginia Supreme Court.) Unfortunately, UVA first agreed to release the requested materials by the middle of August 2012 per court order. In its public statements, the university acknowledged that some of the materials were protected by statutory exemptions and that while the ATI would receive those documents, ATI was prohibited from revealing the contents unless given permission by the court. Subsequent to this decision and public announcement, the university appealed the court order requiring production. Professor Michael Mann sought to intervene in the appeal, arguing that the emails in question were his and, therefore, he should have standing in any litigation relevant to any document release. AAUP submitted a letter to the 31st Judicial Circuit Court of Virginia in support of Mann's intervention, and the court granted him standing.

AAUP and the Union of Concerned Scientists subsequently filed a joint amicus brief on July 24, 2012, in support of UVA and Professor Mann's appeal and urged that "in evaluating disclosure under FOIA, the public's right to know must be balanced against the significant risk of chilling academic freedom that FOIA requests may pose." The brief also argued that enforcement of broad FOIA requests that seek correspondence with other academics, as ATI sought here, "will invariably chill intellectual debate among researchers and scientists." Also, exposing researchers' "initial thoughts, suspicions, and hypotheses" to public scrutiny would "inhibit researchers from speaking freely with colleagues, with no discernible countervailing benefit." The brief further argued that allowing FOIA requests "to burden a university with broad-ranging document demands based on questions concerning the scientific validity of a researcher's work or on the potential that something might turn up would have the strong potential to 'direct the content of university discourse toward or away from particular subjects or points of view,' and will have a significant chilling effect on scientific and academic research and debate."

Oral arguments were heard on September 17, 2012, and the court issued a verbal ruling that UVA does not have to produce Professor Mann's emails on the grounds that Virginia's public records law, which contains a specific "faculty research exemption" that protects information in furtherance of research on scientific and scholarly issues, applies to faculty communications, including email. We are waiting for the judge to issue a written decision to see whether ATI will appeal the circuit court's decision.

B. *In re: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Matters of Criminal Matters in the Matter of Dolours Price*, U.S. M.D. Case No.: 11-MC-91078.

Referred to collectively as the "Boston College Subpoena" case, this complex litigation involves two separate federal subpoenas served on Boston College for oral history materials held in its John J. Burns Library. The Boston College subpoenas were issued on behalf of the British government based on the Mutual Legal Assistance Treaty (MLAT) which allows signing members to assist each other in international criminal investigations without going through diplomatic channels. The Boston College subpoenas are part of an investigation by United Kingdom authorities into the 1972 abduction and death of Jean McConville who was thought to have acted as an informer for the British authorities on the activities of republicans in Northern Ireland.

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

In May 2011, Boston College received the first federal subpoena seeking Belfast Project materials related to Dolours Price and Brendan Hughes. In August 2011, a second set of subpoenas sought any information contained in any of the other interview materials that may be related to the death or abduction of Jean McConville. Boston College complied with the subpoena for documents relating to Brendan Hughes, who is deceased, as doing so did not conflict with his confidentiality agreement. Boston College then asked the United States District Court to quash the subpoenas as to records pertaining to the other still-living interviewees on the grounds that release of the information could threaten the safety of interviewees, the continuing peace process in Northern Ireland, and the future of oral history.[3] Boston College also argued that this type of forced disclosure could have a detrimental impact on academic freedom. A major concern is that a lack of protection for interviewees in this type of oral history project would greatly discourage people from giving future interviews about any controversial topic.

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

The Justice Department filed a response to the motion to quash, dismissing academic freedom as a legally meaningless "quasi-privilege" and saying the college had offered "no claim of a cognizable federal privilege."[4] In addition, the principal interviewers in the project, Ed Moloney and Anthony MacIntyre, together filed a motion to intervene in the district court case to protect the confidentiality of past and future contributors to the Belfast Project.

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

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

Within days of this decision, the court conducted its in-camera review of 13 interview transcripts. Following this review, the court issued an order requiring Boston College to turn over to the federal government the original materials related to Dolours Price and provided that copies of the materials would be made and returned to the library archives. The court further ordered, relevant to the August 2011 subpoenas, that Boston College turn over to the federal government interviews, transcripts, and related records of seven other interviewees. Boston College did not appeal the court's ruling regarding the Dolours Price materials, but did appeal its ruling regarding the August 2011 subpoenas. Boston College and Moloney/McIntyre both requested a stay of the production of the records pending these appeals, which the district court has granted.

Moloney and McIntyre also filed an individual complaint in the district court in December 2011, essentially making the same legal arguments as they did in their petition to

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

intervene in the Boston College lawsuit. The district court summarily dismissed their individual complaint for lack of jurisdiction, and Moloney and McIntyre appealed to the First Circuit, with the ACLU filing an amicus brief in their support. On July 6, 2012, the First Circuit issued its ruling and upheld the dismissal of Moloney and McIntyre's individual lawsuit, citing legal precedent that the US-UK MLAT expressly disclaims the private rights of individuals to "obtain, suppress, or exclude any evidence, or to impede the execution of a request."[5] The court also analyzed Moloney/McIntyre's First Amendment claim that compelling production of the records violated their individual "constitutional right to freedom of speech, and in particular their right to impart historically important information for the benefit of the American public, without the threat of adverse government reaction." Moloney/McIntyre asserted that production of the subpoenaed interviews is contrary to the confidentiality they promised the interviewees and they asserted an "academic research privilege" to be evaluated similarly to a reporter's privilege. The court noted, however, that the United States Supreme Court has distinguished between "academic freedom" cases (involving government attempts to influence the content of academic speech and direct efforts by government to determine who teaches) on the one hand, from, on the other hand, the question of privilege in the academic setting to protect confidential peer review materials.

The court viewed this case as falling into the second category of cases and as such "is far attenuated from the academic freedom issue, and the claimed injury as to academic freedom is speculative." The court relied heavily on the decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which the Supreme Court rejected a general-purpose reporter's privilege for confidential sources and held that the "government's strong interests in law enforcement precluded the creation of a special rule granting reporters a privilege which other citizens do not enjoy." The First Circuit pointed out that in *Branzburg* the court discussed the situation of reporters who promised confidentiality as well as of informants who had committed crimes and those innocent informants who had information pertinent to the investigation of crimes and found that the interests in confidentiality of both kinds of informants does not give rise to a *First Amendment* interest in the reporters to whom they had given the information under a promise of confidentiality. "These insufficient interests," the court noted, "included the fear, as here, that disclosure might 'threaten their job security or personal safety or that it will simply result in dishonor or embarrassment.'" Thus, the court reasoned, "If the reporters' interests were insufficient in *Branzburg*, the academic researchers' interests necessarily are insufficient here," and therefore Moloney and McIntyre had no *First Amendment* basis to challenge the subpoenas.

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[5] *IN RE: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Matters of Criminal Matters in the Matter of Dolours Price, 2012 U.S. App. LEXIS 13837 (1st Cir. 2012).* http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=11-2511P.01A (last accessed 3/11/2012)

The First Circuit's decision was appealed to the U.S. Supreme Court, and a petition for a writ of certiorari was filed in November 2012. The Supreme Court has yet to rule on the petition.

C. *Sussex Commons v. Rutgers*, 210 N.J. 531 (2012).

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

On October 7, 2008, the Superior Court of New Jersey ruled that the clinical programs of Rutgers School of Law are unique hybrid institutions and, therefore, exempt from New Jersey's open records law. In its decision, the court analogized the OPRA request to similar questions about the application of conflict of interest laws and the collection of attorneys' fees in the clinical education setting. In the end, the court found "that the unique hybrid nature of the Rutgers School of Law Clinics, as subdivisions of Rutgers the State University, entitles them to an exemption from OPRA, which is necessary to protect the unique and valuable function the law clinic provides in both education and jurisprudence."

The development company appealed the decision to the Appellate Division, and AAUP joined in filing an amicus brief in support of the Rutgers University Environmental Law Clinic. The brief argued that requiring the clinic's records to be released publicly would impinge on the academic freedom rights of Rutgers faculty and students as well as the First Amendment rights of citizens to access and use law clinics. The brief urged the court to view legal clinics as the law schools' research laboratories where clinical instructors train their students in developing new legal theories and expanding existing legal doctrine through litigation of actual cases. It further argued that requiring law clinics to release documents related to the operation of the clinics risks forcing law clinics, and particularly clinical educators, to make case intake or other decisions for non-pedagogical reasons, thereby preventing clinics from using the best means to train students in professional skills and values. The brief also asserted that forcing clinics to produce such records would infringe upon the First Amendment rights of the clinic clients by "chilling public participation in government disputes and interfering with modes of expression and association between clients and their attorneys."

The Appellate Division, however, reversed the lower court's decision, finding that the law clinic met the definition of a "public agency" and therefore was subject to OPRA. The court also found that the Legislature had "carefully delineated [21 categorical] exemptions" from disclosure under OPRA, six of which were specifically addressed to higher-education institutions. Those exemptions, the court reasoned, rebutted the defendants' arguments that a judicial exemption for legal clinics was necessary to prevent OPRA from being used to

"indiscriminately access" legal clinic records. Further, the court stated that even if it did share the defendants' public policy concerns about the need to specifically exempt legal clinic records from the definition of "government record," it is "not our role to amend this statute by judicial fiat and add a twenty-second exemption category."

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

IV. Tenure, Due Process, and Breach of Contract

A. Tenure – Breach of Contract

1. *Haviland v. Simmons*, 45 A.3d 1246 (R.I. 2012), *aff'g Haviland v. Brown University*, 2010 R.I. Super. LEXIS 30 (R.I. Super. Ct. Feb. 11, 2010).

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

In the spring of 2000, Brown University asked Paul Armstrong to be the Dean of the College at Brown. Both Armstrong and his wife Beverly Haviland were tenured professors at the State University of New York at Stony Brook (SUNY), and Armstrong told Brown that he would not accept the position unless the university also offered Haviland a tenured teaching position. Because there were no tenured positions open in Haviland's specialties, the university offered Haviland a position combining that of a Senior Lecturer and a Visiting Associate Professor. Instead of drawing up one cohesive contract, the university offered Haviland the job and described its scope and benefits through a series of letters.

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

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

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

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

Initially, Brown argued that Haviland could not sue because she had not suffered any legal injury. But the court disagreed, finding that Haviland's "interest in her continued employment is undisputable and constitutes a legally-protectable interest." Thus, Haviland's interest in her job provided adequate standing for Haviland to sue "to resolve the real uncertainty she ha[d] concerning employment security with Brown."

The court further held that, although the terms of Haviland's agreement with Brown were not set out in a single document, "an enforceable, express employment contract" nevertheless existed between the parties. Further, finding that "the terms of the contract are contained within the several communications and letters exchanged between Brown University and Haviland," the court noted that any ambiguity in the contract's terms should be construed against Brown, the drafting party. As such, the court ruled that Haviland's reappointment should be governed by the "express terms [that Brown's agents dictated] . . . in the letter of October 18, 2000." This meant that Haviland's appointment must be renewed for additional five-year terms unless Brown

presented her with written proof of adequate cause, defined as "demonstrated incompetence, dishonesty in teaching or research, substantial and manifest neglect of duty, or personal conduct which substantially impairs fulfillment of institutional responsibility."

Finally, Brown argued that the university officers that corresponded with Haviland in finalizing her employment contract lacked both apparent and actual authority to provide Haviland with a "tenure-like status." However, the court found that Brown failed to provide evidence establishing that these officers lacked such authority. As such, the court concluded that Brown was "precluded from denying that its administrators had the authority to provide plaintiff with employment security."

2. *Kant v. Lexington Theological Seminary*, 2012 Ky. App. LEXIS 124 (Ky. Ct. App. 2012), *appeal docketed*, No. 2012-SC-000502 (Ky. Aug. 24, 2012).

Dr. Laurence Kant is the plaintiff-movant in this matter. Dr. Kant, who is of the Jewish faith, was an Associate Professor of the History of Religion at the Lexington Theological Seminary (LTS). LTS is affiliated with the Disciples of Christ, a denomination of the Christian faith, and does not provide classes with a secular purpose. Teaching at LTS in various capacities since 2000, Dr. Kant was granted tenure by LTS in March 2006. However, LTS terminated Dr. Kant's contract at the end of the spring 2009 semester, citing financial exigency as the impetus for its decision.

Following his termination in 2009, Dr. Kant filed a complaint against LTS, "alleging that LTS had breached his contractual right to tenured employment and breached the implied duty of good faith and fair dealing." Dr. Kant's complaint sought both compensatory and punitive damages from LTS. Following a hearing on LTS' motion to dismiss the case as an "ecclesiastical matter," the district court sustained LTS' motion and concluded that Dr. Kant was a "ministerial employee" due to the subject matter of his course load. Concluding that the ministerial exception thus applied in the case, and "that the issues in the case also involved an ecclesiastical matter," the district court ruled that it lacked the requisite subject matter jurisdiction over the controversy.

Dr. Kant appealed the district court's decision to the Commonwealth of Kentucky Court of Appeals, arguing that both the "ecclesiastical matters rule" and the "ministerial exception" do not apply to this controversy. Ultimately, the court of appeals affirmed the district court's ruling that it had no subject matter jurisdiction in this case. First, the court of appeals found that LTS' "decision making as to who will teach its students . . . would be an inquiry into an ecclesiastical matter" and that such inquiries are prohibited—except in rare circumstances—under the so-called "ecclesiastical matters" rule. Second, the court of appeals agreed that the ministerial exception barred Dr. Kant's claims because his "primary duties involved teaching religious-themed courses at a seminary . . . that prepared students for Christian ministry." Relying heavily on the U.S. Supreme Court's recent decision in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012), the court of appeals found that Dr. Kant's proffered

cause of action (based in contract law principles) did "not trump constitutional protections and freedoms of the church."

Dr. Kant then petitioned the Kentucky Supreme Court for a discretionary review of the court of appeals decision. On or about February 18, 2013, the Supreme Court granted Dr. Kant's petition for discretionary review of the court of appeals determination. At the heart of this case,(*i.e.* whether LTS was permitted to eliminate tenure and terminate Dr. Kant due to a financial exigency), is a narrowly tailored, non-religious question that will not require the court of appeals to intrude on or analyze matters of church doctrine or governance. The AAUP will submit an *amicus* brief on behalf of Dr. Kant in April 2013.

V. Faculty and Institutional Authority and Governance

A. *Rosenthal v. New York University*, 482 Fed. App'x 609 (2d Cir. 2012).

In this case the United States Court of Appeals for the Second Circuit, affirming a federal district court decision, reinforced the discretion and authority of faculty over clearly educational matters.

Ayal Rosenthal was a part-time MBA student at NYU's Stern School of Business. He also worked for PricewaterhouseCoopers, and he tipped off his brother to non-public securities information which his brother used to make trades. The federal government initiated an investigation upon learning of his activities. Rosenthal pled guilty to conspiracy to commit securities fraud shortly after completing his Stern course requirements but before receiving his degree. The school decided not to grant him his degree, based in part on a recommendation from the faculty, and Rosenthal sued.

At the district court level, NYU and Rosenthal wrangled over whether the school had provided him with the precise procedural requirements guaranteed by various handbooks and sets of rules. The court, however, took a more holistic approach. As the district court observed:

> As an initial matter, Rosenthal proposes an elaborate jurisdictional and procedural argument that cherry picks from NYU's various rules and regulations. Defendants have risen to the bait, framing the case largely in those terms. But this is a misconception. The University Bylaws expressly confer upon the faculty of each school the authority to determine "the standards of academic achievement to be attained for each degree offered" and "to certify to the President, for recommendation to the Board, qualified candidates for degrees and certificates." While the Stern faculty's decision to withhold Rosenthal's degree followed the form of a disciplinary proceeding, it determined pursuant to its duly-conferred authority that Rosenthal was not fit to receive a degree on the basis of his admitted felonious conspiracy to commit securities fraud. That decision was fully within the faculty's power and discretion. It was neither arbitrary nor capricious. Thus, Rosenthal's contentions are entirely without merit on that ground alone.

The court went on to examine the University Bylaws, which also appear in the NYU Faculty Handbook. The NYU Bylaws state:

> Subject to the approval of the Board and to general University policy as defined by the President and the Senate, it is the duty of each faculty to determine . . . the standards of academic achievement to be attained for each degree offered, . . . to make and enforce rules for the guidance and conduct of the students, and to certify to the President, for recommendation to the Board, qualified candidates for degrees and certificates.

The Bylaws also state that "[t]he power of suspending or dismissing a student of any school is lodged with the voting faculty of that school" (as opposed to the University Senate, which has jurisdiction over "educational matters and regulations of the academic community").

The court concluded that the Bylaws "grant the Stern faculty exclusive jurisdiction and authority to determine Stern's standards of academic achievement, confer degrees, and dismiss students. The Stern faculty's decision to withhold Rosenthal's degree was an exercise of the authority delegated to it" under the Bylaws.

On appeal, Rosenthal again argued that NYU had breached its implied contract with students "by failing to observe its own rules and procedures." Relying on New York state law precedent requiring courts to defer greatly to "'faculty's professional judgment' in the case of . . . 'genuinely academic decision[s],'" the U.S. Court of Appeals affirmed the lower court's decision. The appeals court held that it was not "arbitrary and capricious for the Stern faculty to conclude that it had the power to apply its Code of Conduct to a violation of federal criminal law to determine it would not certify Rosenthal a 'Master of Business Administration' after he pled guilty, while an MBA candidate and professional accountant, to insider trading."

VI. Discrimination and Affirmative Action

A. Affirmative Action in Admissions

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

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

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

household. In addition, the state legislature and the university adopted a variety of other initiatives to increase diversity, including scholarship programs, high school outreach and recruitment, and the "Top Ten Percent Law," under which all high school seniors in the top ten percent of their class at the time of application are guaranteed admission to a state university.[6] The top ten percent rule accounts for 92% of the in-state students that are admitted to UT.

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

Relying on the Supreme Court's 2003 decision in *Grutter v. Bollinger*, the Fifth Circuit ruled in favor of the university, pointing out three objectives of promoting diversity among universities in the Texas system: 1) increased perspectives inside and outside the classroom, 2) better preparation to act as professionals, and 3) increased civic engagement.[7] The circuit court noted that, after it previously struck down the university's prior race-based admissions system, minority applications and enrollment plunged, prompting Texas to pass the Top Ten Percent Law.

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

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

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

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

On appeal of the Fifth Circuit's decision, the United States Supreme Court granted certiorari. In August 2012, the AAUP again joined in a coalition amicus brief submitted to the Supreme Court and drafted by the American Council on Education. The Supreme Court heard oral arguments in this case on October 10, 2012, and is expected to render its decision prior to the end of the term in June 2013. Noting that "affirmative action is alive but ailing," analysts report that the Court's earlier *Grutter* precedent is likely to be overturned, or at least significantly limited, by the Supreme Court's decision in this case. In fact, Justice Sotomayor indicated as much during oral arguments, stating that the plaintiff doesn't "want to overrule *Grutter* . . . [but instead wants to] gut it."

B. "Mixed Motive" Instructions and Discrimination Statutes

1. *Nassar v. University of Texas Southwestern Medical Center*, 674 F.3d 448 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 978 (Jan. 18, 2013).

Naiel Nassar, M.D. began his employment with the University of Texas Southwestern Medical Center (UTSW) in 1995. He served as an Assistant Professor of Internal Medicine and Associate Medical Director of a UTSW Clinic. His immediate supervisor was Dr. Phillip Reiser who in turn reported to Dr. Beth Levine.

Dr. Nassar complained that he allegedly was being harassed by Dr. Levine and sought transfer to another role that would take him out of her line of supervision. He stepped down from his faculty post when he received a job offer working for Parkland, an affiliated clinic, effective July 10, 2006. On July 3, he submitted a letter of resignation in which he asserted that his "primary reason" for resigning was because of Dr. Levine's harassing and discriminatory behavior. Shortly thereafter, Parkland withdrew its job offer.

Dr. Nassar brought suit in federal court, accusing UTSW of orchestrating Parkland's refusal to hire him in retaliation for his discrimination complaints, in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e-3*(a). The jury found that UTSW constructively discharged and retaliated against Dr. Nassar and awarded him $ 3.4 million in back pay and compensatory damages. UTSW appealed to a three-judge panel of the Circuit Court of Appeals for the Fifth Circuit, arguing among other things that Dr. Nassar failed to prove that retaliation was the "but for" cause of Parkland's decision not to hire him.

Citing its 2010 ruling in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) which held that the mixed-motive framework is available to Title VII retaliation plaintiffs, the Fifth Circuit Court panel, without further analysis, affirmed the district court's judgment regarding liability for retaliation. After its requests for rehearing and rehearing *en banc* were denied, UTSW filed a Petition for a Writ of Certiorari with the U.S. Supreme Court (the "Supreme Court"). Certiorari was granted on January 18, 2013.

The American Council on Education (ACE) filed an amicus brief in support of UTSW. In its brief, ACE argued that faculty members who claim retaliation under Title VII should be subject to a higher burden of proof than other employees. If the "but for" standard of proof is

adopted by the Supreme Court, then this result could have a substantial impact on the academic freedom and employment practices of the nation's academic institutions. Specifically, ACE argues that AAUP's policies support the "but for" standard of proof in retaliation cases. ACE asserts that these AAUP policies are an "effective and efficient means of remedying and deterring discriminatory conduct within the higher education community." The AAUP will file an amicus brief on behalf of Dr. Nassar in April 2013.

C. Americans with Disabilities Act

1. *Branham v. Thomas M. Cooley Law School*, 689 F.3d 558 (6th Cir. 2012).

Tenured law professor Lynn Branham was terminated from Thomas M. Cooley School of Law ("Cooley") and subsequently sued the law school in federal court on claims of violations of the Americans with Disabilities Act and Michigan Persons with Disabilities Civil Rights Act, intentional infliction of emotional distress, and breach of contract. The federal district court granted Cooley's motion for summary judgment on Branham's first three claims but allowed her breach of contract claim to proceed. The district court went on to rule that Cooley had breached its employment contract with Branham because it failed to follow the specified procedures for dismissal and ordered Cooley to comply with that process. To comply with the court's order, Cooley held a faculty conference to determine whether there was good cause to dismiss Branham from her position. The faculty concurred with the decision to dismiss Branham, and the Board of Directors unanimously upheld the faculty's decision. The district court then ruled that Cooley had fulfilled its due process obligations under the employment contract and that the process complied with Michigan law. The court then entered judgment against Branham.

Branham subsequently appealed to the U.S. Court of Appeals for the Sixth Circuit, arguing, among other things, that the district court erred in concluding that the tenure granted under her contract does not afford her rights beyond those specified in her employment contract. The Sixth Circuit upheld the district court's decision, concluding that Branham's employment contract did not create an obligation of continuous employment, but rather expressly limited its term to one year. The Court reasoned that while Branham may have had tenure in the sense that she had academic freedom, she was due only the employment protection and process specified in her employment contract.

Branham's attorney subsequently filed a *Petition for Rehearing en Banc* on September 6, 2012. AAUP filed a motion and amicus brief in support of Branham's petition which was authored by AAUP Committee A member, Matt Finkin. AAUP's brief argued that the district court ignored the well-developed body of law in which the courts have uniformly emphasized that tenure accords a continuing appointment until dismissal for cause. Additionally, the brief noted that the courts have stressed that in construing the content of academic tenure, attention has to be paid to the relationship of tenure to the protection of academic freedom. AAUP's brief pointed out that the panel's reasoning that Branham may have had "tenure" in the sense of having academic freedom but otherwise only had an annual contract for a one-year appointment ignores the fact that "it is permanence of appointment that protects academic freedom in a way

that a sequence of annual contracts simply cannot." Further, the brief posited that "by negating the security of academic tenure, the decision weakens academic freedom, not only at Cooley, nor only in schools of law, but in every institution of higher education in this Circuit insofar as tenured faculty are given annual notice of the terms of their continuing appointments."

The Sixth Circuit issued an order on October 3, 2012, denying Branham's petition for rehearing.

VII. Intellectual Property

A. Patent and Copyright Cases

1. *Cambridge University Press v. Becker*, 2012 U.S. Dist. LEXIS 123154 (N.D. Ga. 2012), *appeal docketed*, No. 12-14676 (11th Cir. Sept. 12, 2012).

Plaintiffs-Appellants Cambridge University Press, Oxford University Press, and Sage Publishers (the Publishers) brought this copyright infringement action in April 2008 against Georgia State University (GSU), asserting claims for direct, contributory, and vicarious infringement and seeking declaratory and injunctive relief against an ongoing pattern and practice of unauthorized copying and distribution of substantial excerpts of their copyrighted academic books in connection with online course reading systems operated by GSU. Among the affirmative defenses that GSU asserted in their answer was fair use.

In February 2009, GSU announced a new copyright policy in an effort to moot the litigation. This new policy delegated to GSU instructors the determination of whether contemplated digital course readings would qualify as fair use and thus not require permission of the copyright owners. The district court, on its own initiative, ordered the Publishers to submit a list of all infringements alleged to have occurred during certain academic terms. In response, the Publishers identified hundreds of claimed infringements, and GSU challenged those identified claimed infringements. During the course of the case, more than twenty professors were accused of infringement and deposed to justify their use of electronic reserves.

In September 2010, the district court ruled that only infringements occurring after the 2009 Policy were actionable and required the Publishers to show that the 2009 Policy resulted in "ongoing and continuous misuse of the fair use defense" by proving "a sufficient number of instances of infringement of Plaintiffs' copyrights to show such ongoing and continuous misuse."

After a series of motions, a trial was conducted, and, in May 2012, the district court issued a 350-page decision applying its conception of fair-use principles to 74 claimed infringements from 64 of Plaintiffs' works. The court rejected 26 of those claims without addressing the issue of fair use, focusing instead on purported technical deficiencies relating to such matters as ownership and registration, as well as on instances of what it found to be de minimis access to the work. The court also found that the five infringements it identified were "caused" by the 2009 Policy's failure to limit copying to "decidedly small excerpts" (as defined by the court); to prohibit the use of multiple chapters from the same book; or to "provide

sufficient guidance in determining the 'actual or potential effect on the market or the value for the copyrighted work.'" The parties submitted briefing on proposed injunctive relief.

In August 2012, the court issued an order providing for declaratory and injunctive relief, essentially limited to ordering GSU to "maintain copyright policies for Georgia State University which are not inconsistent" with the court's previous orders. The court also held that the GSU defendants were the "prevailing party" under 17 U.S.C. § 505 because they "prevailed on all but five of the 99 copyright claims which were at issue" when the trial began. This conclusion led the court to find that GSU defendants were entitled to reasonable attorneys' fees and costs because the Publishers' "failure to narrow their individual infringement claims significantly increased the cost of defending the suit."

In September 2012, the district court awarded the GSU defendants $2,861,348.71 in attorneys' fees and $85,746.39 in costs and entered a final judgment that also incorporated its prior rulings on the merits. The Publishers timely filed a notice of appeal to the Eleventh Circuit Court of Appeals. The AAUP will submit an amicus brief on behalf of GSU in April 2013.

2. *Author's Guild, Inc. v. HathiTrust*, 2012 U.S. Dist. LEXIS 146169 (S.D.N.Y. 2012).

In October 2012, the U.S. district court for the Southern District of New York ruled that various universities (collectively referred to as "HathiTrust") did not violate the Copyright Act of 1976 when they digitally reproduced books, owned by the universities' respective libraries, for the purpose of aiding print-disabled students.

HathiTrust, a collection of universities including the University of Michigan, the University of California, the University of Wisconsin, Indiana University, and Cornell University, has agreements with Google, Inc. that permits "Google to create digital copies of works in the Universities' libraries in exchange for which Google provides digital copies to [HathiTrust]." HathiTrust stores the digital copies of the works in the HathiTrust Digital Library (HDL), which is used by its member institutions in three ways: for "(1) full-text searches; (2) preservation; and (3) access for people with certified print disabilities." (There is no indication from the court's opinion that digital copies in the HDL are used outside of the library setting for purposes other than those enumerated.) The full-text search function allows users to conduct term-based searches across all the works in the HDL; however, where works are not in the public domain or have not been authorized for use by the copyright owner, the term-based search only indicates the page number on which the term appears. Digital preservation of the works in the HDL helps member universities "preserve their collections in the face of normal deterioration during circulation, natural disasters, or other catastrophes." Finally, the function providing access to print-disabled individuals, or individuals with visual disabilities, allows disabled "students to navigate [materials] . . . just as a sighted person would."

The plaintiffs asserted that HathiTrust's digital reproduction of the universities' works constituted copyright infringement. The U.S. district court for the Southern District of New York, however, disagreed with this assertion. While acknowledging that the plaintiffs had

established a prima facie case of copyright infringement, the court found that HathiTrust successfully defended its right to use the works under the fair use exception outlined in the Copyright Act. Weighing four factors relevant to evaluating a claim of fair use—namely, (i) the purpose and character of the use of the works, (ii) the nature of the copyrighted works, (iii) the amount of the work copied, and (iv) the impact on the market for, or value of, the works—the court held that the uses of the works in the HDL constituted fair use and, thus, did not constitute copyright infringement. The court weighed heavily the fact that the digital reproduction of the works was for educational purposes, noting that "[w]here the purpose of the use is for scholarship and research . . . [the evaluation] 'tilts in the defendant's favor.'" Further, the court acknowledged that a subset of the HDL's collection—"previously published non-dramatic literary works"—were specifically protected by the Chafee Amendment to the Copyright Act. The Chafee Amendment, when read in conjunction with the Americans with Disabilities Act, requires educational institutions to make such works available in special formats for persons with disabilities.

3. *Molinelli-Freytes v. University of Puerto Rico*, 2012 U.S. Dist. LEXIS 143262 (D.P.R. 2012).

In September 2012, the U.S. District Court for the District of Puerto Rico held that the University of Puerto Rico (the University) did not violate the Copyright Act of 1976 when it adopted and implemented, without permission, a proposal drafted "during non-working hours" by two of its employees.

Two employees of the University, Professor José Molinelli-Freytes and program director Lillian Bird-Canals, drafted a proposal for a new graduate program in the University's Department of Environmental Sciences. The University and the employees disagree whether Molinelli-Freytes and Bird-Canals drafted the proposal pursuant to "any express assignment or instruction from [the University]." The employees argue that no such assignment existed and that the proposal was drafted during spare time, vacation time, and holiday breaks. The University, however, contends that a dean "verbally assigned the task" to the plaintiffs. In any event, after working on the proposal for six years, Molinelli-Freytes and Bird-Canals ultimately met with university officials to "start the approval process" for their proposal, and the employees participated in many subsequent stages of the approval process. In the midst of this process, however, the employees obtained a Copyright Office registration for the proposal and requested that the University "stop using or following the proposal." The employees initiated an administrative proceeding to enforce their copyright claims. However, the hearing officer recommended the dismissal of the employees' claims, and, on appeal, the University's Office of the President adopted the hearing officer's recommendation. In 2011, the University implemented the proposed graduate program.

The employees appealed the results of the University's administrative hearing to the district court, claiming, interalia, copyright infringement under the Copyright Act. Defendants, including the University and the Puerto Rico Council for Higher Education, moved to dismiss

these claims on summary judgment. Noting that the employees' proposal "was within the scope of [their] employment" with the University, the court found that the work-for-hire doctrine applied to the proposal and "vest[ed] copyright in [the University]." Additionally, the court determined that the University's stated intellectual property policy did not supersede the work-for-hire doctrine, noting that "in work for hire situations, a written instrument signed by both parties is required to create a valid transfer." As the University's intellectual property policy lacked the signatures of both a representative of the University and the plaintiff-employees, the policy did not transfer copyright to the employees—even if the University caused "faculty to trust that they own the copyrights to their academic work regardless of scope of employment." The district court granted the University's motion for summary judgment and dismissed the employees' claims.

3. *Cameron v. Arizona Board of Regents*, 2011 Ariz. App. Unpub. LEXIS 1129 (2011), *petition for review denied*, 2012 Ariz. LEXIS 220 (2012).

Theresa Cameron was a tenured associate professor at Arizona State University. She was accused of misconduct by the Dean and Associate Dean for, among other things, allegedly plagiarizing syllabi of other faculty in the construction and use of several of her own course syllabi. The Dean, Associate Dean, and Provost asked the university President to terminate Dr. Cameron for "just cause" under University and Board of Regents policies, and he did so. Professor Cameron appealed her termination to the ASU Faculty Senate's Committee on Academic Freedom and Tenure ("CAFT") which found that, even though Dr. Cameron admitted she had plagiarized her syllabi, CAFT unanimously recommended that she be reinstated and undergo a post-tenure review to assist her with construction and use of syllabi. The university President, however, rejected CAFT's recommendation, and Dr. Cameron filed suit. Both the trial and appellate court ruled in favor of the University and Professor Cameron has filed a petition for review by the Arizona Supreme Court.

AAUP's interests in this case were 1) whether Dr. Cameron received due process during the CAFT hearing in which she was prohibited from calling an expert witness to testify on her behalf regarding academic integrity and plagiarism issues, and 2) the severity of the disciplinary action against her in proportion to the charges. Arizona State University law professors Joseph Feller and Paul Bender drafted AAUP's amicus brief in support of Dr. Cameron's petition for review, which was filed on July 16, 2012, and joined by 15 ASU law school faculty. The brief primarily argued that the sanction of dismissal was grossly disproportionate to a finding that Dr. Cameron copied portions of syllabi from other sources without attribution and, therefore,deprived Dr. Cameron of her position without proper due process.

The Arizona Supreme Court issued an order on October 30, 2012, denying Professor Cameron's petition for review.

VIII. Union/Collective Bargaining Cases and Issues

A. NLRB Guidance/Cases of Interest

1. *Noel Canning v. NLRB*, 705 F.3d 490 (2013).

In January 2013, the U.S. Court of Appeals for the District of Columbia Circuit found invalid three recess appointments that President Obama made to the National Labor Relations Board (NLRB) early the previous year. As the recess appointments were "invalid from their inception," the court found that the NLRB lacked the requisite quorum to issue a decision in this case and vacated the NLRB's decision.

To render decisions, the NLRB must have a quorum of at least three Board members. On January 4, 2012, following the expiration of a Board member's term the previous day, President Obama appointed three new Board members to the NLRB to ensure that the Board could reach this requisite quorum and, in effect, avoid a shutdown of the NLRB. The President appointed Board members Block, Griffin, and Flynn using the Recess Appointments Clause of the Constitution.

In this particular case, Noel Canning, a Pepsi-Cola bottler and distributor from Washington state, appealed an adverse NLRB decision, dated February 8, 2012, to the U.S. Court of Appeals for the District of Columbia Circuit. Arguing that President Obama's appointment of members Block, Griffin, and Flynn was unconstitutional, Noel Canning contended that the NLRB's decision in its case was invalid because the Board lacked the quorum required to render a decision. The circuit court agreed and ultimately ruled President Obama's recess appointments invalid, vacating the NLRB's decision. To reach this conclusion, the circuit court closely scrutinized the meaning of the phrase "the Recess" in the Recess Appointments Clause of the Constitution and relied heavily on "logic and language . . . [and] also constitutional history" to decipher the term. Concluding that "the Recess" refers only to recesses between sessions of the Senate—periods "when the Senate simply cannot provide advice and consent"—rather than mere intrasession breaks, the court ruled that President Obama impermissibly utilized the Recess Appointments Clause to appoint members Block, Griffin, and Flynn. Because it ruled President Obama's appointments invalid, the court vacated the NLRB's decision in this case.

This case signifies that all NLRB rulings issued after President Obama's January 2012 appointment of members Block, Griffin, and Flynn (over 200 decisions in total) may be invalid. However, despite the circuit court's decision, the NLRB has continued business as usual. While the district court's decision in this case is only binding for the District of Columbia circuit, similar challenges are pending in other circuits.

On March 12, 2013, the NLRB, in conjunction with the U.S. Department of Justice, announced plans to appeal the U.S. Court of Appeals decision to the U.S. Supreme Court. The deadline for filing the petition for certiorari is April 25, 2013.

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

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

AAUP submitted an amicus brief in July 2012, urging the NLRB to develop a legal definition of employee status "in a manner that accurately reflects employment relationships in universities and colleges and that respects the rights of college and university employees to exercise their rights to organize and engage in collective bargaining."[8] AAUP's brief stressed the extent to which the erosion of faculty power that union advocates at Point Park have cited reflects broad trends. "The application of a corporate model of management has resulted in significant changes in university institutional structure and distribution of authority. There has been a major expansion of the administrative hierarchy, which exercises greater unilateral authority over academic affairs," the brief states. AAUP also points out that, "This organizational structure stands in stark contrast to the *Yeshiva* majority's description of the university as a collegial institution primarily driven by the internal decision-making authority of its faculty. Further, university administrators increasingly are making decisions in response to external market concerns, rather than consulting with, relying on, or following faculty recommendations. Thus, university decision-making is increasingly made unilaterally by high-level administrators who are driven by external market factors in setting and implementing policy on such issues as program development or discontinuance, student admissions, tuition hikes, and university-industry relationships. As a result, the faculty have experienced a continually shrinking scope of influence over academic matters."

In addition to AAUP's brief, amicus briefs were filed by Matthew Finkin, Joel Cutcher-Gershenfeld, and Thomas A. Kochan (as impartial employment and labor relations scholars); Dr. Michael Hoerger, PhD, social scientist; Higher Education Council of the Employment Law Alliance; National Education Association; Newspaper Guild of Pittsburgh, CWA, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations; American Council on Education, National Association of Independent Colleges and Universities, Council of Independent Colleges, Association of Independent Colleges and Universities of Pennsylvania,

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

College and University Professional Association for Human Resources, and Association of American Universities; The Center for the Analysis of Small Business Labor Policy, Inc.; Louis Benedict, MBA, J.D., Ph.D. (Higher Education Administrator); and National Right to Work Legal Defense and Education Foundation, Inc.[9]

3. *New York University v. GSOC/UAW*, N.L.R.B. Case No.: 02-RC-023481; *Polytechnic Institute of New York University v. International Union, United Automobile Aerospace, and Agricultural Implement Workers of America (UAW)*, N.L.R.B. Case No.: 29-RC-012054.

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

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

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

On the issue of whether the NLRB should continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, the brief distinguishes graduate students pursuing their *own* studies supported by external financial assistance from graduate students performing research duties to further a *professor's* externally funded research. The former are not performing a "service to the University and thus [would] not [be] employees of the University." The latter, however, are "no different from other university employees, such as the principal investigator, lab techs, and clericals, who are working on the same project," and the source of funding used to pay their wages, "is not relative to, much less determinative of, employee status." The brief also argues that there is no difference between graduate student assistants "assist[ing] on externally funded research projects of their university in return for compensation" from graduate student assistants "employed by a foundation" "established [by their university] to manage its research awards."

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

B. Agency Fee

1. *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012).

In June 2012, the Supreme Court held that public-sector unions, seeking to collect either a mid-year fee increase or a special assessment, are required to issue a fresh "*Hudson* notice" to nonmembers at the time of the fee request; further, the Court held that after such notice is given, unions can only collect funds from those nonmembers who affirmatively choose to pay the requested fees. This decision reversed an earlier decision of the U.S. Court of Appeals for the Ninth Circuit and may have implications for all public-sector unions operating under "agency shop" arrangements, which permit a union to represent all employees (union members and nonmembers alike) in a unionized workplace and collect annual agency fees from the nonmembers to cover the cost of the union's services.

At issue in this case was whether the Service Employees International Union Local 1000 (SEIU Local 1000), the bargaining agent for California state employees, was required to provide a separate *Hudson* notice after it imposed a temporary, mid-year fee increase to be used for political purposes. More specifically, SEIU Local 1000 levied a special assessment to mount campaigns to defeat two measures on a November, 2005 ballot but did not issue a second agency

fee notice for the year. Agency fee payers challenged the special assessment, arguing that it violated their First Amendment rights under the U.S. Constitution because it seized their money for non-chargeable political expenses. The district court denied the plaintiffs' motion for a preliminary injunction against the union but ruled that the union must give the agency fee payers a chance to ask for a refund on the special dues. SEIU Local 1000 appealed the district court's decision, and the Ninth Circuit overturned the lower court's decision, holding that the union's notice complied with the procedural requirements for agency fee notices set out in the seminal case *Chicago Teachers Union v. Hudson*.

The Supreme Court ultimately overturned the Ninth Circuit's ruling, however, and held that, "when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent." Contrasting the lower court's holding, the Supreme Court found that the *Hudson* precedent is not dispositive in the current case, explaining that the *Hudson* requirements only concern a union's "regular annual fees," while the plaintiffs in the current case were objecting to "a special assessment or dues increase . . . levied to meet expenses that were not disclosed when the amount of the regular assessment was set." Because SEIU Local 1000's special assessment was requested after the union established its annual fee, the union was obligated to send a new *Hudson* notice with the special assessment to ensure that nonmembers could make "informed choice[s]" about paying the additional fees. Further, to "respect the limits of the First Amendment," the Court stated that the fresh *Hudson* notice would only allow SEIU Local 1000 to collect the special assessment if the nonmembers "opt into the special fee."

In dicta, Justice Alito indicated that the Court's former decisions (such as *Hudson*), which authorize agency shops to collect union fees from nonmembers, may in fact violate nonmembers' First Amendment rights by compelling nonmembers to fund speech with which they may disagree. Noting that the Court's earlier cases have "tolerated" this potential impingement upon First Amendment rights, however, Justice Alito declined to render a decision on the overall constitutionality of agency shops. Commentators, however, have reported that this language could signal "[C]ourt approval of a . . . union-weakening, so-called 'right to work', law." Similarly, other commentators argue that the language "all but begs" opponents of organized labor to use the Court's emerging First Amendment jurisprudence to challenge the validity of agency shops altogether. Indeed, on January 9, 2013, five Alaska State Troopers, with the help of the National Right to Work Legal Defense Foundation, Inc., filed a federal lawsuit seeking to expand the rights expounded upon in this case. Specifically, the plaintiffs challenge the method their agency shop uses to collect nonmember agency fees: a structure which requires nonmembers to opt out of, rather than opt into, the payment of special assessment fees. The case has not yet gone to trial but will undoubtedly provide insight into the meaning of the Supreme Court's *Knox* statements about the general constitutionality of agency shops.