Journal of Collective Bargaining in the Academy

Volume 0 *National Center Proceedings 2018* Article 40

April 2018

Legal Issues in Higher Education

Aaron Nisenson
AAUP

45th 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

March, 2018
Legal Update

Aaron Nisenson
Senior Counsel
American Association of University Professors

Annual Legal Update[1]
March, 2018

Aaron Nisenson, Senior Counsel
American Association of University Professors

[1]This outline is an illustrative, not exhaustive, list of higher education cases of interest to this audience. 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.

I. Introduction

The election of Donald Trump as President has started to impact the legal landscape. There have been substantive changes already reflected in rulings of administrative agencies with the National Labor Relations Board reversing a decision on the standard for determining bargaining units and the Department of Education changing course on Title IX guidance. Other changes may be on the horizon with potentially substantial modifications to the law governing unionization of faculty and graduate students in the private sector and the constitutionality of agency fee in the public sector. Finally, the new political and social environment has led to an increase in the harassment and discipline of faculty members, resulting in First Amendment and other legal challenges.

The most significant change may arise in the Supreme Court. In 2016 the Supreme Court accepted a case challenging the constitutionality of agency fees in the public sector. (*See Friedrichs infra*.) The Court appeared poised to find agency fees unconstitutional when Justice Antonin Scalia died. Left with only eight justices, the Court issued a one sentence 4-4 decision that upheld the lower court's decision and the status quo on agency fee. Trump appointed Justice Neil Gorsuch to fill Scalia' seat, and he will likely adopt a conservative position. The issue is now before the Supreme Court in *Janus v. AFSCME*. The Supreme Court heard oral arguments on February 26, 2018 and the argument went largely as expected. Because none of the justices appeared to depart from their expected position, the oral argument reinforced the view that the Court will likely rule that the collection of agency fees in the public section is unconstitutional.

In the private sector, the coming change in the makeup of the Board will likely bring into question the future of the Board's rulings in a number of important cases. With new appointments now filling two of three vacancies on the National Labor Relations Board and the likelihood that the third vacancy will be filled by another conservative nominee, the Board may revisit some of its important rulings regarding faculty, particularly its *Pacific Lutheran University* (2014) decision on the test used to determine whether religiously-affiliated institutions are exempt from NLRB jurisdiction, and its *Columbia University* (2016) decision that graduate student employees (teaching assistants and research assistants) have the right to unionize.

The increase in scrutiny of faculty actions, and the attendant online harassment of faculty, has also created new legal challenges. In some instances, faculty have been disciplined for their activities, drawing First Amendment or contract based challenges, and these cases are winding their way through the courts.

II. First Amendment and Speech Rights

A. Garcetti / Citizen Speech

***Lane v. Franks*, 134 S. Ct. 2369 (2014)**

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

Edward Lane was the director of Community Intensive Training for Youth (CITY), a program operated by Central Alabama Community College (CACC). Lane in the course of his duties as director conducted an audit of the program's expenses and discovered that Suzanne Schmitz, an Alabama State Representative who was on CITY's payroll, had not been reporting for work. As a result Lane terminated Schmitz' employment. Federal authorities soon indicted Schmitz on charges of mail fraud and theft. Lane was subpoenaed and testified regarding the events that led to the termination of Schmitz at CITY. Schmitz was later convicted. Steve Franks, then CACC's president, terminated Lane along with 28 other employees under the auspices of financial difficulties. Soon afterward, however, "Franks rescinded all but 2 of the 29 terminations—those of Lane and one other employee". Lane sued alleging that Franks had violated the First Amendment by firing him in retaliation for testifying against Schmitz.

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

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

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

"the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee--rather than citizen--speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." And the Court found that "Lane's sworn testimony is speech as a citizen."

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

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

B. Faculty Speech

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

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

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

internal audit in response to his open criticisms of administration decisions and because of his publications.

The district court dismissed Demers' First Amendment claim on the ground that Demers made his comments in connection with his duties as a faculty member. *Garcetti v. Ceballos,* 547 U.S. 410 (2006). Demers appealed to the Ninth Circuit. The AAUP joined with the Thomas Jefferson Center for the Protection of Free Expression to file an *amicus* brief in support of Demers. The *amicus* brief argued that academic speech was not governed by the *Garcetti* analysis, but instead was governed by the balancing test established in *Pickering v. Board of Education,* 391 US 563 (1968). The Ninth Circuit agreed and issued a ruling that vigorously affirmed that the First Amendment protects the academic speech of faculty members.

The Ninth Circuit held that *Garcetti* does not apply to "speech related to scholarship or teaching" and reaffirmed that "*Garcetti* does not – indeed, consistent with the First Amendment, cannot – apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."

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

***Wetherbe v. Tex. Tech Univ. Sys.*, 669 F. Appx 297 (5th Cir. 2017); *Wetherbe v. Goebel,* No. 07-16-00179-CV, 2018 Tex. App. LEXIS 1676 (Mar. 6, 2018)**

In this case, the Fifth Circuit held that a professor's public statements opposing tenure were protected by the First Amendment. Professor James Wetherbe sued his employer, Texas Tech University, and the current and former deans of the business school where he taught. Wetherbe claimed that the University and the deans violated the First Amendment by retaliating against him for publicly criticizing tenure in the academy. The district court granted Defendants' motion to dismiss, holding that Wetherbe's speech was not protected by the First Amendment as it did not involve a matter of public concern because "[t]enure is a benefit that owes its existence to, and is generally found only in the context of, government employment."

The Fifth Circuit reversed the lower court, finding that Wetherbe's statements criticizing tenure were protected. The court explained that "Whether speech addresses a matter of public concern is to be 'determined by the content, form, and context of a given statement.'" As to the content of the speech, the court found that "Because these articles focus on the systemic impact of tenure, not Wetherbe's own job conditions, the content of the speech indicates that the speech involves a matter of public concern." As to the form and context of the speech, the court emphasized the publicity and media coverage surrounding Wetherbe's statements, and that the speech consisted of articles Wetherbe published in various media outlets. The court also rejected arguments by the university that Wetherbe's speech was made in the course of performing his job, as there was no reason to infer that writing articles on tenure or speaking to the press are part of Wetherbe's job duties.

By contrast, in an earlier case, the Fifth Circuit had found that the First Amendment did not protect Wetherbe's decision to reject tenure or his personal views on tenure. *Wetherbe v. Smith*, 593 F. App'x 323, 327-29 (5th Cir. 2014). In that case, the Fifth Circuit found that because Wetherbe's statements had been made solely to university employees during the course of his interview for a position, and had not been made publicly, they were not speech on a matter of public concern and therefore were not protected by the First Amendment. These two cases together demonstrate that it is not just the content of the speech that is important, but the forum and audience at which the speech is directed.

In *Wetherbe v. Goebel*, No. 07-16-00179-CV, 2018 Tex. App. LEXIS 1676 (Mar. 6, 2018), a parallel case before the Court of Appeals for the Seventh District Court of Texas at Amarillo, the sole issue on this appeal was whether Wetherbe's speech was a matter of public concern. The court reversed the dismissal of this state law claim and remanded the case back to the trial court further proceedings finding, "Because the continued value of academic tenure was a matter of public concern, conceptually distinct from any speech related to Appellant's prior litigation or disputes with the university."

***Buchanan v. Alexander, et al.*, 2018 U.S. Dist. LEXIS 4479 (M.D. LA Jan. 10, 2018)**

In this case, the district court dismissed Plaintiff's Motion for Summary Judgment with prejudice. Plaintiff, Teresa Buchanan, a tenured professor at Louisiana State University (LSU), alleged that LSU infringed upon her freedom of speech, academic freedom, and procedural and substantive due process rights when LSU's Board of Supervisors terminated her employment after finding that her remarks about marriage and sex to students—made while training students for preschool to third-grade instruction—violated the university's Policy Statements on Sexual Harassment. Plaintiff also brought a facial and as-applied constitutional challenge to LSU's sexual harassment policy, arguing that it was overbroad and lacked an objective test for offensiveness. The court found that Plaintiff's First Amendment claims failed either because they were time-barred or because qualified immunity protected Defendants' objectively reasonable actions, notwithstanding the fact that Plaintiff failed to show that her remarks were protected by the

academic freedom exception to *Garcetti* and did not involve a matter of public concern. The court found, "Plaintiff has utterly failed to present any summary judgment evidence establishing how her conduct and language related in any way to assignments, instruction, and education of preschool and elementary teachers." The court further found that LSU's sexual harassment policy was constitutional, both facially and as-applied to Plaintiff, since its language required conduct to be objectively severe and examples provided in the policy illustrated that conduct must be sufficiently severe and pervasive. Last, the court found that Plaintiff was afforded procedural and substantive due process to satisfy constitutional standards leading up to her termination.

C. Union Speech

Meade v. Moraine Valley Cmty. College, 770 F.3d 680 (7th Cir. 2014), and No. 13 C 7950 (N.D. Ill. Oct. 17, 2016)

This case arose from the termination of Robin Meade, an adjunct professor and active union officer at Moraine Valley Community College, who was summarily dismissed after she sent a letter criticizing her college's treatment of its adjunct faculty. The case resulted in several substantive decisions from the district court and one from the Seventh Circuit Court of Appeals. In the appeals court case, the Seventh Circuit greatly enhanced constitutional protection for outspoken critics of public college and university administrators. It reinforced and enhanced recent and congenial decisions in two other federal circuits in cases from Washington (*Demers*) and North Carolina (*Adams*). The court specifically relied on a sympathetic view of the Supreme Court's judgment in the *Garcetti* case, expressly invoking the justices' "reservation" of free speech and press protections for academic speakers and writers. The three-judge panel unanimously declared that an Illinois community college could not summarily dismiss an adjunct teacher for writing a letter criticizing the administration, at least as long as the issues she had raised publicly and visibly constituted "matters of public concern."

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

On remand, the district court initially denied motions for summary judgment by both the College and Meade. 2016 U.S. Dist. LEXIS (N.D. Ill. March 3, 2016). However, on October 17, 2016 in an unpublished decision the district court vacated this ruling, granted Plaintiff's motion for summary judgment, and denied Defendant's motion for summary judgment. *Meade v. Moraine*

Valley Community College, No. 13 C 7950 (N.D. Ill. Oct. 17, 2016). The court ruled in Meade's favor on both First Amendment and Due Process grounds, and explained.

> In regard to the First Amendment retaliation claims, the Seventh Circuit made it clear that the letter in question (Letter) involved a matter of public concern. The Seventh Circuit indicated that this court need only address the remaining two issues of "whether the speech was a substantial or motivating factor in the retaliatory action, and whether the defendant can show that it would have taken the same action without the existence of the protected speech." *Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680, 686 (7th Cir. 2014). . . . . The undisputed facts in this case clearly show that the Letter was the motivating factor behind the actions taken against Meade, and the College has not pointed to sufficient evidence for a reasonable trier of fact to conclude that the College would have taken the same action without the existence of the protected speech. The College admits that it took action against Meade because of her statements in the Letter. The College has not pointed to other evidence showing that it had an alternative basis to terminate Meade's employment. . . .Therefore, Meade's motion for summary judgment on the issue of liability on the First Amendment retaliation claim is granted.
>
> In regard to the due process claim, the Seventh Circuit has found that Meade has shown that she has a protected property interest. Once again, after discovery and the filing of dispositive motions, the undisputed facts show that Meade did not waive any right to due process, and that she was not accorded a proper hearing. Meade justifiably declined to appear at a prospective hearing that did not afford Meade an opportunity to obtain counsel. The undisputed facts show that Meade was deprived of her protected interest and that the deprivation was done is a way that violated due process standards. . . . Therefore, Meade's motion for summary judgment on the issue of liability on the due process claim is granted.

After this decision was issued Moraine settled with Professor Meade.

***Meagher v. Andover Sch. Comm.*, 94 F. Supp. 3d 21 (D. Mass. 2015) and 2016 U.S. Dist. LEXIS 1100 (D. Mass. Jan. 6, 2016)**

In this case, a U.S. District in Massachusetts ruled that speech made by a teacher as a union representative was protected under the First Amendment finding that the *Garcetti* test did not apply because speech was not a part of her normal employment duties as clarified in *Lane v. Franks*.

This case arose out of the September 2012 termination of the plaintiff, Jennifer Meagher ("Meagher"), from her employment as a tenured teacher at Andover High School ("AHS") in Andover, Massachusetts. Prior to her termination, Meagher and other members of the teachers' union, the Andover Education Association ("AEA" or "Union"), were involved in contentious negotiations with the Andover School Committee over a new collective bargaining agreement. In addition, AHS was engaged in the process of seeking re-accreditation pursuant to the standards established by the New England Association of Schools and Colleges ("NEASC"). The

accreditation process centered on a self-study, which required teachers and administrators at AHS to conduct evaluations of the school's programs, prepare separate reports addressing one of seven accreditation standards, and present the reports to the faculty for approval. Under the NEASC guidelines, each report required approval by a two-thirds majority vote of the faculty. It was undisputed that Meagher was discharged from employment, effective September 17, 2012, because she sent an email to approximately sixty other teachers in which she urged them to enter an "abstain" vote on the ballots for each of the self-study reports as a means of putting the accreditation process on hold and using it to gain leverage in the collective bargaining negotiations. Meagher alleged that the decision to terminate her for writing and distributing the email to her colleagues constituted unlawful retaliation for, and otherwise interfered with, the exercise of her First Amendment right to engage in free speech.

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

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

> The record on summary judgment establishes that Meagher was speaking as a citizen, and not an employee of the Andover School Department, when she distributed the June 10, 2012 email at issue in this case. There is no dispute that Meagher wrote the email on her personal, home computer, and distributed it to her colleagues using her personal email account. Moreover, there is no dispute that she sent the communication during non-working hours, that she contacted the recipients using their personal email accounts, and that the email concerned issues that were addressed in the press and triggered considerable discussion among members of the local com-munity. The substance of the email, in which Meagher advocated use of the "abstain" option on the ballots for the self-study reports as a means of delaying the NEASC re-accreditation process and gaining leverage in the contract dispute between the Union and the ASC, would not have given objective observers the impression that Meagher was representing her employer when she communicated with her colleagues. . . . Accordingly, the record demonstrates that Meagher was working in her capacity as a Union activist rather than in her capacity as a high school English teacher, when she distributed the communication in question.

94. F Supp. 3d at 38.

The court also found that the value of Meagher's speech outweighed any interest that the defendants had in preventing unnecessary disruptions and inefficiencies in the workplace.

Therefore, the court found that Meagher's speech was protected and that her termination violated her rights under the First Amendment.

The suit and many of Meagher's claims were ultimately adjudicated or resolved. While the First Amendment lawsuit was pending the Commonwealth Employment Relations Board ("CERB" or "Board") issued its decision in connection with an unfair labor practices charge filed by the union, finding Meagher's termination was in response to protected concerted activity and that her employer had discriminated against her based on her union activity in violation of Massachusetts law. The School Committee was ordered to reinstate Meagher to her teaching position at AHS and to compensate Meagher for all losses she had suffered, if any, as a result of the unlawful action. In addition, before the trial in the First Amendment lawsuit, the parties settled Meagher's claim for $100,000.00, leaving to the court the issue of reasonable attorneys' fees and costs, which it assessed at $183,691.97. *Meagher v. Andover Sch. Comm.*, 2016 U.S. Dist. LEXIS 1100 (D. Mass. Jan. 26, 2016)

D. Exclusive Representation

***Hill v. SEIU*, 850 F.3d 861 (7th Cir. 2017) cert denied (Nov. 13, 2017); *D'Agostino v. Baker*, 812 F.3d 240 (1st Cir. 2016) cert denied (June 13, 2016); *Jarvis v. Cuomo*, 660 Fed. Appx. 72 (2d Cir. 2016) cert denied (Feb. 27, 2017)**

These cases involved lawsuits in which anti-union plaintiffs challenged the long established rights of unions to exclusively represent employees in public sector bargaining. In a decision written by former Supreme Court Justice David Souter, the First Circuit firmly rejected the plaintiffs' claims. The court explained, that non-union public employees have no cognizable claim that their First Amendment associational rights were violated by the union acting as an exclusive bargaining agent with the state. In *D'Agostino v.* Baker, 812 F.3d 240 (1st Cir. 2016), the court explained,

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

> amplification that an exclusive agent necessarily enjoys in speaking for the unionized majority, *id. at 288*.

The court also rejected the Plaintiff's attempts to use the recent Supreme Court decision in *Harris v. Quinn,* 189 L. Ed. 2d 620 (U.S. 2014) to justify their claims. Plaintiffs sought review by the Supreme Court, which was rejected on June 13, 2016. *D'Agostino v. Baker,* 195 L. Ed. 2d 812 (U.S. June 13, 2016).

Similarly, in *Hill v. SEIU,* 850 F.3d 861 (7th Cir. Ill. Mar. 9, 2017) the National Right to Work Legal Defense Foundation asserted that the state and public sector unions violated plaintiffs First Amendment rights in enacting and enforcing legislation allowing home child-care providers within a state-designated bargaining unit to elect an exclusive representative to bargain collectively with the state. On March 9, 2017, the Seventh Second Circuit soundly rejected this argument, explaining, "under Knight, the IPLRA's exclusive-bargaining-representative scheme is constitutionally firm." On November 13, 2017, the Supreme Court denied Plaintiff's writ of certiorari. *Hill v. SEIU,* 850 F.3d 861 (7th Cir. 2017).

E. Agency Fee

Janus v. American Federation of State, County, and Municipal Employees, Council 31, 851 F. 3d 746 (7th Cir. March 21, 2017) cert granted 2017 U.S. LEXIS 4459 (U.S. Sept. 28, 2017)

In this case, anti-union forces are making their second attempt to overrule the Supreme Court's 1977 precedent in *Abood v. Detroit Board of Education*, which held that agency fees are constitutional under the First Amendment. At issue in the case is whether nonmembers of unions, who share in the wages, benefits, and protections that have been negotiated into a collectively bargained contract, may be required to pay their fair share for the cost of those negotiations. The National Right to Work Committee, which is behind the case, is asking the Court to find that such fair share fees violate the First Amendment.

AAUP filed with the National Education Association (NEA) an *amicus* brief in the US Supreme Court arguing that the payment of agency fees by nonmembers in public sector collective bargaining unions is constitutional. The NEA/AAUP *amicus* brief explains that the US Supreme Court's historical interpretation of the First Amendment gives the government, in its role as employer, significant authority to manage the public sector workplace. Where state laws provide for public sector unionization, public employers have strong interests in ensuring robust collective bargaining, including agency fees as a fair and equitable way to distribute the costs of collective bargaining among all the employees who benefit. Evidence shows that maintaining a robust collective bargaining system advances the government's interest in providing high quality public services. The *amicus* brief discusses studies showing that unionization in public schools and

universities is linked to improving the quality of education and of working relationships within educational institutions.

The Supreme Court held oral arguments in the case on February 26, 2018. Because none of the justices appeared to depart from their expected position, the oral argument reinforced the view that the Court will likely rule that the collection of agency fees in the public section is unconstitutional. A decision is expected by the time the Court's term ends in late June 2018. If the Supreme Court holds that agency fees are unconstitutional, it would likely be effective the day it is issued.

***Jarvis v. Cuomo,* 660 Fed. Appx. 72 (2d Cir. 2016) cert denied (Feb. 27, 2017)**

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

After the *Harris* decision was issued, the Union and the employer negotiated a new collective bargaining agreement that did not require the deduction of agency fees. The union also rebated to the plaintiff's agency fees that were collected after the Supreme Court issued its decision in *Harris*. The plaintiffs continued to prosecute their suit arguing that the Union was obligated to rebate them for agency fees paid prior to the Court's decision in *Harris*.

The second circuit found that the Union was not obligated to make such a reimbursement as the union relied in good faith when it collected the agency fees prior to *Harris*. The Court explained, "In obtaining the challenged fair share fees from plaintiffs, CSEA relied on a validly enacted state law and the controlling weight of Supreme Court precedent. Because it was objectively reasonable for CSEA "to act on the basis of a statute not yet held invalid," defendants are not liable for damages stemming from the pre-Harris collection of fair share fees." *Jarvis v. Cuomo,* 660 Fed. Appx. 72 *76, (2d Cir. N.Y. 2016). Similarly, the district court in Illinois rejected a claim for payment of agency fees collected for services performed before the *Harris* decision was issued on June 30, 2014. *Winner v. Rauner*, 2016 U.S. Dist. LEXIS 175925 (N.D. Ill. Dec. 20, 2016).

III. Academic Freedom and FOIA/Subpoenas

***Energy & Environment Legal Institute v. Arizona Board of Regents,* Case No. 2CACV-2017-0002 (Ariz. App. Ct., Second App. Div., Sept. 14, 2017) (unpublished)**

In this decision the Arizona Court of Appeals rejected attempts by a "free market" legal foundation to use public records requests to compel faculty members to release emails related to their climate research. In an *amicus* brief in support of the scientists, the AAUP had argued that

Arizona statute creates an exemption to public release of records for academic research records, and that a general statutory exemption protecting records when in the best interests of the state, in particular the state's interest in academic freedom, should have been considered. The appeals court agreed and reversed the decision of the trial court that required release of the records and returned the case to the trial court so that it could address these issues.

This case has a long and tortured history, with two lower court decisions, two appeals court decisions, and three AAUP *amicus* briefs. It started with a lawsuit filed by Energy & Environment Legal Institute, a "free market" legal foundation using public records requests in a campaign against climate science. Previously, E & E (then American Tradition Institute) sought similar records of University of Virginia faculty members Michael Mann and others, which the Virginia Supreme Court, with AAUP filing an *amicus* brief supporting the scientists, rebuffed. Here, E & E's public records requests targeted two University of Arizona faculty members, climate researchers Professors Malcolm Hughes and Jonathan Overpeck. E & E counsel has stated that the suit was intended to "put false science on trial" and E & E vowed to "keep peppering universities around the country with similar requests under state open records laws."

The case has moved between the trial court and the Appeals Court of Arizona several times. In this appeal, the trial court had initially ruled that the records should be disclosed. As the Appeals Court decision explained,

> the trial court determined the e-mails sought by Energy & Environment Legal Institute (E&E) that had been characterized as "prepublication critical analysis, unpublished data, analysis, research, results, drafts, and commentary," were subject to release under A.R.S. § 39-121, concluding that Arizona Board of Regents (Board) had "not met its burden justifying its decision to withhold the subject emails."

The University appealed, and AAUP submitted an *amicus* brief that advanced two arguments. First, the trial court did not properly apply a section of the public records law which specifically protected the research records of the university faculty, and thus created a privilege for these records. Second, the trial court did not properly apply a general section of the public records law which required that the court consider the best interests of the state, and particularly the importance of academic freedom in research. As the brief explained, "Courts should consider the best interests of the state to maintain a free and vital university system, which depends on the protection of academic freedom to engage in the free and open scientific debate necessary to create high quality academic research. Where the requests seek prepublication communications and other unpublished academic research materials, as in the case at bar, compelled disclosure would have a severe chilling effect on intellectual debate among researchers and scientists."

The Appeals Court agreed with both of these arguments, and reversed the decision of the trial court. Importantly, the Appeals Court specifically found there was an academic privilege created by the statute:

> . . . . the trial court's decision concludes that "the creation of an academic privilege exception . . . is a proposition more properly made to the legislature rather than the courts." Section 15-1640, although it is not titled as an "academic privilege," grants an exemption from Arizona public records law for certain "records of a university." The trial court's comment seems to demonstrate that the court did not consider the application of § 15-1640 and was not aware the legislature had already created an academic privilege.

The Appeals Court also found that, as argued by AAUP, the trial court had failed to address whether the best interests of the state warranted protecting these research records. Because the trial court had not properly applied the statutory protections available to the scientists, the Appeals Court reversed the trial court's decision requiring release of the records, and remanded the case to the trial court for it to issue a decision fully addressing these protections.

***Glass v. Paxton (University of Texas at Austin), appeal docketed,* No. 17-50641 (5th Cir. July 24, 2017)**

This case involves an appeal of a lawsuit filed by several faculty at the University of Texas contesting a policy that had been promulgated as a result of a Texas campus carry law. Texas passed a "campus carry law" that expressly permits concealed handguns on university campuses, and in 2016 the University of Texas at Austin issued a Campus Carry Policy mandating that faculty permit concealed handguns in their classrooms. Several faculty filed suit in the United States District Court for the Western District of Texas alleging that enforcement of the Campus Carry Policy profoundly changes the educational environment in which Plaintiffs teach in violation of the First Amendment. The District Court dismissed the case, holding that the faculty did not have standing to sue because they had not proven that they had been harmed by the law or university policy. The faculty appealed and the AAUP joined with the Giffords Law Center to Prevent Gun Violence and the Brady Center to Prevent Gun Violence in an *amicus* brief filed in the Fifth Circuit in support of the faculty members' appeal.

The brief explains that college campuses are marketplaces of ideas, and that the presence of weapons has a chilling effect on rigorous academic exchange of ideas. The brief argues that the policy (and the law pursuant to which the policy was created) requiring that handguns be permitted in classrooms harms faculty as it deprives them of a core academic decision and chills their First Amendment right to academic freedom.

The brief further explains that the deleterious impact of guns on education is widely recognized by university administrators and faculty, whose conclusions are confirmed by a significant body of social science research. The brief argues that the "decision whether to permit

or exclude handguns in a given classroom is, at bottom, a decision about educational policy and pedagogical strategy. It predictably affects not only the choice of course materials, but how a particular professor can and should interact with her students—how far she should press a student or a class to wrestle with unsettling ideas, how trenchantly and forthrightly she can evaluate student work. Permitting handguns in the classroom also affects the extent to which faculty can or should prompt students to challenge each other. The law and policy thus implicate concerns at the very core of academic freedom: They compel faculty to alter their pedagogical choices, deprive them of the decision to exclude guns from their classrooms, and censor their protected speech."

***McAdams v. Marquette University, pet. to bypass Ct. of Apps. granted,* 379 Wis. 2d 438 (2018)**

This pending appeal arose from a blog post written by Dr. McAdams, a tenured professor at Marquette University, which criticized the university, other university faculty, and the actions of a graduate student/instructor. The administration proposed terminating Dr. McAdams. The Faculty Hearing Committee found that the opinions expressed by Dr. McAdams were protected by academic freedom, but that parts of the blog post, such as naming the graduate student/instructor, warranted a one to two-semester unpaid suspension, but not termination. Marquette University President Michael Lovell accepted the recommendation of the suspension, but also imposed a penalty, as a condition of Dr. Adams's reinstatement, requiring Dr. McAdams to write a statement of apology and admission of wrongdoing. Dr. McAdams's reasonable refusal to do so resulted in his de facto termination without due process or opportunity to contest the administration's action.

Dr. McAdams brought suit and claimed, *inter alia*, that Marquette violated his due process rights and his right to academic freedom. The trial court granted Marquette's motion for summary judgment. Dr. McAdams appealed the trial court's decision and the Wisconsin Supreme Court agreed to bypass the Court of Appeals and to hear the case immediately. The AAUP recently filed an *amicus* brief in the Wisconsin Supreme Court in support of Dr. John McAdams, who seeks to overturn the trial court's decision to deny his motion for summary judgment. The AAUP *amicus* brief explained that its policy documents and standards guaranteeing faculty rights of academic freedom and due process must protect faculty (like Dr. McAdams) from discipline when they express controversial views.

On the academic freedom issue, the trial court opined, "In short, academic freedom gives a professor, such as Dr. McAdams, the right to express his view in speeches, writing and on the internet, so long as he does not infringe on the rights of others." The *amicus* brief explained that "Such a formulation of limiting academic freedom to 'views' that do 'not infringe on the rights of others' vastly undermines academic freedom. The nature of offering opinions, particularly controversial ones, is that they may prompt vigorous responses, including assertions that the right of others have been infringed. Views and opinions should be subject to debate, not to limitations based on claims that the expression of views infringes upon the rights of others. Adding such a

component will only serve to limit the openness and breadth of the views expressed in academia, compromising essential rights of academic freedom." The *amicus* brief urged the Wisconsin Supreme Court to adopt AAUP standards to interpret academic freedom policies, including those at Marquette, as protecting faculty from discipline for extramural speech unless the university administration proves that such speech clearly demonstrates the faculty member's unfitness to serve, taking into account his entire record as a teacher and scholar. As AAUP standards explain, "Extramural utterances rarely bear upon the faculty member's fitness for continuing service."

The *amicus* brief also argued that Marquette violated Dr. McAdams's due process rights by unilaterally imposing a new penalty that required Dr. McAdams to write a statement of apology/admission as a condition of reinstatement. This severe sanction would compel Dr. McAdams to renounce his opinions, a fundamental violation of his academic freedom. It also amounted to a de facto termination that was imposed in contravention of the Faculty Hearing Committee's recommended lesser penalty.

***City and County of San Francisco v. Donald J. Trump et. al.*, No. 3:2017cv00485-WHO (N.D. Cal. 2017), *County of Santa Clara v. Donald J. Trump, et. al.*, No. 3:2017cv00574-WHO (N.D. Cal. 2017), *appeal docketed*, No. 17-17478 (9th Cir. Nov. 20, 2017)**

This pending appeal involves a challenge to a January 25, 2017 Trump administration Executive Order 13768 "Enhancing Public Safety in the Interior of the United States," which declared that "(i)t is the policy of the executive branch to . . . (e)nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law." Section 9 implements that policy by commanding executive branch officials to strip state and local governments deemed to be "sanctuary jurisdictions" of their eligibility "to receive grants." The City and County of San Francisco filed suit in the US District Court for the Northern District of California against President Trump and other federal officials, alleging that the Executive Order violated the separation of powers doctrine, the Tenth Amendment, and due process guarantees. On April 25, 2017, the District Court entered a nationwide preliminary injunction against the Executive Order determining that the City and County of San Francisco and County of Santa Clara had pre-enforcement standing to protect hundreds of millions of dollars of federal grants from the unconstitutionally broad sweep of the Executive Order. The AAUP joined an *amicus* brief submitted to the Ninth Circuit in support of the permanent injunction that enjoins the US government from enforcing Section 9 (a) of Executive Order 13768. The *amicus* brief argued that upholding the Executive Order would create a precedent that would enable the Trump administration to extend the Executive Order to apply to colleges and universities, and addresses the harms that would flow from overturning the permanent injunction.

The *amicus* brief further argued that such an extension would negatively impact colleges' and universities' ability to carry out their public mission ("This public mission extends to private and nonprofit colleges and universities as well. In the United States, colleges and universities explicitly see themselves as "conducted for the common good." AM. ASSOC. OF UNIV.

PROFESSORS, 1940 Statement of Principles on Academic Freedom and Tenure), and their interests in developing a diverse student body, " . . . A diverse student body breaks down stereotypes, "promotes learning outcomes," and "'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Grutter*, 539 U.S. at 330. (quoting from *amicus* brief); *Fisher II*, 136 S. Ct. at 2210. Diversity contributes to a robust exchange of ideas, exposure to different cultures and the acquisition of competencies necessary in our increasingly diverse society and closely connected world. *Id.* at 2211." The brief also emphasized the harms caused by the Executive Order—undermining the critical interest that our society has in the education of all its residents regardless of immigration status; threatening higher education's constitutional interest in educational independence to create the sort of diverse student body that is critical to the intellectual and academic life of the community; devastating university research opportunities by withdrawing federal funding for failure to participate in federal immigration enforcement; and penalizing students' opportunities for higher education by withdrawing federal student scholarship funding.

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

A. Tenure – Breach of Contract

***Matter of Monaco v. N.Y. Univ.*, 145 A.D.3d 567, 43 N.Y.S.3d 328 (N.Y. App. Div., 2016)**

Professors Marie Monaco and Herbert Samuels, New York University Medical School, had their salaries significantly slashed after NYU arbitrarily imposed a salary reduction policy. The Professors believed that this policy violated their contracts of employment, as well as NYU's handbook which, in its definition of tenure, "guarantees both freedom of research and economic security and thus prohibits a diminution in salary." NYU argued that it was not even bound by the Faculty Handbook. On December 15, 2016, the Supreme Court of the State of New York, Appellate Division, First Department found that Professors Monaco and Samuels sufficiently alleged that the policies contained in NYU's handbook, which, "form part of the essential employment understandings between a member of the Faculty and the University have the force of contract."

***Beckwith v. Pa. State Univ.*, 672 F. App'x 194 (3d Cir. 2016)**

Plaintiff, a tenure track faculty, brought suit against the university and alleged that the university breached her employment agreement when the university terminated her before the end of her employment agreement. Plaintiff's offer letter described her position as "tenure-eligible" with tenure being a six-year process although consideration for earlier tenure was possible based on performance yet was also subject to the universities' policies regarding faculty appointments.

The United States Court of Appeals for the Third Circuit held that Plaintiff failed to overcome Pennsylvania's presumption of at-will employment because she failed to show that there was "an express contract between the parties for a definite duration or an explicit statement that an employee can only be terminated "for cause.'" The court emphasized that because Plaintiff's employment agreement (nor any other document that was incorporated by reference) failed to establish a term of years, Plaintiff did not meet her burden on the breach of contract claim.

B. Tenure – Constitutionality

Vergara v. State of Cal., 246 Cal. App. 4th 619, 209 Cal. Rptr. 3d 532 (Cal. App. 2d Dist., May 3, 2016)

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

The challenged statutes in the California Education Code establish: a two-year probationary period during which new teachers may be terminated without cause, due process protections for non-probationary teachers facing termination for cause, and procedures for implementing budget-based reductions-in-force. After an eight-week bench trial, Los Angeles Superior Court Judge Rolf Michael Treu, in a short sixteen-page opinion containing only superficial analysis, adopted the plaintiffs' theories in full, striking down each challenged statute as unconstitutional. In doing so, Judge Treu improperly used the "strict scrutiny" standard and failed to adequately consider the substantial state interest in providing statutory rights of tenure and due process for K–12 teachers in the public schools.

The AAUP filed an *amicus* brief in support of tenure. The AAUP has a particular interest in defending the due process protections of tenure at all levels of education. The brief, primarily authored by Professor Charlotte Garden, an expert in labor law and constitutional law and litigation director of the Korematsu Center for Law & Equality at Seattle University, advanced two substantive arguments. First, the brief explained that by helping to insulate teachers from backlash or retaliation, the challenged statutes allow teachers to act in students' interests in deciding when and how to present curricular material and to advocate for students within their schools and

districts. In so doing, the brief recognized the distinction between the academic freedom rights of primary and secondary school teachers and those of professors in colleges and universities. Second, the brief argued that students are better off when good teachers remain in their classrooms, and the challenged statutes promote teacher longevity and discourage teacher turnover.

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

C. Due Process

Wilkerson v. Univ. of N. Tex., 878 F.3d 147 (5th Cir. 2017)

Plaintiff, a non-tenured professor, had a one-year appointment per a contract that included a five-year commitment to renew at the option of the university. Plaintiff was informed by a university representative that the renewal provision was only included for the university's convenience and would only be invoked if there was a reduction in workforce that necessitated non-renewals. Plaintiff was terminated and alleged that he had a property interest in his continued employment. The question before the court was not whether the university was within its right to terminate Plaintiff but rather was Plaintiff reasonable in expecting, based on rules and expectations, the university to employ him for the fourth year of a five-year contract? The United States District Court for the Eastern District of Texas followed the reasoning in *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), and held that Plaintiff had a reasonable expectation of his continued employment based on the university's assurances and the context of his contract that it would exercise its option to renew each year, absent serious violations or a reduction in force.

The U.S. Court of Appeals for the Fifth Circuit reversed the district court's decision and found that the Sindermann case was not dispositive here, ". . . Sindermann noted that Texas law could still bar a teacher's due process claim." "Far from inviting Wilkerson 'to feel that he has permanent tenure'", *citation omitted*, his contract provided a one-year appointment, and the bylaws and caselaw warned not to expect further ones. . ." The court further noted that the district court overlooked the contract's integration clause and put "informal understandings and customs" above the university's officially promulgated position.

***McAdams v. Marquette University, pet. to bypass Ct. of Apps. granted,* 379 Wis. 2d 438 (2018)**

This pending appeal arose from a blog post written by Dr. McAdams, which criticized the university, other university faculty, and the actions of a graduate student/instructor. The administration proposed terminating Dr. McAdams. The Faculty Hearing Committee found that the opinions expressed by Dr. McAdams were protected by academic freedom, but that parts of the blog post, such as naming the graduate student/instructor, warranted a one to two-semester unpaid suspension, but not termination. Marquette University President Michael Lovell accepted the recommendation of the suspension, but also imposed a penalty, as a condition of Dr. Adams's reinstatement, requiring Dr. McAdams to write a statement of apology and admission of wrongdoing. Dr. McAdams's reasonable refusal to do so resulted in his de facto termination without due process or opportunity to contest the administration's action. Dr. McAdams brought suit and claimed, *inter alia*, that Marquette violated his due process rights and his right to academic freedom. The trial court granted Marquette's motion for summary judgment. Dr. McAdams appealed the trial court's decision and the Wisconsin Supreme Court agreed to bypass the Court of Appeals and to hear the case immediately.

The *amicus* brief argue that Marquette violated Dr. McAdams's due process rights by unilaterally imposing a new penalty that required Dr. McAdams to write a statement of apology/admission as a condition of reinstatement. This severe sanction would compel Dr. McAdams to renounce his opinions, a fundamental violation of his academic freedom. It also amounted to a de facto termination that was imposed in contravention of the Faculty Hearing Committee's recommended lesser penalty.

D. Faculty Handbooks

***Crosby v. University of Kentucky* 863 F.3d 545 (6th Cir. July 17, 2017)**

In this case, the Sixth Circuit affirmed the dismissal of Plaintiff-Appellant's claims. Plaintiff-Appellant, Richard Crosby, is a tenured Professor and former Department Chair at the University of Kentucky's College of Public Health. He filed suit against the University and several University officials under Section 1983 and state law, claiming that his removal as Department Chair amounted to a violations of his right to due process. Prior to his removal, the University had investigated Plaintiff-Appellant for reports that he was "[v]olatile," "explosive," "disrespectful," "condescending," "out of control," "prone to angry outbursts," made an offensive remark about women, and that the Department's performance was suffering because of Plaintiff-Appellant's temper and hostility toward other departments. After being stripped of his Department Chair position, Plaintiff-Appellant appealed and demanded that the University handle his appeal under a proposed governing regulation not yet adopted by the University. The University declined, and Plaintiff-Appellant filed suit. In affirming the district court's dismissal, the Sixth Circuit found

that Plaintiff-Appellant identified "no statute, formal contract, or contract implied from the circumstances that supports his claim to a protected property interest in his position as Chair," and that the individual Defendants were entitled to qualified immunity.

V. Discrimination and Affirmative Action

A. Affirmative Action in Admissions

***Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016)**

The US Supreme Court upheld the constitutionality of University of Texas at Austin's affirmative action program. In its second consideration of *Fisher's* challenge to UT's program, the Court confirmed that universities must prove that race is considered only as necessary to meet the permissible goals of affirmative action. In particular, the university must prove that "race-neutral alternatives" will not suffice to meet these goals.

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

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

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

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

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

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

B. Sexual Misconduct – Title IX

Letter from Office of Civil Rights, Department of Education, (Sept. 22, 2017)

In a Dear Colleague Letter issued on September 22, 2017 the Department of Education announced its withdrawal of the 2011 Dear Colleague Letter and the related 2014 "Q&A" guidance. The Department also issued a Q&A on Campus Sexual Misconduct and announced it intends to conduct a notice and comment rulemaking process. The 2017 letter and Q&A's largely revert to the guidance that predated the 2011 Dear Colleague Letter, though they offer certain specific advice that extends beyond the earlier guidance. (See companion paper by Bridget Maricich for further details.)

Article: Aaron Nisenson, Constitutional Due Process and Title IX Investigation and Appeal Procedures at Colleges and Universities, 120 Penn State Law Review 963 (Spring 2016)

Over the last several years, the federal government has been pressing universities and colleges to strengthen the processes used for the investigation, discipline, and appeal of sexual harassment and assault cases arising under Title IX of the Education Act Amendments. Public sector universities and colleges are also obligated to provide to employees and students disciplined

for sexual harassment or assault procedural protections under the Due Process Clause of the U.S. Constitution. These disparate legal obligations have led to lawsuits alleging that universities have failed to comply with the Due Process Clause when discipline has been instituted as a result of Title IX investigations or when instituting discipline. This article provides an overview of Constitutional Due Process rights and their application to public sector universities and colleges and will review recent judicial decisions addressing these rights in cases arising from investigations, discipline and appeals under Title IX. It also includes recommendations for balancing need to address sexual misconduct on campus with the due process rights of students and employees.

VI. Immigration

A. Executive Order Banning Immigration

***Hawaii v. Trump,* 2017 U.S. App. LEXIS 10356 (9th Cir. June 12, 2017) cert granted 2018 U.S. LEXIS 759 (U.S. Jan. 19, 2018)**

This pending Supreme Court appeal arose from a Ninth Circuit decision and order affirming in part and vacating in part the district court's preliminary injunction prohibiting the government from enforcing one of the President's Executive Orders on immigration. In March 2017, the President issued Executive Order No. 13,769, which temporarily restricted foreign nationals of certain countries and refugees from entering into the United States. Plaintiffs brought suit challenging the legality of the Order. On motion by Plaintiffs, a district court preliminarily enjoined the federal government from enforcing Sections 2 and 6 of the Order. Defendants appealed, and the Ninth Circuit largely upheld the district court's ruling. The Ninth Circuit found that the President exceeded his authority in issuing an order excluding nationals of specified countries from entry into the United States since there were no adequate findings that entry of excluded nationals would be detrimental to the interests of the United States, that present vetting standards were inadequate, or that absent improved vetting procedures there likely would be harm to the national interests. It also held that the order improperly suspended entry of the nationals on the basis of their country of origin, since the order in substance operated as a prohibited discriminatory ban on visa issuance on the basis of nationality. Finally it ruled that restricting entry of refugees and decreasing the annual number of refugees who could be admitted was improper since there was no showing that the entry of refugees was harmful and procedures for setting the annual admission of refugees were disregarded.

The Trump administration appealed the case to the US Supreme Court, which recently agreed to hear the case. The Trump administration argues that by preventing the President from implementing the travel ban, the courts have restricted the President’s ability to protect the nation, pointing to the possibility of inadequate information-sharing and deficient risk assessments from

foreign nations. Hawaii responded by emphasizing that the Ninth Circuit's ruling was not restrictive, but rather iterated the previously imposed limitations on the President's authority.

The Supreme Court will consider four questions raised in *Trump v. Hawaii,* 199 L.Ed.2d 620 (U.S. 2018): Can the courts even review this challenge? Has the President overstepped his authority over immigration in issuing the September 24 order? Was the lower court's ruling overbroad? Does the September 24 order violate the Establishment Clause? The Supreme Court will hear oral argument on April 25, 2018, with a decision expected to be released in late June. The AAUP is again considering signing onto an *amicus* brief authored by the American Council on Education contesting the Executive Order based on the arguments advanced in the first case.

***Trump v. Int'l Refugee Assistance Project,* 137 S. Ct. 2080 (June 26, 2017)(granting cert and granting stay in part), 138 S. Ct. 353 (Oct. 10, 2017)(vacating judgement as moot)**

The Supreme Court case arose out of appeals from two lower court decisions addressing the travel ban, *Hawaii v. Trump, 859 F.3d 741* (9th Cir. June 12, 2017) and *Int'l Refugee Assistance Project v. Trump, 857 F.3d 554* (4th Cir. May 25, 2017). In *Hawaii v. Trump,* plaintiffs brought suit challenging the legality of the travel ban. The federal district court preliminarily enjoined the federal government from enforcing certain sections of the travel ban. The government appealed, and the Court of the Appeals for the Ninth Circuit largely upheld the district court's ruling. The Ninth Circuit found that the President exceeded his authority in issuing an order excluding nationals of specified countries from entry into the United States since there were no adequate findings that entry of excluded nationals would be detrimental to the interests of the United States, that present vetting standards were inadequate, or that absent improved vetting procedures there likely would be harm to the national interests. It also held that the travel ban improperly suspended entry of the nationals on the basis of their country of origin, since the travel ban in substance operated as a prohibited discriminatory ban on visa issuance on the basis of nationality. Finally, it ruled that restricting entry of refugees and decreasing the annual number of refugees who could be admitted was improper since there was no showing that the entry of refugees was harmful and procedures for setting the annual admission of refugees were disregarded.

In *Int'l Refugee Assistance Project v. Trump*, after the district court concluded that Plaintiffs had standing to sue, it found that Plaintiffs were likely to succeed on the merits of their Establishment Clause claim and issued a preliminary injunction against enforcement of the travel ban. The Court of Appeals for the Fourth Circuit affirmed in part, holding that the political branches' plenary power over immigration is subject to constitutional limitations and that, "Where plaintiffs have seriously called into question whether the stated reason for the challenged action was provided in good faith," courts are required to look beyond that stated, facially legitimate rationale for evidence the rationale is not genuine. In this case, the court examined the travel ban in the context of statements made by the president during the 2016 campaign season and found that it "drip[ped] with religious intolerance, animus, and discrimination." The court held that the

preliminary injunction was proper because it could likely be shown that the Muslim travel ban violated the Establishment Clause because its primary purpose was religious, based on evidence that it was motivated by the President's desire to exclude Muslims from the United States. The court also rejected the government's reliance on allegations of harm to national security interests finding they did not outweigh the competing harm of the likely constitutional violation and because it was plausibly alleged that the stated national security purpose was provided in bad faith.

The Supreme Court of the United States consolidated these cases and on June 26, 2017, the Supreme Court granted the government's *petition* for *writ of certiorari* and issued a brief opinion allowing the government to enforce the Muslim travel ban, with an exception for travelers and refugees who have a "credible claim" of a genuine relationship with an individual or institution in the United States. When that relationship is with an institution, the relationship must be a genuine one, rather than one created just to get around the Muslim travel ban.

On September 18, 2017, the AAUP joined with the American Council on Education and other higher education associations, in an *amicus* brief filed in the Supreme Court that opposes the travel ban. The brief specifically noted the harm to faculty: "From the moment [travel ban] was signed, . . . [f]aculty recruits were . . . deterred from accepting teaching and research positions. And scholars based abroad pulled out of academic conferences in the United States, either because they were directly affected by the [travel ban] or because they are concerned about the [travel ban's] harmful impact on academic discourse and research worldwide." It is difficult to overstate the importance of conferences, colloquia, and symposia to scholarly communication. They enable intellectual give-and take and real-time digestion and discussion of research. Conferences also allow for in-person encounters and discussions that give rise to important future collaborations."

The brief concluded "American colleges and universities 'have a mission of 'global engagement' and rely on . . . visiting students, scholars, and faculty to advance their educational goals.' *Washington v. Trump*, 847 F.3d 1151, 1160 (9Th Cir. 2017). That vital mission cannot be achieved if American immigration policy no longer sends a welcoming message to the members of the international community who wish to enter our campus gates. As explained above, the [travel ban] jeopardizes the many contributions that foreign students, scholars, and researchers make to American colleges and universities, as well as our nation's economy and general well-being."

The travel ban expired by its own terms in late 2017. Therefore, on October 10, 2017, the Court vacated the judgment of the Fourth Circuit and remanded the case with instructions to dismiss the case as moot due to the September 24, 2017 expiration of certain parts of the travel ban. *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (Oct. 10, 2017)(vacating judgement as moot). On October 24, 2017, vacated the judgement of the Ninth Circuit and remanded the case with instructions to dismiss the case as moot due to the October 24, 2017 expiration of another provision of the travel ban. *Trump v. Hawaii*, 2017 U.S. LEXIS 6367, 199 L. Ed. 2d 275, (Oct. 24 2017)(vacating judgement as moot.)

VII. Collective Bargaining Cases and Issues – Private Sector

A. NLRB Authority

1. Religiously Affiliated Institutions

***Pacific Lutheran Univ. & SEIU, Local 925*, 361 N.L.R.B. 157 (2014)**

In this case the National Labor Relations Board published a significant decision expanding the organizing rights of private-sector faculty members. The Board modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities; and second, whether certain faculty members are managers, who are excluded from protection of the Act. (*see infra*) However, both holdings may be overturned by a newly constituted Board.

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

The employer and its supporters argued that only the threshold question of whether the university was a bona fide religious institution was relevant, in which case the Act would not apply to any faculty members. The Board responded that this argument "overreaches because it focuses solely on the nature of the institution, without considering whether the petitioned-for faculty members act in support of the school's religious mission." Therefore, the Board established a standard that examines whether faculty members play a role in supporting the school's religious environment.

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

The Board also found that that faculty must be "held out as performing a *specific religious function*," such as integrating the institution's religious teachings into coursework or engaging in religious indoctrination (emphasis in original). This would not be satisfied by general statements that faculty are to support religious goals, or that they must adhere to an institution's commitment to diversity or academic freedom. Applying this standard, the Board found that while Pacific Lutheran University held itself out as providing a religious educational environment, the petitioned-for faculty members were not performing a specific religious function. Therefore, the Board asserted jurisdiction and turned to the question of whether certain of the faculty members were managerial employees.

However, this holding is very susceptible to reversal by a newly constituted Board, and the holding drew dissents from both Republican members of the Board. The NLRB would not be able to modify PLU until one or more cases with these issues come to the Board on appeal. In recent unfair labor practice cases, the Board rejected attempts by several religiously affiliated universities to overturn earlier election decisions where the Board asserted jurisdiction. *See Xavier University*, Case 3–CA–204564 (NLRB March 9, 2018). However, these were generally procedural rulings that do not portend the Board affirming the Pacific Lutheran standard substantively. One of these cases involving Duquesne University was recently appealed to the United States Court of Appeals for the District of Columbia Circuit, and the Court may address the standard there. *Duquesne v. NLRB, appeal docketed*, No.18-1063 (D.C. Cir. March 1, 2018).

2. Faculty as Managers

***Pacific Lutheran Univ. & SEIU, Local 925*, 361 N.L.R.B. 157 (2014)**

In this case the National Labor Relations Board published a significant decision expanding the organizing rights of private-sector faculty members. The Board modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities (*see supra*); and second, whether certain faculty members are managers, who are excluded from protection of the Act. In addressing this second issue, the Board specifically highlighted, as AAUP had in its *amicus* brief submitted in the case, the increasing corporatization of the university. However, this holding is susceptible to reversal under a newly constituted Board.

This case started when faculty members at Pacific Lutheran University petitioned for an election to be represented by a union. The university challenged the decision to hold the election, claiming that some or all of the faculty members were managers and therefore ineligible for union representation. The NLRB Regional Director ruled in favor of the union and found that the faculty in question do not have enough managerial authority to be precluded from unionizing. Pacific Lutheran asked the NLRB to overturn this ruling. The NLRB invited briefs from interested parties on the questions regarding whether university faculty members seeking to be represented by a

union are employees covered by the National Labor Relations Act or excluded as managers and whether the NLRB has jurisdiction over faculty members at religious educational institutions.

In March 2014, the AAUP submitted an *amicus* brief urging the NLRB to consider the full context when determining whether faculty at private colleges are managerial. The brief described the significant changes in university hierarchical and decision-making models since the US Supreme Court ruled in 1980 that faculty at Yeshiva University were managerial employees and thus ineligible to unionize. The AAUP brief urged the NLRB to consider, when determining the managerial status of faculty, factors such as the extent of university administration hierarchy, the extent to which the administration makes academic decisions based on market-based considerations, the degree of consultation by the administration with faculty governance bodies, whether the administration treats faculty recommendations as advisory rather than as effective recommendations, whether the administration routinely approves nearly all faculty recommendations without independent administrative review, and whether conflict between the administration and the faculty reflects a lack of alignment of administration and faculty interests.

In its decision the NLRB ruled that it had jurisdiction over the petitioned for faculty members, even though they were employed at a religious institution, and that the faculty members were not managers. This second question arises from the Supreme Court's decision in *Yeshiva*, where the Court found that in certain circumstances faculty may be considered "managers" who are excluded from the protections of the Act. The Board noted that the application of *Yeshiva* previously involved an open-ended and uncertain set of criteria for making decisions regarding whether faculty were managers. This led to significant complications in determining whether the test was met and created uncertainty for all of the parties.

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

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

do, we will find that they are managerial employees and, therefore, excluded from the Act's protections."

The Board emphasized that to be found managers, faculty must in fact have actual control or make effective recommendations over policy areas. This requires that "the party asserting managerial status must prove actual—rather than mere paper—authority. . . . A faculty handbook may state that the faculty has authority over or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority *in fact*." Proof requires "specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decision making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed." Further, the Board used strong language in defining "effective" as meaning that "recommendations must almost always be followed by the administration" or "routinely become operative without independent review by the administration."

***University of Southern California v. National Labor Relations Board, appeal docketed,* No. 17-1149 (D.C. Cir. 2017)**

This case arose when SEIU filed a petition to represent non-tenure-track full-time and part-time faculty in two colleges within USC. USC objected to the petition arguing that the faculty were managers under *Yeshiva*. The Board applied the test established in *Pacific Lutheran University*, 361 NLRB 1404 (2014) (in which AAUP had also filed an *amicus* brief) and found that the faculty in the units were not managerial and therefore were eligible to unionize. After the union won the election in the Roski School of Art and Design, USC refused to bargain citing its objection, and the Board ordered USC to bargain. USC appealed to the US Court of Appeals for the DC Circuit arguing that the faculty had no right to unionize as they were managerial employees.

The AAUP submitted an *amicus* brief December 28, 2017 to the US Court of Appeals for the DC Circuit urging the Court to uphold the NLRB's determination that non-tenure-track faculty at USC are not managerial employees. The brief supported the legal framework established by the NLRB in *Pacific Lutheran University* and describes in detail the significant changes in university hierarchical and decision-making models since the US Supreme Court ruled in 1980 that faculty at Yeshiva University were managerial employees and thus ineligible to unionize under the National Labor Relations Act. Specifically, the Board concluded that USC had not proven that non-tenure-track faculty actually exercise control or make effective recommendations about policies that affect the university as a whole. The brief focused on the fundamental structural and operational changes in universities during the more than three decades since *NLRB v. Yeshiva University*. Universities have adopted a corporate model of decision-making and employment relations that has reduced faculty authority in university policy-making and has created conflicts of interests between faculty and university administrations. Rather than relying on faculty expertise

and recommendations, the growing ranks of university administrators have engaged increasingly in unilateral top-down decision-making, often influenced by considerations of external market forces and revenue generation. At the same time, universities have cut back on tenure-track/tenured positions and greatly expanded non-tenure-track faculty positions. Under these conditions, universities' assertions that faculty are managerial are often based only on "paper authority" rather than actual authority or effective recommendations by faculty in university policy-making.

3. Graduate Assistants Right to Organize

***Columbia University*, 364 N.L.R.B. 90 (2016)**

Echoing arguments made by the AAUP in an *amicus* brief, the National Labor Relations Board held that student assistants working at private colleges and universities are statutory employees covered by the National Labor Relations Act. The 3–1 decision overrules a 2004 decision in *Brown University*, which had found that graduate assistants were not employees and therefore did not have statutory rights to unionize. However, this decision is susceptible to reversal under a newly constituted Board.

The AAUP filed an *amicus* brief with the Board arguing that extending collective bargaining rights to student employees promotes academic freedom and does not harm faculty-student mentoring relationships, and instead would reflect the reality that the student employees were performing the work of the university when fulfilling their duties. In reversing *Brown*, the majority said that the earlier decision "deprived an entire category of workers of the protections of the Act without a convincing justification." The Board found that granting collective bargaining rights to student employees would not infringe on First Amendment academic freedom and, citing the AAUP *amicus* brief, would not seriously harm the ability of universities to function. The Board also relied on the AAUP *amicus* brief when it found that the duties of graduate assistant constituted work for the university and were not primarily educational.

The AAUP decided to file an *amicus* brief in this case in keeping with its long history of support for the unionization of graduate assistants. The AAUP has previously filed numerous *amicus* briefs arguing the graduate assistants are employees with rights to unionize under the NLRA, has issued statements affirming the rights of graduate assistants to unionize, and has an active committee on graduate students and professional employees that represents the interests of graduate students. The AAUP brief in this case addressed the two questions involving the *Brown* decision. The brief argued that graduate assistants, including those working on federal grant funded research, are employees with the right to unionize under the NLRA and it refuted the *Brown* decision's speculative claims that collective bargaining would compromise academic freedom and the cooperative relationships between faculty mentors and their graduate student mentees.

In its decision, the Board held that graduate assistants, and other student teaching and research assistants, are employees with a right to unionize. In doing so the Board echoed arguments made by the AAUP and specifically cited the AAUP *amicus* brief. First the Board found, as AAUP had argued, that the unionization of graduate students would not infringe upon First Amendment

academic freedom. The Board explained that "there is little, if any, basis here to conclude that treating employed graduate students as employees under the Act would raise serious constitutional questions, much less violate the First Amendment." *Id.* at 7.

The Board next found that experience with graduate student unions, primarily in the public sector, had demonstrated that unionization did not seriously harm the ability of universities to function. The Board stated, "As AAUP notes in its *amicus* brief, many of its unionized faculty chapters' collective-bargaining agreements expressly refer to and quote the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*, which provides a framework that has proven mutually agreeable to many unions and universities."*Id.* at 10, footnote 82. Therefore, the Board found that "there is no compelling reason—in theory or in practice—to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education." *Id.* at 12.

Finally, the Board also found that the duties of teaching assistants constituted work for the institutions. The Board noted that "teaching assistants frequently take on a role akin to that of faculty, the traditional purveyors of a university's instructional output." In doing so, the Board again cited to the AAUP's *amicus* brief. "As the American Association of University Professors, an organization that represents professional faculty—the very careers that many graduate students aspire to—states in its brief, teaching abilities acquired through teaching assistantships are of relatively slight benefit in the attainment of a career in higher education." *Id.* at 16, footnote 104.

Despite the instability that this would add to the NLRB's precedents, a newly constituted NLRB could overrule *Columbia University* and return to the *Brown University* holding that graduate assistants are not employees under the NLRA. In *Columbia,* Miscimarra filed a vigorous dissent arguing that the Board's earlier decision and reasoning in *Brown* were correct. *Id.* at 24-25. Miscimarra explained his broader disagreement with the Board's decision.

> I disagree with my colleagues' decision to apply the Act to college and university student assistants. In my view, this change is unsupported by our statute, and it is ill-advised based on substantial considerations, including those that far outweigh whether students can engage in collective bargaining over the terms and conditions of education-related positions while attempting to earn an undergraduate or graduate **[*112]** degree.
>
> The Supreme Court has stated that "the authority structure of a university does not fit neatly within the statutory scheme" set forth in the NLRA. *NLRB v. Yeshiva University, 444 U.S. 672, 680, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980)*. Likewise, the Board has recognized that a university, which relies so heavily on collegiality, "does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world." *Adelphi University, 195 NLRB at 648*. The obvious distinction here has been recognized by the Supreme Court and the Board: the lecture hall is not the factory floor, and the "industrial model cannot be imposed blindly on

> the academic world." *Syracuse University, 204 NLRB 641, 643 (1973)*; see also *Yeshiva, 444 U.S. at 680*.

Id. at 24. Miscimarra then expressed his disagreement with several particular aspects of the Board's decision. Miscimarra concluded, "For these reasons, and consistent with the Board's prior holding in Brown University, I believe the Board should find that the relationship between Columbia and the student assistants in the petitioned-for unit in this matter is primarily educational, and that student assistants are not employees under Section 2(3) of the Act." *Id*. at 34.

Unions representing graduate student employees have withdrawn pending NLRB petitions and charges, and are not filing new petitions or charges, which would result in the NLRB not having the opportunity to review and reverse or modify the *Columbia University* decision. Therefore, it appears that there are not currently any pending cases before the NLRB that would allow the NLRB to overrule *Columbia University*. However, it is possible that such a case could reach the NLRB.

B. Bargaining Units

***Yale Univ. & Unite Here Local 33,* 365 N.L.R.B. 40 (2017); *PCC Structurals, Inc.,* 365 N.L.R.B. 160 (2017)**

Another area in which there has recently been significant change is in the standard for determining the appropriate bargaining unit for collective bargaining. In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), the Board reviewed and clarified its standards for making unit determinations when a representation petition is filed. However, in *PCC Structurals, Inc.*, 365 NLRB No. 160 (N.L.R.B. Dec. 15, 2017) the new Board overruled Specialty Health Care, throwing into question recent decisions of the Board on bargaining units at colleges and universities.

In *Yale Univ. & Unite Here Local 33*, 365 NLRB No. 40 (N.L.R.B. Feb. 22, 2017), the NLRB applied the *Specialty Healthcare* standard and approved an election for graduate students in nine separate units. Yale contended both that the graduate students were not employees, asserting both that the Board's earlier Columbia University decision was wrongly decided, and alternatively even under that standard the graduate students were not employees.

At Yale, the union "filed nine petitions, each of which seeks to represent separate bargaining units composed of all teaching fellows, discussion section leaders, part-time acting instructors (PTAIs), associates in teaching, lab leaders, grader/tutors, graders without contact, and teaching assistants (referred to collectively as teaching fellows) who teach in each of nine departments at Yale University (Yale or the University). The nine separate units would include teaching fellows in the following departments: English, East Asian Languages and Literature,

History, History of Art, Political Science, Sociology, Physics, Geology and Geophysics, and Mathematics." *Yale University*, (01-RC183014) Boston MA (Reg. 1 Jan. 25, 2017).

The Regional Director summarized the standard used to determine whether a proposed unit was appropriate.

> In *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enforced sub nom*. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6thCir. 2013), the Board set forth the standard to be applied when an employer contends that the smallest appropriate unit contains employees who are not in the petitioned-for unit. When a petitioned-for unit consists of employees who are readily identifiable as a group, and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the group could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit. *Id.* at 945-946.

Id. at 28-29.

Applying these standards, The Regional Director found that nine proposed units were appropriate. The Regional Director rejected Yale's argument that individual units were not appropriate, and instead a university wide unit would be appropriate, explaining, "while a university wide unit might also be appropriate, I find that Yale has failed to meet its burden of demonstrating that there is such an overwhelming community of interest among all of the teaching fellows at the University that there is no rational basis for approving units based on academic departments." *Id.* at 36.

Yale filed a request for expedited review of the Regional Director's Decision and Direction of Election, a request to stay the elections. *Yale Univ. & Unite Here Local 33*, 365 NLRB No. 40 (N.L.R.B. Feb. 22, 2017). The Board denied these requests. Miscimarra filed a dissent which highlighted several disagreements with the Board's current rulings and procedures. Miscimarra addressed the issue of the appropriateness of the unit expressing his disagreement with the *Specialty Health* care standard in general, and his view that "the instant case also gives rise to questions regarding the appropriateness of applying the Board's *Specialty Healthcare* standard in a university setting."

On December 15, 2017, one day before Chairman Philip A. Miscimarra's term on the board expired, the Board issued *PCC Structurals, Inc.*, 365 NLRB No. 160 (N.L.R.B. December 15, 2017), which overruled Specialty Healthcare and reinstated the prior community-of-interest standard for determining an appropriate bargaining unit in union representation cases. Newly appointed members Marvin E. Kaplan (R) and William J. Emanuel (R) joined Miscimarra in the 3-2 decision. This important decision was issued without the normal request for *amicus* briefs, and

it was followed by a NLRB General Counsel Memorandum, OM 18-05, that specifies that employers will be allowed to raise issues with previously determined or agreed to bargaining units.

On December 19, 2017, regional director Dennis Walsh, applied the Board's new standard to an election petition involving graduate students at the University of Pennsylvania. *University of Pennsylvania*, 04-RC-199609 (NLRB Reg. 4, Dec. 19, 2017). The Regional Director outlined the legal standard under *PCC Structurals*.

> The Act requires only that a petitioner seek representation of employees in an appropriate unit, not in the most appropriate unit possible. *Overnite Transportation Co*., 322 NLRB 723 (1996). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the employees in the unit sought by a petitioner share a community of interest, the Board must next evaluate whether the interests of that group are "sufficiently distinct from those of other [excluded] employees to warrant establishment of a separate unit." *PCC Structurals*, 365 NLRB No. 160, slip op. at 7 (Dec. 15, 2017) quoting *Wheeling Island Gaming*, 355 NLRB 637, 642 fn. 2 (2010) (emphasis in original). Specifically, the inquiry is whether "'excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.'" *PCC Structurals, supra*, slip op. at 11, quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016). In making this assessment, PCC Structurals instructs the decision-maker to assess [w]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *Id*., slip op. at 5 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002). Particularly important in considering whether the unit sought is appropriate are the organization of the facility and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, 1069 fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

Id. at 21.

Applying these standards, Walsh directed that students from the business and engineering schools — who were previously excluded — must also be included in the bargaining unit:

> based on the record and relevant Board cases, including the Board's recently minted decision in *PCC Structurals, Inc*., 365 NLRB No. 160 (Dec. 15, 2017) overturning *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. 727 F.3d 552 (6th Cir. 2013), I find, in agreement with the Employer, that a unit limited to

> graduate student employees in the seven petitioned-for schools is not appropriate, and that to constitute an appropriate unit it must also include graduate students in both the Wharton School and the School of Engineering and Applied Science because the interests of the former group are not sufficiently distinct from those of the latter group to warrant a separate unit.

Id. at 2.

In February 2018 the union in the University of Pennsylvania case withdrew its election petition and therefore the Board will not address the bargaining unit standard in this case.

C. NLRB Elections

NLRB Election Rules, 29 CFR Parts 101, 102, and 103; Request for Information Regarding Representation Election Regulations, RIN 3142-AA12 (NLRB Dec. 14, 2017)

In December 2014 the NLRB issued revisions to union election rules that vastly simplified and expedited the election process. However, this election rule may be retracted or changed by the new Board based on a recent Request for Information.

On December 15, 2014, the Board published the Election Rule, which amended the Board's prior Election Regulations. 79 Fed. Reg. 74308 (2014). The Election Rule was adopted after public comment periods in which tens of thousands of public comments were received. The Rule was approved by a three-member Board majority, with two Board members dissenting. Thereafter, the Rule was submitted for review by Congress pursuant to the Congressional Review Act. In March 2015, majorities in both houses of Congress voted in favor of a joint resolution disapproving the Board's rule and declaring that it should have no force or effect. President Obama vetoed this resolution on March 31, 2015. The amendments adopted by the final rule became effective on April 14, 2015, and have been applicable to all representation cases filed on or after that date. Lawsuits challenging the facial validity of the Election Rule were rejected with the Courts finding that the changes were not arbitrary or capricious and did not violate federal statutes or the Constitution. *See Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 218 (5th Cir. 2016) (The "rule, on its face, does not violate the National Labor Relations Act or the Administrative Procedure Act[.]"); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 220 (D.D.C. 2015) (rejecting claims that the Final Rule contravenes either the NLRA or the Constitution or is arbitrary and capricious or an abuse of the Board's discretion).

The 2014 Election Rule includes the following: Provides for electronic filing and transmission of election petitions and other documents; Ensures that employees, employers and unions receive timely information they need to understand and participate in the representation case process; Eliminates or reduces unnecessary litigation, duplication and delay; Adopts best practices and uniform procedures across regions; Requires that additional contact information

(personal telephone numbers and email addresses) be included in voter lists, to the extent that information is available to the employer, in order to enhance information sharing by permitting other parties to the election to communicate with voters about the election; and Allows parties to consolidate all election-related appeals to the Board into a single appeals process. Cumulatively, these changes will likely reduce the time from the filing of a representation petition to the holding of an election to between 10 and 20 days.

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

However, a recent Request for Information issued by the Board indicates the Board may modify or rescind the 2014 election rule. On December 14, 2017, the National Labor Relations Board published a Request for Information in the Federal Register, asking for public input regarding the Board's 2014 Election Rule, which modified the Board's representation-election procedures located at 29 CFR parts 101 and 102. The Board sought information from interested parties regarding three questions:

> 1. Should the 2014 Election Rule be retained without change?
>
> 2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
>
> 3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed?

Responses to this request were originally due on February 12, 2018, but the deadline was subsequently extended to Wednesday, April 18, 2018.

The Request for Information was approved by former Board Chairman Philip A. Miscimarra and Board Members Marvin E. Kaplan (now Chairman) and William J. Emanuel. Board Members Mark Gaston Pearce and Lauren McFerran dissented. The majority noted that the request "does not suggest even a single specific change in current representation election procedures." *Id.* at 3. However, member McFerren in a dissent argued that "the nature and timing of this [request], along with its faulty justifications, suggests that the majority's interest lies . . . in

manufacturing a rationale for a subsequent rollback of the Rule in light of the change in the composition of the Board." *Id.* at 11.