

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 42

MILWAUKEE COUNTY

JOHN MCADAMS,

Plaintiff,

v.

MARQUETTE UNIVERSITY,

Defendant,

Case No. 16-CV-003396

Other - Contracts

Case Code: 30303

Marquette University's Reply Brief In Support Of Its Motion For Summary Judgment

We end where we began – rights have corresponding duties. Contrary to his eighty pages of briefing, Dr. McAdams **conceded in his testimony that “there are some limits that really are professional obligations.”** (FOF 115.5; Tr. Vol. IV at 46:16-48:22).¹ He draws the line at the boundaries of his department but his tenured peers disagreed. They found his professional duties extended to Ms. Abbate. (FHC Report at 104-105). The Court should accept this concession and critical finding.

He began attacking Ms. Abbate on November 9, 2014, drafting his blog post “in a way calculated to direct a negative response at Ms. Abbate, more than at the University or others.” (FHC Report at 54-55). Essentially ignoring the only allegedly newsworthy and legitimate subject of intramural concern (the handling of the advisee’s complaint), Dr. McAdams instead personally targeted Ms. Abbate. (Id.). His peers found that in doing so he breached his professional duties.

¹ See the briefs in opposition to the motions for summary judgment from both Marquette and Dr. McAdams at page four in each brief for a description of references to documents that have been previously submitted. Documents referred to as “Trigg Aff. 4 Ex. **” are attached to the Fourth Affidavit of Stephen T. Trigg, submitted in support of this brief.

Dr. McAdams' opposing brief demonstrates that over two years later these attacks continue. He highlights personal emails Ms. Abbate sent to her friends and advisors while she was trying to deal with the fallout from the blog, and creates a false equivalency between these personal emails and his public blog posts. (McAdams Opp. Br. at 10-14). He glides over the fact that what Ms. Abbate said in private to a friend is not the same as what Dr. McAdams continues to put into the public domain.

Dr. McAdams' briefs do not address the above concession or the FHC finding that he "clearly and substantially failed to meet the standard of personal and professional excellence . . . by recklessly, albeit indirectly, causing harm to Ms. Abbate through his conduct, harm that was substantial, foreseeable, easily avoidable, and not justifiable" and that his fitness "will probably be substantially impaired . . . given his demonstrated failure to recognize his essential obligations to fellow members of the Marquette community." (FHC Report at 105-106).

I. Dr. McAdams Concedes By Not Addressing That He Violated His Duties.

Marquette's opening brief described in detail (1) the duties that Dr. McAdams as a member of the Marquette community owes to graduate students outside his department, (2) the sources of those duties, and (3) how he violated them (Marquette Br. at 16-26). Dr. McAdams' opposition brief entirely ignores his obligations to Marquette and its students. He fails to address his own concession of professional obligations or the extensive analysis conducted by the FHC on these issues (FHC Report at 74-105), as well as the report from Dr. Nancy Busch Rossnagel which buttresses the findings and conclusions of the FHC (Trigg Ex. 27).

As both Dr. Rossnagel and Dr. McAdams' expert Dr. Wood agree, the freedoms and responsibilities of academic freedom must be understood in the context in which they are applied. (Id. at 2). As a Jesuit university, Marquette places its primary focus on students. (Id. at 2; Trigg

Ex. 28). “For professors at Jesuit universities, then, the primary balance is between academic freedom and responsibilities to students. Keeping this balance intact means, first of all, doing no harm to individual students.” (Trigg Ex. 27 at 3). The Jesuit commitment to a campus culture of responsibility, respect, and compassion, and the foundational role of *cura personalis* “leads Jesuit universities to insist that all members of the community are entitled to respect and freedom from alienation.” (Id.).

Dr. McAdams ignores the critical fact that graduate students with teaching responsibilities are learning how to teach undergraduates. (Id. at 3). Jesuit education emphasizes experience as the primary means of learning, and what Ms. Abbate needed was advice about dealing effectively with difficult students, not internet shaming and mockery. (Trigg Ex. 27 at 5). As the FHC recognized, employing her skills in practice was a crucial aspect of educating Ms. Abbate. (Id. at 4; FHC Report at 21). The AAUP emphasizes the unique circumstances of graduate students and stresses that “[t]he responsibility to secure and respect general conditions conducive to a graduate student’s freedom to learn and teach **is shared by all** members of a university’s graduate community.” (Trigg Aff. 4 Ex. 1 at 387) (emphasis added).

Dr. McAdams fails to address, much less rebut, the finding that by naming Ms. Abbate and linking to her contact information he violated his duties as a Marquette professor. In eighty pages of briefing, he makes no attempt to justify why he had to name her when he conceded in his FHC testimony that he had a professional obligation not to do so if she were a graduate student in his department. (See *infra* at 1). The only allegedly newsworthy portion of his post concerned the University’s supposed response to his advisee’s complaint,² not who the graduate student instructor was. (FOF 103.3; FHC Ex. 18 at MU-236). But Dr. McAdams made no other efforts

² Dr. McAdams got this wrong.

to solve his advisee's problems, and instead focused on promoting his own story and gaining publicity for his blog. (Trigg Ex. 27 at 6-7; FHC Report at 52-26). Dr. McAdams was "delighted" by the attention his efforts were getting him because writing in "obscurity" is not enjoyable. (Trigg Aff. 4 Ex. 2 at 184:10-14; Trigg Aff. 4 Ex. 3). His blog is an attention-seeking device and Ms. Abbate was a useful target.

Dr. McAdams could have told the exact same story without using Ms. Abbate's name, just as his expert witness Dr. Donald Downs did when he criticized an unnamed graduate student in his article on academic freedom. (Tr. Vol. IV at 201:11-205:5). As Dr. McAdams admits, "[i]t typically isn't that significant *who* the student is anyway." (FHC Ex. 20 at MU-292) (emphasis in the original); (Trigg Aff. 4 Ex. 4 ("Perhaps I could have made the point as well without naming her.")). Given that Ms. Abbate's name and contact information had nothing to do with Marquette's supposed handling of the undergraduate's complaint, his decision to include it in the blog post was seriously reckless, because most faculty would have "at least thought seriously about not publishing her name" given the potential for harm. (Trigg Aff. 4 Ex. 5 at 86:17-21; 88:1-10; 89:4-12).

Dr. McAdams especially should have thought seriously before publishing Ms. Abbate's name and contact information because, as the FHC found, he knew the consequences. (FHC Report at 89-92). Dr. McAdams knew that simply appearing as a target in his blog could have negative effects for his targets, because he had previously used it as a threat. (FOF 30; FHC Ex. 20 at MU-255, 268-269, 277, 286; Tr. Vol. II 205:1-20; Tr. Vol. III 82:13-23; Tr. Vol. IV 33:11-34:9; 37:4-7; 39:8-14) ("you don't want to be on my blog"). He conceded in his FHC testimony that in a prior blog post he had anticipated and taken care to prevent his readers from contacting a student by redacting her contact information. (FOF 27; FHC Ex. 20 at MU-277-289). Dr.

McAdams thought it was important in that blog post to strip out any contact information because he “didn’t want to make it easy for people to send e-mails to her.” (Tr. Vol. III at 150:24-151:20). Again, as noted above, he conceded he had a professional obligation not to put graduate students from his own department in his blog. For Ms. Abbate, by contrast, he went out of his way to make it easy for his readers to contact her by linking to her blog and its contact information. (Tr. Vol. III at 151:20-152:20).

Perhaps Dr. McAdams’ briefs ignore Ms. Abbate’s status as a graduate student because he would otherwise contradict his own expert, Dr. Wood. (Trigg Aff. 4 Ex. 6 at 96:17-97:20 (agreeing that “all members of the university” have responsibilities to graduate students “whether they are in that person’s department or not.”)). Regardless, Dr. McAdams fails to address, much less rebut, his duty of care, and violations of that duty.

II. McAdams’ Response Brief Invents and Distorts Facts.

Throughout his brief Dr. McAdams asserts as facts that Marquette “deliberately abused the FHC process to give itself strategic and tactical advantages” and “tilted the playing field by withholding information” to “game the system.” (McAdams Opp. Br. at 3, 9-17). Dr. McAdams’ unsupported conspiracy theory falls flat, however, because Marquette played by the rules and did not review anyone’s email files (including Dr. McAdams) until after the litigation had been filed. (Affidavit of Marquette Information Security Manager Jeremy Edson).

Dr. McAdams then asserts (wrongly) that the documents produced in the litigation rebut what was presented to the FHC and undermine Marquette’s position.

- He claims that Marquette focused on Ms. Abbate’s status as a graduate student as an after-the-fact rationalization, and that the architect of this conspiracy was a Columbia doctoral student. (McAdams Opp. Br. at 16-17). Dr. McAdams’ own exhibits show that the immediate focus was on Ms. Abbate’s vulnerable status as a graduate student. (See M2; M3; T10). The drumbeat of support for Ms. Abbate **as a graduate student** was a constant

theme. (Trigg Aff. 4 Ex. 7 at MU-190-195, 242, MARQ-005192; 5199; 5238-5239; 5240; 5242; 5243; 6433-6434; 6444; JM0354; JM0370).

- He argues that Ms. Abbate and Dr. Foster did not immediately think the blog post was harmful to Ms. Abbate. (McAdams Opp. Br. at 11). It turned out to be wishful thinking.
- He claims it was the *Daily Nous* article (on a website for philosophy professors) (M10; M13) that somehow caused the dispute to go national (rather than Fox News). (McAdams Opp. Br. at 12). Dr. McAdams forgets that he was discussing the story with Fox News on November 17, 2014, **before** the *Daily Nous* article was published. (Trigg Aff. 4 Ex. 3). Also, his incorrect/narrow focus ignores talk radio coverage, requests for comment, multiple stories on additional websites, and Dr. McAdams additional follow-on posts that stoked the fire. (Marquette Opp. Br. at 5; Trigg Aff. 3 Ex. 4; Trigg Aff. 4 Ex. 12). Finally, of the 96 emails he references, 37 were supportive, 58 were sent after the Fox News story was posted and of those 49 were “critical” or “distasteful.” (Trigg Aff. 4 Ex. 13; Luehrs Affidavit ISO Pltf’s MFSJ).
- He asserts that Ms. Abbate created the publicity regarding the dispute. In blaming the victim he ignores the coverage he created on the internet, talk radio and television. (Trigg Aff. 3 Ex. 4; Trigg Aff. 4 Ex. 7 at MARQ-005199; Trigg Aff. 4 Ex. 8). The editor of the *Daily Nous* reached out to Ms. Abbate *in response* to a story written on The College Fix. (Trigg Aff. 4 Ex. 11). Similarly, Inside Higher Ed reached out to Ms. Abbate, not vice versa. (Trigg Aff. 4 Ex. 10) The fact that Ms. Abbate decided to defend herself on sites she believed would “give a decent account” or write in a “fair, impartial manner” in response to these numerous stories does not demonstrate that “she was an active participant in publicizing the dispute.” (McAdams Opp. Br. at 11; Trigg Aff. 4 Exs. 10 & 11).³
- He claims that Ms. Abbate, who was on the verge of defending her dissertation, applying for Marquette’s prestigious Raynor fellowship and had scheduled her Spring classes, did not leave Marquette as a result of the dispute with Dr. McAdams. (McAdams Opp. Br. at 13). Marquette previously rebutted this argument. (Marquette Opp. Br. at 29-31).
- He argues that he did not rush to judgment because Ms. Abbate was never going to respond to his email for comment. (McAdams Opp. Br. at 10). But he did not know or care about that at the time, and instead sent a draft of his story only to the undergraduate. (Trigg Aff. 4 Ex. 14). Had he likewise sent the draft story to Ms. Abbate, Dr. Snow, and Dr. Foster they could have provided information dramatically inconsistent with the theme of his story. (Marquette Opp. Br. at 4-5). His email to Ms. Abbate was an attempt to paper his file.
- He claims that emails supportive of his position should have been turned over as part of the FHC process. The FHC process has been described in detail previously. (Marquette Br. at 2-4, 35-36; Marquette Opp. Br. at 24-31). Moreover, the FHC heard and was not

³ Dr. McAdams also notes (oddly) that no Marquette faculty member objected to Ms. Abbate stating that she hoped the *Daily Nous* article would “bring McAdams down.” (McAdams Br. at 11-12, citing M12). The note is odd because that email was sent to a graduate student at St. Louis University, not to the Marquette faculty. (M12).

persuaded by the argument that Marquette was being criticized for its defense of Ms. Abbate (e.g., Tr. Vol. I at 24:23-25:8; Trigg Aff. 4 Ex. 15 at 2). He ignores that litigation discovery has also involved many emails in support of Ms. Abbate and Marquette, a few examples of which are attached. (Trigg Aff. 4 Ex. 16). Finally, he does not disclose that the former dean he references on page 15 of his brief is his “good buddy.” (Trigg Aff. 4 Ex. 2 at 39:9-40:4).

III. The FHC Process In the Parties’ Contract Was Followed and Deserves Deference.

Marquette’s prior briefs demonstrate how (as found by the FHC), it fully complied with the FHC process.⁴ (Marquette Br. at 29-31, 34-38; Marquette Opp. Br. at 24-35, 38-40). These arguments are incorporated by reference.

His response brief seems to take issue with the American university system of shared governance. Faculty participation in disciplinary decisions through committees like the FHC makes use of faculty experience, expertise and self-interest. (Marquette Br. at 6-7). Dr. McAdams agreed that a group of his peers drawn from across the University would pass judgment on his actions. While Dr. McAdams challenges one member of the FHC, the FHC noted in rejecting his challenge that given the notorious nature of any campus dispute requiring a FHC, it would be impossible to empanel a committee of individuals that had not formed any views on the matter or had no knowledge of the dispute. (Trigg Ex. 4 at 3-5). The Faculty Statutes vest all recusal decisions in the discretion of the FHC, which it exercised in a written decision unanimously determining that given the role and purpose of the FHC Dr. Turner was not required to recuse herself. (Id.). Furthermore, the FHC decision was unanimous, while only a majority vote was needed. (Marquette Opp. Br. at 32-33).

Dr. McAdams likewise wants to ignore the FHC’s interpretation of academic freedom and his contract in light of his duties as a university professor. (McAdams Opp. Br. at 20-24). The

⁴ Dr. McAdams’ complaints regarding (1) pre-hearing access to witnesses, (2) documents from individuals who did not appear as witnesses, and (3) evidence about prior disputes have all been previously rebutted by both the FHC and Marquette. (See Marquette Br. at 35-28; Marquette Opp. Br. at 24-33).

FHC extensively analyzed academic freedom's rights and duties based on its seven members' years of expertise and authoritative statements from relevant authorities. (FHC Report at 68-71, 108-120). Marquette previously explained how the FHC's interpretation is the correct one, and why Dr. McAdams' interpretation is absurd and lacks any support in professional standards, legal decisions or common expectation. (Marquette Br. at 26-29; Marquette Opp. Br. at 5-24). Dr. McAdams repeatedly confuses academic freedom and its associated professional duties with his individual free speech rights. (See Trigg Aff. 4 Ex. 9) ("Free Speech and Academic Freedom" and "Robert C. Post On Why Speech at Universities Must Be Regulated").

Dr. McAdams then relies almost exclusively on the decision in *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987) and the few decisions that have followed it (the majority of which are from either the D.C. Circuit or the District Court for the District of Columbia). (McAdams Opp. Br. at 24-27). But those decisions are outliers when compared to the great weight of persuasive authority giving deference to academic decision making.⁵ (Marquette Br. at 7-12).

Dr. McAdams tries to distinguish the authorities Marquette cites in its opening brief by claiming that they involved "situations where the process to be followed by the university was, in fact, followed" or where the contract suggested the university decision was final. (McAdams Opp. Br. at 27-29). But as discussed above and in prior briefs, the FHC process was followed and the parties agreed to vest the decision making on Dr. McAdams' discipline within the University.⁶ (Marquette Br. at 2-6, 14-15, 35-36; Marquette Opp. Br. at 24-36). He now claims that Section 307.09's reference to a judicial action means there should be no deference. But that provision

⁵ Marquette previously addressed how *Sweezy* and *Keyishian* dealt with infringement on academic decision making from outside the university and institutional self-governance in academic affairs. (Marquette Opp. Br. at 18-19).

⁶ Dr. McAdams tries to distinguish the analogous cases involving hospital admitting privileges by claiming they involved "true 'peers,'" making decisions based on training and experience. But that is precisely what the FHC did. Furthermore, contrary to his assertion, they also involved breach of contract claims. *Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 804 (7th Cir. 1999); *Seitzinger v. Community Health Network*, 2004 WI 28, ¶¶ 10, 20-22, 270 Wis. 2d 1, 676 N.W.2d 426.

specifically refers to a “judicial action . . . to **test the validity** of the nonrenewal, suspension, or termination.” (Section 307.09) (emphasis supplied). Testing the “validity” of Dr. McAdams’ suspension is entirely consistent with a deferential standard of review, which weighs whether substantial evidence supported the University’s decision.

Finally, Dr. McAdams misunderstands Marquette’s references to administrative agency law in Wisconsin and argues that the Court needs to adopt wholesale the case law addressing deference to administrative agencies. (McAdams Opp. Br. at 33-37). Marquette is not asking to be treated as an administrative agency; instead it seeks the traditional deference that courts have applied to academic decision making, which is similar to the deference given to administrative agencies. Under administrative standards Marquette would be entitled to “great weight” deference: (1) the FHC and President Lovell were charged by the parties’ contract with administering the Faculty Statutes; (2) the decisions reached were based on long-standing interpretations of academic standards promulgated by the AAUP; (3) the members of the FHC and President Lovell brought over two centuries worth of experience in Academia to the task of assessing this matter; and (4) the 123-page analysis provides uniformity and consistency in the application of the Faculty Statutes. (FHC Report at 3).⁷

IV. Both the FHC’s and President Lovell’s Decisions About Dr. McAdams’ Unprofessional Conduct Should Receive Deference.

Because Marquette followed the FHC process, and the parties agreed to vest the decision making on Dr. McAdams’ conduct with the FHC and President Lovell, the Court should defer (1) to the FHC’s breach-of-duty analysis and fitness to be a university professor and (2) the decisions and analysis of President Lovell implementing the FHC suspension. (Marquette Br. at 32-34;

⁷ As Marquette has discussed previously, the FHC’s decision interpreting express powers to suspend with pay and benefits, by contrast, does not rely on unique insights into a professor’s duties. (Marquette Br. at 29-31; Marquette Opp. Br. at 38-40).

Marquette Opp. Br. at 35-38). The findings of the FHC regarding Dr. McAdams' lack of "fitness" as a university professor highlighted that he does not view himself as bound by the fundamental norms of the University or profession, recognizes only those constraints that he chooses to, and found that his conduct was likely to continue in the future. (FHC Report at 101-105).

The FHC's decision then was given to President Lovell, whose adoption and implementation of that decision was based on his lengthy experience in academia and his responsibility to Marquette as a whole. Prior to becoming Marquette's first lay President, President Lovell had been a professor and associate dean at the University of Pittsburgh. He then served first as the Dean of the UW-Milwaukee Engineering School and then as Chancellor. When the FHC found Dr. McAdams' has "set himself on a course that was and continues to be likely to produce" future instances of student abuse (FHC Report at 105), Dr. Lovell concluded based on his broad experience and duties to protect Marquette students that additional elements were necessary to make the suspension serve its purposes and confirm Dr. McAdams' fitness to return. Much like the universities in *Sweezy* and *Keyishian* had the right to determine who had the right to teach free from outside influence, so too does Marquette. (See Marquette Opp. Br. at 18-19).

CONCLUSION

Both Dr. McAdams and his experts concede that his professional obligations limit what he can do with his blog. While Dr. McAdams draws the line at his own department, his tenured peers rejected that cramped and indefensible view. These concessions together with the caselaw and FHC findings entitle Marquette to summary judgment.⁸

⁸ Marquette incorporates by reference its arguments concerning Dr. McAdams suspension with pay and benefits (Marquette Br. at 29-31; Marquette Opp. Br. at 38-40), President Lovell's implementation of the FHC's decision (Marquette Br. at 32-34; Marquette Opp. Br. at 36-38), and the good faith and fair dealing claim (Marquette Br. at 36-38; Marquette Opp. Br. at 24-35).

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