STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JOHN McADAMS
Plaintiff,
v. Case No. 16-CV-3396

MARQUETTE UNIVERSITY
Defendant.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This case is not that complicated. It is about a single blog post written by Professor John McAdams on November 9, 2014. Before the Court does anything else, McAdams requests it read or reread that blog post. (McAdams Aff. Ex. A1.) Notwithstanding all of the hyperbole raised by Abbate, her faculty allies, the press, and Marquette – and notwithstanding the generalizations about "attacks," "harm" and "recklessness" – the post is not unusual. It addresses a subject of great public concern. A Marquette instructor told an undergraduate that he would not be permitted to express opposition to same sex marriage in her class. Whether – as Marquette speculates but cannot prove – she "really" meant to say that,[1] it is what she said.

It is not surprising that McAdams would think this raises an important issue. Whether certain opinions ought to be censored to protect the sensibilities of those who oppose them is a significant issue on college campuses. The view expressed by Abbate – that certain discourse must be restrained – is, sadly in McAdams' view, not an isolated one or peculiar to her. Although McAdams' post is critical of Abbate's position, it is not an ad hominem attack. It criticizes Abbate for the views she expressed and nothing more. It does not name-call nor use vile or inappropriate language. Although Marquette asserts (but does not explain) that the post was

[1] In fact, documents produced in discovery suggest that Abbate believes what she said and meant to tell the student precisely what she told him.

somehow calculated to invite personal attacks, it was nothing more than a critique of what Abbate said her classroom policy was and an attempt to place it in the larger context of censorship or "political correctness" on campus. There is nothing in the actual blog post that Marquette has or could say is false[2] or constitutes an unfair attack.

While Marquette claims that the information in the post was "improperly" obtained, McAdams relates what the student told him. Whatever one thinks of the student's decision to lawfully record the conversation – a decision that McAdams had nothing to do with – the recording merely confirms what the student told McAdams. Although the post identified Abbate and linked to background information that she herself placed on the internet, there is nothing unusual about that. Public discourse and criticism routinely identifies the person whose conduct or positions are being discussed – save, perhaps for isolated categories such as minors or crime victims not applicable here. Although Marquette's entire case now seems to turn on this routine and unexceptional act, doing so violated no rule of Marquette University.

Marquette promises not to fire professors for exercising their rights of academic freedom or legitimate personal expression (Faculty Statutes §306.03) and says that it will not use termination to restrain any right guaranteed by the Constitution (§307.07(2)). In light of that commitment, Marquette fails to explain – no matter one's view of the precise scope of academic freedom and regardless of whether one applies the *Pickering/Connick* test or more general First Amendment principles – how it can fire someone for writing an accurate and civil, if critical, post about a matter of public concern discussing the actions of a person who Marquette placed in a position of authority. What it says is this: McAdams should adhere to "professional norms."

[2] Marquette says that McAdams could not have known that she said something "airily" and argues that McAdams implies – although he did not say – that the student dropped the course because of this confrontation. But McAdams wrote based on what the student told him and Marquette submits nothing that shows that these points are false.

(FHC Report, 69.) He should not "cause harm." (*Id.* at 75.) But nowhere does Marquette tell us what those "norms" are or what type of "harm" a faculty member must avoid.

As McAdams pointed out in his brief opposing Marquette's motion for summary judgment, even Marquette's own FHC conceded that there are no prohibitions against anything McAdams did. In its latest brief, Marquette makes the same concessions. A faculty member cannot be fired for criticizing a colleague – even for a "one-sided critique." (D. Opp. Br. 20.) A faculty member cannot be fired for a post that turns out to be inaccurate (even though McAdams' post was correct in all material aspects). (Id.) Although even the FHC conceded that the post was not uncivil, a faculty member cannot be fired for writing something that is uncivil. (*Id*.) It could have even added the concession of the FHC that there is no prohibition on naming the object of one's criticism – and linking to that person's information. (FHC Report, 73.) These concessions are not surprising. Free speech and academic freedom could hardly exist in their absence. What they demonstrate is that McAdams violated no professional norms.

Marquette says that, nevertheless, McAdams "recklessly exposed Abbate to easily avoidable foreseeable harm through the use of improperly obtained information in a way that he should have known could lead to harm." (D. Opp. Br. 20.) But that alleged "recklessness" is merely ordinary criticism. The "improperly obtained information" came from a student who told McAdams what Abbate said to him. The only "harm" that he could have foreseen is that readers might agree with his criticism and disagree with her position. In doing so, they might think less of her. But that is a "norm" that would make any criticism subject to post hoc discipline and a "harm" that is always present when people engage in critical speech.

It cannot be a prohibited form of "harm" that someone might read criticism and be persuaded by it. Marquette makes much of the fact that some persons who read the blog post

directed vile and disgusting comments towards Abbate. But it offers no evidence – because there is none – that McAdams had anything to do with this. It offers no reason to think that McAdams "should have known" this would happen. It is undisputed that, as far as McAdams knew, in 10 plus years of blogging, it had never happened before. (FHC Transcript, Vol. III, 118-121; Weber Aff. Ex 3.) The reasons offered by the FHC for thinking he "should have known" were embarrassingly thin. It said McAdams knew, like everyone else who has a passing acquaintance with the internet knows, that sometimes people online behave badly. (FHC Report at 74, 90.) It said that once in the past, two commenters on his blog said they would contact a student he wrote about, although there is no evidence that they did so or did so in an uncivil way. (*Id.* at 90.) It noted McAdams was aware that people might not like to be criticized on his blog. (*Id.* at 91.) But none of these observations distinguish this case from any other in which a faculty member might engage with and criticize someone.

And even if McAdams knew it was possible that someone who read his criticism of Abbate might react in an offensive manner, that possibility is not a limit on academic freedom or free speech. The possibility of a reaction will always exist – particularly when the subject of a post is something that people feel strongly about. Academic freedom or free speech cannot be limited by a type of "reverse heckler's veto" by which you speak at the risk that someone else will react in a vile and offensive matter to what you say.

But, Marquette says – it's now really all it says – McAdams did not "have to" name her. But it points to no rule or norm that says he could not or even should not have. In fact, the FHC expressly denied the existence of any such rule or norm. (FHC Report, 73.) Not to name her would have harmed the credibility of his story, but the question is not whether he might have made a different judgment call. It's whether doing something that is routinely done when

reporting about people – particularly those in positions of authority – somehow violates the norms of free discourse. In the absence of some standard or rule that forbids identifying those one is speaking about, Marquette cannot come close to establishing that.

What Marquette is really doing is holding McAdams responsible for the reaction of others. No matter how fancy and verbose the rhetoric, it is firing him because he did not anticipate that something that had never happened before would happen this time, subordinating his right to criticize Abbate to the potential of future heckling. It is doing so even though his words were not objectionable. In fact, when they read the post the next day, neither Abbate nor her faculty mentor was particularly troubled by what McAdams had said. (P. Opp. Br. 11.) Moreover, Marquette is punishing McAdams despite the fact that there was virtually no negative reaction to McAdams' blog until after it was picked up by third parties. All but three of the communications Abbate received came after the Daily Nous made it a national issue on November 18. (*Id.* at 12.) This happened, at least in part, because of her own actions. (*Id.*)[3]

McAdams is entitled to summary judgment because no reasonable protection of academic freedom or free speech could ever work in this way. A professor ought to be judged by his own words and not the reactions of others. While subjectivity cannot be completely avoided, there has to be some set of discernable standards and norms that any "balancing test" applies. If the standard is simply do not say anything that turns out to cause some type of bad outcome, no one will ever know what they can and cannot say.

Marquette argues that it would be anomalous to think that it is unable to protect its institutional interests. First, Marquette decided that guaranteeing academic freedom and freedom of speech *was* in its institutional interest. That is why it made the broad promises that it did.

[3] McAdams believes that Abbate acted within her right of academic freedom and free speech in doing so. While her language was intemperate and her motive far more personal than McAdams', she had the right to engage him publicly and express her own point of view.

Second, even if it now wishes it had decided differently, the contract means what it says. Finally, Marquette's hands are not tied. For example, using Marquette's example, if a teacher refuses to teach an assigned subject, she would be subject to termination under Section 306.02 (refusal to perform substantial duties constitutes absolute cause for dismissal). If professors do not perform their teaching jobs they are subject to discipline. But those who criticize what others say and do cannot be.

I. McAdams' Speech Is Protected by both Academic Freedom and the First Amendment.

Under the doctrine of academic freedom, McAdams is free to speak in public (an extramural utterance) on any issue, without risk of being disciplined, unless Marquette can show that the blog post itself – the **only** offense Marquette has charged McAdams with – was so far beyond the pale that it demonstrates that he is unfit to serve on the Marquette faculty. And "unfit" in this context does not mean uncivil, or not creating a "safe place," or controversial, but rather that he is not capable of being a teacher on the Marquette faculty. (P. Br. 22-30.) Even Marquette does not contend that it can meet that standard. With respect to his performance as a teacher, even the FHC concluded his "teaching evaluations are on the whole favorable, and in some cases excellent" (FHC Report, 41) and "his scholarship is appropriately distinguished for a tenured associate professor." (*Id.*)

Under the First Amendment, as it applies to this case by contract, McAdams is entitled to speak in public and not be disciplined by Marquette for doing so unless his words lack First Amendment protection (incitement to violence, fighting words, etc.) Marquette argues that the right is not so broad but instead is covered by the same rules as applied to public employees as

set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983).[4]

The contract is not written that way. It says that **in no case** can discretionary cause be interpreted to impair the full enjoyment for all personal or academic freedoms of discourse and advocacy and that discipline cannot be used to restrain any right guaranteed by the United States Constitution. Marquette might have limited its contractual commitment to some type of more limited balancing test. It might even have made clear that it or some internal agency like the FHC would resolve the balance, but it didn't. It decided that its institutional interest in recruitment and, perhaps, facilitating academic discourse required a broad and unqualified guarantee of free discourse. In fact, the U.S. Supreme Court has said that even the limitations of the speech of public employees that it has recognized – which are inapplicable here – may not apply in the university context because of the importance of academic freedom. *Garcetti v. Ceballos*, 547 U.S. 410, 425, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)

But even if *Pickering* applies, it means broad protection for speech on matters of public concern. *Id*. at 574 ("In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.") McAdams' post, although written about an event at Marquette, was on a matter of public interest - political correctness on campus. So, even if he were a public employee and *Pickering/Connick* applies, McAdams still wins.[5] While some speech on a matter of public concern might

[4] Marquette chastises McAdams for what it calls a "new argument." But nothing is "new" at this point in the proceedings. The pending summary judgment motions are both sides' first chance to make their legal arguments in court.

[5] The easiest way to see this is to remember that Pickering actually won his case in the U.S. Supreme Court. His letter (attached to the Third Taylor Affidavit as Ex. T37) can be compared to the McAdams blog post. Pickering's letter is much more critical of the school involved and written in much harsher language than the McAdams' blog

conceivably run afoul of *Pickering*, that line of cases offers no support for the notion that the "disruption" that might warrant dismissal can be disagreement with the speech or the reaction of third parties.

II. Marquette Mischaracterizes the Testimony of both Dr. Downs and Dr. Wood.

Marquette refers to excerpts from the testimony of both Dr. Donald Downs and Dr. Peter Wood as though they support Marquette's position. They do not. Dr. Downs testified as follows:

> So I considered Abbate's comments themselves to pose a real concern for public freedom. … And so John McAdams was addressing a matter of genuine public concern in the context of all the controversies over free speech and free thought in higher education that have been taking place in the last 25 years. This is a classic case… And Professor McAdams posted about it and wrote about it. And professors do have the extramural right, under AAUP policy, as well as First Amendment policy to engage in that. Extramural expression is part of academic freedom per se.

(FHC Tr., Vol. IV, p.79; Weber Aff. Ex.4.)

Dr. Wood has said:

> The university's action against Professor McAdams is based entirely on its dislike of an act of speech—one in which he accurately quoted the words of a named individual. The accuracy of the quotations are not in dispute. The matter comes down to members of the Marquette University community having been embarrassed by an accurate summary of facts. Academic freedom protects Professor McAdams' right to express those facts and to state his opinions about what they mean. . . . Academic freedom does not permit the university to terminate a faculty member for "discretionary cause" when the cause is merely the expression of views with which the administration strongly disagrees.

(Taylor Aff. Ex. T25, ¶42.) Both Dr. Downs and Dr. Wood are harsh critics, not supporters, of Marquette and its unsupportable position regarding academic freedom.

III. McAdams Is Entitled to Summary Judgment on His Claims that Marquette Violated His Procedural Rights under the Contract.

The procedural protections to which McAdams was entitled are not disputed. Both sides agree on what they say and agree that they are part of the contract. The legal question is whether

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post. If Pickering's letter is protected, and the U.S. Supreme Court said it was, then a fortiori applying that same standard means that McAdams' blog post is protected.

Marquette's implementation of those protections was consistent or inconsistent with the contract. That is a question of law for the Court.

In his opposition brief, McAdams set forth seven pages of facts that were deliberately kept from McAdams and from the FHC by Marquette. (P. Resp. Br. 10-17.) Marquette complains it is somehow unwarranted and unprofessional and an ad hominem attack to point out that it had access to those facts and hid them from McAdams and the FHC. But Marquette concedes that "McAdams was provided with all of the documents that supported Marquette's position before the FHC" but nothing else. (Marq. Br. at 26.) Yet §307.07(11) provides that the "faculty member [shall] be afforded an opportunity to obtain . . . documentation or other evidence." It does not say that McAdams only gets to see the evidence Marquette wants to put in against him. In fact, the right to see that evidence is an additional right guaranteed under §307.07(11) ("the faculty member … is entitled to examine the evidence submitted to the FHC by the University Administration.") The right to obtain documentation is separate from and additional to the right to see Marquette's evidence. The only way to provide an opportunity to obtain documentation that is in Marquette's possession – other than hacking its server – is for Marquette to turn it over.

Marquette also argues that it was entitled to: (1) keep Dr. Turner on the FHC despite her statements in writing that she had already formed an opinion on the matters to be heard by the FHC (no such "juror" would be allowed to sit); (2) prosecute McAdams for matters upon which he had no notice; and (3) present evidence from witnesses who were not subject to cross-examination. It then asks the Court to treat the FHC as though it provided McAdams with a fair hearing by a jury of his peers. The argument refutes itself.

IV. McAdams Has Been Terminated.

Finally, Marquette asserts McAdams has not been terminated. But Marquette is wrong as a matter of law. On March 24, 2016, President Lovell suspended McAdams without pay for two semesters (until January 17, 2017) and conditioned his reinstatement to the faculty on McAdams providing him (and Abbate) with a written statement expressing "deep regret" and admitting his blog post was "reckless and incompatible with the mission and values of Marquette University." McAdams has advised Lovell that he will not say what he does not believe to be true. On January 12, 2017, Marquette advised McAdams that he will not be reinstated and that he remains suspended without pay indefinitely. (Third Taylor Aff. Ex. T38.)

This is a "de facto termination" as a matter of law. *See Hedrich v. Bd. of Regents of the Univ. of Wis.*, 2000 WL 34229419, *3 (W.D. Wis. Aug, 16, 2000) (faculty member effectively terminated due to length of suspension and the fact that she was no longer teaching); *Moffitt v. Tunkhannock Area Sch. Dist.* 2013 WL 6909958 (M.D. Pa. Dec. 13, 2013) (indefinite suspension without pay is the functional equivalent of discharge); *Hammond v. Chester Upland Sch. Dist*., 2014 WL 4473726 (E.D. Pa., Sept. 9, 2014), (suspension for an extensive period of time is a de facto termination). Marquette did not address de facto termination.

CONCLUSION

McAdams requests that the Court grant him summary judgment declaring that Marquette has breached his contract, that McAdams be reinstated, and that this matter be set for a trial on damages.

Dated this 19th day of January, 2017.

Respectfully submitted,
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