SUPREME COURT
OF WISCONSIN
APPEAL CASE NO. 2017AP1240

JOHN McADAMS

Plaintiff-Appellant-Petitioner

v.

MARQUETTE UNIVERSITY

Defendant-Appellee-Respondent.

On Appeal from the Decision of the Circuit Court of Milwaukee County
Honorable David A. Hansher Presiding
Circuit Court Case No. 16-CV-003396

PETITON FOR BYPASS AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER JOHN McADAMS

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Issue 1: Was the statement made by Professor John McAdams in a November 9, 2014 post on his *Marquette Warrior* blog protected under the doctrines of academic freedom and freedom of expression.

Circuit Court's Decision: The Circuit Court decided that it was not, and that Marquette's decision to terminate McAdams did not violate his right to academic freedom or his right to free expression even though both of those rights were guaranteed to him under his contract with Marquette.

Issue 2: Did the Circuit Court improperly deny Professor McAdams a trial on the merits by deferring to the findings of fact and conclusions of law made by Marquette's internal Faculty Hearing Committee.

Circuit Court's Decision: The Circuit Court decided that it should defer to the Marquette Committee's findings of fact and conclusions of law, and thus that McAdams was not entitled to a trial on the merits.

INTRODUCTION

Marquette University's contract with tenured members of its faculty promises them that they will not be disciplined for exercising "legitimate personal or academic freedoms of thought, doctrine, discourse, association,

advocacy, or action." Faculty Statute § 306.03. (R. 57:7; P. App. 136.) That contract further promises them that the prospect of dismissal from the faculty will never be used to "restrain . . . rights guaranteed them by the United States Constitution." Faculty Statute § 307.07(2). (R. 57:8; P. App. 137.) These ironclad commitments are designed to protect the academic freedom of Marquette's faculty. Academic freedom is of central importance to our civil society.

Nevertheless, Marquette has effectively fired Professor McAdams for writing a blog post on a matter of public and institutional interest – whether a Marquette Instructor should shut off discussion because a student wishes to express his opinion about a controversial issue. In this case, a student intended to express his opposition to same sex marriage. According to the Instructor, his opinion would not be tolerated, echoing the increasingly common view that some opinions are offensive and off limits.[1] Although civil in tone and content, McAdams' blog post was critical of the

[1] For example, a recent extensive Cato Institute survey found that, among other things, 53% of Americans believe that colleges have an obligation to protect students from offensive ideas, and majorities of liberals, African Americans, Latinos, and women believe colleges should prohibit offensive or biased speech on campus. Even among people with college experience, most would favor banning speakers from campus based on what they were advocating. *See* Emily Ekins, *The State of Free Speech and Tolerance in America*, October 31, 2017, *available at* https://www.cato.org/survey-reports/state-free-speech-tolerance-america.

Instructor's decision. He expressed the traditional view that both academic freedom and free speech protect the expression of even those views with which we disagree and do not like.

The importance of the doctrine of academic freedom to the country as a whole (and not just to college professors) was recognized fifty years ago by the United States Supreme Court:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (citations omitted).

Wisconsin is deeply committed to safeguarding academic freedom as well. As recently as 2015, President Ray Cross of the University of Wisconsin System spoke to the Board of Regents on the history and central importance of academic freedom and freedom of expression in Wisconsin. He reminded them that as long ago as 1894, their predecessors had vigorously defended Professor Richard Ely's academic freedom to advocate an unpopular cause – socialism – by adopting the now famous "sifting and winnowing" report: "Whatever may be the limitations which trammel inquiry elsewhere we believe the great state University of Wisconsin should

ever encourage the continual and fearless sifting and winnowing by which alone the truth can be found." Thus, the Regents have carved academic freedom and freedom of expression forever into the foundational bedrock of the State. Free expression is, as Professor Ely himself later said, Wisconsin's Magna Carta.[2]

The Circuit Court decided that Professor McAdams' blog post was not protected by his rights to academic freedom and freedom of expression, rights guaranteed in his contract with Marquette. It did so without discussion or analysis of the law of academic freedom in Wisconsin. Rather, the Circuit Court deferred to the judgment of the University about whether what McAdams said was protected by the doctrine of academic freedom. In other words, it concluded that one party to the contract – the University – gets to decide what that contract means and whether, when, and how it will honor the terms of the contract.

This is problematic for two reasons. First, it is the duty of the court to enforce the contract and thus to decide what academic freedom and freedom of expression mean. Second, academic freedom and freedom of speech are, by their very nature, protection against the suppression or

[2] *See* Ray Cross, *Remarks to the Board of Regents Regarding Academic Freedom of Expression*, Dec. 11, 2015, *available at* https://www.wisconsin.edu/news/download/Freedom-of-Expression-Remarks-to-the-Board-12112015.pdf.

punishment of speech by a governing authority *or* the majority of one's "peers." They cannot be taken away by a post hoc and ad hoc assessment of what should or should not have been said. These problems present questions of great importance not only to Professor McAdams, but to university faculty across the State and to the Wisconsin community as a whole.

BRIEF STATEMENT ON CRITERIA FOR BYPASS

This Court should take this case on bypass for three reasons. First, the meaning of "academic freedom" in Wisconsin is of statewide importance yet is essentially a question of first impression. Second, the Circuit Court's decision in favor of the University will have, and may already have had, a chilling effect on free expression by the faculty of other universities around the state, including professors at the University of Wisconsin. Finally, the Circuit Court's decision to defer to the University raises a question of first impression in Wisconsin. Although there are no cases anywhere deferring to a university or faculty on what academic freedom means or whether particular speech is protected by it (doing so would be inconsistent with the very concept of free expression), there is a division of authority on deference to universities with respect to the

administration of employment contracts. While the great weight of authority is against such deference, the Circuit Court chose to follow a decision of an intermediate appeals court in Ohio to the contrary. Resolving that conflict raises important questions of university governance and the ability of faculty to rely on the promises made in their employment contracts. The Circuit Court's decision also raises a constitutional question of when the judiciary may defer to other entities, a question that this court has already indicated it will consider in the context of deference to state administrative agencies.

According to this Court's Internal Operating Procedures at Section III.B.2:

> A party may request the court to take jurisdiction of an appeal or other proceeding pending in the Court of Appeals by filing a petition to bypass pursuant to Wis. Stat. § (Rule) 809.60. A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1), and one the court concludes it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues

This case satisfies that test.

This case meets the criteria for review in Wis. Stat. § (Rule) 809.62(1r)(c). A decision by this Court will develop the law of Wisconsin on the issues presented. There is virtually no published case law in

Wisconsin interpreting academic freedom or the First Amendment as applied to speech by college professors. Nor is there any published authority in Wisconsin regarding the deference issue presented by this appeal. Because of the lack of existing case law on these issues in Wisconsin, this case falls squarely within the criteria for review under § (Rule) 809.62(1r).

And because it is a law-developing court, this Court should consider the case regardless of how the Court of Appeals might rule. There is little by way of precedent for the Court of Appeals to apply, and this Court must itself develop and explain the law of academic freedom in Wisconsin.

Even though it is a private school, Marquette's contractual guarantees of academic freedom and free expression give this case a broader impact. A decision in this case defining the scope of those doctrines in the academic context will apply not only to Marquette but to the University of Wisconsin System, which has committed itself to the principles of academic freedom and freedom of expression for all members of the university community.[3] It will also apply to other private colleges

[3] *See* University of Wisconsin System, Regent Policy Document 4-21, *available at* https://www.wisconsin.edu/regents/policies/commitment-to-academic-freedom-and-freedom-of-expression (last visited Nov. 1, 2017).

and universities in the State that grant their faculty the same protections by contract or otherwise.

This Court is often asked to define terms that are commonly used in statutes and contracts, *e.g.*, "moral turpitude," "for cause," "negligence," and "gross neglect." It is charged with developing law and this case calls directly for law development. Whether the Court of Appeals would agree with McAdams or Marquette, this Court has the primary and final responsibility to determine Wisconsin law on issues of this importance.

STATEMENT OF THE CASE

Procedural History

Professor McAdams wrote his blog post on November 9, 2014. (R. 66:4-7; P. App. 142-45.) He was suspended and banished from campus on December 16, 2014. (R. 1:24.) On January 30, 2015, he was informed that Marquette intended to revoke his tenure and terminate him. (R. 58:27-43.) Marquette's Faculty Statutes required review of that decision by Marquette's Faculty Hearing Committee ("FHC"). The FHC held its hearing on September 21-24, 2015. (R. 3:14.) It issued a written decision on January 18, 2016, recommending that McAdams suffer a one or two semester suspension. (R. 3:2.) That decision was not binding on

Marquette's President, Michael Lovell. His decision, conveyed by letter dated March 24, 2016, was that McAdams be suspended without pay for two semesters. President Lovell added a new condition to the FHC's recommendation – that McAdams would not be reinstated unless by April 4 of that year he issued a written statement acknowledging that he had been irresponsible and apologizing to Marquette and Instructor Abbate. (R. 4.) McAdams informed Marquette on April 4, 2016, that he did not believe he had done anything wrong and that he would not apologize. (R. 66:20-24.) He has never been reinstated. (R. 89:10.)

McAdams filed this action on May 2, 2016. (R. 1.) The parties filed cross-motions for summary judgment. (R. 35, 52.) The Circuit Court issued its Decision and Order denying McAdams' motion, granting Marquette's motion, and dismissing McAdams' complaint on May 4, 2017 (R. 134; P. App. 101-133), and entered a final judgment on June 9, 2017 (R. 136; P. App. 134). McAdams timely filed his notice of appeal on June 23, 2017. (R. 137.) Professor McAdams filed his opening brief in the Court of Appeals on September 11, 2017. Marquette filed its response brief on October 20, 2017. Professor McAdams' Reply Brief will be filed on November 6, 2017.

Factual Background

Professor McAdams joined the Marquette faculty in 1977. (R. 66:1.) He was granted tenure in 1984. (*Id.*) It is undisputed that McAdams has been a productive member of the faculty with many scholarly publications to his credit and a good record of classroom performance over his long career. (R. 66:1, 14-17.) As a tenured member of the faculty, McAdams has a contract with Marquette. (R. 66:2, 18-19.) By its express terms, the contract incorporates and is subject to the provisions of Marquette's Faculty Statutes ("Faculty Statutes"). (*Id.*)

According to the Faculty Statutes, McAdams can be suspended or fired for "discretionary cause." §§ 306.02, 306.03. (R. 57:7-8.) Marquette has invoked that standard. But § 306.03 provides that "**[i]n no case, however, shall discretionary cause be interpreted so as to impair the full and free enjoyment of legitimate personal or academic freedom of thought, doctrine, discourse, association, advocacy or action**." (R. 57:7; P. App. 136 (emphasis added).)

Section 307.07 of the Statutes further provides that "**dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed by the United States Constitution**."

(R. 57:8; P. App. 137 (emphasis added).) Marquette cannot suspend or fire McAdams for conduct that is protected by these provisions of his contract. Thus, if McAdams' conduct falls within the protection of academic freedom or the First Amendment, he cannot be fired or otherwise disciplined.

McAdams is an outspoken defender of conservative values. (R. 66:2.) He publishes a blog called the *Marquette Warrior*. (*Id.*) He has been strongly critical of views described by him and others as "political correctness" and is a frequent critic of Marquette's administration, including the President, Provost, Deans and Department Chairs. (*Id.*) He is not a popular figure on campus among those who disagree with him. (*Id.*) For example, the Chair of Marquette's Philosophy Department referred to him in writing as Marquette's "resident right wing lunatic." (R. 57:12.)

During the Fall Semester of 2014, Cheryl Abbate – a graduate student – was the Instructor for Theory of Ethics, a philosophy course for Marquette undergraduates. (R. 57:15.) She was solely responsible for delivering the course and grading the students. (*Id*.)

On the morning of October 28, 2014, Ms. Abbate was discussing the philosophy of John Rawls in class. (R. 57:15-16.) The discussion included

various issues and how they might be resolved under Rawls' theory of justice. The issue of same sex marriage came up, but there was no discussion allowed because Ms. Abbate said that there could obviously be no genuine disagreement about that issue. (*Id.*)

After class, one of her students, referred to in briefing as "JD,"[4] approached Ms. Abbate. JD recorded their after-class discussion. (R. 57:19-21.) He told Ms. Abbate that he opposed same sex marriage and thought that it had been wrong for her to cut the class discussion short. (R. 57:19.) Ms. Abbate told him that "there are some opinions that are not appropriate that are harmful, such as racist opinions, sexist opinions, and quite honestly, do you know whether anyone in the class is homosexual? . . . And don't you think that that would be offensive to them if you were to raise your hand and challenge this?" (R. 57:20.) Ms. Abbate then told JD, "[Y]ou don't have a right in this class . . . to make homophobic comments." (*Id.*) She said, "You can have whatever opinions you want but I can tell you right now, in this class homophobic comments . . . will not be tolerated." (R. 57:21.)

[4] Throughout these proceedings the student has requested anonymity and his identity is protected by the Federal Education and Rights Privacy Act.

JD attempted to complain about Ms. Abbate's conduct to the appropriate academic authorities. He was rebuffed, and told to mend his ways. (R. 57:29-30.) The Chair of Marquette's philosophy department went so far as to describe him to others as an "insulin [sic] little twerp." (R. 57:29.) JD eventually met with McAdams, and gave him the recording of the Abbate conversation. He agreed that McAdams could blog about it. (R. 66:2.)

On the morning of November 9, 2014, McAdams sent an email to Ms. Abbate stating that he was working on a story about her confrontation with JD and asking for her version of the events. (R. 55:11.) Within thirty minutes of receiving the email she forwarded it to three Marquette faculty members indicating she did not intend to respond. (R. 55:11.) That same day, without talking to McAdams and without waiting to see what he would write, Ms. Abbate told her mentor Dr. Suzanne Foster that "I really don't care what some uncritical, creepy homophobic person with bad argumentation skills has to say about me." (R. 55:14.) She told an acquaintance that "I don't want to waste my energy worrying about some uncritical, hateful homophobic group." (R. 56:9.)

Ms. Abbate apparently believed that "there is a whole group at Marquette who are extreme white [sic] wing, hateful people and McAdams is the ring leader." (*Id*.) She called McAdams "a flaming bigot, sexist and homophobic idiot." (R. 55:17.) She accused McAdams of using the concept of free speech to "insert his ugly face into my class business to try to scare me into silence." (*Id*.) And she considered McAdams' polite request for comment "harassment." (R. 55:16.)

All of these comments were made before McAdams published his blog post – before anyone knew what he would say. On the evening of November 9, he published the blog post. (R. 66:4-7; P. App. 142-145.) It does not take a position on same-sex marriage, but argues that the topic is appropriate for debate, and that differences of opinion should be discussed and not censored. The blog post named and criticized Ms. Abbate and criticized Marquette for its lack of response to JD's complaints about her conduct. It contained no intemperate language and no ad hominem attack of any kind. It contained a link to Ms. Abbate's publicly available website.

Ms. Abbate and her allies on the Marquette faculty saw the blog post as a vehicle to go after McAdams. The next day, Ms. Abbate drafted a formal letter of complaint. She asked that McAdams be disciplined for his

speech. (R. 57:34-35.) She sent a draft of her complaint to a confidant by email. (R. 56:7.) In her email, she described JD as one of her "right wing students." (*Id.*) She said McAdams "hates homosexuals or anyone who supports gay rights" and that she "cannot believe that this bigoted moron has a job at Marquette." (*Id.*)

Eventually, Ms. Abbate threatened the University with a lawsuit. She wrote a letter to Marquette President Michael Lovell demanding that Marquette fire McAdams, punish JD, and pay her damages of various kinds. She said that if Marquette did not comply with her demands she would have "recourse to a lawsuit." (R. 58:3-5.)[5]

On November 17, a website called the *College Fix* posted a story on the incident based upon an interview with JD. *See* Matt Lamb, *Student Told He Can't Openly Disagree with Gay Marriage in Class at Jesuit college*, THE COLLEGE FIX (Nov. 17, 2014), http://www.thecollegefix.com/post/20138/.

Next, the editor of a philosophy website called the *Daily Nous* saw the *College Fix* story and wrote Ms. Abbate about it, suggesting that he

[5] Within a few days, and in light of the controversy that arose over the blog post, Ms. Abbate was offered an opportunity to leave Marquette for the more prestigious philosophy department at the University of Colorado, even though her earlier application had been rejected. She accepted the offer. (R. 55:24.)

would be supportive of her position and asking her to comment. She did, sending him a lengthy memo setting out her side of the story. (R. 58:10-15.) The *Daily Nous* published its story on November 18, claiming that Ms. Abbate was the victim of a "smear campaign." *See* Justin Weinberg, *Philosophy Grad Student Target of Political Smear Campaign*, DAILY NOUS (Nov. 18, 2014), http://dailynous.com/2014/11/18/philosophy-grad-student-target-of-political-smear-campaign/.

On November 20, *Inside Higher Ed* published an article on the incident. *See* Colleen Flaherty, *Ethics Lesson*, INSIDE HIGHER ED (Nov. 20, 2014), https://www.insidehighered.com/news/2014/11/20/marquette-u-grad-student-shes-being-targeted-after-ending-class-discussion-gay. As with the *Daily Nous*, Ms. Abbate gave the reporter her version of events. (*Id*.) *Fox News* published an article on the incident on November 22. *See* Todd Starnes, *Teacher to Student: If You Don't Support Gay Marriage, Drop My Class*, FOX NEWS (Nov. 22, 2014), http://www.foxnews.com/opinion/2014/11/22/teacher-to-student-if-dont-support-gay-marriage-drop-my-class.html. Their story was, like the *College Fix* story, based primarily on an interview with JD.

After the story made national press, Ms. Abbate began to receive numerous emails, some in support of her conduct, some critical, and some distasteful. (R. 54:3-5.) According to Marquette, the "hate mail" that Abbate received and the harm that she says she suffered as a result – harm that Marquette says McAdams should somehow have foreseen and somehow avoided – are the central feature of this case. But there is no evidence that McAdams had anything to do with any of them. They were the result of the publicity generated by the *College Fix*, the *Daily Nous*, *Fox News*, and others. (R. 66:3.) McAdams thought Abbate's censorship was an important issue that should be discussed in public, as it was. Ms. Abbate – based on her cooperation with friendly media – apparently agreed and had as much, if not more, to do with the attendant publicity than McAdams did.

Although the record is clear that he had nothing to do with them, Marquette took action against McAdams because of the distasteful emails Ms. Abbate received. On December 16, 2014, Marquette suspended McAdams from his teaching duties and banished him from campus. (R. 1:24.) Marquette declared, with absolutely no basis in fact, that McAdams' presence on the Marquette campus would pose a threat to public safety. Marquette spokesman Brian Dorrington issued a statement condemning

McAdams: The University "will not stand for faculty members subjecting students to any form of abuse, putting them in harm's way. We take any situation where a student's safety is compromised extremely seriously." *See* Karen Herzog, *Marquette University Professor John McAdams Remains Banned From Campus*, MILWAUKEE JOURNAL-SENTINEL, (Jan. 13, 2015), *available at* http://archive.jsonline.com/news/education/marquette-university-professor-john-mcadams-remains-banned-from-campus-b99425150z1-288427731.html.

On January 30, 2015, Marquette formally notified McAdams that it intended to revoke his tenure and terminate his employment. (R. 58:27-43.) On February 6, 2015, McAdams protested his suspension and termination as allowed by the Faculty Statutes. (R. 53:21-22.) In such a case, the Statutes provide for a hearing on the issue of discretionary cause before the FHC. The FHC hearing took place in September 2015. (R. 55:1.)

McAdams objected on procedural grounds to the way the hearing was conducted. (R. 55:2, 10; R. 53:21-22.) The FHC rejected McAdams' objections and issued a report, concluding that the charges against McAdams were insufficient to support revocation of his tenure and

termination, recommending instead that he serve a one- or two-semester suspension without pay. (R. 3:110.)

On March 24, 2016, the President of the University, Michael Lovell, advised McAdams that he was to be suspended without pay for two semesters, consistent with the FHC recommendation. (R. 66:3.) He went beyond their recommendation, however, by demanding that as a condition of his reinstatement to the faculty, McAdams provide him and Abbate with a written statement expressing "deep regret" and admitting that his blog post was "reckless and incompatible with the mission and values of Marquette University." (*Id*.) By letter dated April 4, 2016, McAdams advised Lovell that he would not say what he did not believe to be true, and that Lovell was exceeding his authority by demanding that he do so. (R. 66:20-24.) As a result, McAdams has not been reinstated to the faculty and has effectively been fired. He has no job and receives no pay.

ARGUMENT

I. THIS COURT SHOULD TAKE THIS CASE TO DEVELOP THE LAW OF ACADEMIC FREEDOM IN WISCONSIN

Marquette's commitments to McAdams are strong and unconditional. The University may discipline him for discretionary cause, but "**[i]n no case**, however, shall discretionary cause be interpreted so as to

impair the full and free enjoyment of legitimate personal or academic freedoms of thought, doctrine, discourse, association, advocacy, or action." Faculty Statutes § 306.03. (R. 57:7; P. App. 136 (emphasis added).) This protection is strengthened and extended by § 307.07(2), providing that "[d]ismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed them by the United States Constitution." (R. 57:8; P. App. 137.) Thus, the language in § 306.03 when coupled with § 307.07(2) means that discretionary cause can never include any advocacy or discourse protected by academic freedom or the First Amendment.

As a private university, Marquette did not have to make these commitments. Although it would have paid a price for doing so, it could have reserved the right to control faculty speech. But having promised to honor this notion of academic freedom and to abide by the strictures of the First Amendment, it must live up to its commitment. And for that to happen, this Court needs to interpret those commitments. The legal question then is whether the November 9, 2014 blog post was an exercise of McAdams' academic freedom or his right to free expression under the constitution. These are questions of law. McAdams believes that, in the

American tradition, these are not vague and ambiguous concepts. Courts know something about free speech. But with one minor exception, there are no Wisconsin cases involving the termination of a tenured university professor who claimed that his conduct was protected by academic freedom or freedom of speech.

The single exception is *State ex rel. Ball v McPhee*, 6 Wis 2d. 190, 94 N.W.2d 711 (1959) (overruled on other grounds by *Stacy v. Ashland County*, 39 Wis. 2d 595, 159 N.W.2d 630 (1968)). In that case, one of the charges offered by the Board of Regents to show that a professor could be terminated for violating his duty of "efficiency and good behavior" was that he had criticized the university's practice of awarding graduate students course credit for taking undergraduate courses. This Court pointed out that Professor Ball surely had the academic freedom to criticize school programs with which he disagreed, and that such criticism was protected by the doctrine of academic freedom and could not qualify as inefficiency or bad behavior as a matter of Wisconsin law. *Id.* at 204.

But the issue of what speech is protected by the doctrine of academic freedom in Wisconsin was not squarely before the Court, as the case was remanded for further proceedings on other grounds. *Id.* at 203. Until now,

this Court has never had an opportunity to consider the extent of academic freedom as a matter of Wisconsin law.

It can do so in this case, and it should. This Court – not the Court of Appeals – is the law-developing court for the State. *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶49, 326 Wis. 2d 729, 786 N.W.2d 78; *Spankowski v. Spankowski*, 172 Wis. 2d 285, 292, 493 N.W.2d 737 (Ct. App. 1992). Although Marquette is a private institution, it entered into a Wisconsin contract that protects "academic freedom," and the question before the Court would be the proper application of the doctrine of academic freedom to the statements of a university professor under Wisconsin law. This Court's decision on that question would apply not only to Marquette, but to other colleges and universities around the State, including the institutions within the University of Wisconsin System. The Court is surely aware that this is an issue of great importance, as all of these institutions are under pressure to enact or implement speech codes or otherwise restrict speech in various ways. All of them would benefit from a clear expression by this Court as to the protection afforded university professors by the doctrines of academic freedom and freedom of expression.

More than 100 years after the UW Board of Regents stood up for the broadest possible protection for academic freedom in the case of Professor Ely, academic freedom remains under threat. There are many, both inside the academy and outside it, who believe that it is not only acceptable but necessary to prevent the expression of opinions that are offensive to some protected group.[6] Many of our universities have seen efforts by students and faculty to silence unpopular or politically incorrect speakers who intend to do nothing more than engage in civil discourse on matters of public concern. Universities are under pressure to create "safe spaces" by preventing faculty or outside speakers from simply stating their ideas – if some students might find their ideas to be frightening or hurtful.

This problem was discussed by UW Chancellor Rebecca Blank in January of this year when confronting yet another challenge to academic freedom in Wisconsin. Chancellor Rebecca Blank, *On Academic Freedom and Free Speech* (Jan. 8, 2017), https://chancellor.wisc.edu/blog/on-academic-freedom-and-free-speech/. Chancellor Blank reminded the public that a university's "greatest value to society is that they are places where any idea is thinkable and debatable . . . even ideas that shock and insult."

[6] *See* Ekins, *supra.*

This Court should make it clear that Wisconsin law protects academic freedom and that the protection it affords is both broad and robust. That is what this case is about. Professor McAdams did nothing more than criticize another Marquette Instructor for telling her student that she would not permit him to express an opinion – opposition to same sex marriage – that she said would shock or insult others. Professor McAdams simply came to her student's defense. His blog post says that in his view the University should be a place where even unpopular ideas can be freely discussed, and that it was wrong for the Instructor to forbid such a discussion.

The majority of Marquette faculty may disagree with McAdams on this point. The Administration fired him for making it. But the rights of free expression and academic freedom cannot be limited by the will of the majority or the sensibilities of one's "peers." Freedom of expression and academic freedom are never needed to protect speech that is popular. It should hardly be surprising that, as in this case, virtually every case in which a university attempts to limit academic freedom and free expression involves speech that many people – usually a majority – find objectionable.

Professor McAdams contends that his suspension and termination were wrong and that his conduct was protected under the doctrines of academic freedom and freedom of expression. The Circuit Court (lacking guidance on the subject from this Court) disagreed and held that under Wisconsin law neither Professor McAdams' right to academic freedom nor his right to free expression were enough to protect him from Marquette's decision to suspend and fire him.

McAdams provided the Circuit Court with numerous non-Wisconsin authorities in support of his position, without effect. For example, in *Salaita v. Kennedy*, 118 F. Supp. 3d 1068 (N.D. Ill. 2015), a court held that anti-Semitic Twitter statements made by Professor Salaita – statements so harsh and profanity-laden the court was reluctant to quote them – were protected. Rescinding his job offer based on his tweets was in violation of his right to academic freedom. *Id.* at 1083-84.

In *Starsky v. Williams*, 353 F. Supp. 900 (D. Ariz. 1972), a tenured professor was fired for participating in a protest and making vile remarks to bystanders. In finding that the university violated his academic freedom, the court stated:

> This Court finds that the Board, in discharging Professor Starsky on the basis of narrow professional standards of

> accuracy, respect, and restraint applied to public statements made as a citizen, has violated its own A.A.U.P. standards not to discipline a teacher when he "speaks or writes as a citizen," and has violated Professor Starsky's rights to freedom of speech by applying constitutionally impermissible standards to speech made as a citizen.

Id. at 922; *see also Blum v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975) (academic freedom protected professor who made vulgar comments in an attempt to block a motorcade and incite fellow protestors to storm campus stadium during a Vietnam protest.).

McAdams argued, also without effect, that his position is supported by the American Association of University Professors ("AAUP"), a professional organization heavily involved in defending academic freedom around the country. In its 1940 Statement, the AAUP defined academic freedom as including the freedom to "speak or write as citizens . . . free from institutional censorship or discipline."[7] This includes the freedom to speak outside of the classroom, something that the AAUP refers to as "extramural utterances."

> the right of faculty members to speak as citizens – that is, "to address the larger community with regard to any matter of social, political, economic or other interest without institutional discipline or restraint". . . . **Freedom of**

[7] *See* AAUP, 1940 Statement of Principles on Academic Freedom and Tenure, *available at* https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure.

> **extramural utterance is a constitutive part of the American conception of academic freedom**.

AAUP, Statement on Civility, *available at* https://www.aaup.org/issues/civility (emphasis added). According to the AAUP, the intended effect of protecting extramural utterances "is to remove from consideration any supposed rhetorical transgressions that would not be found to exceed the protections of the First Amendment." AAUP Report, *Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions* 102 (2011) ("2011 Report").[8] According to the AAUP then, if an extramural statement is otherwise protected by the First Amendment, it cannot be grounds for discipline.

The Circuit Court decided that it would defer to Marquette's contradictory and obviously self-interested interpretation of the AAUP statements: that extramural speech by a university professor is protected by academic freedom only until the university – or at least a committee of faculty members and the administration – says that it is not.

The Circuit Court upheld Marquette's view that academic freedom is riddled with exceptions and limitations. It says that speech by a professor

[8] *Available at* https://www.aaup.org/NR/rdonlyres/895B2C30-29F6-4A88-80B9-FCC4D23CF28B/0/PoliticallyControversialDecisionsreport.pdf.

is limited by the professor's "responsibilities" and "special obligations," which are, in turn, to be pronounced after the fact by the university. The Court relied on the FHC's conclusions of law, which adopted an indeterminate and elastic "balancing" test that could be used to condemn anything. (R. 3:118-120.) That test – endorsed by the Circuit Court (R. 134:24-25; P. App. 124-25) – offers no safe harbor for speech. It imposes a duty to avoid "harm" even if that "harm" is caused by the way *others* react to otherwise unobjectionable speech.

And "harm" is not limited to those things that have historically been thought to limit freedom of expression – *e.g.* fighting words or defamation – but may include the fact that a person who is criticized will not like it and that others may react badly. The FHC made clear that it thought the "harm" need not even be "likely" to occur. (R.3:89-90.) There is no way that a member of Marquette's faculty could apply the "test" endorsed by the Court and understand what is protected by academic freedom and what is not. It depends, in the end, on what the faculty decides is worthy of protection.

This kind of an elastic and after-the-fact test for academic freedom cannot support the "continual and fearless sifting and winnowing by which

alone the truth can be found" – the standard that should be maintained in Wisconsin. A "test" that promises protection for unpopular speech and then allows the administration or other faculty members to decide the measure of that protection after the fact is no protection at all.

This Court should take this case to make clear that, notwithstanding what others may do, Wisconsin extends robust protection for academic freedom. There should be no exception to academic freedom allowing a university to discipline a professor for speech that violates some subjective or unarticulated standard of "responsibility," as Marquette seeks to do in this case. To the contrary, as the AAUP has said, "[a]ny rule which bases dismissal upon the mere fact of exercise of constitutional rights violates the principles of both academic freedom and academic tenure." *Academic Freedom and Tenure in the Quest for National Security*, AAUP BULLETIN Vol. 42, No. 1 (1956), at 57-58.[9] [10]

[9] *Available at* https://www.aaup.org/sites/default/files/files/Quest%20for%20National%20Security.pdf.

[10] Professors should be free as well to criticize the institutions that employ them. Peter Wood, the president of the National Association of Scholars ("NAS"), an association of university professors, submitted an expert report and testified in this matter. Under the NAS standards, academic freedom:

> refers to the right of scholars to research, teach, publish, and otherwise express their views on matters within their disciplines or pertaining to broader issues on which they have a claim to scholarly understanding. **These broader issues have always included the governance of**

Wisconsin law regarding the doctrine of academic freedom is completely undeveloped. The boundaries of academic freedom are likely to be repeatedly tested in the future given the current atmosphere on college campuses seeking to suppress dissent, avoid unpopular opinions, and impose political correctness. This Court should take this case in order to develop and explain Wisconsin law on this important and timely matter.

II. THIS COURT SHOULD ALSO TAKE THIS CASE TO DEVELOP WISCONSIN LAW ON THE RELATIONSHIP BETWEEN ACADEMIC FREEDOM AND THE PROTECTION OF FREE SPEECH UNDER THE FIRST AMENDMENT

The doctrine of academic freedom is closely related to and intertwined with the right of freedom of expression under the First Amendment. While the First Amendment does not generally protect against reprisal from a private employer, Marquette contractually bound itself to constitutional protections. It promised McAdams that "[d]ismissal will not be used to restrain faculty members in their exercise of academic freedom *or other rights guaranteed them by the United States*

> **colleges and universities and debates over the norms and standards of instruction.**

(R. 53:1 (emphasis added).) Because the blog post dealt with Marquette's norms and standards of instruction, it fell directly within the protection of academic freedom enunciated by the NAS. (*Id.* at 7.)

Constitution." Faculty Statutes § 307.07(2). (R. 57:8; P. App. 137 (emphasis added).) Thus, this case involves both academic freedom and the right of free speech under the First Amendment.

It may be that those rights are coextensive under the circumstances of this case. That is Professor McAdams' position and that is the way that the AAUP sees it. When dealing with so-called extramural utterances (statements by professor outside of the classroom and outside their academic writings) the AAUP has said that the effect of protecting extramural utterances "is to remove from consideration any supposed rhetorical transgressions that would not be found to exceed the protections of the First Amendment." According to the AAUP then, if an extramural statement is otherwise protected by the First Amendment, it cannot be grounds for discipline. 2011 Report at 102.

The extent to which the constitutional protection of free speech overlaps the protection of academic freedom is an open question in Wisconsin. And it is a question that must be resolved by this Court. The Circuit Court concluded as a matter of law that McAdams was not protected by either academic freedom or by the First Amendment. It cited no legal authority for its interpretation of either and with respect to the First

Amendment the Circuit Court said only that to actually give McAdams First Amendment protection would "lead to absurd consequences." (R. 134:27; P. App. 127.)

But there is nothing absurd about a university promising a professor that he will not be disciplined for extramural statements made as a private citizen, so long as they are within the domain protected by the First Amendment. Respect for the First Amendment is hardly an "absurd consequence," and protecting university professors from reprisals by university administrators for their speech is precisely the result long advocated for by the AAUP.

This Court should take this case to develop and explain the relationship between the doctrine of academic freedom and the protections offered by the First Amendment under Wisconsin law.

III. THIS COURT SHOULD TAKE THIS CASE TO DEVELOP, WISCONSIN LAW REGARDING THE CONSTITUTIONAL DUTY OF WISCONSIN COURTS TO ADJUDICATE LEGAL DISPUTES

The Circuit Court not only upheld Marquette's ultimate decision but also denied McAdams a trial on the merits by deferring to Marquette's internal findings of fact and legal conclusions. This presents another important issue – whether and to what extent the courts of Wisconsin may

abdicate their responsibility to decide the cases before them to some other, non-judicial authority.

This Court has already recognized this is an important issue in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, Appeal No. 2015AP2019, and *Wisconsin Department of Workforce Development v. Wisconsin Labor and Industry Review Commission*, Appeal No. 2016AP1365. In both of those cases, this Court asked the parties to brief the question whether deference to agency determinations by the Wisconsin courts is compatible with the Wisconsin Constitution, which vests judicial authority in the courts. Oral argument in both cases is scheduled for December 1, 2017.

A similar issue is presented here. The Circuit Court went even further and deferred to determinations made by a private party, one of the litigants. Relying on the FHC report, the Circuit Court resolved certain legal issues in Marquette's favor, holding that McAdams' blog post was not protected by academic freedom or his First Amendment right of free expression. Those legal disputes were appropriate issues for summary judgment and remain so. But the court should not have decided them by

deferring to the FHC's view of the law of academic freedom and freedom of expression.

But even if the blog post was not protected speech as a matter of law, Marquette would still have to establish that McAdams' conduct was sufficient to provide the University with "discretionary cause" to discipline or fire him under the Faculty Statutes.

As to that question, there were material disputes of fact:

- Was there anything false in McAdams' blog post?
- Was there some requirement not to identify Ms. Abbate in the blog post?
- Who was responsible for the publicity that surrounded the blog post?
- Should McAdams have anticipated the publicity?
- Did Marquette comply with the procedural requirements to which McAdams was entitled?
- Did Marquette's discipline exceed that appropriate for McAdams' conduct?

The Circuit Court decided these and other factual disputes against McAdams, relying on the findings of fact in Marquette's FHC report as the Court's basis for its factual determinations. It did so even where evidence in the Court's own record contradicted the FHC findings.

The Court relied on cases involving agency determinations and stated as a general principle that courts should defer in some undetermined way to universities on questions of faculty professionalism and fitness. (R.

134:11-13; P. App. 111-13.) But it had no authority for its decision to decide factual issues against a party on summary judgment by deferring to findings of fact made by, in effect, one of the parties to a contract dispute. In fact, the Circuit Court explicitly acknowledged that no Wisconsin court had ever addressed the question of whether a court may defer to an internal decision by a university committee in these circumstances. (R. 134:7; P. App. 107.)

Only by deferring to the FHC's findings of fact was the court able to decide the "discretionary cause" issue in Marquette's favor. In doing so it violated the long-standing admonition that courts are not to resolve factual disputes on summary judgment. *See Kraemer Bros. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 565–66, 278 N.W.2d 857 (1979) ("On summary judgment the court does not decide a genuine issue of material fact; it decides whether there is a genuine issue.").

This Court should take this case to develop Wisconsin law as to the circumstances, if any, in which Wisconsin courts may delegate their authority in such a fashion. This Court has repeatedly said it is the duty of the judiciary to adjudicate legal disputes. *State v. Williams*, 2012 WI 59, ¶36, n. 13, 341 Wis. 2d 191, 814 N.W.2d 460; *State v. Van Brocklin*, 194

Wis. 441, 217 N.W. 277, 277 (1927) ("'[J]udicial power' is that power which adjudicates and protects the rights and interests of individual citizens, and to that end construes and applies the laws.") (citing 2 Words and Phrases, Second Series, p. 1268).

As the Circuit Court acknowledged, there are two competing lines of cases from other jurisdictions on the issue of deference to universities on question of faculty fitness and responsibility. This Court must consider which of them is right. The Circuit Court rejected the line of cases stemming from *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987), which held that there is no legal basis to defer to findings or conclusions made by one of the parties to a contractual dispute even if one of those parties is a university.

In *McConnell*, the DC Circuit noted that:

> It would make no sense for a court blindly to defer to a university's interpretation of a tenure contract to which it is an interested party. Moreover, the theory of deference to administrative action flows from prudential concepts of separation of powers, as well as statutory proscriptions on the scope of judicial review. Obviously, none of those factors apply here. The notion of treating a private university as if it were a state or federal administrative agency is simply unsupported where a contract claim is involved.

Id. at 69.

McConnell also addressed and rejected Howard University's pleas regarding "the special nature of the university."

> [W]e do not understand why university affairs are more deserving of judicial deference than the affairs of any other business or profession. Arguably, there might be matters unique to education on which courts are relatively ill equipped to pass judgment. However, this is true in many areas of the law, including, for example, technical, scientific and medical issues. Yet, this lack of expertise does not compel courts to defer to the view of one of the parties in such cases.

Id.

McConnell has been followed widely across fourteen jurisdictions and circuits. *See, e.g., Craine v. Trinity College*, 791 A.2d 518, 536 (Conn. 2002) ("The principle of academic freedom does not preclude us from vindicating the contractual rights of a plaintiff who has been denied tenure in breach of an employment contract."); *New Castle County Vocational Technical Educ. Ass'n v. Bd. of Education of New Castle Cty*, 1988 WL 97840, *3 (Del. Ct. of Chancery Sept. 22, 1988) (to adopt a view "limiting judicial review" over the university's decision would be to allow "one of the parties of the contract to determine whether the contract had been breached," making a "sham of the parties' contractual tenure arrangement"); *Kyriakopoulos v. George Washington University*, 866 F.2d

438, 446 (D.C. Cir. 1989) ("[C]ontractual rights are to be enforced as diligently (and are valued as highly) in a university setting as in any other."); *Breiner-Sanders v. Georgetown University*, 118 F. Supp. 2d 1, 7 (D.D.C. 1999) (collateral estoppel principles did not require the "court to give preclusive effect to a private university's grievance panel").

Instead, the Circuit Court decided to rely on a decision of an Ohio intermediate court in *Yackshaw v. John Carroll Univ. Bd. Of Trust*ees, 624 N.E. 225 (Ohio App. 1993). (R. 134:7-8; P. App. 107-08.)

Yackshaw was not an academic freedom case. *Yackshaw* involved a professor who accused others of sexual misconduct and who did not assert academic freedom as a defense. Moreover, the *Yackshaw* court concluded that the parties had agreed by contract to accept the decision of the faculty review board. Thus, deference was a way of "honoring the parties' contractual agreement." 624 N.E. at 228. This is true of the cases that followed it as well. *See, e.g.*, *Traster v. Ohio Northern University*, 2015 WL 10739302, *1 (N.D. Oh. Dec. 18, 2015) (faculty member targeted for discharge permitted recourse provided in faculty handbook as "exclusive remedy"); *Collins v. Notre Dame*, 2012 WL 1877682, *4 (N.D. Ind. May

21, 2012) (nothing in the tenure contract indicated any of the university's judgments would be open to review by judge or jury).

In contrast to *Yackshaw* and its progeny, there is nothing in the contract here that would suggest that the court should defer to Marquette and its own FHC.[11] Nothing in McAdams' contract states that the FHC's decision is binding on anybody. To the contrary, Section 307.09 specifically contemplates a separate judicial action following the FHC report and nowhere states that the report is to be given deference in such a subsequent legal action. (R. 57:10; P. App. 139.) And Marquette certainly did not consider that *it* was bound by the FHC. President Lovell implemented discipline different from and more severe than that recommended by the FHC.

As pointed out in *McConnell*, "even if there are issues on which courts are ill equipped to rule, the interpretation of a contract is not one of them." 818 F.2d at 69. Whether and to what extent Wisconsin's courts should defer to universities on questions of contract interpretation is, as the Circuit Court itself recognized, a question of first impression under

[11] This is nothing like an arbitration provision in a contract that puts the dispute before a neutral, third party, decision-maker where the parties expressly waive most court challenges to the decision.

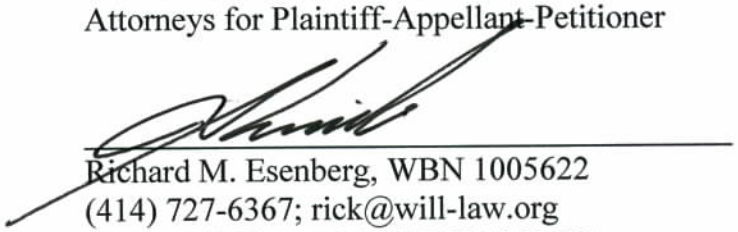
Wisconsin law. (R. 134:7; P. App. 107.) This Court should take this case to develop and explain the law on this point.

CONCLUSION

For the reasons set forth above, the Petitioner requests that this Court bypass the Court of Appeals and take this case directly pursuant to Wis. Stat. § (Rule) 809.60.

Dated this 3rd day of November, 2017

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiff-Appellant-Petitioner



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APPENDIX
PETITIONER'S PETITION TO BYPASS
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STATE OF WISCONSIN | CIRCUIT COURT Branch 42 | MILWAUKEE COUNTY

JOHN MCADAMS,

Plaintiff,

vs.

MARQUETTE UNIVERSITY,

Case No. 16-CV-003396

Defendant.

DECISION AND ORDER FOR SUMMARY JUDGMENT

BACKGROUND

On November 9, 2014, John McAdams, a tenured professor at Marquette University ("Marquette"), which is a private Jesuit University, published a blog post on his personal blog, *Marquette Warrior*, which criticized Chery Abbate, a graduate student and philosophy instructor. In the blog post, Dr. McAdams discussed events surrounding an October 28, 2014, class taught by Ms. Abbate, and he intentionally included her name and a clickable link to her contact information and personal website (https://ceabbate.wordpress.com/). The blog post in its entirety is as follows:

> A student we know was in a philosophy class ("Theory of Ethics"), and the instructor (one Cheryl Abbate) was attempting to apply a philosophical text to modern political controversies. So far so good.
>
> She listed some issues on the board, and came to "gay rights." She then airily said that "everybody agrees on this, and there is no need to discuss it."
>
> The student, a conservative who disagrees with some of the gay lobby's notions of "gay rights" (such as gay marriage) approached her after class and told her he thought the issue deserved to be discussed. Indeed, he told Abbate that if she dismisses an entire argument because of her personal views, that sets a terrible precedent for the class.

The student argued against gay marriage and gay adoption, and for a while, Abbate made some plausible arguments to the student — pointing out that single people can adopt a child, so why not a gay couple? She even asked the student for research showing that children of gay parents do worse than children of straight, married parents. The student said he would provide it.

So far, this is the sort of argument that ought to happen in academia.

But then things deteriorated.

Certain Opinions Banned

Abbate explained that "some opinions are not appropriate, such as racist opinions, sexist opinions" and then went on to ask "do you know if anyone in your class is homosexual?" And further "don't you think it would be offensive to them" if some student raised his hand and challenged gay marriage? The point being, apparently that any gay classmates should not be subjected to hearing any disagreement with their presumed policy views.

Then things deteriorated further as the student said that it was his right as an American citizen to make arguments against gay marriage. Abbate replied that "you don't have a right in this class to make homophobic comments."

She further said she would "take offense" if the student said that women can't serve in particular roles. And she added that somebody who is homosexual would experience similar offense if somebody opposed gay marriage in class.

She went on "In this class, homophobic comments, racist comments, will not be tolerated." She then invited the student to drop the class.

Which the student is doing.

Shutting People Up

Abbate, of course, was just using a tactic typical among liberals now. Opinions with which they disagree are not merely wrong, and are not to be argued against on their merits, but are deemed "offensive" and need to be shut up.

As Charles Krauthammer explained:

> The proper word for that attitude is totalitarian. It declares certain controversies over and visits serious consequences — from social ostracism to vocational defenestration — upon those who refuse to be silenced.

> The newest closing of the leftist mind is on gay marriage. Just as the science of global warming is settled, so, it seems, are the moral and philosophical merits of gay marriage.
>
> To oppose it is nothing but bigotry, akin to racism. Opponents are to be similarly marginalized and shunned, destroyed personally and professionally.

Of course, only certain groups have the privilege of shutting up debate. Things thought to be "offensive" to gays, blacks, women and so on must be stifled. Further, it's not considered necessary to actually find out what the group really thinks. "Women" are supposed to feel warred upon when somebody opposes abortion, but in he (sic) real world men and women are equally likely to oppose abortion.

The same is true of Obama's contraception mandate.

But in the politically correct world of academia, one is supposed to assume that all victim groups think the same way as leftist professors.

The "Offended" Card

Groups not favored by leftist professors, of course, can be freely attacked, and their views (or supposed views) ridiculed. Christians and Muslims are not allowed to be "offended" by pro-gay comments.

(Muslims are a protected victim group in lots of other ways, but not this one.)

And it is a free fire zone where straight white males are concerned.

Student Seeks Redress

The student first complained to the office of the Dean of Arts & Sciences, and talked to an Associate Dean, one Suzanne Foster. Foster sent the student to the Chair of the Philosophy Department, saying that department chairs usually handle such cases. The chair, Nancy Snow, pretty much blew off the issue.

Interestingly, both Snow and Foster have been involved in cases of politically correct attacks on free expression at Marquette.

Foster took offense when one of her colleagues referred to a dinner which happened to involve only female faculty as a "girls night out." He was reprimanded by then department chair James South for "sexism," but the reprimand was overturned by Marquette.

> Snow, in a class on the "Philosophy of Crime and Punishment" tried to shut up a student who offered a response, from the perspective of police, to Snow's comments about supposed "racial profiling." The student said talk about racial profiling makes life hard for cops, since it may make minorities hostile and uncooperative.
>
> Snow tried to silence him, claiming "this is a diverse class." This was an apparent reference to two black students in the class, who were, Snow assumed, likely offended on hearing that.
>
> The majority of the class, contacted by The Marquette Warrior, felt the comments were reasonable and relevant, but Snow insisted that the student write an apology to the black students.
>
> So how is a student to get vindication from University officials who hold the same intolerant views as Abbate?
>
> **Conclusion**
>
> Thus the student is dropping the class, and will have to take another Philosophy class in the future.
>
> But this student is rather outspoken and assertive about his beliefs. That puts him among a small minority of Marquette students. How many students, especially in politically correct departments like Philosophy, simply stifle their disagreement, or worse yet get indoctrinated into the views of the instructor, since those are the only ideas allowed, and no alternative views are aired?
>
> Like the rest of academia, Marquette is less and less a real university. And when gay marriage cannot be discussed, certainly not a Catholic university.

Aff. of John McAdams, Ex. A1.

Ms. Abbate started receiving strongly negative emails on the evening of November 9, 2014, and several of the communications expressed violent thoughts about her. On December 16, 2014, Dean Richard Holz advised Dr. McAdams that until further notice he was "relieved of all teaching duties and all other faculty activities," and that he would still receive his salary and benefits. On January 2, 2015, Dean Holz affirmed that Dr. McAdams was banned from campus. On January 30, 2015, Dean Holz advised Dr. McAdams that his "conduct clearly and substantially fails to meet the standards of personal and professional excellence that generally characterizes University faculties," and that Marquette was therefore initiating the process to revoke his tenure and terminate his employment.

Pursuant to Marquette's Faculty Statutes on Appointment ("Faculty Statutes"), which are incorporated into Dr. McAdams' employment contract by reference, a Faculty Hearing Committee ("FHC") was assembled to conduct a hearing. The FHC is an independent subcommittee of the Faculty Council that reports to the University President in cases of contested disciplinary action. The FHC was comprised of seven tenured faculty members, was chaired by a law professor, and included a representative from the American Association of University Professors ("AAUP") attending as an observer. Both parties were represented by counsel and multiple witnesses were examined and cross-examined during a four-day hearing, which was conducted from September 21, 2015 to September 24, 2015. On January 18, 2016, the FHC unanimously found "clear and convincing" evidence to support the conclusion that Marquette had "discretionary cause," within the meaning of Section 306.03 of the Faculty Statutes,[1] to impose discipline. Section 306.03 states:

> Discretionary cause shall include those circumstances, exclusive of absolute cause, which arise from a faculty member's conduct and which clearly and substantially fail to meet the standard of personal and professional excellence which generally characterizes University faculties, but only if through this conduct a faculty member's value will probably be substantially impaired. Examples of conduct that substantially impair the value or utility of a faculty member are: serious instances of illegal, immoral, dishonorable, irresponsible, or incompetent conduct. In no case, however, shall discretionary cause be interpreted so as to impair the full and free enjoyment of legitimate personal or academic freedoms of thought, doctrine, discourse, association, advocacy, or action.

See id. While the FHC concluded that the charges against Dr. McAdams were insufficient to revoke his tenure and terminate his employment, it did recommend that he serve a paid suspension for up to two semesters. Consistent with the FHC's recommendation, Marquette University President Michael Lovell imposed a two-semester suspension. President Lovell also demanded, as a condition of his reinstatement, that Dr. McAdams provide a private written statement expressing his "deep regret" and admitting that his blog post was "reckless and incompatible with the mission and values of Marquette University." Dr. McAdams refused to issue the apology.

[1] The references throughout this decision to "Section 306" or "Section 307" are to paragraphs in Marquette's Faculty Statutes on Appointment.

On May 2, 2016, Dr. McAdams filed this lawsuit, challenging his suspension and effective termination and alleging the following six causes of action: (1) Breach of Contract – Professor McAdams' Unlawful Suspension and Banning from Campus from December 16, 2014 through March 31, 2016; (2) Breach of Contract – Marquette Lacks the Necessary Cause to Suspend Professor McAdams without Pay From April 1, 2016 through January 17, 2017 and Marquette's Suspension Violates Professor McAdams' Right to Academic Freedom; (3) Breach of Contract – Failure to Renew; (4) Breach of Contract – Marquette Lacks the Necessary Cause to Terminate Professor McAdams and Marquette's Attempt to Coerce Professor McAdams and Marquette's Termination of Professor McAdams Violate Professor McAdams' Contract and His Right to Academic Freedom; (5) Breach of Contract – Marquette Violated Professor McAdams' Due Process Rights Under the Contract; and (6) Breach of the Implied Covenant of Good Faith and Fair Dealing. *See* Complaint. Cross-motions for summary judgment were filed on December 9, 2016 by both parties. Marquette seeks summary judgment on all six claims, while McAdams seeks summary judgment on claims one, two, and five. A summary judgment hearing was held on February 2, 2017. At the request of the parties the Court granted each party the right to exceed the page limits of Local Rule § 3.15 for the motions and reply briefs, resulting in over 180 pages being filed with hundreds of pages of foreign cited cases attached. This Court failed to stay discovery and pretrial reports, pending summary judgment, until an in-chambers meeting on April 26, 2017, but by then, voluminous motions regarding discovery and the plaintiff's pretrial report and list of witnesses were filed. The Court only adds this information to explain to the Appellate Court why this case has boxes and boxes of filings, in spite of the fact that the case is being disposed of on summary judgment.

STANDARD OF REVIEW

Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wis. Stat. § 802.08(2). The party with the burden of proof at trial has the burden on summary judgment "to show that there are genuine issues of fact that require[] a trial on that claim." *Milwaukee Area Tech. College v. Frontier Adjusters*, 2008 WI App 76, ¶ 6, 312 Wis. 2d 360, 752 N.W.2d 396. A "material fact is one that is of consequence to the merits of litigation."

Sherry v. Salvo, 205 Wis. 2d 14, 31, 555 N.W.2d 402, 408 (Ct. App. 1994). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *City of Elkhorn v. 211 Centralia St. Corp.*, 2004 WI App 139, ¶ 18, 275 Wis. 2d 584, 597, 685 N.W.2d 874, 881 (citing *Baxter v. DNR,* 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct.App.1991)).

ANALYSIS

The Court finds that there are no genuine disputes of material fact in this case, and the Court will dispose of this case on summary judgment. *See* Wis. Stat. § 802.08(2). The subsequent sections contain explanations as to why the Court finds the following: (1) The FHC Report deserves deference; (2) The letter from President Lovell deserves deference; (3) Dr. McAdams was afforded due process that he was entitled to during the FHC hearing; (4) There were no damages for the initial suspension and banishment from campus; (5) Dr. McAdams' rights to academic freedom and freedom of expression were not violated; (6) Marquette's decision not to renew and reappoint Dr. McAdams did not breach his contract; and (7) Marquette did not breach the implied covenant of good faith and fair dealing.

I. Deference Regarding the FHC Report

Prior to addressing the merits of Dr. McAdams' claims, the Court must first address the issue of deference in the context of academic disciplinary decisions. While the Wisconsin appellate courts have yet to address this issue, guidance can be found in two lines of cases. Dr. McAdams relies primarily on *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987), and *Roberts v. Columbia College Chicago*, 821 F.3d 855 (7th Cir. 2016), to support the conclusion that deference should not be afforded, whereas Marquette relies on *Yackshaw v. John Carroll Univ. Bd. of Trustees*, 89 Ohio App. 3d 237, 624 N.E.2d 225 (1993), to support the opposite conclusion. For the reasons stated below, this Court is persuaded by the logic of *Yackshaw*.

At issue in *Yackshaw* was whether a tenured professor at a private university had a right to a de novo trial on his breach of contract claim, or whether review was limited to the record of the university's hearing to terminate his contract. The court found rationale and guidance from

the standard of review adopted by administrative agencies, and concluded that "when the parties' contract defines the procedure to be used to determine termination of a tenured professor's contract at a private university, the standard of review is whether the contract and the United States Constitution have been adhered to, and whether there is substantial evidence in the record to support the termination." *Id.* at 243. The court noted that "[t]he prevailing view, at least on the federal level, is that judicial review should be limited." *Id.* at 242. The court cited *McConnell* as an "obscure" case that was authored by an appellate court that had been preoccupied, and rightfully so, with the failure of the university to honor the contract. *Id.* The court construed *McConnell* as "creating an exception to the traditional rule of deference . . . as opposed to an absolute rejection of that tenet of law." *Id.* Instead, it read *McConnell* as creating "an exception to the traditional rule of deference" because in that case "the university failed to honor its contract and the evidence did not substantially support the facts concluded by the university's review board." *Id.* at 228-29. The court found that deferential review was especially warranted because the parties had contractually agreed to a disciplinary procedure that contained both procedural and substantive due process safeguards. Therefore the court would not substitute its judgment unless the university "had acted fraudulently, in bad faith, abused its discretion, or infringed on constitutional rights." *See* id at 242.

McConnell is based on case-specific facts that are readily distinguishable. That case involved an associate professor of mathematics at Howard University. During one of his classes one of his female students called him a "condescending, patronizing racist." The professor demanded her apology, and she refused. The professor then taught the remainder of the class without incident. After class, the professor asked her to remain so that he could speak with her. She refused. The professor tried to meet with her again before the next class session, and she again refused to speak with him. The professor then raised the subject during class, and the student refused to apologize or explain her actions. The professor asked her to leave the classroom, and, when she refused to do so, he called security. She was taken to the Office of the Dean for Special Student Services. The dean requested an apology from the student, and she again refused to do so. The dean advised her that her conduct was unacceptable and that any further activity of this kind would result in disciplinary action.

At the next meeting of the class, the professor renewed his request that she either apologize or leave the room. The student refused to do either. The professor then dismissed the entire class. The next day, the professor sent a letter to the dean requesting that disciplinary action be taken against the student, and that she be removed from his class pending satisfactory resolution of the situation. The professor told the dean that he would not return to the classroom until the "right atmosphere" was reestablished by having the student either apologize or remove herself from the class. Instead of taking steps to support the professor, the dean directed him to resume teaching.

On the next day of class, the dean accompanied the professor into the classroom. The professor renewed his request for an apology, and the student refused. The professor then gave the following statement to the class:

> It will be clear to most of you that a proper academic atmosphere conducive to teaching and learning is not possible in the presence of a person who persists in her right to slander the teacher. I have requested the administration of this University to restore conditions to this classroom in which you and I can resume our proper work. I remain hopeful that they will soon do this. We shall resume as soon as they do.

He then left the classroom, and the dean proceeded to teach the class. That same day, the dean sent the professor a letter indicating that slander was not an offense under the university's code of conduct, and that no further action would be taken with regard to the student.

The university subsequently instituted formal charges seeking termination of the professor's appointment. A Grievance Committee, composed of five tenured faculty members, was convened to conduct a hearing and make findings and recommendations. After conducting a two-day hearing, the committee found that the professor did not neglect his professional responsibilities and that termination was not warranted. The Grievance Committee noted that the incident must be placed "within a broader context of professorial authority inherent in the teacher-student relationship," and that "[a] teacher has the right to expect the University to protect the professional authority in teacher-student relationships." In addition to exonerating the professor's actions, the Grievance Committee pointed to the failure of the university to take adequate steps to support the professor in the "aftermath" of the incident.

While the Faculty Handbook required the dean to transmit the Grievance Committee's full report to the Board of Trustees, there was evidence in the record to support the conclusion that only a two-page summary and a supplemental report had been provided. Despite the findings of the Grievance Committee, the Board of Trustees voted to terminate the professor's appointment.

On appeal, the court held that the breach of contract claim could go forward based on numerous reasons, including classroom discipline, who's fault caused the disruption and cancellation of the class, the university's role to protect the teacher, who had the authority to restore order in the class, and whether the university breached an obligation it owed to him in the way it handled the incident. Unlike in this case, the professor in *McDonnell* was clearly not given a fair hearing by the perfunctory procedure used and the overruling of the Grievance Committee's recommendation based on a two-page summary. The Court finds that *McDonnell* is limited to the particular facts cited and not the general proposition that a court can never give deference to a university's disciplinary decisions.

Roberts v. Columbia Coll. Chicago, 821 F.3d 855 (7th Cir. 2016) is also inopposite. There, Columbia College Chicago ("Columbia") terminated a professor after it discovered that he had plagiarized several chapters in a textbook that he wrote. The court cited *McConnell* to support the conclusion that the university's internal review procedures did not prevent the professor from seeking judicial review. The applicable provision stated that terminated tenured professors wishing to seek review of the university's decision "may do so solely in accordance with the following provisions of this Section IX.D.2.b., allowing for a review by the [ERC]." According to the court, this provision merely clarified the internal review procedures for professors seeking to challenge the termination decision *within Columbia itself.* The court then addressed the professor's allegations that the university breached its contract. Notably, the court actually gave deference to the university by limiting its review to an evaluation of whether the university acted in good faith and whether it reasonably exercised its discretion. For these reasons McAdams' reliance on *Roberts* is also misplaced.

Courts in other jurisdictions have given deference to a university's decision to terminate or discipline a tenured professor. For example, in *Gertler v. Goodgold*, 107 A.D.2d 481, 487 N.Y.S.2d 565, *aff'd*, 66 N.Y.2d 946, 489 N.E.2d 748 (1985), the court stated that "since the academic and administrative decisions of educational institutions involve the exercise of

subjective professional judgment, public policy compels a restraint which removes such determinations from judicial scrutiny." *Id.* at 485. The court added that "[t]his public policy is grounded in the view that in matters wholly internal these institutions are peculiarly capable of making the decisions which are appropriate and necessary to their continued existence." *Id.* The court stated that while judicial review is available, a reviewing court is limited to an inquiry as to whether the educational institution abided by its own rules, acted in good faith, or acted arbitrarily. *Id.* at 486.

Similarly, in *Collins v. Univ. of Notre Dame du Lac*, 2012 WL 1877682 (N.D. Ind. May 21, 2012), a tenured professor at Notre Dame sued the university after the university dismissed him. The professor argued that the university breached his contract by not following the proper procedures and by dismissing him without proper cause. On summary judgment, the court noted that "[i]n reviewing the universities' actions regarding tenured professors, the courts are reluctant to second-guess the administrative decisions." *Id.* at *4. Accordingly, the court stated that it would refrain from addressing the substantive violations of the contract unless the university "clearly violated its dismissal procedure." *Id.*

This Court finds that deference in this case is warranted for a number of reasons. Most importantly, Dr. McAdams expressly agreed as a condition of his employment to abide by the disciplinary procedure set forth in the Faculty Statutes, incorporated by reference into his contract. The parties' contract incorporates a specialized standard for cause that focuses on issues of professional duties and fitness as a university professor. The Faculty Statutes afforded Dr. McAdams with a detailed, quasi-judicial process which gave him an adequate opportunity to meaningfully voice his concerns. As will be explained, Marquette complied with the procedural requirements set forth by the Faculty Statutes. Under these circumstances, public policy compels a constraint on the judiciary with respect to Marquette's academic decision-making and governance. Professionalism and fitness in the context of a university professor are difficult if not impossible issues for a jury to assess, which is likely why the model standards from the AAUP assign that judgment to a committee of professional peers with oversight by the executive officer or governing board. For these reasons, deference is appropriate.

In light of the deferential review of Marquette's disciplinary decision-making, questions remain as to the appropriate level of deference that must be afforded, and whether deference

should also be given to President Lovell's additional demands. With respect to the level of deference, both parties rely on the sliding scales of deference afforded to administrative agencies, which are contingent upon the level of the agencies' experience, technical competence and specialized knowledge. In *M.M. Schranz Roofing, Inc. v. First Choice Temp.*, 2012 WI App 9, 338 Wis. 2d 420, the court of appeals explained the various levels of deference as follows:

> When we afford "great weight" deference to the agency's interpretation, we will sustain a reasonable agency conclusion even if an alternative conclusion is more reasonable. We give "great weight" deference to the agency's interpretation when all of the following conditions are met: (1) the agency was charged by the legislature with the duty of administering the statute, (2) the interpretation of the agency is one of long-standing, (3) the agency employed its expertise or specialized knowledge in forming the interpretation, and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute.
>
> In affording "due weight" deference to the agency's interpretation, we will not overturn a reasonable agency decision that comports with the purpose of the statute unless we determine that there is a more reasonable interpretation available. We afford "due weight" deference to the agency's determination when it has some experience in an area, but has not developed the expertise that necessarily places it in a better position than a court to make judgments regarding the interpretation of the statute.
>
> When we review an agency decision "de novo," we give no deference to the agency's interpretation. De novo review is appropriate if any of the following is true: (1) the issue before the agency is clearly one of first impression, (2) a legal question is presented and there is no evidence of any special agency expertise or experience, or (3) the agency's position on an issue has been so inconsistent that it provides no real guidance.

Id., ¶ 7. Here, we do not have an "agency" determination to start with but a contracted and agreed upon FHC decision and recommendation and President Lovell's additional requirements.

Dr. McAdams argues that de novo review is appropriate because: (1) the FHC had never met before to consider a contested dismissal and the issues presented in McAdams' case were necessarily issues of first impression; (2) McAdams' case presented complex legal issues regarding contract interpretation for which the FHC had no particular expertise; and (3) if the FHC's position has not been "so inconsistent that it provides no real guidance," that is only

because the FHC had never opined on the issues.[2] The Court is not persuaded by this argument. De novo review amounts to no deference and would render the Faculty Statutes and the hearing as required by the Faculty Statutes null and void. This the Court does not accept, and the Court holds that Marquette is entitled to at least some degree of deference.

Marquette argues that it is entitled to "great weight" deference because: (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.

As to Marquette's claim of "great weight" deference, the Court is not convinced that "great weight" deference is appropriate. Marquette is a private university and has not been charged by the legislature with the duty of administering its internal grievance process. In addition, Marquette has not produced any documentation to support the conclusion that it has a long-standing interpretation of discretionary cause under Section 306.03. Thus, great weight deference is not appropriate. However, not granting any deference, as Dr. McAdams argues, would render the Faculty Statutes null and void and would render the FHC decision and recommendation useless in articulating what the professional obligations of a professor are.

The Court finds that the applicable standard to apply is more akin to "due weight deference," in which the Court will not overturn a reasonable decision that comports with the purpose of the contract. Accordingly, this Court will not disturb Marquette's decision unless (1) Marquette failed to follow the procedures contractually agreed upon in the Faculty Statutes or (2) Dr. McAdams can demonstrate fraud, bad faith, abuse of discretion, or infringement of Constitutional rights. *See Yackshaw*, 89 Ohio App. 3d 237, 242, 624 N.E.2d 225.

Also, the decision by Marquette and Dr. McAdams pursuant to the contract to have their dispute considered by a nonjudicial panel is similar to agreeing to arbitrate. As noted in Marquette's brief, "[t]he rule is well settled that courts will not substitute their judgment for the

[2] McAdams noted that only once before in Marquette's 135-year history has a faculty member been terminated for cause. McAdams Br. at 13. The faculty member who received a notice of termination for cause in the 1990s did not request a hearing under the Faculty Statutes and did not otherwise contest the termination. *Id.* (citing Ex. T33).

arbitrator's because the parties contracted for a nonjudicial factfinding and decision." *See* Marquette Br. at 14 (citing *Madison v. Madison Prof'l Police Officers Ass'n*, 144 Wis. 2d 576, 585, 425 N.W.2d 8 (1988)). Overturning an arbitration decision requires "perverse misconstruction or positive misconduct," "manifest disregard of the law, or if the award itself is illegal or violates strong public policy." *Id.* (quoting *Milwaukee Bd. Of School Dirs. v. Milwaukee Teachers' Educ. Ass'n*, 93 Wis. 2d 415, 422, 287 N.W.2d 131 (1980)).

Therefore, the standard the Court will use is identical to that applied by the *Yackshaw* court, that is, barring action that was fraudulent, taken in bad faith, an abuse of discretion, or infringing on constitutional rights; it is not the Court's place to substitute its judgment for that reached by Marquette. *Id.* at 228. Since the parties' contract defined the procedures to be used, the Court will consider whether there is substantial evidence to support the suspension and effective termination. Review will be limited to the record assembled by the FHC, and due weight will be given to their findings.

II. The Court will also give due weight deference to the letter from President Lovell which required, as a condition of reinstatement, that Dr. McAdams apologize and acknowledge that his conduct was reckless.

An issue related to whether to give deference to the FHC Report is the issue of whether the Court must also defer to President Lovell's March 24, 2016 decision to demand, as a condition of reinstatement, that Dr. McAdams provide a written statement expressing his "deep regret" and admitting that his blog post was "reckless and incompatible with the mission and values of Marquette University," which Dr. McAdams refused to do. He characterized the letter as requiring him to engage in "compelled speech." McAdams' fourth cause of action for breach of contract alleges, "Marquette lacks the necessary cause to terminate Professor McAdams." Dr. McAdams characterized the letter from President Lovell as an attempt at coercion and stated that "Marquette's termination of Professor McAdams violates [his] contract and his right to academic freedom." Complaint at ¶¶ 64-73. This case does not involve a president's bad faith decision to ridicule or embarrass a professor in a public forum. To the contrary, Dr. McAdams' written statement was to be shared confidentially with Ms. Abbate for the purpose of assuring that something similar would not happen again in the future.

Moreover, the FHC expressly noted in its report that Dr. McAdams was unwilling to take responsibility for his actions, and that he never expressed regret for his actions. The FHC stated:

> The record before us clearly demonstrates that Dr. McAdams does not view himself as bound by the fundamental norms of the university, or of the academic profession, or indeed by any consistently applicable body of norms. He has instead assembled his own moral code cobbled together from various sources, to be applied as he sees fit.

FHC Report at 103-104. Dr. McAdams' peers perceived that he did not view himself as bound by norms of the university, which confirms that President Lovell's condition of reinstatement was consistent with the recommendation of the FHC. It would not have been prudent for Marquette to have reinstated Dr. McAdams as a tenured professor while he continued to show no signs of regret or willingness to be more responsible with regard to his blog, especially concerning the identification of graduate students.

Moreover, Dr. McAdams' own expert witness – Dr. Donald Downs – testified that it would make no sense to invite Dr. McAdams back without getting a commitment from him to change. He further testified that in such a case he would advise the university to ask for an assurance. *See* Marquette Br. at 33 (citing Downs Depo. 106:10-16, 106:23-107:11). Ultimately, although the FHC recommended only suspension and not termination, Dr. McAdams did in fact have an opportunity to return to teaching at Marquette University had he chosen to comply with the condition required by President Lovell. It was his own refusal to do so that resulted in his continued suspension.

Last, according to McAdams, if the FHC wanted President Lovell to impose any additional requirements, it would have included them in its report. The Court will defer to President Lovell's decision because the ultimate authority to make the final disciplinary decision rests with the university president. Section 307.07 states, "If the FHC concludes that an academic penalty less than dismissal is warranted by the evidence, its findings of fact and conclusions will set forth a recommendation to that effect together with supporting reasons" and "The FHC will issue its findings of fact and conclusions, together with any supporting reasons, to the President of Marquette University . . ." *Id.* at ¶¶ 18-19. This section makes it clear that the role of the FHC is to make a *recommendation* to the president, who in turn has the authority

to make the final decision. President Lovell sought to enforce, not breach, Dr. McAdams' contractual obligations by implementing the recommendation of the FHC. For these reasons, the Court finds that the requests made by President Lovell were consistent with the FHC Report and will therefore defer to the requirements of his letter.

III. Dr. McAdams was afforded the process that he was due in accordance with his contract because Marquette complied with the procedures set forth in Section 307.07 of the Faculty Statutes.

The Court finds that the FHC substantially complied with the procedures as outlined in the Faculty Statutes. In Dr. McAdams' fifth cause of action for breach of contract, he alleges that Marquette violated his due process rights under the contract. Complaint at ¶¶ 74-92. The FHC was comprised of seven tenured faculty members elected by the faculty as a whole pursuant to Section 307.07(6), and they conducted a hearing for four days. Multiple witnesses were called and subject to examination, five called by the University, two called by Dr. McAdams, and one called by the FHC itself. *See* FHC Report at 10. Both the University and Dr. McAdams were represented by counsel, and a member from the AAUP was present as an observer. The FHC received sixty exhibits containing 734 pages of material and two recordings, made over 300 findings of fact using the "clear and convincing" burden of proof, and a court reporter compiled 866 pages of testimony. *Id.* Subsequent to the hearing, the FHC met to deliberate seven times and ultimately issued a 123-page report containing its recommendation, in which it held unanimously that the evidence showed clearly and convincingly that Dr. McAdams "failed to meet the standard of professional excellence that generally characterizes University faculties." *Id.* at 100. The FHC recommended a one to two semester suspension, and noted that the University had not presented sufficient evidence demonstrating cause to warrant dismissal. *Id.*

Concerning alleged procedural defects at the FHC hearing, Dr. McAdams points to Sections 307.07(7) and (11). Section 307.07(7) discusses removal of a FHC member for bias, and Section 307.07(11) discusses allowing the petitioner to obtain necessary witnesses and documentation. Although Dr. McAdams asserts 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," there is no evidence to support these claims.

See McAdams Resp. Br. at 3. The Court does not find these arguments to be persuasive and finds that there was substantial procedural compliance by the University such that Dr. McAdams was afforded the process that he was due pursuant to the parties' contract.

a. FHC Decision to Allow Dr. Lynn Turner to Serve on the FHC

First, Dr. McAdams argues that there was a biased faculty member serving on the FHC, Dr. Lynn Turner of the Department of Communication Studies, who refused to recuse herself. Turner signed an open letter published in the Marquette Tribune that was critical of Dr. McAdams and supportive of Ms. Abbate. *See* McAdams Br. at 35. On August 24, 2015, counsel for Dr. McAdams requested the recusal of both Dr. Lynn Turner and Dr. John Pauly. Pauly was the Provost at the time of a 2011 incident involving Dr. McAdams, and on September 3, 2015, he recused himself from all further proceedings. However, the FHC unanimously rejected the motion to recuse Turner. Its reasons were explained in a letter to the parties dated September 16, 2015. *See* FHC Report at 9. The letter stated the following reasons for allowing Turner to continue to serve on the FHC:

> First and foremost, Dr. Turner does not meet the standard for recusal. Although counsel for Dr. McAdams cites the potential for "the appearance of bias," drawing an analogy to judicial recusals, that is neither the correct standard not the proper analogy. FS § 307.07 ¶ [7] provides that members shall remove themselves, or be removed, only for "bias or interest," either in their own discretion or in the discretion of the committee. Indeed, "bias or interest" is the only ground on which the committee is permitted to remove one of its own members; the mere "appearance" will not suffice.
>
> . . .
>
> Nor does it matter that Dr. Turner has publicly stated an opinion, and other committee members have not, or at least not in ways that were recorded and have come to light. Since the standard is actual "bias or interest," and not the mere public appearance of bias or interest, any "commitment to a particular view of the matter . . . taken before the opportunity for investigation," even an internal one, would require recusal under counsel's interpretation of the standard. That is thoroughly unworkable. . . .

FHC Report at 143, App. D (September 16, 2015 letter from FHC to parties). (Internal citations omitted.) As noted in the letter, Section 307.07(7) explicitly states that "[r]emoval of a member for bias or interest is at the discretion of the FHC." For these reasons, the Court finds that the

FHC carefully considered the issue of allowing Dr. Turner to serve on the FHC. The FHC did not abuse its discretion, and this Court will defer to their conclusion that there was no procedural violation.

b. Opportunity to Obtain Prehearing Documentation and Evidence

Second, regarding Section 307.07(11), Dr. McAdams argues that he was not afforded an opportunity "to obtain necessary witnesses and documentation or other evidence" or "to examine the evidence submitted to the FHC by the University Administration." *See* § 307.07(11). Section 307.07(11) states:

> [T]he subject faculty member will be afforded an opportunity to obtain necessary witnesses and documentation or other evidence and is entitled to examine the evidence submitted to the FHC by the University Administration. The Administration also will cooperate with the FHC in securing witnesses from the University and making available documentary or other evidence. Likewise, the Administration will be entitled to examine documentary or other evidence submitted to the FHC by the subject faculty member.

Id. Dr. McAdams contends that Marquette refused to make "documentary or other evidence" available to him. *See* McAdams Br. at 31. He states that "Marquette deliberately abused the FHC process to give itself strategic and tactical advantages at the hearing by withholding documentary evidence and access to witnesses." *Id.* He also states, "Only after McAdams filed suit and Marquette was forced to produce relevant documents has McAdams discovered that Marquette had and failed to disclose documents that would have been essential to the preparation of his case before the FHC." *Id.* at 32. Among the evidence that was not provided by Marquette, Dr. McAdams specifically references documents showing that Ms. Abbate encouraged some of the publicity, that she threatened Marquette in order to be paid "reparations," and that she had applied to the University of Colorado the year before and was denied admission. *See id.* He also states that Marquette refused to give the FHC all of the relevant emails that Ms. Abbate had received. She received a total of 135 emails and letters commenting on the situation. "Of the 135, 49 were supportive of her, 85 criticized her, and one was neutral." *Id.* Of the 85 that criticized her, in McAdams' opinion, "only 18 were distasteful." *Id.* However, the Faculty Statutes do not set forth a right of pre-hearing discovery akin to that provided in civil litigation. *See* FHC Report at 18. Further, the Court finds that the substance of the evidence that was not

provided, such as the issue of who actually caused the nationwide publicity, is not material and not dispositive of the case.

Dr. McAdams also argues that Marquette failed to make witnesses against him available, including Ms. Abbate. *Id.* at 33. He claims that he was denied the right to cross examine witnesses because Marquette submitted statements and other documents authored by individuals that it did not also call as witnesses. *Id.* However, the Faculty Statutes specifically provide, "The FHC will not be bound by legal rules of evidence and may admit any evidence that is deemed probative of the issues involved in the proceedings." *See* Section 307.07 ¶ 17. It follows from that statement in the contract that hearsay is admissible. Also, Dr. McAdams received all of the documents submitted to the FHC ahead of time and was free to call additional witnesses if he wanted to follow up on those statements. *See* Marquette Resp. Br. at 27.

Next, Dr. McAdams claims he was not allowed to depose the various witnesses before the FHC hearing. *See* McAdams Br. at 33. The Court finds this argument to be unpersuasive since he has only taken one deposition, that of Dr. Lowell Barrington, despite having the opportunity to depose others. *See* Marquette Resp. Br. at 25-26 (citing Weber August 4, 2015 Letter at 3 (Trigg Aff. 3 Ex. 9)); *See also* McAdams Br. at 27-28. Counsel for Marquette and Dr. McAdams had arranged and scheduled the depositions of Drs. South, Holz, Snow and Callahan, President Lovell and Ms. Abbate, but counsel for McAdams cancelled them all. *See id.* Ms. Abbate was not willing to make herself available to Dr. McAdams' counsel for an interview. The FHC concluded, "[t]here is no obligation that each side turn over all material relevant to any party's claim or defense in preparation for the hearing, or to 'make available' witnesses for some sort of pre-hearing deposition that is nowhere mentioned in the statutes." FHC Report at 148 (citing FS § 307.07(11)). The Court agrees that nowhere in Section 307.07(11) does the contract state that the faculty member will have the right to interview any witnesses prior to the hearing.

Subsequent to the FHC issuing its recommendation, Dr. McAdams raised procedural concerns with the AAUP, which responded that he had been afforded what the AAUP considers to be academic due process. *See* Marquette Resp. Br. at 27 (citing Trigg Ex. 24). Ultimately, the Court finds that the FHC did not violate any procedures as set forth in Marquette and FHC followed the procedures set forth in the Faculty Statutes, the Court finds that the FHC

recommendation and subsequent letter from President Lovell do not demonstrate fraud, bad faith, or an abuse of discretion.

The FHC concluded, and the Court agrees, that the Faculty Statutes do not set forth a right of pre-hearing discovery akin to that provided in civil litigation. *See* FHC Report at 18. Dr. McAdams was provided with all necessary witnesses and other evidence that was required by his contract, and his requests for discovery were outside of the scope of the Faculty Statutes. Therefore, the Court grants summary judgment in favor of Marquette on the fifth cause of action.

IV. Dr. McAdams does not have an actionable claim for breach of contract based on the initial suspension because there are no recoverable damages.

Dr. McAdams argues that if this Court grants deference to the FHC, it must also give deference to the FHC's conclusion that Marquette abused its discretion when it initially suspended Dr. McAdams with pay. The Court agrees with that statement and will defer to the entire FHC report. Dr. McAdams' first cause of action for breach of contract alleges that his "initial [] suspension and banning from campus from December 16, 2014 through March 31, 2016" were unlawful. Complaint at ¶¶ 23-45. For the reasons stated below, the Court finds that Marquette failed to follow the proper procedures when it initially suspended Dr. McAdams with pay and banned him from campus, but the Court nevertheless grants summary judgment in favor of Marquette on this cause of action because there are no recoverable damages with regard to the initial breach.

Section 307.03 sets forth the notice requirements for cases of non-renewal, suspension, or termination. Pursuant to the contractually agreed upon Faculty Statutes, notice must include:

1. The statute allegedly violated; the date of the alleged violation; the location of the alleged violation; a sufficiently detailed description of the facts constituting the violation including the names of the witnesses against the faculty member.
2. The nature of the University's contemplated action, with a specification of the date or dates upon which such action is to become effective with respect to faculty status, duties, salary, and benefit entitlements, respectively.
3. Such notice shall be personally delivered . . .

Id. The initial suspension letter from Dean Holz, dated December 16, 2014, did not comply with these notice requirements. It informed Dr. McAdams that he would be "relieved of all teaching duties and removed from all other faculty activities, including but not limited to advising, committee work, faculty meetings and any other activity which would necessitate your interaction with students, faculty and other Marquette staff." *See Aff. of Clyde A. Taylor*, Ex. T23. The letter went on to state, "You are to remain off campus during this time, and should you need to come to campus, you are to contact me in writing beforehand to explain the purpose of your visit, obtain my consent and make appropriate arrangements for that visit." *Id.* Attached to the letter were copies of the Marquette harassment policy, the University guiding values, the University mission statement, and sections from the Faculty Handbook, but Dean Holz did not include any of the notice requirements detailed in Section 307.03. Therefore, it is evident that the initial suspension was an abuse of discretion by Marquette University.

However, for a several reasons, the Court finds that the damages for the initial breach are *de minimis*. *De minimis* is defined as "so insignificant that a court may overlook it in deciding an issue or case." Black's Law Dictionary (10th ed. 2014). First, Dr. McAdams received pay and benefits during the initial suspension, which continued until the FHC decision was implemented by President Lovell on March 24, 2016. Second, the suspension was over winter break. Fall semester classes were over by December 16, 2014, so Dr. McAdams had no teaching duties at that time. Third, Marquette corrected its procedural error almost immediately with its letter dated January 30, 2015. Regarding the initial banishment from campus, Marquette permitted Dr. McAdams to return to campus to gather his materials and offered him an alternate office during the ban, an offer which Dr. McAdams refused. FHC Report at 64. Dr. McAdams was allowed back on campus beginning February 13, 2015. Fourth, Dr. McAdams cannot recover for emotional distress on a breach of contract claim. Compensatory damages for breach of employment contract are limited in Wisconsin to lost wages and expenses incurred in obtaining new employment; damages for emotional distress, humiliation and loss of reputation are not recoverable. *See Bourque v. Wausau Hosp. Ctr.*, 145 Wis. 2d 589, 597, 427 N.W.2d 433, 436 (Ct. App. 1988) (citing *Mursch v. Van Dorn Co.*, 627 F. Supp. 1310, 1316–17 (W.D. Wis. 1986); *see also Christensen v. Sullivan*, 2009 WI 87, ¶ 86, 320 Wis. 2d 76, 121, 768 N.W.2d 798, 820.

Dr. McAdams himself posted on his blog the day after getting the letter from Dean Holz that the suspension was "kind of a joke." *See* MU Warrior Blog Post, December 17, 2014; *See also* Trigg Ex. 19; Tr. Vol. III 34:2-7. During the initial suspension, Dr. McAdams finished a book that he had been working on. *See* Marquette Br. at 31 (citing Dr. McAdams Depo. 42:18-43:12; 168:1-9). Wisconsin Statute section 802.08(3) states, "When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." The only damages alleged by Dr. McAdams in regard to the initial breach are emotional distress, loss of reputation, and loss of present and future income. Not only has Dr. McAdams failed to present any facts showing he was emotionally distressed or suffered from a loss of reputation, but, as provided above, those damages are not recoverable in a breach of contract action. In addition, Dr. McAdams has not provided any facts supporting his allegation of loss of future income, and his original suspension was with pay so he suffered no losses at the time. For these reasons, the initial breach will be given no more effect than what it was given by the FHC, which nevertheless recommended a one or two semester suspension. Marquette's breach in procedure with regard to the initial suspension cannot support a cause of action for breach of contract. Damages "are an essential element of a contract action," and the lack of damages to Dr. McAdams requires dismissal of this claim. *See Black v. St. Bernadette Congregation of Appleton*, 121 Wis. 2d 560, 566, 360 N.W.2d 550 (Ct. App. 1984).

With his January 30, 2015, letter to Dr. McAdams, Dean Holz promptly corrected his procedural mistake on behalf of Marquette and properly followed the notice requirements of Section 307.03. This fifteen-page letter with attached exhibits identified Section 306.03 as being allegedly violated on November 9, 2014, the date of the internet blog post, and the letter included a detailed description of the facts constituting the violation including the name of Cheryl Abbate and her contact information. *See Aff. of Clyde A. Taylor*, Ex. T24. The January 30, 2015 letter also includes the nature of the University's contemplated action, specifically, "revocation of the tenure previously granted to Dr. John McAdams and dismissal from the faculty" to be commenced as of the date of the letter. *Id.* Since Marquette corrected its procedural error almost immediately and followed the requirements of Section 307.03, the Court finds no actionable

procedural defect with regard to the initial suspension. Therefore, the Court grants summary judgment in favor of Marquette University on the first cause of action.

V. Academic Freedom and Freedom of Speech/Expression

Next, the Court will address whether Dr. McAdams' rights to academic freedom or freedom of speech or expression have been violated. Dr. McAdams' alleges as his fourth cause of action for breach of contract that "Marquette lacks the necessary cause to terminate Professor McAdams and Marquette's attempt to coerce Professor McAdams and Marquette's Termination of Professor McAdams violate Professor McAdams' contract and his right to academic freedom." Complaint at ¶¶ 64-73.

a. Academic Freedom

Turning first to the right to academic freedom, the Faculty Handbook proposes safeguards to that freedom. Relevant to this case is the following safeguard:

> The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When [he] speaks or writes as a citizen, [he] should be free from institutional censorship or discipline.

Marquette University Faculty Handbook, *Rights and Responsibilities: Academic Freedom*, 45. In addition, the FHC noted that academic freedom is most essential when the ideas being promulgated reflect unpopular opinions, stating:

> Discipline may seem obvious only if one concludes that academic freedom does not apply when someone's views are distasteful or out of the mainstream. But freedom to express one's views, even critical views, is a foundational principle of modern universities, and it is *most needed* when a faculty member's views are out of the mainstream…"

(Emphasis in original.) *See* FHC Report at 6. The Faculty Handbook defines three varieties of academic freedom: (1) Full freedom in research and in publication of the results; (2) Freedom in the classroom in discussing their subject; and (3) Freedom to make extramural statements as a citizen. *Id.* Freedom of research is nearly complete; freedom to teach is "limited by the need to remain germane to curricular requirements"; and extramural statements, to which Dr. McAdams' blog post qualifies, are subject to certain conditions and are the most limited category of

academic freedoms. *See* FHC Report at 110-111. The limitation on the freedom to speak and write as a citizen is evident in this clause from the Faculty Handbook:

> When [he] speaks or writes as a citizen, [he] should be free from institutional censorship or discipline, but [his] special position in the civil community imposes special obligations. As a [man] of learning and an educational officer, [he] should remember that the public may judge [his] profession and institution by [his] utterances. Hence, [he] should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that [he] is not an institutional spokesperson.

Faculty Handbook, 45. As the FHC emphasized in its report, the right to academic freedom does not come without correlative responsibilities and obligations. The rights of faculty members "must be balanced against their responsibilities to their students, their colleagues, their universities, and their communities." FHC Report at 110. Under the AAUP's definition of academic freedom for extramural utterances, which Marquette incorporated into its Faculty Handbook, the protection is expressly balanced by other professional duties. FHC Report at 110-111. Faculty members must take into account the obligations imposed by their position to the subject, students, profession, and institution, be clear that they are not speaking for the institution, and promote conditions of free inquiry and public understanding of academic freedom. FHC Report at 114-16 (citing the AAUP *1940 Statement of Principles on Academic Freedom and Tenure* and AAUP "Statement on Professional Ethics" in *Policy Documents and Reports*, 11th ed., 15n6).

Academic freedom allows both faculty members and students to engage in intellectual debate without fear of censorship or retaliation and it establishes a faculty member's right to remain true to his or her pedagogical philosophy and intellectual commitments. Academic freedom also gives both students and faculty the right to express their views without fear of sanction, unless the manner of expression substantially impairs the rights of others. On the other hand, academic freedom *does not* mean that a faculty member can harass, threaten, intimidate, ridicule, or impose his or her views on students. Neither does academic freedom protect faculty members from disciplinary action or sanctions for professional misconduct, when there has been due process.

As Marquette noted in its brief, "extramural utterances in violation of these obligations can constitute discretionary cause when, as here, they clearly demonstrate the faculty member's unfitness for their position considering their entire record as a teacher and scholar." Marquette Br. at 27 (citing FHC Report at 116). The FHC further explained that in the course of reaching the determination that Dr. McAdams violated his fundamental responsibilities to Marquette, to the scholarly profession, and to colleagues, "the Committee considered the balance **between rights and responsibilities** inherent in academic freedom, and nevertheless concluded that McAdams's conduct rose to the level of clearly and substantially failing to meet the standard of professional excellence which generally characterizes University faculties." (Emphasis in original.) FHC Report at 116. Dr. McAdams even conceded in his testimony that "there are some limits that really are professional obligations." Marquette Reply Br. at 1 (citing FOF 115.5; Tr. Vol. IV at 46:16-48:22). In short, academic freedom gives a professor, such as Dr. McAdams, the right to express his views in speeches, writings and on the internet, so long as he does not infringe on the rights of others.

Here, Dr. McAdams conceded that he had a professional obligation not to name Ms. Abbate if she had been a graduate student in his department. As both Marquette and the FHC noted, Dr. McAdams "drew the line" at the boundaries of his department. His tenured peers, however, disagreed. They found his professional duties extended to Ms. Abbate, who was in the philosophy department (*i.e.*, as opposed to the political science department) . *Id.* (citing FHC Report at 104-105). This Court agrees with the FHC. Dr. McAdams' distinction between blogging about students in his own department, as opposed to blogging about students in other departments, makes no sense since they all are graduate students that are entitled to the same protection against harassment and criticism. As Dr. McAdams own expert, Dr. Peter Wood, stated, "all members of the university" have a responsibility to graduate students "whether they are in that person's department or not." *See* Fourth Aff. of Steven T. Trigg, Ex. 6 at 96:17-97.20.

As Marquette noted in its brief, "the only justification Dr. McAdams offered the FHC for identifying Ms. Abbate was the alleged norms of journalism as he understands them from reading news outlets." Marquette Br. at 24. However, Dr. McAdams is not employed by Marquette as a journalist. *See* FHC Report at 94. During the summary judgment hearing, counsel for Dr. McAdams again referenced journalistic norms and credibility as reasons for

using Ms. Abbate's name in the blog post. Tr. at 49:9-20 (February 2, 2017). Counsel for McAdams also mentioned there is no explicit prohibition on identifying a student by name and therefore Dr. McAdams did not have notice that he was doing anything wrong by using her name. *See id.* at 30:21-25 – 31:1-6. Although Dr. McAdams was criticizing Ms. Abbate in his blog on an issue of great institutional and public importance, he should have known that he had a duty to her as a graduate student. This is because the harm to Ms. Abbate was foreseeable, easily avoidable, and not justified. It is undisputed he could have posted the article without her name or contact information and made the same point.

Although Dr. McAdams may not have been given explicit notice that the specific actions he took in publishing his blog post about a graduate student could lead to termination proceedings, "no faculty member should need a specific warning not to recklessly take actions that indirectly cause substantial harm to others." *See* FHC Report at 100. As stated above, Dr. McAdams' attempt to distinguish between graduate students of different departments makes no sense, and his argument thus fails to the extent it is based on a lack of notice regarding his responsibilities to graduate students in other departments. Moreover, Dr. McAdams was clearly on notice that mentioning a student's name on his blog was problematic. This was clearly pointed out in pages 35 through 40 of the FHC report, where the FHC identified numerous prior conflicts with colleagues and students. For example, in February of 2011, Dr. McAdams emailed a student listed as the contact on the Facebook page for the production of "The Vagina Monologues" and then called her at her permanent residence, disturbing her parents. He then wrote a blog post mentioning the student by name, and continued to blog about her by name when she complained about his behavior. FHC Report at 36. At a meeting in April of 2011, Dr. McAdams was made aware that his mention of an undergraduate student's name on his blog was a cause for concern. He promised to be more careful in mentioning student names. FHC Report at 38. He also recognized that mentioning students by name on his blog could lead to unwanted "blowback for students that aren't out front with highly visible political activity." FHC Report at 39. Here, Ms. Abbate was a graduate student who was not involved in highly political activities, as she was merely talking to a student after class about the confines of what would be proper to discuss in class.

As set forth in the FHC Report:

> Among the obligations that professors have are obligations to other members of the academic community. Although professors are not properly bound by ordinary social norms of civility, they are not free from all restraint with respect to their colleagues. One of the more important obligations that professors have is to take care not to cause harm, directly or indirectly, to members of the university community. Professors, of course, cannot be held responsible for all harm that results from their actions; some will be unforeseeable, some will be unavoidable, and some will be outweighed by other considerations. For example, a low grade justifiably awarded to a student for their performance in class may be harmful to that student's career, but that harm is overridden by other, stronger obligations of fair assessment. However, where substantial harm is foreseeable, easily avoidable, and not justifiable, it violates a professor's obligations to fellow members of the Marquette community to proceed anyway, heedless of the consequences.

FHC Report at 75-76. The Court finds that the conclusion by the FHC that Dr. McAdams' right to academic freedom was not violated is reasonable in light of the evidence. Even putting deference aside and deciding this issue independently, as a matter of law, the actions of Dr. McAdams in posting Ms. Abbate's name and contact information are clearly not an exercise of his "right of academic freedom," but an act he should have foreseen would create harm and anguish to a graduate student.

b. Freedom of Expression

Next, regarding the alleged violation of Constitutional rights, namely freedom of speech and expression, the Court first turns to Section 307.07(2), which states:

> A faculty member who has been awarded tenure at Marquette University may only be dismissed upon a showing of absolute or discretionary cause . . . *Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed them by the United States Constitution.* . . .

(Emphasis added.) § 307.07 ¶ 2. Similar to the Court's analysis of academic freedom, the Court emphasizes that rights have corresponding duties and that freedom of speech and expression is not absolute. Considering that speech is subject to an employment contract, to interpret the above provision to import "the full panoply of First Amendment rights" would lead to absurd consequences, as the FHC noted. *See* FHC Report at 117. In addition, Dr. McAdams

contractually agreed to be subject to peer disciplinary review as provided in the Faculty Statutes. § 307.07. Also, there is nothing in the record that suggests Marquette was using the proceedings against Dr. McAdams for pretextual reasons. *See* FHC Report at 120. The FHC decision was not about the content of the blog, so the Court is not concerned that its decision was content-restrictive. McAdams had actually been involved in at least six controversies involving his blog or internet or campus speech in the past. In each of those instances, the record shows that Marquette more or less went out of its way to avoid formally reprimanding him, so he had at least some form of notice that his actions in the future could potentially lead to sanctions. *See id.* Furthermore, the Court agrees that nothing in the proceedings suggested a lack of genuine concern about his blog post and its effect on Ms. Abbate. *See id.*

There has been some dispute in the parties' briefing for this motion regarding whether Ms. Abbate should be treated as an instructor or as a student. The record is clear she was both. Therefore, the fact that she was nevertheless a graduate student cannot be ignored. In his blog post, Dr. McAdams made the deliberate decision to include Ms. Abbate's name and a link to her contact information and personal website. The FHC found that this caused substantial harm to Ms. Abbate, which was foreseeable, easily avoidable, and not justified. Dr. McAdams' actions are in direct conflict with Marquette's foundational value as a Jesuit University of *cura personalis* – care for the whole person. Marquette incorporated this tenet into its Mission Statement providing that the Marquette community takes seriously its "responsibility… to offer personal attention and care to each member of the Marquette community." *See* FHC Report at 76-77. The Marquette community includes "*faculty*, staff, *students*, trustees, alumni and friends…" (Emphasis added) *Id.* Dr. McAdams' blog post violated his duty owed to Ms. Abbate in her role as *both* a student and as a member of the faculty.

The Court finds that there is substantial evidence in the record to support the finding of the FHC. McAdams notes "that the blog post did not urge unlawful action and was not phrased in obscene or even intemperate language." McAdams Br. at 20. However, the use of a graduate student's name and contact information in Dr. McAdams' blog post, which resulted in substantial harm to that student, albeit indirectly, was where Dr. McAdams crossed the line. The clickable link to her personal website made her easier to attack. The personal attacks on Ms. Abbate caused her to switch schools, abandon her dissertation and repeat many graduate courses.

The abusive, vicious, and hateful communications sent to Ms. Abbate caused her to fear for her safety, suffer negative mental and physical effects, forced her to shut down her email account, hide her contact information, and sabotaged her reputation on public ranking boards. In addition, as a result her PhD was set back by years. *See* Marquette Br. at 22 (citing FHC Report at 88-89). As noted by Marquette, Dr. McAdams' primary purpose was not to defend an undergraduate student, but instead was to embarrass a graduate student. *See id.* at 20. Also, the evidence has shown that he has continued to blog about Ms. Abbate, exacerbating the harm. *See* Marquette Br. at 21 (citing FHC Report at 86).

Our Supreme Court has stated with regard the right of freedom of speech that "by its very nature every right is related to a duty to exercise it so as to cause a minimum of harm to another" and "that one who seeks freedom may not wholly ignore his neighbor's right to it." *Vogt, Inc. v. International Broth. Of Teamsters, Local 695, A.F.L.*, 270 Wis. 315, 320-21, 74 N.W.2d 749 (1956). Therefore, although the harm to Ms. Abbate was caused indirectly, there is no dispute that had Dr. McAdams not used her name and contact information in his blog post, the harm would not have occurred. Again, this demonstrates that there was substantial evidence to support the FHC conclusion, which this Court fully agrees with, that "the University has demonstrated by clear and convincing evidence that Dr. Dr. McAdams clearly and substantially failed to meet the standard of professional excellence that generally characterizes University faculties," and "that violation will probably substantially impair his value." *See* FHC Report at 33. Therefore, the Court grants summary judgment in favor of Marquette on the fourth cause of action.

VI. Marquette did not breach McAdams' contract by choosing not to renew and reappoint him.

Dr. McAdams' third cause of action is that Marquette breached his contract by failing to renew and reappoint him. Complaint at ¶¶ 56-63. He alleges that as a tenured faculty member he was entitled to annual reappointment at a rank and compensation not less favorable than those which he previously enjoyed and that Marquette breached this provision in 2015 and 2016 by failing to reappoint him. *See id.*; *See also* Marquette Br. at 31-32.

The Court adopts the previous discussion and findings as to this cause of action and also concludes that the actions by Marquette complied with the Faculty Statutes to which the parties

had contractually bound themselves. Since there was ultimately no breach of contract, Dr. McAdams cannot claim any damages. Marquette complied with the parties' contract, and Marquette's decision not to renew and reappoint Dr. McAdams was reasonable in light of the evidence presented to the FHC. Therefore, the Court grants summary judgment in favor of Marquette on the third cause of action.

The Court is also granting summary judgment in favor of Marquette on the second cause of action, that "Marquette lacks the necessary cause to suspend Professor McAdams without pay from April 1, 2016 through January 17, 2017." Complaint at ¶¶ 46-55. The Court has already found that the FHC demonstrated by "clear and convincing evidence" that Marquette possessed discretionary cause to discipline Dr. McAdams. Since the claims on the second and third causes of action are similar and, more importantly, since there was ultimately no breach of contract, the Court will also grant summary judgment on the second cause of action in favor of Marquette.

VII. Marquette did not breach the implied covenant of good faith and fair dealing because the acts complained of are specifically authorized in the contract.

Dr. McAdams' sixth cause of action is that Marquette breached the implied covenant of good faith and fair dealing. Complaint at ¶¶ 93-107. Dr. McAdams cites a number of instances to support his claim that Marquette breached its implied covenant of good faith and fair dealing. First, he claims that Marquette failed to conduct a neutral and unbiased initial investigation by appointing Associate Dean South to gather information for Dean Holz, despite prior issues he had with Dr. McAdams and his relationship with Ms. Abbate as her mentor. *See* McAdams Br. at 37. Second, McAdams also makes claims regarding his access to campus and the suspension of his duties. Third, McAdams argues that Marquette failed to turn over information relevant to its decision prior to the FHC hearing. *Id.* at 38. Last, McAdams claims that the FHC decision to allow Turner to serve on the FHC was a violation of this implied duty. *Id.* at 37.

There is a duty of good faith and fair dealing in every contract. *M&I Marshall & Ilsley Bank v. Schlueter*, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521 (Ct. App. 2002); *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 793, 541 N.W.2d 203, 211 (Ct. App. 1995) (approving jury instruction that "[e]very contract implies good faith and fair dealing

between the parties"). A breach of contract may also occur when a party's actions are inconsistent with the principles of good faith and fair dealing. *See Daughtry v. MPC Systems, Inc.*, 2004 WI App 70, ¶55, 272 Wis. 2d 260, 679 N.W.2d 808 (Ct. App. 2004). However, where a party to a contract complains of acts of the other party that are specifically authorized in their agreement, there can be no breach of good faith and fair dealing. *M&I Marshall & Ilsley Bank v. Schlueter*, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521.

In the present case, the acts mentioned above that Dr. McAdams complains of were all authorized in the contract, so his claim for breach of good faith and fair dealing fails. McAdams first points to the biased investigation as a breach of the duty of good faith and fair dealing. *See* McAdams Br. at 37. He states that allowing Dr. South to serve as the lead investigator was a breach of the duty because he was a friend and mentor to Ms. Abbate and had already made up his mind. *See id.* However, the Faculty Statutes are completely silent about what any investigation must entail. Also, the FHC noted that Dean Holz's decision to conduct an investigation merely initiated the process that followed, and Dean Holz supervised the investigation throughout the process. *See* Marquette Resp. Br. at 34 (citing FOF 141; FHC Tr. Vol. III 80:6-15). More importantly, the FHC was clear that it "in no way relied on that investigation in reaching its conclusions." FHC Report at 19.

Second, Dr. McAdams points to the public statements by Marquette "that falsely implied that Professor McAdams was a physical danger to students necessitating his banishment from campus." McAdams Br. at 37. However, Marquette never actually said that Dr. McAdams was a physical danger to students. Marquette sent a document to the Milwaukee Journal Sentinel which made it clear that Marquette was responding to threats to Ms. Abbate, which occurred because of the blog post, "putting [her] in harms way." *See* Marquette Resp. Br. at 5 (citing Trigg Aff. 3 Ex. 5). Regardless, the decision by the FHC had nothing to do with statements made by Marquette to the Milwaukee Journal Sentinel. Those statements regarded the initial suspension, and the Court has already determined that there are no recoverable damages for the initial breach. Moreover, as stated previously at Section IV, Dr. McAdams was allowed back on campus as of February 13, 2015, but he made the decision to work from home instead.

Third, Dr. McAdams argues that Marquette's refusal to produce key documents was a breach of good faith and fair dealing. Again, the Court has already concluded that the FHC process did not afford the parties discovery akin to that of civil litigation and that Marquette did not breach the contract by not providing all of the evidence and documents requested by Dr. McAdams. The Court rejects the statement by McAdams that this action by Marquette "demonstrates Marquette never intended to give Dr. McAdams a fair hearing." *Id.* at 38. There is simply no evidence to support such a claim. As discussed in Section III, the FHC found and the Court agrees that Marquette gave Dr. McAdams all the required exhibits and information that were called for under the parties' contract.

Last, Dr. McAdams references allowing Dr. Turner to serve on the FHC, but the Court has already found that did not create a breach of contract or procedural defect because allowing members to serve on the FHC is explicitly within the discretion of the FHC. This is an example that the acts being complained of are specifically authorized in the parties' agreement, so there can be no breach of good faith and fair dealing. *M&I Marshall & Ilsley Bank v. Schlueter*, 2002 WI App 313, ¶15, 258 Wis. 2d 865, 655 N.W.2d 521. Therefore, the Court grants summary judgment in favor of Marquette on the sixth cause of action.

CONCLUSION

Based on the evidence discussed herein, giving due deference to the FHC report, the Court finds that the FHC's conclusions and recommendations were reasonable and supported by substantial evidence adduced at the hearing. This Court also finds that the letter from President Lovell setting forth conditions for Dr. McAdams's reinstatement was consistent with the FHC recommendation and is also supported by substantial evidence.

For the above reasons, Plaintiff John Dr. McAdams' motions for summary judgment are DENIED and Defendant Marquette University's motions for summary judgment are GRANTED, dismissing all six of Dr. McAdams' claims.

Dated this 4th day of May, 2017, in Milwaukee, Wisconsin.

BY THE COURT:

The Honorable David A. Hansher
Milwaukee County Circuit Court, Branch 42

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

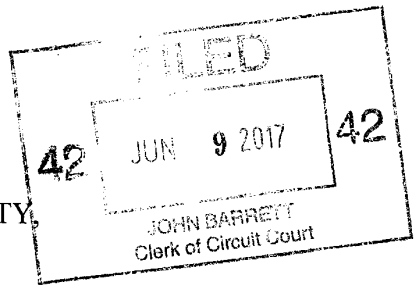
JOHN McADAMS,

Plaintiff,

v.

MARQUETTE UNIVERSITY,

Defendant.



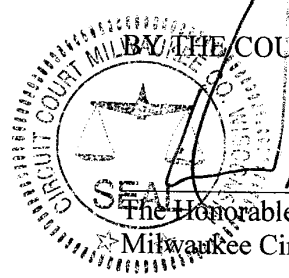
Case No. 16-CV-3396

FINAL JUDGMENT

Pursuant to this Court's Decision and Order for Summary Judgment dated May 4, 2017, judgment is hereby entered in favor of the Defendant Marquette University whose address is 1250 W. Wisconsin Avenue, Milwaukee, WI 53233, and against the Plaintiff John McAdams whose address is 3559 N. Murray, Shorewood, WI 53211, dismissing the complaint with prejudice. This judgment is intended to be final for purposes of appeal.

Dated: June 9, 2017

BY THE COURT:



The Honorable David A. Hansher
Milwaukee Circuit Court Judge, Branch 42

CHAPTER 304 - APPOINTMENT, REAPPOINTMENT, PROMOTION AND TENURE

Section 304.01
Appointment, reappointment, and promotion of the full-time Regular Faculty are made by, or under the duly-delegated authority of the President, and shall take effect at the commencement of the first semester of an academic year unless otherwise indicated.

Appointments shall terminate at the close of that academic year, unless a contract of reappointment has been sooner concluded, in which event the prior appointment continues, in recess, until the reappointment becomes effective.

These provisions apply irrespective of the schedule upon which compensation is payable. When any such appointment, reappointment, or promotion becomes effective in the course of the first semester of an academic year, it shall be deemed, for purposes of computing length of service, to operate retroactively to the commencement of that semester, and to constitute a full year's appointment; otherwise, such initial period of service shall be disregarded for such purposes.

Section 304.02
Tenure is a faculty status that fosters an environment of free inquiry without regard for the need to be considered for reappointment. Tenure is reserved for Regular Faculty who are recognized by the University as having the capacity to make unique, significant, and long-term future contributions to the educational mission of the University. Tenure is not a reward for services performed; it is a contract and property right granted in accordance with this Chapter**

A full-time member of the Regular Faculty, except one appointed without the terminal degree in the pertinent academic discipline, not previously tenured shall be granted tenure with tender and acceptance of the eighth consecutive annual reappointment to the full-time Regular Faculty, following the member's original appointment. Tenure is effective upon commencement of services under such reappointment.

For those faculty who lack the terminal degree pertinent to their academic discipline at the commencement of their full-time Regular Faculty service, tenure is granted with tender and acceptance of the ninth consecutive annual reappointment to the full-time Regular Faculty, following the original appointment.

A person is considered to possess the terminal degree either when the degree has been formally conferred (*i.e.*, the date on the diploma) or when, prior to formal conferral, the Provost at Marquette has been officially notified by the degree-granting institution that all the requirements for the degree have been fulfilled.

Section 304.03***
A faculty member originally appointed at the rank of associate professor or professor, unless sooner tenured, shall be granted tenure with tender and acceptance of the sixth consecutive annual reappointment at such rank to the full-time Regular Faculty, following the original appointment. Tenure is effective upon commencement of services under such reappointment.

** Adopted August 16, 1993. – Effective August 16, 1994. – Amended AS February 25, 1998, and by UAS **August 25, 2008, **September 15, 2008 and ***September 21, 2015.

faculty was on a leave of absence approved by the University, at Marquette by a weighting factor for that rank (*i.e.*, 1 for years as Instructor, 2 for years as Assistant Professor, 3 for years as Associate Professor, and 4 for years as Professor).

4. Appropriate concern for the University's Affirmative Action policy shall be observed. Reasonable measures shall be made to see that the proportion of women and minorities in any given department or college is not lessened because of terminations required by financial exigency.

Section 305.03 - Procedure for Termination

1. Those designated for termination are to be given appropriate notice as indicated in Section 304.07 or an appropriate financial settlement.
2. For a period of three years following termination, any tenured faculty member who is terminated because of financial exigency will be given the first opportunity for the position from which he or she was separated in the event that that position is reinstated. To the extent to which it is reasonable to do so, this same consideration will be extended to non-tenured faculty who have been separated from the faculty because of financial exigency.
3. When tenure claims seem to conflict with Affirmative Action principles, the decisions shall be subject to review and recommendations by the Director of Affirmative Action.
4. Persons adversely affected by the decisions for termination depending upon tenure status may appeal to the Faculty Hearing Committee a subcommittee of the Faculty Council, which will function in their regular manner with reference to such appeals.
5. Efforts shall be made to find alternative positions at the University for those faculty, especially if they are tenured, designated for termination. As far as is reasonably possible, the costs of retraining for these positions are to be borne by the University.

CHAPTER 306 - CAUSE FOR NON-RENEWAL, SUSPENSION, TERMINATION

Section 306.01

The cognizant appointing authority of the University may initiate and execute procedures by which a faculty member's reappointment may be denied or revoked, or any current appointment may be suspended or terminated, for cause as defined therein. Cause may be either absolute or discretionary.

Section 306.02

Absolute cause shall include:

1. Resignation: this shall constitute absolute cause only from and after its effective date; or
2. An intentional failure or refusal to perform a substantial part of any assigned duties; or
3. Death or permanent and total disability.

Section 306.03

Discretionary cause shall include those circumstances, exclusive of absolute cause, which arise from a faculty member's conduct and which clearly and substantially fail to meet the standard of personal and professional excellence which generally characterizes University faculties, but only if through this conduct a faculty member's value will probably be substantially impaired. Examples of conduct that substantially impair the value or utility of a faculty member are: serious instances of illegal, immoral, dishonorable, irresponsible, or incompetent conduct. In no case, however, shall discretionary cause be interpreted so as to impair the full and free enjoyment of legitimate personal or academic freedoms of thought, doctrine, discourse, association, advocacy, or action.

alleged cause or contemplated action, rights of reconsideration or review shall be limited accordingly.

Section 307.05

Whenever a timely objection shall be filed, the cognizant appointing authority shall accord the faculty member fair opportunity to be specifically advised, in one or more conferences, of the alleged cause for the University's contemplated action; and to negotiate such reconsideration or amendment of the contemplated action as may be agreed upon. Either party may enlist the aid and counsel of other persons who may participate in the process of such conference and negotiation, provided that every such person is fully identified to the other in advance with respect to his/her capacity and scope of authority, and provided that every such conference shall be deemed a conference for purposes of settlement. All statements made in such conferences are privileged and may not be used for any purpose in any other proceeding.

Section 307.06

Either party may elect to refer any or all issues to the FC for the purpose of having one or more disinterested mediators appointed, who, promptly upon appointment, shall confer with the parties, investigate the matters at issue, and recommend to the respective parties an appropriate resolution of the issues between them.

Section 307.07*

Faculty Hearing Committee Procedures: Contested Appointment Non-renewal, Suspension or Termination of Tenured Faculty Member

1. In accord with Part II-D-3 of the Marquette University Faculty Handbook, the Faculty Hearing Committee (hereinafter the FHC) serves as the advisory body in cases of contested appointment non-renewal, and suspension or termination (hereinafter dismissal) of a tenured faculty member for absolute or discretionary cause.
2. A faculty member who has been awarded tenure at Marquette University may only be dismissed upon a showing of absolute or discretionary cause, as these terms are defined by the Handbook for Full-Time Faculty (hereinafter University Statutes), Section 306.02 (absolute cause) or 306.03 (discretionary cause). Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed them by the United States Constitution.

   The contested dismissal of a faculty member with tenure shall be preceded by: (a) notice of grounds as provided in Section 307.03 (to which the faculty member has filed a written objection as provided by Section 307.04); (b) discussions between the said faculty member and appropriate administrative officers from the University and the College or Department in order to explore settlement as provided in Section 307.05; and (c) elective mediation under the auspices of the FC as provided in Section 307.06.
3. When such a dispute has been pending and unresolved for at least 120 days, the University Administration shall issue a "Notice of Pending Dispute" to the subject faculty member and to the Chair of the FHC. Such notice will inform the FHC in writing of the failure to resolve the matter and of the Administration's intent to proceed with dismissal. At that time, the Administration will also transmit to the chair of the FHC a copy of the notice of grounds filed under Section 307.03, as well as any and all evidence upon which the Administration has made its decision.
4. Within 90 days of receipt of any Notice of Pending Dispute, the FHC will schedule a hearing to determine the existence of cause and to make findings of fact and conclusions.
5. Following receipt of the Notice of Pending Dispute, the faculty member may waive the right to

*Adopted by Faculty Hearing Committee on 10/19/80. – Revised 10/00. – Approved by Academic Senate on November 15, 2000

proceed before the FHC by submitting an explicit written statement to the Chair of the FHC and to the Administration, indicating his or her intent to waive any right to appear and present evidence. If the faculty member waives the right to appear but denies the charges or asserts that the charges do not support a finding of adequate cause, the FHC will evaluate all available evidence and rest its findings of fact and conclusions upon the evidence of record.

6. As constituted, the FHC shall be composed of seven tenured faculty members elected by the faculty as a whole under the supervision of the Committee on Committees and Elections. Members shall be elected for three year terms. The FHC shall elect a chair and a vice chair. Five (5) members of the Committee shall constitute a quorum, and the action of a majority of the members present at any session duly convened shall be the action of the Committee, except when the FHC is convened to conduct a hearing on the contested dismissal of a tenured faculty member for absolute or discretionary cause, as noted in paragraph 8 below.
7. In the case of a hearing on the contested dismissal of a tenured faculty member, a quorum of five (5) members of the FHC shall constitute a hearing, but any findings of fact and conclusions must be rendered by all members of the FHC. On final disposition of any pending case, no abstentions will be allowed. Any member of the FHC who is absent during a scheduled session or hearing must study the evidence before participating further in FHC deliberations. Members of the FHC who deem themselves disqualified for bias or interest will remove themselves from the case. In addition, either party may petition the FHC for recusal of a particular committee member on grounds of bias or interest. Removal of a member for bias or interest is at the discretion of the FHC. Replacement member(s) to the FHC will be selected from the duly constituted list of alternates maintained by the FC.
8. Notice of a hearing before the FHC must be personally served upon the faculty member and the University Administration at least twenty (20) days prior to any hearing by the FHC on pending charges. Within ten (10) days after such notice, each party may submit additional statements summarizing the issues and the evidence theretofore produced. As noted in paragraph (6), if the faculty member denies the charges or asserts that the charges do not support a finding of absolute or discretionary cause, the FHC will evaluate all available evidence and rest its findings and conclusion upon the evidence of record.
9. All hearings conducted by the FHC shall be closed, unless both parties agree otherwise. Adjournments may also be granted at the request of any party, within the discretion of the FHC.
10. The subject faculty member will be afforded an opportunity to obtain necessary witnesses and documentation or other evidence and is entitled to examine the evidence submitted to the FHC by the University Administration. The Administration also will cooperate with the FHC in securing witnesses from the University and making available documentary or other evidence. Likewise, the Administration will be entitled to examine documentary or other evidence submitted to the FHC by the subject faculty member.
11. During these proceedings, the subject faculty member may be represented by legal counsel or may appear with an academic advisor. Likewise, the Administration may appear or be represented by its legal counsel. Furthermore, at the request of the Administration, the faculty member, or the FHC, a representation of the AAUP will be permitted to attend the proceedings as an observer.
12. A tape recording will be made of any hearing before the FHC. If requested, a verbatim transcript of the tape recording will be made available to the FHC and to the faculty member without cost to the faculty member.
13. The burden of proof that absolute or discretionary cause exists to dismiss a tenured faculty member rests with the University. It will be satisfied only by clear and convincing evidence in the record considered as a whole. The University Administration must appear at the hearing by a designated representative, and it must make the initial showing.
14. At the hearing, the subject faculty member and the University Administration will have the right to confront and ask questions of all witnesses. Any member of the FHC also shall have the right to question a witness. Where the witnesses cannot or will not appear, but the FHC determines

that the interests of justice require their statements, the FHC will identify such witnesses and provide interrogatories to such witnesses. Thereafter, the FHC will provide copies of the interrogatories, together with any response, to the University Administration and the subject faculty member.

15. The faculty member or the Administration also shall be permitted to introduce testimony of qualified professionals at the hearing, including those from outside the University. Any compensation due such professionals remains the obligation of the party who calls that witness.
16. If either the University Administration or the subject faculty member willfully fails or refuses to give relevant evidence that is exclusively within its control, the issue shall be resolved against the party who so fails or refuses to give evidence. With respect to student academic or disciplinary records, however, it is understood that the University Administration must observe the Federal Educational Rights and Privacy Act (FERPA), and does so without prejudice to its case.
17. The FHC will not be bound by legal rules of evidence and may admit any evidence that is deemed probative of the issues involved in the proceedings.
18. Following the hearing, the FHC will meet as a whole to discuss the evidence and will issue findings of fact and conclusions based upon all matters of record. In the event the findings of fact and conclusions are not unanimously supported by members of the FHC, the FHC shall articulate the dissenting views. If the FHC concludes that an academic penalty less than dismissal is warranted by the evidence, its findings of fact and conclusions will set forth a recommendation to that effect together with supporting reasons. In all events, the FHC's findings of fact and conclusions shall issue as soon as is reasonably possible, but not more than ninety (90) days following termination of the proceedings.
19. The FHC will issue its findings of fact and conclusions, together with any supporting reasons, to the President of Marquette University and, either personally or by certified mail, to the subject faculty member.

Section 307.08

So long as the periodic compensation and benefits provided by the faculty member's appointment are both continued, and during such further periods of negotiation, mediation, hearing, or review as the parties may mutually stipulate, both parties shall diligently continue in good faith to attempt a mutually-acceptable resolution of the issues between them by one or more of the procedures described in the three preceding sections, and neither shall, during such period, resort to or encourage litigation, demonstration, or tactics of duress, embarrassment, or censure against the other; provided that this paragraph shall not be construed so as to require the University to continue the faculty member's duty assignment during such period.

Section 307.09

To the extent that none of the foregoing procedures produces a resolution of the issues arising out of a timely objection to a faculty member's non-renewal, suspension, or termination, at or prior to the time specified in the preceding paragraph, the University shall, for a period of six months thereafter, or until the final determination of any judicial action which may be commenced within such period to test the validity of the non-renewal, suspension, or termination, hold itself ready to reinstate the faculty member, with unimpaired rank, tenure, compensation, and benefits, to the extent that the faculty member's entitlement thereto may be judicially adjudged or decreed, or conceded by the University in such interval. Whenever entitlement to retroactive compensation is so determined, such compensation shall be reduced by any amount otherwise earned by the faculty member in the same period.

7.08 - The Provost shall communicate the university's response to the reports of the FC and the Faculty Hearing Committee by written communication to the chair of the FC, to the chair of the committee, and to the grievant, within three weeks of receiving the report of the FC.

ARTICLE 8. CONFLICTS OF INTEREST

8.01 - A member of the FC or the Faculty Hearing Committee who was involved in the formal decision-making process that occasioned a grievance may not participate in the processing of the grievance under the Marquette University Faculty Grievance Procedure.

8.02 - A member of the FC or the Faculty Hearing Committee whose impartiality might be compromised by participating in the processing of the grievance ought to recuse himself or herself from consideration of the grievance.

ARTICLE 9. CONFIDENTIALITY

9.01 - Confidentiality is important to the success of any grievance procedure. Accordingly, it is expected that those who participate in the grievance process and thereby become privy to a grievant's allegations, the university's response, information obtained in the course of any investigation, the final reports of the committee and the FC, and the university's final report, should respect the confidentiality of matters disclosed to them.

9.02 - The confidentiality referred to in section 9.01 above is designed as a protection for the grievant. Thus, should the grievant choose to make public what would otherwise be deemed confidential, the university, the FC, or the committee may respond by disclosing related matters that ought, in fairness to the university, the FC, or the committee, be disclosed.

CHAPTER 307 - PROCEDURES FOR CAUSE*
Revised by UAS April 20, 2009

Section 307.01
Written and accepted resignations from the faculty shall be effective according to their terms, and shall not be subject to any rights of reconsideration or review at the instance of either party without the concurrence of the other. Unless expressly provided to the contrary, all right to rank, tenure, salary, and benefits shall terminate as of the effective date of the resignation.

Section 307.02
In all cases of non-renewal, suspension, or termination for absolute or discretionary cause (except resignation), a faculty member's entitlement to salary and fringe benefits shall continue, irrespective of any suspension from duties:

1. For a period of at least thirty days after the cause arises;
2. Where notice is required under Section 307.03, after service of such notice;
3. Where a formal hearing has been requested as provided in Section 307.07, until the University has made a final decision following the report of the hearing, whichever is longer;
4. In the cases provided in Section 306.02(2), such entitlement may be terminated as of the day following the commencement of such cause;
5. Salary entitlement shall, in cases of disability, be limited by the provisions of the University's disability program.

In the discretion of the cognizant appointing authority, the faculty member's duty assignment may be either continued to a time not beyond the time at which his/her salary and benefits terminate, or may be suspended or terminated earlier.

Section 307.03
In all cases of non-renewal, suspension, or termination for absolute or discretionary cause, except Section 307.02(1) and (3), death, and permanent, total disability, the appropriate appointing authority of the University shall notify the faculty member in writing of the University's action. The notice shall include:

1. The statute allegedly violated; the date of the alleged violation; the location of the alleged violation; a sufficiently detailed description of the facts constituting the violation including the names of the witnesses against the faculty member.
2. The nature of the University's contemplated action, with a specification of the date or dates upon which such action is to become effective with respect to faculty status, duties, salary, and benefit entitlements, respectively.
3. Such notice shall be personally delivered and service shall operate from date of such delivery; if in the exercise of reasonable diligence, it is not possible to personally serve the faculty member, it may be served by certified mail addressed to the faculty member's last known place of residence, and service shall operate from date of mailing.

Section 307.04
A faculty member shall, within ten days of the service of such notice, file with the appointing authority a written objection to all or part of the University's charges or its contemplated action unless an extension is granted for good cause. The failure to timely respond shall be deemed an acquiescence and acceptance of the action according to its terms. Neither such action nor its causal basis shall thereafter be subject to any rights of reconsideration or review at the instance of either party. Whenever such objection shall be expressly limited to one or more parts or aspects of the

MARQUETTE WARRIOR

WE ARE HERE TO PROVIDE AN INDEPENDENT, RATHER SKEPTICAL VIEW OF EVENTS AT MARQUETTE UNIVERSITY. COMMENTS ARE ENABLED ON MOST POSTS, BUT EXTENDED COMMENTS ARE WELCOME AND CAN BE E-MAILED TO JMCADAMS2@JUNO.COM. E-MAILED COMMENTS WILL BE TREATED LIKE LETTERS TO THE EDITOR. THIS SITE HAS NO OFFICIAL CONNECTION WITH MARQUETTE UNIVERSITY. INDEED, WHEN UNIVERSITY OFFICIALS FIND OUT ABOUT IT, THEY WILL DOUBTLESS WANT IT SHUT DOWN.

SUNDAY, NOVEMBER 09, 2014

Marquette Philosophy Instructor: "Gay Rights" Can't Be Discussed in Class Since Any Disagreement Would Offend Gay Students

A student we know was in a philosophy class ("Theory of Ethics"), and the instructor (one Cheryl Abbate) was attempting to apply a philosophical text to modern political controversies. So far so good.

She listed some issues on the board, and came to "gay rights." She then irily said that "everybody agrees on this, and there is no need to discuss it."

The student, a conservative who disagrees with some of the gay lobby's notions of "gay rights" (such as gay marriage) approached her after class and told her he thought the issue deserved to be discussed. Indeed, he told Abbate that if she dismisses an entire argument because of her personal views, that sets a terrible precedent for the class.

The student argued against gay marriage and gay adoption, and for a while, Abbate made some plausible arguments to the student — pointing out that single people can adopt a child, so why not a gay couple? She even asked the student for research showing that children of gay parents do worse than children of straight, married parents. The student said he would provide it.

So far, this is the sort of argument that ought to happen in academia.

ut then things deteriorated.

Certain Opinions Banned

ABOUT ME

JOHN MCADAMS
MILWAUKEE, WISCONSIN, UNITED STATES

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EXHIBIT
A1

MU-000073

Abbate explained that "some opinions are not appropriate, such as *racist opinions, sexist opinions*" and then went on to ask "do you know if anyone in your class is homosexual?" And further "don't you think it would be offensive to them" if some student raised his hand and challenged gay marriage? The point being, apparently that any gay classmates should not be subjected to hearing any disagreement with their presumed policy views.

Then things deteriorated further as the student said that it was his right as an American citizen to make arguments against gay marriage. Abbate replied that "you don't have a right in this class to make homophobic comments."

She further said she would "take offense" if the student said that women can't serve in particular roles. And she added that somebody who is homosexual would experience similar offense if somebody opposed gay marriage in class.

She went on "In this class, homophobic comments, racist comments, will not be tolerated." She then invited the student to drop the class.

Which the student is doing.

Shutting People Up

Abbate, of course, was just using a tactic typical among liberals now. Opinions with which they disagree are not merely wrong, and are not to be argued against on their merits, but are deemed "offensive" and need to be shut up.

As Charles Krauthammer explained:

> The proper word for that attitude is totalitarian. It declares certain controversies over and visits serious consequences — from social ostracism to vocational defenestration — upon those who refuse to be silenced.
>
> The newest closing of the leftist mind is on gay marriage. Just as the science of global warming is settled, so, it seems, are the moral and philosophical merits of gay marriage.
>
> To oppose it is nothing but bigotry, akin to racism. Opponents are to be similarly marginalized and shunned, destroyed personally and professionally.

Of course, only certain groups have the privilege of shutting up debate. Things thought to be "offensive" to gays, blacks, women and so on must

Sykes Writes — blog of conservative local talk show host with an interest in Marquette University.

Marquette Tribune — Marquette's own junior version of the mainstream media.

Marquette College Republicans — Pretty active of late.

Marquette College Democrats — Just what the name implies, and like the College Republicans, pretty active.

Dad29 — Marquette alum writing mostly on state politics issues.

Marquette University Law School Faculty Blog — Law professors write some of the best blogs in the country, so it's good to see Marquette Law faculty joining that movement.

Shark and Shepherd — Blog from a conservative Law School faculty member.

Mark F. Johnson — A Marquette theologian with an interest in politics.

The Dimming Torch — Liberal Marquette Philosophy professor on politics and other things.

Marquette Student Media — Journalism Faculty member and former print reporter writes about journalism.

Health Reform Explained — Marquette alum writes about the changes in the health care system.

Kennedy Assassination Home

be stifled. Further, it's not considered necessary to actually find out what the group really thinks. "Women" are supposed to feel warred upon when somebody opposes abortion, but in he real world men and women are equally likely to oppose abortion.

The same is true of Obama's contraception mandate.

But in the politically correct world of academia, one is supposed to assume that all victim groups think the same way as leftist professors.

The "Offended" Card

Groups not favored by leftist professors, of course, can be freely attacked, and their views (or supposed views) ridiculed. Christians and Muslims are not allowed to be "offended" by pro-gay comments.

(Muslims are a protected victim group in lots of other ways, but not this one.)

And it is a free fire zone where straight white males are concerned.

Student Seeks Redress

The student first complained to the office of the Dean of Arts & Sciences, and talked to an Associate Dean, one Suzanne Foster. Foster sent the student to the Chair of the Philosophy Department, saying that department chairs usually handle such cases. The chair, Nancy Show, pretty much blew off the issue.

Interestingly, both Snow and Foster have been involved in cases of politically correct attacks on free expression at Marquette.

Foster took offense when one of her colleagues referred to a dinner which happened to involve only female faculty as a "girls night out." He was reprimanded by then department chair James South for "sexism," but the reprimand was overturned by Marquette.

Snow, in a class on the "Philosophy of Crime and Punishment" tried to shut up a student who offered a response, from the perspective of police, to Snow's comments about supposed "racial profiling." The student said talk about racial profiling makes life hard for cops, since it may make minorities hostile and uncooperative.

Snow tried to silence him, claiming "this is a diverse class." This was an apparent reference to two black students in the class, who were, Snow assumed, likely offended on hearing that.

Page — one of this bloggers other obsessions.

Hot Christian Acappella Internet Radio — Yet another project from your humble blogger.

Student Blogs

Gay/Straight Alliance of Marquette — Student organization Marquette recognized claiming it was in no way in conflict with Marquette's Catholic mission

Wisconsin Blogs — A Selective List, All Highly Recommended

Media Trackers

Wagner on the Web

Jiblog

Boots & Sabers

MacIver Institute

FoxPolitics.net

An Ol' Broad's Ramblings

Freedom Eden

yoSAMite says

Wigderson Library & Pub

Christian Schneider

Milwaukee Federalists

The Provincial E-Mails

From Where I Sit

Real Debate Wisconsin

silent E speaks

Wisconsin Family Voice

Lance Burri

The majority of the class, contacted by The Marquette Warrior, felt the comments were reasonable and relevant, but Snow insisted that the student write an apology to the black students.

So how is a student to get vindication from University officials who hold the same intolerant views as Abbate?

Conclusion

Thus the student is dropping the class, and will have to take another Philosophy class in the future.

But this student is rather outspoken and assertive about his beliefs. That puts him among a small minority of Marquette students. How many students, especially in politically correct departments like Philosophy, simply stifle their disagreement, or worse yet get indoctrinated into the views of the instructor, since those are the only ideas allowed, and no alternative views are aired?

Like the rest of academia, Marquette is less and less a real university. And when gay marriage cannot be discussed, certainly not a Catholic university.

Labels: Cheryl Abbate, Gay Marriage, Intolerance, Leftist Intolerance, Leftist Professors, Liberal Intolerance, Marquette, Nancy Snow, Philosophy Department, Political Correctness, Suzanne Foster

POSTED BY JOHN MCADAMS AT 6:06 PM

36 COMMENTS:

Walter-marie Miller said...

Being forced to drop PHIL 104 in November is a huge burden on the student. That's a required class. It's a time penalty, it's a financial sanction. That she would make that remark about dropping the class is despicable. She should be fired.

9:55 AM

Kate Mulligan said...

Thanks for these posts. I went to Marquette as an undergrad and am so disappointed by the decline. A couple of years ago, I complained about the Gender and Sexual Resource Center, and a Jesuit, in response to my assertion that the center was propagating beliefs contrary to Catholic teaching, said that there were many truths. Not one truth, not

Modern Commentaries

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2012 WL 1877682
Only the Westlaw citation is currently available.
United States District Court,
N.D. Indiana,
Hammond Division.

Oliver COLLINS, Ph.D., Plaintiff,
v.
UNIVERSITY OF NOTRE
DAME DU LAC, Defendant.

No. 3:10–CV–281 JVB.
|
May 21, 2012.

Attorneys and Law Firms

John F. Ittenbach, Ittenbach Johnson Trettin & Koeller, Indianapolis, IN, for Plaintiff.

Claire Konopa Aigotti, Office of General Counsel, Notre Dame, IN, Lawrence C. Dinardo, Jones Day, Chicago, IL, Breanne E. Atzert, Jonathan B. Leiken, Jones Day, Cleveland, OH, for Defendant.

OPINION AND ORDER

JOSEPH S. VAN BOKKELEN, District Judge.

***1** Plaintiff Dr. Oliver Collins, a tenured professor at Notre Dame, sued the university after the university dismissed him. Plaintiff alleges that the university breached his contract by not following the proper procedure when it dismissed him and by not showing adequate cause to dismiss him. Notre Dame counters that Plaintiff breached the contract by misappropriating National Science Foundation ("NSF") funds and using those funds for his personal purposes, while telling university and NSF officials that he was using the funds for other purposes.

Both parties move for summary judgment. Plaintiff moves for summary judgment on the grounds that the university breached his contract. Notre Dame moves for summary judgment on the grounds that Plaintiff, not Notre Dame, breached the contract. After reviewing the material facts and the parties' arguments, the Court grants in part and denies in part both motions.

A. Standard of Review

A motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Rule 56(c) further requires the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A party seeking summary judgment bears the initial responsibility of informing a court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. If the moving party supports its motion for summary judgment with affidavits or other materials, it thereby shifts to the non-moving party the burden of showing that an issue of material fact exists. *Keri v. Bd. of Trust. of Purdue Univ.,* 458 F.3d 620, 628 (7th Cir.2006).

Rule 56(e) specifies that once a properly supported motion for summary judgment is made, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts to establish that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences and resolve all doubts in favor of that party. *Keri,* 458 F.3d at 628. A court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Anderson v. Liberty Lobby,* 477 U.S. 242, 249–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. Statement of Facts

***2** Neither party disputes the material facts. Instead, the crux of their dispute revolves around the interpretation

of the procedural protections provided in the Academic Articles.

(1) ***Plaintiff's Conduct***

Plaintiff was an engineering professor at Defendant Notre Dame du Lac University's Electrical Engineering Department. (DE 45 at 6.) During his tenure at Notre Dame, Plaintiff applied for and received eight or more NSF research grants, including a Major Research Instrumentation ("MRI") grant for acquisition of high speed mixed signal test equipment, and a grant for research entitled Intrinsically Digital Radio. (*Id.* at 11.)

In July 2009, the Chairman of the Electrical Engineering Department (Plaintiff's department) inspected whether some of Plaintiff's purchases were supported by NSF grant proposals or Notre Dame University matching funds. He found that, instead of purchasing the equipment listed in his grant application, Plaintiff used grant funds to purchase expensive camera equipment and Apple computers. (*Id.* at 13.) Plaintiff used the camera equipment to take thousands of personal photographs of a family residence in upstate New York. (*Id.* at 14.) He then used some of these pictures on a website advertising the residence as an inn and submitted other pictures to magazines for publication. (*Id.*) After investigating Plaintiff's purchases, university personnel found pornographic images on computers that he purchased with NSF grant money. (*Id.*) When the NSF and the university learned of Plaintiff's conduct, the NSF suspended all his NSF grants and launched a criminal investigation. (*Id.* at 5.) The university moved to dismiss Collins.

(2) ***The Procedure to Dismiss a Tenured Professor under the Academic Articles***

Section 8 of the Academic Articles governs dismissal of tenured professors. The section mandates that the university may only dismiss a tenured professor after showing severe cause. (DE 53–1 at 2.) Under § 8(b) severe cause is:

- Academic dishonesty or plagiarism;
- Misrepresentation of academic credentials;
- Professional incompetence;
- Continued neglect of academic duties, regulations, or responsibilities;
- Conviction of a felony;
- Serious and deliberate personal or professional misconduct ...;
- Continual serious disregard for the Catholic character of the University; or
- Causing notorious and public scandal.

Id.

Notre Dame's Provost must inform the professor "in writing[ ] of the charges, of the basis for the charges, and of the proposed sanction." (*Id.*) The accused professor can meet with the Provost to informally attempt to resolve the situation. (*Id.*) If the Provost and the professor cannot resolve the matter, the Provost must appoint "two elected members of the Academic Council to meet with the relevant University administrator and with the faculty member to attempt to resolve the matter." (*Id.*) One of the appointees must be a professor, not an administrator. (*Id.*)

***3** If the matter is still not resolved after the meetings, the professor may request a hearing. At this hearing, "the Provost makes known the charges, but not the name of the accused, to the Executive Committee of the Academic Council. The Executive Committee ... elects a Hearing Committee consisting of three elected, tenured members of the Academic Council to conduct a formal, closed-door hearing." (*Id.* at 3.) The Executive Committee also chooses an alternate "to take the place of any member elected to the Hearing Committee who must recuse himself or herself because of bias or interest, including participation in the informal resolution process set forth [in subsection c]." (*Id.*)

Once the Executive Committee elects the Hearing Committee, the accused professor has thirty days to prepare a defense. (*Id.*) The university carries the burden of proof at the hearing to prove by clear and convincing evidence that adequate cause exists for severe sanctions. (*Id.*) The accused professor "has the right to bring counsel, to confront the accusers and adverse witnesses for questioning, and to present witnesses. The University also has the right to counsel and the right to present witnesses." (*Id.*) After the hearing, the Hearing Committee

must "report[ ] its findings and recommendations in writing to the Provost and to the accused faculty member. The report must include factual findings as well as the Hearing Committee's conclusion regarding whether there is clear and convincing evidence of adequate cause for imposition of the severe sanction or dismissal." (*Id.*) The Provost decides the case on the basis of the Hearing Committee's recommendation. (*Id.*)

If the Provost decides to impose severe sanctions or dismiss the professor, the professor "has a right to appeal to the President within [ten] days." (*Id.* at 4.) The President decides the appeal with the advice of an Appeal Board. (*Id.*) The Academic Articles do not specifically mention a right to appeal the final decision to a court. However, all members of the Hearing Committee and Appeal Board must keep the matter confidential "except in the event that litigation requires disclosure." (*Id.*)

(3) ***Notre Dame's Actions after Learning of Plaintif's Conduct***

On September 21, 2009, Notre Dame's Provost sent a letter to Plaintiff notifying him of Notre Dame's formal charges. (DE 43 at 7 .) The Provost informed Plaintiff in writing that his actions were dishonest and constituted serious and deliberate personal and professional misconduct; he exhibited a serious disregard for the Catholic character of the university; and he has exposed the university to notorious and public scandal. (*Id.*) These are three of the grounds for dismissal contained in the Academic Articles.

The university based these charges on Plaintiff's conduct related to the procurement of NSF funds and use of equipment obtained with those funds:

1) using NSF funds to purchase equipment significantly different than the equipment specified in the grant documents;

***4** 2) failing to inform NSF of the nature of the equipment purchase;

3) submitting a final report under one grant in which he falsely indicated that the grant funds were used as indicated;

4) using equipment purchased with NSF funds for extensive personal use with negligible if any scientific use of the equipment;

5) taking and storing sexually explicit and pornographic images using university computing resources; and

6) failing to exercise care in maintaining university equipment, including university equipment purchased with government funds.

(*Id.*)

After providing Plaintiff with written notice, the Provost tried to resolve the matter through informal measures as required by the Academic Articles. (DE 43–1 ¶ 18.) When these efforts proved unsuccessful, he appointed two faculty members, including Fr. Coughlin, to the Academic Council to help resolve the situation, but this informal effort was also unsuccessful. (*Id.* ¶ 20–21.) At this point, the Provost appointed four faculty members to sit on a Hearing Committee. (*Id.* ¶ 23.) Three were members of the committee, while the fourth was an alternate. Fr. Coughlin, one of the three members of the Hearing Committee had already served on the Academic Council. (*Id.*)

During the hearing, the university carried the burden of proof to demonstrate the existence of "serious cause" as defined in the contract by clear and convincing evidence. The university focused on the six bases of its charges and did not specifically address how these bases met the definition of "serious cause." (DE 43 at 9.) The Hearing Committee voted to dismiss Plaintiff because of his actions. (*Id.*) After Plaintiff exhausted his internal appeals, Notre Dame dismissed him and he filed this suit alleging breach of contract, and now moves for summary judgment. Notre Dame also moves for summary judgment.

C. Argument

Plaintiff alleges that Notre Dame breached the tenure contract by not following the procedures set out in the Academic Articles and by dismissing him without proper cause. Notre Dame alleges that Plaintiff breached the contract by engaging in serious and deliberate personal and professional misconduct when he misappropriated over $220,000 in NSF grant money and university matching funds.

(1) ***Degree of Deference***

In reviewing the universities' actions regarding tenured professors, the courts are reluctant to second-guess the administrative decisions. *See Vanasco v. Nat'l–Louis University,* 137 F.3d 962, 968 (7th Cir.1998) ("[A court] must not second-guess the expert decisions of faculty committees in the absence of evidence that those decisions mask actual but unarticulated reasons for the University's actions."); *Yackshaw v. John Carroll Univ. Bd. of Trustees,* 89 Ohio App.3d 237, 624 N.E.2d 225, 228–29 (Ohio App. 8th Dist.1993) (affording the same deference to a university's findings of fact as the court applies in appeals of administrative decisions); *Murphy v. Duquesne Univ. of The Holy Ghost,* 565 Pa. 571, 777 A.2d 418, 427–28 (Pa.2001) (noting that there was nothing in the [tenure c]ontract to indicate that any of the judgments relating to a faculty member's continued place in the University, or lack thereof, would be open to a judge or jury to override"). [1] In fact, this Court may only address the substantive violations of the contract if it determines that the university clearly violated its dismissal procedure. *Cf. Murphy v. Duquesne Univ.,* 565 Pa. 571, 777 A.2d 418, 433 (Pa.2001) ("[W]hile [a professor] is free to assert in a court of law that the process of forfeiture that was afforded him did not comply with the contract terms, he is not free to demand that a jury reconsider and re-decide the merits of his termination."); *Baker v. Lafayette College,* 516 Pa. 291, 532 A.2d 399, 403 (Pa.1987) ("This court has no jurisdiction to review the factual determinations of a college's governing body unless it can be clearly demonstrated that the body violated its own procedures."). With this principle in mind, the Court turns to the parties' arguments.

(2) *Notre Dame Provided Suficient Notice of Plaintiff's Charges*

***5** Section 8(c) of the Academic Articles lists offenses that could lead to dismissal. Plaintiff says the university must specifically charge him with one or more offenses on the list in its written notice or waive the ability to bring those charges at the hearing. Notre Dame counters by saying that the plain language of the contract contains no such requirement and that the list only relates to a nonexclusive set of examples of prohibited conduct.

Under § 8(c), "[t]he University may impose severe sanctions or terminate the services of any member of the faculty for serious cause." Serious cause is any of the following:

- academic dishonesty or plagiarism; misrepresentation of academic credentials;
- professional incompetence;
- continued neglect of academic duties, regulations, or responsibilities;
- conviction of a felony; serious and deliberate personal or professional misconduct ...;
- continual serious disregard for the Catholic character of the University; or
- causing notorious and public scandal.

The Provost must "inform[ ] the accused, in writing, of the charges, of the basis of the charges, and of the proposed sanction." *Id.* The accused professor is then given at least thirty days to prepare a defense to the charges before appearing at the hearing.

The Academic Articles specifically limit the actions that can constitute "serious cause" and require the Provost to notify the accused in writing of the charges against him. Here, the Provost's written notice of the charges against Plaintiff listed three charges: "serious and deliberate misconduct of both a personal and professional nature," a "serious disregard for the Catholic character of the university," and "exposing the university to notorious and public scandal." The Provost also included in his letter the bases for those charges:

- using NSF funds to purchase equipment significantly different than the equipment specified in the grant documents;
- failing to inform NSF of the nature of the equipment purchase;
- submitting a final report under one grant in which he falsely indicated that the grant funds were used as indicated;
- using equipment purchased with NSF funds for extensive personal use with negligible if any scientific use of the equipment;
- taking and storing sexually explicit and pornographic images using university computing resources; and

- failing to exercise care in maintaining university equipment, including university equipment purchased with government funds.

At the hearing, Notre Dame presented evidence to prove Plaintiff misappropriated NSF funds but it did not specify which charges the evidence was meant to prove. Plaintiff alleges that this constitutes a breach of the contract because, according to Plaintiff, Notre Dame must specify which § 8(b) charge it is trying to prove when it presents evidence. Notre Dame is not required to do this under the plain language of the Academic Articles. Instead, Notre Dame must present evidence of the charges and the basis of the charges against the accused professor, which it did in the Provost's letter. Having done this, Notre Dame avoided any procedural violation of the notice requirement set out in the Academic Articles.

(3) ***Notre Dame Breached the Contract by Appointing Father Coughlin to Serve on the Hearing Committee***

***6** Finally, Plaintiff maintains that the Hearing Committee was not properly constituted because it included Fr. Coughlin. Before the hearing, Notre Dame's Provost appointed Fr. Coughlin to meet with Plaintiff and the relevant administrator to attempt to resolve the matter as required by § 8(c) of the Academic Articles. The Provost later appointed Fr. Coughlin to serve on the Hearing Committee.

Plaintiff argues that Fr. Coughlin's appointment to the Hearing Committee was improper because any faculty member who takes part in the informal resolution process must recuse himself from the Hearing Committee. He bases this argument on subsection (c)(3) which mandates that the Hearing Committee consist of an alternate "to take the place of any member elected to the Hearing Committee who must recuse himself or herself because of bias or interest, including participation in the informal resolution process set forth above."

Under the plain language of the contract, a Hearing Committee member must recuse himself if he takes part in informal dispute resolution procedures. This language applies to Fr. Coughlin, who did not recuse himself even though he participated in informal procedures at the Provost's request. The university violated its dismissal procedure by allowing Fr. Coughlin to serve on the Hearing Committee.

The Court concludes that Notre Dame breached its procedural obligations under the parties' contract by allowing Fr. Coughlin to serve on the Hearing Committee after he had already participated in the informal dispute resolution procedures.

D. Conclusion

The Court grants in part and denies in part Plaintiff's motion for summary judgment (DE 42). The Court also grants in part and denies in part Notre Dame's motion for summary judgment (DE 44).

The Court sets a status teleconference for May 30, 2012, at 11 am. The Court will initiate the call.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1877682

Footnotes

1 The parties primarily refer to law from other jurisdictions because the law in Indiana is scant.

1988 WL 97840
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.

NEW CASTLE COUNTY VOCATIONAL TECHNICAL EDUCATION ASSOCIATION and Richard Rosenthal, Plaintiffs,
v.
BOARD OF EDUCATION OF the NEW CASTLE COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, Defendant.

CIV. A. No. 9075.
|
Submitted: June 7, 1988.
|
Decided: Sept. 22, 1988.

Attorneys and Law Firms

Sheldon N. Sandler, and E. Scott Bradley, Young, Conaway, Stargatt & Taylor, Wilmington, for plaintiffs.

Jeffrey M. Weiner, Wilmington, for defendant.

MEMORANDUM OPINION

BERGER, Vice Chancellor.

***1** Plaintiffs, Richard Rosenthal ("Rosenthal") and the New Castle County Vocational Technical Education Association (the "Association"), brought this action against the Board of Education of the New Castle County Vocational Technical School District (the "Board") seeking specific performance of a provision in the parties' collective bargaining agreement (the "Bargaining Agreement") concerning the assignment of tenured employees. The Board moved to dismiss or for judgment on the pleadings and plaintiffs filed a cross-motion for summary judgment. This is the decision on the pending motions.

The relevant facts are undisputed. The Board oversees more than fifty vocational-technical and educational programs throughout New Castle County. These programs are offered at three major facilities-Delcastle Technical High School ("Delcastle"), Hodgson Technical School ("Hodgson") and Howard Career Center ("Howard"). In addition to regular "9-5" school programs, the school district provides special programs for adult education, school drop-outs and apprentice training as well as programs in state prisons and hospitals. The regular 9-5 programs are financed from state and local funds, whereas many of the other programs are funded in whole or in part by the federal government.

At all relevant times, Rosenthal was a tenured guidance counselor employed by the Board. During the 1982-83 school year he was employed in a state funded program at Howard. However, Rosenthal was not entirely satisfied with his position and, by letter dated May 16, 1983, requested a transfer to another counseling position, preferably at Hodgson or Delcastle. The Board granted Rosenthal's request, but transferred him to the Ferris/Woods Haven Program (the "Ferris Program"). Rosenthal's primary responsibility as a counselor in the Ferris Program was to prepare the incarcerated juveniles to enter vocational training upon their release.

The Ferris Program was financed by federal funds that were scheduled to terminate after three years. In anticipation that the funding would not continue beyond June, 1986, Rosenthal requested in May, 1986 that he be reassigned to a regular counseling position. In making that request, Rosenthal invoked his rights under § 6.18 of the Bargaining Agreement, which provides in relevant part:

All applicable provisions of this procedure shall be used in making assignments, reassignments and reduction in force determinations of Federally funded employees. Tenured State funded employees who elect to accept position in Federally funded programs shall retain and accrue seniority based upon their certification status. Such employees may exercise their seniority rights, to return to a State-funded program the succeeding school year if the funding for the federal program is reduced causing elimination of their position.

In August, 1986, Rosenthal was advised that the Ferris Program had been terminated for lack of funding. He was reassigned to the Delaware Correctional Center Pilot Project (the "Pilot Project"), which was partially federally funded.

***2** In response to this reassignment, Rosenthal filed a grievance alleging that, pursuant to § 6.18 of the Bargaining Agreement, he was entitled to be assigned to a State funded program. Following the procedure set forth in § 4 of the Bargaining Agreement, Rosenthal's grievance was considered by the Superintendent of the school district and, after an adverse decision by the Superintendent, the Association submitted the grievance to advisory arbitration. The arbitrator, Clyde W. Summers, issued a written decision on December 16, 1986 in which he concluded:

... Section 6.18 of the Collective Agreement must be interpreted to mean that when an employee who has been assigned to a federally funded program exercises his right to return to a State funded program the succeeding school year, he cannot be assigned to a program which is funded in whole or in part by the federal government. He is entitled to exercise his seniority rights within the programs funded entirely by state and local funds. The assignment of Mr. Rosenthal to the Delaware Correctional Center Pilot Project was a violation of the Section 6.18, and he is entitled to be reassigned.

Arbitration Decision, p. 7-8. The arbitration award at the end of the decision included the direction that Rosenthal "be reassigned to a position not funded in whole or in part with federal funds in line with his seniority." *Id.* at p. 8.

By letter dated January 6, 1987, the Board purported to accept the arbitrator's decision:

In accordance with the Arbitrator's decision dated December 17, 1986 we are accepting and complying with that decision by modifying your salary sources from state/federal to state/local, as most employees are paid. The effective date to be January 1, 1987.

Thus, rather than transfer Rosenthal from the Pilot Project to a different program supported entirely by state funds, the Board revised its bookkeeping so that all of Rosenthal's paychecks are drawn from state and local funds.

The Board advances three arguments in support of its motion to dismiss or for judgment on the pleadings. First, it contends that Rosenthal has no constitutionally protected property interest in teaching at a specific location. This argument requires no analysis inasmuch as Rosenthal is not claiming such a property interest. The complaint seeks specific enforcement of Rosenthal's contract rights-in this case his right under § 6.18 to be reassigned to a state funded program.

The Board next argues that Rosenthal is precluded from seeking judicial relief because, pursuant to the procedures set forth in the Bargaining Agreement, the Board's decision to accept or reject the arbitrator's recommendation constitutes the "final resolution" of the grievance. Bargaining Agreement, § 4.3.6.3. The Board relies upon *Pettinaro Const. Co. v. Harry C. Partridge, Jr. & Sons,* Del.Ch., 408 A.2d 957 (1979) for the proposition that an agreement to arbitrate divests the courts of jurisdiction over the controversy. However, this general legal principle includes as a premise that there is, in fact, an agreement to arbitrate. Such a contractual commitment ordinarily includes an agreement as to the subject matter to be arbitrated and an agreement to abide by the decision of the arbitrator. *See* 5 Am.Jur.2d *Arbitration and Award* § 12; *Manes v. Dallas Baptist College,* Ct.App.Tex., 638 S.W.2d 143 (1982); *McConnell v. Howard University,* 818 F.2d 58 (D.C.Cir.1987). The Bargaining Agreement denominates the arbitrator's decision an "advisory recommendation" and provides that, "[t]he Board shall accept or reject the arbitrator's recommendation and such decision shall be the final resolution." Bargaining Agreement, § 4.3.6.3. Thus, the Board is not bound by the arbitrator's decision. On this basis, alone, I am satisfied that the arbitration provisions in the Bargaining Agreement do not preclude judicial review as a matter of law.

***3** The *Manes* and *McConnell* decisions provide further support for this result. In *Manes,* plaintiff was a tenured faculty member who was terminated by the defendant college for alleged insubordination. His employment contract provided for an appeal to the Campus Administration and stated that action by the Board of Trustees "shall be final." *Manes v. Dallas Baptist College,* 638 S.W.2d at 144. In response to the college's argument that the contract language constituted an agreement for arbitration and precluded litigation, the Texas court held:

"Arbitration" is generally a contractual proceeding by which the parties to a controversy, in order to obtain a speedy and inexpensive final disposition of the disputed matter, select arbitrators or judges of their own

choice, and by consent, submit the controversy to these arbitrators for determination.... If the Board of Trustees was considered to be an arbitrator, the effect would be to allow one of the parties to act as judge in its own case. Such a result is totally inconsistent with the theory of arbitration. The contract plainly establishes only a procedure for internal administrative remedies and cannot be considered as an agreement to arbitrate.

Id. at 145. In *McConnell,* another action by a tenured college professor whose contract was terminated, the same argument was advanced and rejected. The Faculty Handbook in *McConnell* provided for a series of steps in the termination process including a hearing before a grievance committee and review by the Board of Trustees or its Executive Committee. As in *Manes,* the Faculty Handbook in *McConnell* provided that the Board of Trustees' decision "shall be final." *McConnell v. Howard University,* 818 F.2d at 68. The court held:

Given the structure of the prescribed procedures, it appears that the Board of Trustees has tremendous leeway to reject findings of the Grievance Committee. If we were to adopt a view limiting judicial review over the substance of the Board of Trustees' decision, we would be allowing one of the parties of the contract to determine whether the contract had been breached. This would make a sham of the parties' contractual tenure arrangement. (Footnote omitted). *Ibid.*

There is no meaningful distinction between the contract provisions considered in *Manes* and *McConnell* and the Bargaining Agreement at issue here. Although the grievance procedure includes a hearing before an impartial arbitrator, the Board is free to ignore the arbitrator's decision. Thus, absent judicial review, the Board would have the sole power to determine whether the Bargaining Agreement has been breached. Although the Board suggests that such a result was intended by the parties, it has not established its position either as a matter of fact or law at the present stage of the proceedings.

Finally, the Board argues that this Court lacks subject matter jurisdiction because, through a writ of mandamus, plaintiffs have an adequate remedy at law. Mandamus will lie to require an inferior tribunal to perform a ministerial duty imposed upon that tribunal by law. *Capital Educators Assoc. v. Camper,* Del.Ch., 320 A.2d 782 (1974). Here, the duty is one imposed by contract and it is discretionary rather than ministerial. Assuming that the Board is required to transfer Rosenthal to a state funded program, it remains within the Board's discretion to determine in which state funded program Rosenthal will be placed. Accordingly, I am satisfied that plaintiffs do not have an adequate remedy at law and that their claim for specific performance may be heard by this Court.

***4** There remains plaintiffs' motion for summary judgment. The parties agree that plaintiffs' claim turns upon the meaning of the phrase "state funded program" in § 6.18 of the Bargaining Agreement. Plaintiffs argue that this issue has been decided by the arbitrator and that the arbitrator's decision was accepted by the Board. Thus, they say that the Board is estopped from contesting the factual and legal conclusions reached by the arbitrator and that plaintiffs are entitled to judgment as a matter of law in accordance with the arbitrator's decision.

I cannot accept plaintiffs' position that their claim is ripe for summary judgment. If, as stated in the complaint, plaintiffs are seeking specific performance of § 6.18 of the Bargaining Agreement as opposed to enforcement of the arbitrator's decision, then it is the Court that must decide the meaning of the phrase "state funded program." As noted by the court in *McConnell,* this Court's determination must be made *de novo* with no special deference to the arbitrator's decision. *McConnel v. Howard University,* 818 F.2d at 68. The fact that the Board purported to accept the arbitrator's decision is not dispositive. The Board apparently interprets the arbitrator's decision as meaning that § 6.18 is satisfied if the particular employee's salary is paid by state and local funds even if the program to which he is assigned is partially federally funded. Plaintiffs contend that, under the arbitrator's decision, the employee must be assigned to a fully stated funded program. Thus, there is a dispute as to the meaning of § 6.18 as well as a further dispute as to the meaning of the arbitrator's decision. Since the Court is not being asked to enforce the arbitrator's decision, the dispute over its meaning is irrelevant. As to the dispute over the meaning of § 6.18, the Court will have to consider extrinsic evidence concerning, among other things, the parties' understanding of the term "state funded program." *See Klair v. Reese,* Del.Supr., 531 A.2d 219 (1987). Until that evidence is developed, this Court is unable to rule on a motion for summary judgment.

Based upon the foregoing, both parties' motions must be denied. IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 1988 WL 97840

2015 WL 10739302
United States District Court,
N.D. Ohio, Western Division.

Vernon L. Traster, Plaintiff,
v.
Ohio Northern University, Defendant.

Case No. 3:13 CV 1323
|
Signed December 18, 2015

MEMORANDUM OPINION AND ORDER

JACK ZOUHARY, U.S. DISTRICT JUDGE

INTRODUCTION

***1** Defendant Ohio Northern University ("ONU") terminated Plaintiff Vernon Traster, a tenured law professor, in 2013 following allegations he sexually harassed a law student and Law School employee. Traster claims he was denied the dismissal process spelled out in his employment contract, while ONU argues he received the process to which he was entitled. Following a bench trial (8/03/15 Dkt. Entry.) and review of the post-trial submissions (Docs. 69 & 70), this Court agrees with ONU.

FINDINGS OF FACT

Traster received annual continuing appointment letters from ONU, explaining his "[e]mployment pursuant to this appointment is subject to the rules, regulations, and personnel policies of the University" (PX 1 at 1; *see also* PX 2 at 1). [1] This catch-all "applicable-rules" phrase generally includes the ONU Handbook (PX 7), as well as the Bylaws of the ONU Claude W. Pettit College of Law (PX 5; *see also* Tr. at 53–54). Both policies refer to faculty dismissal procedures.

Handbook Provisions. Under the Handbook, "[t]enure is the right to appointment on a continuing basis until the faculty member resigns, retires, or is separated from the University for adequate cause in accordance with the procedures set forth herein or hereafter defined" (PX 7 at 18 (§ 2.4(1))). The University Administration "has the right to discipline faculty members for just cause," with penalties ranging from "oral reprimand to immediate discharge" (*id.* at 31 (§ 2.10)). However, a faculty member targeted for discharge is "permitted the recourse provided in Dismissal in th[e] Handbook as the exclusive remedy" (*id.*).

Section 2.10's reference to "Dismissal" means the detailed procedures of Section 2.7, "Dismissal of Faculty Member" (*id.* at 25). Section 2.7 allows dismissal "only for adequate cause," and provides examples of "[c]auses that warrant such dismissal," including "grave misconduct" (*id.* (§ 2.7(1))). A violation of ONU's sexual harassment policy is grounds for dismissal (*id.* at 49 (§ 2.25(5)(D))).

"When the issue of dismissal for cause arises," Section 2.7 is triggered, beginning with an informal conference between the faculty member and the relevant college dean which, if unsuccessful, leads to referral to "a standing or ad hoc committee of five faculty members elected by the faculty and charged with the function of rendering confidential advice to both parties in such situations" (*id.* at 25 (§ 2.7(2))). ONU's President considers the review committee's report to determine if "dismissal proceedings shall be undertaken" (*id.*). If the President decides such "formal proceedings shall be initiated," he or she explains to the faculty member the basis for the charge (*id.* at 26 (§ 2.7(3))). ONU may suspend a faculty member during termination proceedings "only if immediate harm to the faculty member, to others, or the instructional program of [ONU] is threatened by the faculty member's continuance" (*id.* at 27 (§ 2.7(14))).

***2** Proceedings then shift to the hearing committee. "A committee of five full-time faculty members," elected by the University Faculty, "conduct[s] the hearing and render[s] a decision" regarding "whether or not the faculty member should be removed from the faculty position held on the grounds stated" in the President's charge (*id.* at 26 (§ 2.7(3)–(4)); *see also id.* at 151–52 (membership of review and hearing committees, respectively)). The Handbook includes extensive procedural protections (*id.* at 26–27 (§ 2.7(4)–(9))). The hearing committee must make "explicit findings" whether dismissal is appropriate (*id.* at 27 (§ 2.7(10))), and the University bears a preponderance-of-the-evidence burden of proof (*id.* at 26 (§ 2.7(7))). After the hearing committee reaches a decision, the President sends the committee's report to the ONU Board of Trustees,

which can sustain or overrule the committee (*id.* at 27 (§ 2.7(12))).

Law School Bylaws. The Bylaws establish rules that "are the exclusive means of making hiring, retention, promotion[,] and tenure decisions" at the Law School (PX 5 at 2 (Bylaw I(A))). Bylaw III, titled "Retention," explains how the Law School retains non-tenured faculty (see id. at 12 (Bylaw III(A)(1))). Bylaw III also provides that "[d]ismissal of tenured faculty shall not occur except pursuant to AAUP, ABA, and AALS guidelines" (id. at 13 (Bylaw III(A)(2))). The AAUP's Regulations describe in detail dismissal procedures for faculty members (PX 6 at 65–67), while the ABA Standards provide similar recommended procedures, albeit in briefer form (DX 33 & 34). The AALS guidelines only condition AALS membership on a law school maintaining "academic freedom and tenure in accordance with the principles of the" AAUP. Traster v. Ohio Northern Univ., Case No. 3:12–cv–02966, Doc. 1–3 at 277 (N.D. Ohio 2012).

The Disputes. The parties generally agree that the applicable rules referenced in Traster's appointment letter incorporate into Traster's employment contract both the Handbook and Bylaws (Doc. 56 at 3), but they disagree about whether the Bylaws have any application to dismissal proceedings and, if so, what the Bylaws require of the University.

Traster emphasizes six differences between the Handbook and the Bylaws. The existence of these differences is premised on Traster's assumption that the Bylaw's reference to the AAUP Regulations incorporates every aspect of the AAUP-recommended process into the Law School dismissal process. Here is how Traster frames those differences (*see* Doc. 70 at 6):

- The Regulations require a university to consult with "the Faculty Committee on Academic Freedom and Tenure" regarding the terms of suspension pending dismissal proceedings (PX 6 at 65–66 (§ 5(c)(1))), while the Handbook vests suspension authority in the President alone (PX 7 at 27 (§ 2.7(14))).

- The Regulations prohibit suspension without pay (PX 6 at 65–66 (§ 5(c)(1))), while the Handbook is silent on the subject.

- The Regulations "[p]rovide[ ] a right to a hearing before the Law School Tenure Committee," which Traster contends is "the elected faculty hearing committee" referenced in the Regulations (Doc. 70 at 6 (quoting PX 6 at 65 (§ 5(c)))), while the Handbook assigns the hearing task to a standing Hearing Committee on the Dismissal of Faculty, staffed by five faculty members from departments across the University (PX 7 at 26 (§ 2.7(4)); *see also id.* at 151–52).

- The Regulations allow the faculty member two peremptory strikes of hearing committee members (PX 6 at 65 (§ 5(c))), while the Handbook provides a single strike (PX 7 at 26 (§ 2.7(4))).

- The Regulations do not limit the faculty member's attorney's role at the dismissal hearing (PX 6 at 66 (§ 5(c)(5))), while the Handbook does (PX 7 at 27 (§ 2.7(9))).

- The Regulations require the university to show adequate cause for dismissal by clear-and-convincing evidence (PX 6 at 66 (§ 5(c)(8))), while the Handbook requires only a preponderance showing (PX 7 at 26 (§ 2.7(7))).

***3** The process owed Traster during dismissal proceedings is the key point of contention between the parties, but they further dispute the authority ONU relied on to suspend Traster pending termination proceedings. ONU contends it used Section 2.10's general disciplinary authority (*see* Doc. 69 at 6–7). Traster argues ONU used Section 2.7(14), but breached his employment contract by failing to make a finding that Traster's presence on campus pending the outcome of dismissal proceedings posed an immediate harm to ONU or a community member (*see* Doc. 70 at 2–4).

STANDARD OF REVIEW

In construing Traster's employment contract, this Court's role is to "give effect to the intent of the parties," looking first to the contract as a whole and presuming the parties manifested their intent through "the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement." *Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 129 Ohio St.3d 397, 404 (2011). "Where one instrument incorporates another by reference, both must be read together." *Christe v. GMS Mgmt. Co.*, 124 Ohio

App.3d 84, 88 (1997). "As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Sunoco, Inc. (R & M),* 129 Ohio St.3d at 404 (quotation marks omitted).

A contract is ambiguous, however, if it contains conflicting provisions, *see Fairmont Creamery Co. v. Ewing,* 43 Ohio App. 191, 196 (1932), or terms that are "so broad and vague as to require reference outside the instrument in order to comprehend [their] meaning," *Stony's Trucking Co. v. Pub. Utils. Comm'n,* 32 Ohio St.2d 139, 142 (1972). "[W]here the language of a contract is of doubtful import, it is proper to ascertain the circumstances which surrounded the parties at the time it was made, the object intended to be accomplished, and the construction which the acts of the parties show they gave to their agreement, in order to give proper construction to the words they have used in the instrument, and to determine its legal effect." *Blosser v. Carter,* 67 Ohio App.3d 215, 219 (1990) (quotation marks and emphasis omitted). "No provision of a contract [should] be disregarded as inconsistent with other provisions, unless no other reasonable construction is possible." *Broad St. Energy Co. v. Endeavor Ohio, LLC,* 975 F.Supp.2d 878, 884 (S.D. Ohio 2013) (quotation marks omitted). Traster bears the burden to prove each element of his contract claim by a preponderance of the evidence. *See Cooper & Pachell v. Haslage,* 142 Ohio App.3d 704, 707 (2001).

CONCLUSIONS OF LAW

ONU did not Breach Traster's Employment Contract by Applying the Handbook

After careful review of the employment contract text and structure, the context in which it was adopted, the purpose for its adoption, and past practice at the University, this Court concludes Traster's employment contract entitled him to the process outlined in the Handbook. Law School Bylaw provisions that reference the "retention" of law school faculty refer to the process of either granting tenure or renewing term contracts. And the Bylaw statement that "[d]ismissal of tenured faculty shall not occur except pursuant to AAUP, ABA, and AALS guidelines" (PX 5 at 13 (Bylaw III(A)(2))) means the disciplinary procedures adopted by ONU must be consistent with these educational associations' standards, which themselves are only recommendations. This "pursuant-to" clause does not wholesale adopt these standards as the dismissal procedure that applies to tenured law faculty. The Handbook dismissal provisions are consistent with these recommended guidelines. Because a reasonable reading can be given to both Handbook Section 2.7 and Bylaw III(A)(2), this Court rejects Traster's request to substitute, in full, the AAUP Regulations for ONU's generally applicable dismissal provisions.

4** ***Text and Structure. Dictionary definitions help set the ordinary meaning of contract language. *See Sunoco, Inc. (R & M),* 129 Ohio St.3d at 404. With the exception of a narrow dispute over the meaning of Sections 2.7(14) and 2.10, neither party disputes the meaning of language used in Section 2.7. Rather, the parties dispute what the Bylaws mean when they state that tenured faculty "shall not [be dismissed] except pursuant to AAUP, ABA, and AALS guidelines" (PX 5 at 13 (Bylaw III(A)(2))).

"Pursuant to" means "[i]n compliance with," "in accordance with," or "under" some other provision or authority. BLACK'S LAW DICTIONARY 1431 (10th ed.2014); *see also* WEBSTER'S II NEW COLLEGE DICTIONARY 900 ("In accordance with"). That phrase could reasonably mean that a tenured law faculty member can be dismissed only if ONU uses the procedures specified in the relevant guidelines. But the same phrase could mean that a tenured faculty member can be dismissed if ONU's dismissal procedures are "in accordance" with, or consistent with, the referenced guidelines, not that ONU's dismissal procedures must be in all particulars identical with the guidelines.

Structure confirms that, when the law faculty adopted the pursuant-to clause, it sought to endorse the referenced guidelines as a basis for disciplining faculty who otherwise have continuing appointments, not to adopt those provisions wholesale. *See Marusa v. Erie Ins. Co.,* 136 Ohio St.3d 118, 120 (2013) ("The meaning of a contract is to be gathered from a consideration of all its parts ...." (quotation marks omitted)). The law faculty established the Bylaws as the "exclusive means for making hiring, retention, promotion [,] and tenure decisions" at the Law School (PX 5 at 2 (Bylaw 1(A))). The law faculty did not purport to establish exclusive rules for disciplining its own members.

The Bylaws' structure, unchanged since Traster joined the faculty (*compare id., with* DX 32), follows that limited

purpose. Bylaw II, titled "Hiring," establishes criteria for filling positions and assigns recruitment roles (PX 5 at 8–11). Bylaw III, titled "Retention," explains the basis for retaining non-tenured faculty and other Law School staff (*id.* at 12–14). Bylaw IV, titled "Promotion," establishes how Law School employees advance in their careers (*id.* at 15–21). Bylaw V sets tenure standards and explains the basis for renewing the four-year contracts held by certain non-tenured employees (*id.* at 22–25). Bylaw VI spells out faculty evaluations (*id.* at 26–27).

The sole reference to dismissal standards for tenured law faculty does not appear in a separate Bylaw dealing with tenured faculty dismissal, as one would expect of such an important topic. Rather, the reference appears in Bylaw III, in a single-sentence subsection that follows a page-long discussion of how the Law School retains—not how it disciplines—non-tenured law faculty. "Retention" in this sense means that non-tenured faculty and law librarians, legal writing instructors, and law clinic instructors undergo regular evaluation and are retained if they meet performance goals (*id.* at 12 (Bylaw III(A)(b))). By contrast, tenured faculty receive continuing appointments that do not depend on the Tenure Committee's assessment of the faculty member's performance (*see, e.g.,* PX 7 at 18 (§ 2.4(1))). The closest parallel to the non-tenured-faculty retention provision would therefore be a tenured-faculty provision that reasonably is read to mean such an appointment continues except upon dismissal proceedings, held according to policies that are consistent with recommendations of the AAUP, the ABA, and AALS. That is what the pursuant-to clause does.

***5** Had the law faculty intended itself be the arbiter of tenured law professor dismissal, it would have created some body tasked with serving that role. Traster argues the Tenure Committee serves as the hearing committee, but that contention fails for two reasons.

First, not even the AAUP Regulations charge a faculty tenure committee with overseeing dismissal proceedings. Rather, the Regulations assign that responsibility to "the elected faculty hearing committee" (PX 6 at 65 (§ 5(c))). When the AAUP Regulations assign a task to a faculty tenure committee, they do so expressly: the Regulations suggest having a tenure committee advise the administration on suspending a faculty member prior to the conclusion of termination proceedings (*id.* at 66 (§ 5(c)(1))). Traster's reading wipes away the AAUP Regulation's careful distinction between the tenure and hearing committees.

Second, under the Law School Constitution, the Tenure Committee's role is limited to "questions of retention, promotion, and tenure as specified in the [Law School] bylaws" (PX 3 at 6 (Art. I, § 4(A)(5)); *see also* PX 4 at 3 (Art. I, § 4(A)(5)–(6)) (1984 Constitution, assigning to the Tenure Committee "questions of tenure as specified in the bylaws," and retention and promotion questions to a now-defunct Retention–Promotion Committee)). If the law faculty also intended the Tenure Committee to hold quasi-judicial proceedings to decide if adequate cause exists to terminate a tenured law faculty member, it would have said so. In a related context, where the Law School acts pursuant to a delegation from ONU (PX 7 at 158), the law faculty set forth with great particularity the process owed a law student charged with violating the student code of conduct (PX 20 at 13–20), including the faculty's role in the adjudicatory process.

Finally, reading the pursuant-to clause as serving a dual function—describing the basis for continuing a tenured faculty member's appointment, and endorsing recommended guidelines for University-wide dismissal procedures—gives meaning to key portions of the Handbook, including the statements that a faculty member facing discharge "will be permitted the recourse provided" in Section 2.7 "as the exclusive remedy" (PX 7 at 31 (§ 2.10)). Traster's reading renders these provisions meaningless, at least with respect to tenured law faculty. And it creates a strange result, affording tenured law faculty more process during dismissal proceedings than their tenure-track or non-tenured colleagues. After all, the pursuant-to clause appears in a section that references tenured law faculty only. Setting aside the oddity of having two different dismissal procedures apply to the faculty of the same college, Traster's reading offers less process to the very faculty members who presumably most need robust academic-freedom protections: younger, less-established professors, who bid for increasingly scarce law school faculty appointments and tenure by publishing in new, unique areas of the law. The law faculty would not have intended such results.

Context. The pursuant-to clause cannot reasonably be construed without reading that clause in the context of the law faculty's authority and place within the University structure. As that structure shows, the law faculty's

authority to adopt, on its own, dismissal processes that apply to tenured law faculty is doubtful as best. A reasonable reading of the pursuant-to clause should not impute to the law faculty a power it likely does not possess, yet that is just what Traster's reading would do.

***6** The Law School is not an autonomous institution; it is one of ONU's five constituent colleges, and its tenured faculty are employed by ONU, not the Law School (Tr. at 30). Three key entities comprise the University: the Board of Trustees, the University Faculty, and the college faculties. "The Faculty of the University," not the faculty of any one college, is primarily tasked under the Faculty Constitution with "making policy recommendations concerning academic matters and ... the general welfare of the University" to the ONU Board of Trustees, which has power to establish University policy (PX 7 at 129 (Art. III, § 1)). A college faculty "has the authority of the Faculty of the University in matters which affect it alone, providing that its actions shall not conflict with the policies or rules of the University" (*id.* (Art. III, § 2)). Faculty and college-specific constitutions and bylaws delineate the roles of these entities, but Traster identifies nothing in this governmental structure that suggests the law faculty may, on its own, design dismissal procedures that apply to itself.

Traster apparently looks first to Article III of the Faculty Constitution, which in general terms assigns authority to the University Faculty, and partially delegates that authority to the college faculties. The design of dismissal procedures does not fall within the scope of the college faculty's delegated authority for at least two reasons.

First, a procedure governing how tenured faculty may be disciplined is not a matter that affects a single college. How a college treats allegations of sexual harassment can have a much broader impact on the university, including (to name a few) negative publicity and government enforcement or private civil lawsuits filed under Title IX or its implied right of action. *See, e.g.*, 20 U.S.C. § 1682; *Cannon v. Univ. of Chicago,* 441 U.S. 677, 717 (1979).

Moreover, while the alleged sexual harassment in this case involved a Law School professor, and Law School employee and Law School student, what if the harassment involved people from different colleges? Would each be entitled to a different procedure? Of course not. There is a single disciplinary procedure, not focused on the tenure requirements of each college, but intended to apply campus-wide.

Second, even if the law faculty's delegated authority extended to such matters, that delegated authority would not include authority to act without the Board's approval. The University Faculty only may recommend important policy changes to the Board. The law faculty would have that same power, and Traster provides no evidence that the Board approved a Law School-designed dismissal process. What the University has done, however, is (1) adopt disciplinary procedures that purport to apply across the University and (2) direct colleges to adopt policies centering on "promotion, tenure, [ ] continuing contracts," and faculty recruitment—the very topics addressed in the Law School Bylaws (*see, e.g.,* PX 7 at 181, 201–02). Traster provides no evidence that the Board ever directed any college to design its own faculty dismissal processes.

Nor does Article III's title, "Educational Policy," authorize a Law School-specific dismissal process (*id.* at 129). The design of dismissal procedures is not an "educational policy," similar to a faculty research assistant policy (PX 18) or policies to promote faculty scholarship (PX 19). Dismissal procedures go to the heart of the University's relationship with its employees.

The other Faculty Constitution provision referenced by Traster, Article IX, is no more helpful. Article IX empowers the University Faculty to adopt bylaws "necessary for the proper conduct and regulation of its business," so long as those bylaws do not conflict with the Faculty Constitution (PX 7 at 134 (Art. IX, § 1)). The University Faculty has used this authority only to structure meetings of the University Faculty (*id.* at 136 (Faculty Bylaws 1 & 2)) and the University Council (*id.* at 136 (Faculty Bylaw 3)), and to create University-wide committees (*id.* at 137–46 (Faculty Bylaws 3–7)). The University Faculty's "business" does not extend to independently adopting policy, and the committees established by the Faculty Bylaws are no different; they sit only to recommend policy changes to the University Council and the Board, and implement existing university policy (*id.* at 137 (Faculty Bylaw 5)). In the absence of another delegated power, Article III's delegation provision would only grant the law faculty this same limited power (Tr. at 109–10) (Provost Crago's explanation of how a University-wide suspension-with-pay policy would be adopted).

***7** Traster also points to provisions of the Law School Constitution that, in his opinion, state the governing law faculty holds "fundamental governing power *at* the law school" (*id.* at 6) (emphasis added). What the relevant provision in fact states is that the "[f]undamental governing power *of* the College of Law is vested in the governing faculty who may vote on all matters" (PX 3 at 4 (Art. I, § 2(D)) (emphasis added)). This difference in prepositional phrases is subtle, but important. Traster suggests that the law faculty has plenary power at the Law School, and therefore may decide the terms on which ONU may dismiss its employees.

His reading, granting more power to the law faculty than to the University Faculty, disregards the careful division of authority set forth in the Faculty Constitution —no party suggests the University Faculty could amend Section 2.7 on its own. Relevant Law School Constitution provisions are more plainly read to divide the authority vested in the College of Law between the law faculty on the one hand, and the Law School administration on the other. The law faculty has "the power to decide all issues affecting the College of Law," except for "purely administrative decisions such as budget and salary" (PX 3 at 5 (Art. I, § 2(H))), while the Dean and his or her staff are responsible for "daily administration of the Law School" (*id.* at 8 (Art. II, § 1)).

In sum, Traster fails to identify any feature of University structure authorizing the law faculty to adopt, on its own, a separate dismissal procedure for tenured law faculty. His reading of the pursuant-to clause is unreasonable, and implausible, in light of the context in which it was adopted.

Purpose. This Court construes contractual ambiguity in light of "the object intended to be accomplished" by the contracting parties. *Blosser*, 67 Ohio App.3d at 219 (quotation marks and emphasis omitted). The purpose intended by the ONU employment contract was to provide qualified faculty members tenure and the academic freedom to express controversial views, while at the same time allowing ONU to end tenured appointments in exceptional circumstances (*see* PX 7 at 25 (§ 2.7(1)) ("Dismissal ... shall not be used to restrain faculty members in the exercise of academic and artistic freedom.")). To protect academic freedom, the parties agreed to extensive procedural protections embodied in Handbook Section 2.7. Because this Section so closely resembles the process set forth in the AAUP Regulations, construing Traster's employment contract to contain only the Handbook procedure fits the parties' objective. The AAUP Regulations and Handbook Section 2.7 are near mirror images (*see* appendix).

Traster mostly points (Doc. 70 at 6) to differences between the two sets of rules that are insignificant when viewed in the context of all of Section 2.7's procedural protections, or which in fact are not clear differences at all. Traster was allowed to strike without cause only one hearing committee member, while under a framework that mirrored the Regulations, he could have struck two members. The Regulations recommend that the administration consult with the Faculty Committee on Academic Freedom and Tenure concerning whether and how to suspend a faculty member during dismissal proceedings, while the Handbook contains no similar faculty advisory role. Under both frameworks, however, suspension authority lies with the administration alone.

Traster also alleges that counsel's role differs substantially under the two sets of rules. The Handbook expressly limits counsel's hearing role, while the Regulations do not. Traster therefore concludes the Regulation-designed hearing committee cannot limit counsel's hearing role, but that conclusion does not necessarily follow.

***8** Two Regulation recommendations that differ from parallel Handbook provisions—the clear-and-convincing evidentiary burden and the prohibition on suspensions-without-pay—are more significant, but a dismissal procedure that omits these features nonetheless achieves the parties' objective.

Past Practice. Finally, this Court may "look to ... past practice to aid in interpretation" of ambiguous contract language. *Westgate Ford Truck Sales v. Ford Motor Co.*, 25 N.E.3d 410, 416 (Ct. App. 2014).

Past practice weighs against Traster's view of the interaction between the Handbook and the Bylaws. Though Traster sat on the Tenure Committee for more than three decades, he cannot recall the Committee ever presiding over disciplinary proceedings (Tr. at 41–42). Provost David Crago, who has held Law School tenure since 1997, also cannot recall the Committee involved in disciplinary proceedings (*id.* at 104). Traster testified that at least some Committee members knew of his Section

dismissal proceedings (*id.* at 49–50), but no Committee member petitioned ONU to transfer Traster's case to the Committee (*id.* at 81). Not even Traster presents evidence that he asked the hearing committee for such a transfer (*see* PX 8–15), and he cannot recall when he first believed that the wrong committee had heard his case (Tr. at 35–36).

Further, Traster presented no evidence that any of ONU's colleges has weighed a faculty member's dismissal under a college-specific dismissal framework. Traster is one of two ONU faculty members disciplined under the sexual harassment policy during current ONU President Daniel DiBiasio's tenure. The second faculty member, a former College of Arts & Sciences instructor, was disciplined under the Handbook and not according to his college's bylaws (*id.* at 81).

Traster agrees that the University sexual harassment policy was properly applied to his case, but at the same time argues the Tenure Committee should have presided over application of that policy, not the Faculty Grievance Committee (*id.* at 32). But the sexual harassment policy itself calls for the Faculty Grievance Committee to handle sexual harassment complaints (PX 7 at 48 (§ 2.25(5)(B))), and there is no precedent for such a selective application of only parts of the sexual harassment policy.

Finally, Traster presents no evidence that the AAUP, the ABA, or AALS has ever complained that Section 2.7 so lacks procedural protections that ONU fails to protect the academic freedom of faculty members who are considered for dismissal. In its most recent survey of the Law School's compliance with ABA standards, the ABA continued the Law School's accreditation, noting no issues with ONU's faculty dismissal processes (DX 35). In fact, the ABA found that "[a]ll members of the law faculty ... are covered by the University policy on academic freedom, which is essentially similar to the AAUP 1940 Statement on Academic Freedom and Tenure" (DX 35 at 13). The AAUP's 1940 Statement serves as the basis for the ABA, AAUP, and AALS standards referenced in the pursuant-to clause (*see* PX 6 at 1; DX 34 at 163 n.*; *Traster v. Ohio Northern University,* Case No. 3:12–cv–02966, Doc. 1–3 at 277 (N.D. Ohio 2012)).

Summary. Contract text and structure, context, the parties' objectives, and past practice all show that Traster was entitled to only the dismissal process set forth in the Handbook. The pursuant-to clause confirms that, in the absence of dismissal proceedings, held according to procedures that are consistent with ABA, AAUP, and AALS guidance, a tenured faculty member's appointment continues and is not subject to any periodic retention review by the Law School. Traster's contrary reading invalidates entire sections of the Handbook and substitutes for those sections a procedure that Traster fails to show the law faculty had the power to adopt, that has never been used by the Law School to discipline tenured faculty, and that the law faculty itself did not insist on employing in Traster's case. "No provision of a contract [should] be disregarded as inconsistent with other provisions, unless no other reasonable construction is possible." *Broad St. Energy Co.,* 975 F.Supp.2d at 884 (quotation marks omitted). Because a reasonable construction gives effect to both Handbook Section 2.7 and the pursuant-to clause, this Court concludes Traster's employment contract allowed him the procedure set forth in Section 2.7 only. ONU therefore did not breach Traster's employment contract by applying the Handbook to his case.

ONU's Departure from the Handbook is not a Breach of Contract

***9** Traster generally concedes that ONU afforded him the process called for in the Handbook (Doc. 70 at 2). That concession has one qualification: "ONU wrongfully suspended Professor Traster ... [when it] made no finding of immediate harm as required under both the Faculty Handbook and the Bylaws" (*id.* at 9). Traster here refers to Handbook Section 2.7(14) (PX at 7 at 27):

> Until final decision upon termination of an appointment, the faculty member will be suspended or assigned to other duties in lieu of suspension by the President only if immediate harm to the faculty member, to others, or the instructional program of [ONU] is threatened by the faculty member's continuance.

ONU responds that it did not suspend Traster under Section 2.7(14); it used Section 2.10, which grants the Administration "the right to discipline faculty members for just cause," allowing penalties to range from "oral reprimand to immediate discharge" (*id.* at 31).

ONU was bound to follow Section 2.7(14), not Section 2.10. Provost Crago testified Section 2.7(14) did not apply because, at the time ONU made its suspension decision, it was not considering Traster's termination (Tr. at 109–12; *see also* Doc. 69 at 6–8). Yet in his March 16, 2012 suspension letter, Crago told Traster that, if true, the sexual harassment complaints "warrant your dismissal" (Doc. 70–1 at 1). ONU plainly was considering Traster's dismissal when it suspended him. Therefore, as ONU concedes, "Section 2.7(14) would be relevant in the event that dismissal was intended at the time of the initial suspension" (Doc. 69 at 6).

But ONU says while that provision is relevant, no immediate-harm finding was necessary in Traster's case, because Section 2.10 is an alternative basis for suspending a faculty member (*id.* at 7). This Court rejects that argument. Section 2.10 might justify suspension as a sanction for misconduct, but Traster was not suspended as a sanction following a just-cause determination. He was suspended in advance of being sanctioned by ONU, while ONU was expressly considering his dismissal, and because ONU's administration worried Traster's presence on campus was harmful to others and the University environment. Section 2.10 itself permits a faculty member in Traster's position "the recourse provided in" Section 2.7 "as the exclusive remedy" (PX 7 at 31), and the immediate-harm provision is part of Section 2.7. "[A] court must give meaning to all provisions of a contract if possible." *Vill. Station Assoc. v. Geauga Co.,* 84 Ohio App.3d 448, 452 (1992).

Therefore, ONU could have suspended Traster prior to the outcome of dismissal proceedings only if ONU concluded his continued presence posed a threat of immediate harm to others. Traster argues ONU breached this provision because President DiBiasio testified he made no such finding.

"Nominal, trifling, or technical departures from the terms of a contract are not sufficient to breach it." *Burlington Res. Oil & Gas Co. v. Cox,* 133 Ohio App.3d 543, 548 (1999). "A party does not breach a contract if it substantially performs the terms of the contract, even if performance does not conform exactly to the plain language of the contract," *Baile–Bairead, LLC v. Magnum Land Servs., LLC,* 19 F.Supp.3d 760, 767 (S.D. Ohio 2014) (quotation marks omitted), and "there is substantial performance upon one side when such performance does not result in any wrongful substantial injury to the other side," *Ohio Farmers Ins. Co. v. Cochran,* 104 Ohio St. 427, 434 (1922).

***10** Traster presents no evidence disputing ONU's contention that it suspended him because of the gravity of the allegations made against him, which "rang[ed] from harassment to assault" (Doc. 70–1 at 1). President DiBiasio suspended Traster because of what he "learned about the nature of the physical sexual contact with the staff member and the less severe but nonetheless still unwelcome contact with the student, that those two together and, in particular, the nature of the physical assault led to the belief and the outcome that we suspended Professor Traster without pay" (Doc. 41 at 43; *see also* Tr. at 67). President DiBiasio worried that such assaults could happen again (Tr. at 67). Provost Crago testified that he had concluded Traster posed a threat of immediate harm to others. He gave particular weight to the Law School Employee's allegations, that Employee felt "extremely uncomfortable" around Traster, and that Law Student worried "Professor Traster was going to continue to behave in the way he behaved with her" (Doc. 40 at 88–91). President DiBiasio may not have invoked the words "immediate harm," and Provost Crago may not have "compartmentalized" his decision in that way (*id.* at 88), but the basis for their decision is substantially the same as such a finding.

The immediate-harm provision is intended to prevent hasty, ill-considered, or punitive suspensions prior to a final determination of adequate cause. Traster disagrees with ONU's basis for its suspension decision, but he has not shown that ONU entered its suspension decision without consideration of the immediate-harm provision's fundamental purpose. Given the grave allegations Traster faced, particularly with respect to the Law School Employee, he has not shown the absence of a particularized immediate-harm finding "result[ed] in any wrongful substantial injury" that would not have occurred if ONU had considered making such a particularized finding. *Ohio Farmers Ins. Co.,* 104 Ohio St. at 434. Traster has at most shown a "[n]ominal, trifling, or technical departure[ ] from the terms of [the] contract," *Burlington Res. Oil & Gas Co.,* 133 Ohio App.3d at 548, but not a breach of the contract.

ONU's Decision to Terminate Traster is Supported by Substantial Evidence

ONU did not breach Traster's employment contract by affording him only those procedures set forth in the Handbook, and Traster presents no evidence showing a material breach of Section 2.7(14). Because the Handbook alone applies, Traster is not entitled to suspension-without-pay damages. That leaves Traster's "challeng[e to] ONU's findings reached during the 2012–13 proceedings," specifically, whether "ONU's basis for terminating Traster is ... 'just cause' within the meaning of the contract" (Doc. 62 at 2).

"When the parties' contract defines the procedure to be used to determine termination of a tenured professor's contract at a private university, the standard of review is whether the contract and the United States Constitution have been adhered to, and whether there is substantial evidence in the record to support the termination." *Brahim v. Ohio Coll. of Pediatric Med.*, 99 Ohio App.3d 479, 487 (1994) (quotation marks omitted). Substantial evidence review is limited to the record assembled by the university. *See Yackshaw v. John Carroll Univ. Bd. of Trustees*, 89 Ohio App.3d 237, 242 (1993).

On this standard, Traster cannot possibly show that ONU's termination decision lacks an adequate basis in the record. The Hearing Committee on the Dismissal of Faculty heard testimony from law student and employee describing Traster's alleged sexually harassing behavior (*see, e.g.,* Doc. 24–2 at 101–111, 240–56). The Hearing Committee credited this testimony (DX 41), and this Court must generally defer to those credibility determinations, *cf. Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980) (per curiam). Having credited this testimony, the Board's decision to terminate Traster for violations of the sexual harassment policy rested on reliable, probative, and substantial evidence.

CONCLUSION

For these reasons, this Court concludes ONU did not breach its employment contract with Traster by suspending him without pay and then subjecting him to dismissal procedures under Handbook Section 2.7. ONU's decision to terminate Traster is supported by substantial evidence. ONU is entitled to judgment on Traster's breach of contract claim, with no remaining claims.

***11** IT IS SO ORDERED.

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

Vernon L. Traster, Plaintiff,

vs

Ohio Northern University, Defendant.

Case No. 3:13 CV 1323

JUDGE JACK ZOUHARY

- The Regulations prohibit use of dismissal process to infringe on academic freedom (PX 6 at 65 (§ 5(a))); so does Handbook Section 2.7(1).

- The Regulations require that formal dismissal proceedings be preceded by informal conferences, screening by a faculty committee, and a statement of the issue for dismissal (PX 6 at 65 (§ 5(b))); so does Handbook Section 2.7(2).

- Under the Regulations, formal dismissal proceedings begin before a faculty hearing committee. The Regulations ensure impartiality of that committee by requiring biased committee members to self-recuse and, further, grants the faculty member two "peremptory" strikes to use against committee members (PX 6 at 65 (§ 5(c))); Handbook Section 2.7(4) provides the same protections, except the faculty member has a single peremptory.

- The Regulations allow the faculty member to waive a hearing, and in such case requires the hearing committee to decide the charge on the basis of "all available evidence" (PX 6 at 66 (§ 5(c)(3))); so does Handbook Section 2.7(5).

- The Regulations allow the committee to decide if a hearing will be open or closed to the public (PX 6 at 66 (§ 5(c)(4))); Handbook Section 2.7(5) allows the faculty member to make the same decision.

- The Regulations permit the faculty member to be represented by counsel (PX 6 at 66 (§ 5(c)(5))); so does Handbook Section 2.7(7).

- The Regulations require an on-the-record hearing and a free transcript copy for the faculty member (PX 6 at 66 (§ 5(c)(7))); Section 2.7(7) also requires a record hearing, but the faculty member must pay for a transcript.

- The Regulations place the burden of proof with the university (PX 6 at 66 (§ 5(c)(8))); so does Handbook Section 2.7(7).

- The Regulations allow the faculty member "an opportunity to obtain necessary witnesses and documentary or other witnesses," and promises university cooperation in obtaining such evidence (PX 6 at 66 (§ 5(c)(10))); so do Handbook Sections 2.7(8)(C)–(D).

- The Regulations allow for cross-examination of witnesses and admission of out-of-court statements in certain cases (PX 6 at 66 (§ 5(c)(11))); so do Handbook Sections 2.7(7) and 2.7(8)(A)–(B).

- Under the Regulations, the hearing committee is not bound by "strict rules of legal evidence," but instead considers the most relevant evidence (PX 6 at 66 (§ 5(c)(13))); so, too, for the Handbook's hearing committee (PX 7 at 26 (§ 2.7(8))).

- The Regulations require a decision based on record evidence (PX 6 at 66 (§ 5(c)(14))); so does Handbook Section 2.7(10).

- The Regulations generally prohibit public discussion of the dismissal proceedings prior to the time the governing body reaches its decision (PX 6 at 66 (§ 5(c)(15))); so does Handbook Section 2.7(11).

- The Regulations require the hearing committee to send a written explanation of its decision to the university president and governing body, along with a copy of the hearing record. The governing body then explains its decision to affirm or reject the hearing committee's recommendation (PX 6 at 66 (§ 5(15)–(16))); ditto under Handbook Sections 2.7(11)–(12).

All Citations

Not Reported in F.Supp.3d, 2015 WL 10739302, 2015 IER Cases 419,806

Footnotes

1 Pincites to trial exhibits refer to the exhibit's native pagination. All other record citation pincites refer to ECF pagination.