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Annual Legal Update¹

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I. Speech Rights of Faculty Members and Other Employees in the Public Sector

1. First Amendment Rights After *Garcetti v. Ceballos*

In 2006, the Supreme Court concluded that when public employees speak “pursuant to their official duties,” they are not speaking as citizens and therefore do not have First Amendment rights. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The majority in that case reserved the question of speech in the academic context, noting that “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for” by the Court’s decision. “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” *Id.* at 425. The courts applying *Garcetti* in litigation about faculty speech and governance have not, however, generally observed that reservation. We start this section on speech by reviewing cases that have invoked *Garcetti* in the higher education context over the last year.

- a. *Gorum v. Sessoms*, 2009 U.S. App. LEXIS 6408 (3d Cir. Mar. 27, 2009)

In this case, a federal appeals court upheld a decision by the U.S. District Court for the District of Delaware concluding that various incidents of speech by a tenured faculty member – none of which were specifically related to his classroom duties – were

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

within his role as a public employee and pursuant to his official duties and were therefore not protected by the First Amendment under *Garcetti v. Ceballos*.

Wendell Gorum was a tenured professor who taught at Delaware State University (DSU) from 1989 until he was suspended from the university in 2004. Before his suspension, he had several conflicts with the administration. In 2003, he participated in the faculty senate's search for DSU's president, and spoke out in opposition to the final three presidential candidates, including Allen Sessoms, the final presidential pick. In addition, in his capacity as an advisor to students with disciplinary problems, he advised a student to retain counsel and sue the university after Sessoms suspended the student for weapons possession. Gorum also acted as an advisor to a student fraternity's annual dinner speaker committee; in the course of planning the dinner, he disinvited Sessoms from speaking after Sessoms was inadvertently invited by another committee member. Finally, the university discovered in 2004 that Gorum had altered and improved multiple students' grades without the relevant professor's or the registrar's permission. When Gorum admitted that he had altered the students' grades in violation of DSU policies, Sessoms initiated termination proceedings. After grieving the termination, which was recommended against by the Grievance Committee but ultimately upheld by the Board of Trustees, Gorum filed suit against President Sessoms and the Board of Trustees, alleging that his termination was in violation of his First Amendment rights.

Gorum identified three occurrences of First Amendment-protected activity: voicing opposition to the presidential finalists; revoking Sessoms' invitation to speak at the fraternity breakfast; and assisting the student in his defense to the suspension for weapons possession (including paying for the student's attorney). He alleged that Sessoms and the Board of Trustees terminated him in retaliation for those activities. The district court, relying on the *Garcetti* analysis but failing to mention the Supreme Court's reservation of speech related to academic matters, concluded that all three were done in Gorum's capacity as a public employee, pursuant to his official duties.

With respect to Gorum's opposition to the presidential candidates, the court observed that he was chair of his department and a member of the faculty senate, and concluded that he was therefore "both privileged and required, as part of his official duties, to participate in the search for a new president." As for the fraternity breakfast matter, Gorum failed to contest the defendants' assertion that he was an "official adviser" to the chapter and that his involvement in selecting a speaker was therefore "pursuant to his official duties," and the court therefore found that his retaliation claim with respect to withdrawing Sessoms' invitation failed under the First Amendment. And with respect to his student advising, the court dismissed his First Amendment claim with no analysis, stating merely that because the defendants asserted that *Garcetti* governed the claim, and because Gorum "fails to distinguish official from unofficial speech," the court would dismiss his claim of retaliation. Essentially, because the university invoked *Garcetti* and Gorum did not raise or discuss the case, the judge decided that the "official duties" analysis applied and that all of Gorum's speech was "pursuant to his official duties"; the judge did not consider whether the "official duties" analysis fits the higher education context, where faculty members are not hired to speak *for* the institution. (In addition; of

course, the fact that Gorum had changed students' grades without permission provided an independent basis for his termination.)

Gorum appealed the district court's decision to the U.S. Court of Appeals for the Third Circuit; he did not, however, appeal the district court's holding that his speech about Sessoms' appointment was not protected by the First Amendment or a substantial reason for his termination and the Third Circuit therefore did not consider it on appeal.

On appeal, the Third Circuit upheld the district court's decision in a unanimous opinion, holding that Gorum's speech was not protected because it was pursuant to his official duties and was not on a matter of public concern, and also that he would have been terminated irrespective of his speech because of the grading misconduct. In reaching its decision, the Third Circuit used a broad definition of "pursuant to official duties"; according to the decision, "a claimant's speech might be considered part of his official duties if it relates to 'special knowledge' or 'experience' acquired through his job." 2009 U.S. App. LEXIS 6408 at **11-12 (quoting *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007)).

The court also explicitly recognized the *Garcetti* reservation for the academic context, though it distinguished Gorum's speech here:

In determining that Gorum did not speak as a citizen when engaging in his claimed protected activities, we are aware that the Supreme Court did not answer in *Garcetti* whether the "official duty" analysis "would apply in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. at 425. We recognize as well that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by . . . customary employee-speech jurisprudence." *Id.* But here we apply the official duty test because Gorum's actions so clearly were not "speech related to scholarship or teaching," *id.*, and because we believe that such a determination here does not "imperil First Amendment protection of academic freedom in public colleges and universities." *Id.* at 438 (Souter, J. dissenting).²

2009 U.S. App. LEXIS 6408 at **14-15.

Finally, the court also acknowledged that "[t]he full implications of the Supreme Court's statements in *Garcetti* regarding 'speech related to scholarship or teaching' are not clear. As a result, federal circuit courts differ over whether (and, if so, when) to apply *Garcetti*'s official-duty test to academic instructors." *Id.* at *15 n.6.

² AAUP's policies do assert a connection between academic freedom and shared governance; its 1994 Statement On the Relationship of Faculty Government to Academic Freedom, for instance, states that the "academic freedom of faculty members includes the freedom to express their views . . . on matters having to do with their institution and its policies"

b. *Renken v. Gregory, et al.*, 541 F.3d 769 (7th Cir. 2008)

Kevin Renken, a tenured professor in the College of Engineering at the University of Wisconsin-Milwaukee, applied with some collaborators for a National Science Foundation (NSF) grant. The university and the NSF both approved the grant application, but Renken refused to sign the confirmation letter from the university because of disagreements with his dean, William Gregory, over the administration of the grant; among other things, he asserted that Gregory was violating NSF rules about the use of funds. In the midst of the disagreements, Renken filed a complaint against Gregory with a university committee, citing, among other things, a delay in paying undergraduates who were working on the project.

When Renken did not sign any of the confirmation letters, Gregory told him that the university had started the process of returning the grant funds to the NSF. Soon after that, Renken emailed the secretary of the board of regents, alleging that Gregory wanted him to sign off on an incorrect use of funds; that the dean's office had refused a variety of expenditures that were necessary for the grant; and that the dean's actions were "unprofessional and vindictive in the extreme." After an additional complaint, the dean of the graduate school presented a compromise, which Renken refused; at that point, the university decided to return the grant to the NSF.

Renken sued the university, claiming the university had reduced his pay and returned the grant in retaliation for his criticism about the university's use of grant funds. The federal district court concluded that his complaints about the grant funding were made pursuant to his official duties, not as a citizen, and therefore were not protected by the First Amendment under *Garcetti*.

Renken appealed, arguing that his grant-related tasks were conducted "*while* in the course of his job and not as a *requirement* of his job." The U.S. Court of Appeals for the Seventh Circuit agreed with the district court, however, stating:

As a professor, Renken was responsible for teaching, research, and service to the University. In fulfillment of his acknowledged teaching and service responsibilities, Renken acted as a [principal investigator], applying for the NSF grant. This grant aided in the fulfillment of his teaching responsibilities because, as Renken notes in his reply brief, the grant was an education grant for the benefit of students as "undergraduate education development." Moreover, because of his responsibilities as PI, Renken was entitled to a reduction in his teaching course load. In his capacity as PI, Renken administered the grant by filing a signed proposal, including a budget regarding the proposed grant and University funds involved in the project, seeking compensation for undergraduate participants, applying for course releases, and noting what appeared to be improprieties in the grant administration. Renken complained to several levels of University officials about the various difficulties he encountered in the course of administering the grant as a PI. Thereby, Renken called attention to fund

misuse relating to a project that he was in charge of administering as a University faculty member[]. In so doing, Renken was speaking as a faculty employee, and not as a private citizen, because administering the grant as a PI fell within the teaching and service duties that he was employed to perform.

541 F.3d at 773-74.

The court added that administration of the grants did not need to be within Renken's *core* job functions; the *Garcetti* inquiry simply asked whether the challenged expression was pursuant to official responsibilities. The court therefore concluded that Renken's speech about the grant was not protected by the First Amendment.

2. Intersection of *Garcetti* and Union-Related Speech

- a. *Zellner v. Herrick et al*, 2009 U.S. Dist. LEXIS 8123 (E.D. Wisc. Jan. 22, 2009)

Although this case arose in a high school rather than a college or university setting, it is nonetheless instructive because it illustrates at least one area where the application of *Garcetti* may be limited: a public employee's speech in his or her capacity as a union representative.

Robert Zellner, an active and vocal union member, was dismissed as a high school biology teacher after being accused of viewing pornography at school on his work computer. This accusation and termination occurred following several years of conflict between teachers at the high school and the district superintendent and school board. The ongoing conflict included numerous instances where Zellner spoke out publicly, in his capacity as a union representative and union president, against actions taken by the Superintendent and school board.

Zellner grieved his termination and the decision was sent to mandatory arbitration. The arbitrator concluded that the school had violated the collective bargaining agreement by terminating Zellner without just cause, and ordered that Zellner be reinstated and be given back pay and benefits from the date of his termination of employment, plus interest. The school board and the district superintendent refused to reinstate Zellner and the teachers' union sued to have the arbitrator's decision enforced. A Wisconsin trial court vacated the arbitrator's award, ruling that reinstatement was contrary to the State's public policy against immoral conduct in school. The case was then appealed to the Appellate Court of Wisconsin, which upheld the lower court's decision ruling that the public policy against immoral conduct in schools was sufficient grounds for the court to vacate the arbitration award. *Cedarburg Education Association v. Cedarburg Board of Education*, 756 N.W.2d 809 (Wisc. Ct. App. 2008) (unpublished and non-precedential).

Subsequently, Zellner filed suit in federal court alleging that his First and Fifth Amendment rights were violated when he was terminated by the Board of Education. Specifically, Zellner alleged that his termination was in retaliation for his speaking out against actions by the board and the superintendent in his capacity as a union representative and union president; Zellner also alleged that he had been denied his liberty interest in employment without due process of law. Zellner sued the superintendent, several board members and the school's information technology manager in their individual capacities. The Defendants asked the court to dismiss the case on the grounds that, among other things, they were immune from suit as governmental officials and that Zellner had no First Amendment protection for his speech as a union leader commenting on internal personnel decisions.

In support of their speech arguments, the Defendants cited *Garcetti's* "official duties" analysis. They also relied on a series of Seventh Circuit cases that they contended support the proposition that "work-related" speech is not protected.³ The District Court reviewed examples of Zellner's public statements concerning actions taken by the superintendent or the school board and found that given the "content, form and context" of many of these examples, Zellner's speech as a union representative or union president could be protected as a "matter of public concern." The court also distinguished this case from the Seventh Circuit cases cited by the Defendants, observing that those cases all involved plaintiffs complaining about personnel matters affecting them, as opposed to Zellner's comments about others.

With respect to their other defense, the Defendants would have immunity from being sued in their individual capacity if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." 2009 U.S. Dist. LEXIS 8123 at *37 (quoting *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))). The District Court opined that despite the *Garcetti* decision, Zellner had a constitutional right to speak because his speech occurred in his union capacity and not in his "official duties" as a teacher. In addition, there were not enough facts in the record to be able to balance the Defendants' interests in promoting efficient public services against Zellner's public comments as a union leader. See *Pickering v. Bd. of Ed. of Twp. High Sch. Dist.*, 391 U.S. 563 (1968) (setting out balancing test to determine scope of public employees' First Amendment rights). The court therefore denied as premature Defendants' qualified immunity defense to Zellner's First Amendment retaliation claim.

Finally, the District Court dismissed Zellner's claim that he lost his liberty interest in employment without due process. In order to prevail, Zellner needed to prove that the defendants' actions stigmatized him and made it "virtually impossible" for him to find new employment. The court found that while he might have been defamed by the board members and the superintendent, his complaint did not demonstrate that he had been foreclosed from finding employment as a teacher, and that the individual defendants' conduct therefore "did not violate Zellner's liberty interest in his profession."

³ See *Taylor v. Carmouche*, 214 F.3d 788 (7th Cir. 2000); *Snider v. Belvidere Twp.*, 216 F.3d 616 (7th Cir. 2000); and *Griffin v. Thomas*, 929 F.2d 1210 (7th Cir. 1991).

Because the Defendants' motion to dismiss Zellner's First Amendment claim was denied, the litigation will continue.

- b. ***Davignon v. Hodgson***, 524 F.3d 91 (1st Cir.), *reh'g. denied* 2008 U.S. App. LEXIS 14578 (1st Cir. June 30), *cert. denied* 172 L. Ed. 2d 726 (2008)

Five correctional officers filed suit against their employer, the sheriff (in both his official and individual capacities), alleging that they were suspended from their jobs because of their union-related activities. The officers' primary claim was that the sheriff retaliated against them for First Amendment activities (both speech and association).

After a trial, the jury found the sheriff liable in his official capacity for the First Amendment violations and for the state law claims but denied liability in his individual capacity for the First Amendment violation. The sheriff appealed the jury verdict and argued, among other things, that the officers' speech was not protected by the First Amendment. On appeal, the U.S. Court of Appeals for the First Circuit affirmed the lower court's judgment in full.

The First Circuit initiated its review by stating that “[a] government employee does not surrender all of her First Amendment rights at her employer’s doorstep.” *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The court then walked through a step-by-step review of the First Amendment analysis in light of the factual record presented at trial and found that: 1) the officers' speech about an upcoming picketing event and failing contract negotiations were matters of public interest; 2) the speech was conducted in a manner that did not jeopardize the State's interest in efficiency or security; and 3) the sheriff cited the officers' speech as the cause of his decision to suspend them. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), *Rankin v. McPherson*, 483 U.S. 378 (1987), and *Curran v. Cousins*, 509 F. 3d 36 (1st Cir. 2007). The court therefore ruled that the sheriff had acted in retaliation for the officers' constitutionally protected speech.

Additionally, the First Circuit found the sheriff had retaliated against one of the officers because of his close association with the union, in violation of the First Amendment. Although the officer was not suspended because of anything he said at work, the court found that it was reasonable for the jury, given the record available, to find that the sheriff suspended the officer because he was “very involved” with the union, including taking an active role in collective bargaining negotiations.

3. Union Employees' Rights to Use Email

As discussed last year, the National Labor Relations Board held in late 2007 that unionized employees in the private sector have “no statutory right to use [their employer’s] e-mail system for Section 7 purposes” and that “discrimination under the [NLRA] means drawing a distinction *along* Section 7 lines.” *Guard Publishing Company, d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194*, 351 NLRB No. 70 (2007). Section 7 of the National Labor Relations Act protects employees’ rights to “self-organiz[e], to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining” 29 U.S.C. § 157. This majority decision – against a vigorous dissent – turned on its head decades of Board precedent protecting Section 7 communication rights. Below, we review several decisions addressing employees’ rights to use their employers’ email systems, and speculate regarding some possible developments.

a. *General Counsel Memorandum*

After the *Register-Guard* decision, the General Counsel of the National Labor Relations Board asked all NLRB Regional Offices to submit discrimination cases implicating *Register-Guard* to the NLRB’s Division of Advice “in order to assure a consistent approach to the interpretation of that decision.”⁴ On May 15, 2008, his office issued a report on the five cases⁵ that had been submitted for advice regarding the proper application of *Register-Guard*.⁶

In the first case, the employer had permitted the union to use the company’s email system for various union matters, including communications with the employer about labor issues. The employer then sent a letter informing the union that it could not use the system to send emails to company managers outside the particular facility. The Division of Advice concluded that the rule was lawful “because it concerned how the union was permitted to use the employer’s e-mail system and did not otherwise prohibit the union from engaging in protected communications outside the plant or to broad groups of managers. Since the rule solely involved company equipment, and did not discriminate against union or Section 7 activity, it was considered lawful.”

In the second case, an employer maintained a no-solicitation rule that prohibited solicitation for any purpose during working time and in patient care areas. The evidence demonstrated, however, that the employer enforced the policy inconsistently; employees engaged in union solicitation were disciplined, while employees were allowed to solicit for Avon and Mary Kay cosmetics, sales of holiday crafts, school fund-raising, and

⁴ Office of the General Counsel Memorandum GC 08-07 (May 15, 2008) (available at http://www.nlr.gov/Research/Memos/general_counsel_memos.aspx (last visited January 12, 2009)).

⁵ The fourth case was *Texas Dental*, described below, and the fifth case did not deal with email; accordingly, only three of the cases are described here.

⁶ All of the case and advice summaries were stripped of identifying information, so significant descriptive details are lacking.

money for individual families. This situation was unlike *Register-Guard*, in which the employer had allowed personal emails but not solicitation emails of any kind. The Division of Advice accordingly found that the employer here had acted discriminatorily by prohibiting union-related solicitations while allowing solicitations “for a variety of groups and organizations other than the union.”

In the third case, an employee sent emails over the employer’s email system to 20 other employees, informing them about an off-site union meeting. Before sending the message, the employee asked the IT Director about appropriate use of the email system; the IT Director advised that some personal use of the system was permitted. After the employee sent the message, he received a written warning for violating the employee handbook by using the email system for solicitation. The handbook stated that the email system was not intended for personal use, and that employees could not solicit during working time for any purpose. The evidence showed, however, that employees had sent a variety of other non-business emails and not been disciplined, and also that the employer’s reason for imposing discipline was to prevent other employees from engaging in union activity.

The case settled, but several months later, the employer disciplined the same employee for sending another union-related email. The Division of Advice concluded that a complaint should issue “since the evidence showed that the employer re-promulgated its e-mail rule for anti-union reasons, and discriminatorily enforced the rule against Section 7 activity.” The General Counsel reasoned that such an outcome was appropriate under *Register-Guard* because the Board majority in that case had held that “‘if the evidence showed that the employer’s motive for the line-drawing [with respect to permitted and prohibited emails] was antiunion, then the action would be unlawful.’” Further, the Board made it clear that it was not altering well-established principles prohibiting employer rules that discriminate against Section 7 activity.”

The General Counsel closed the report by noting that it was continuing to bring *Register-Guard* cases to the Division of Advice “to ensure a consistent approach to our casehandling.”

b. ***Henkel Corporation***, 2008 NLRB LEXIS 247 (August 8, 2008)

In *Henkel Corporation*, an AFL-CIO local sought a rerun of an election, alleging, among other things, that the employer had maintained an unlawful internet policy that was discriminatorily written and applied. The email use policy stated that while employees might use the network occasionally for personal use, it was intended for “business-related transactions” and should not be used for a variety of other purposes, including “non-job-related solicitations.” During the union campaign, several supervisors informed an employee that he was not permitted to access union-related information on company computers, although he continued to use company computers to check personal email.

The Administrative Law Judge observed that if the rule entirely prohibiting “non-job-related solicitations” were applied to oral solicitation rather than to electronic solicitation, it would be overbroad under *Republic Aviation Corporation v. NLRB*, 324 U.S. 793 (1945). Under *Register-Guard*, however, the restriction on the use of the employer’s computers was facially lawful. Because there was no evidence that the employer allowed other “organizational” postings, the ALJ also rejected the argument that the specific prohibition on using the system for union-related emails constituted disparate or differential treatment of the union as against other organizations.

c. ***Texas Dental Association***, 2008 NLRB LEXIS 98 (April 10, 2008)

Texas Dental Association, on the other hand, demonstrates (as also indicated by the second and third cases in the General Counsel’s memo) that *Register-Guard* does not give employers total impunity to act against employees who use electronic communications to engage in concerted activity. An Administrative Law Judge concluded in this case that the firing of two employees of the Texas Dental Association (TDA) for their involvement in various concerted activities, including using the TDA’s computer system to circulate a petition asserting various complaints, violated Section 8(a)(1) of the NLRA. Section 8(a)(1) makes it an “unfair labor practice” for an employer “to interfere with, restrain, or coerce employees in the exercise of rights” guaranteed by Section 7 of the NLRA. 29 U.S.C. § 158(a)(1).

In February 2006, TDA’s Director of Ethics was discharged after breaking off a relationship with a supervisor. Soon after, a number of staff members, along with two supervisors, met in person to discuss grievances. One of the employees present, Nathan Clark, subsequently drafted a petition on his personal computer, and 11 employees signed it at a second meeting that included a supervisor, Barbara Lockerman. Before going to that meeting, Lockerman advised a company official about the upcoming meeting; the official informed her that if the employees held the meeting, “they’ll be fired.” After the second meeting, Clark drafted a resolution calling for an independent investigation of TDA’s management and sent it anonymously to the chairman of TDA’s Ethics and Judicial Committee, along with the petition. The chairman unsuccessfully attempted to bring up the petition at an annual meeting, after which Clark sent the petition anonymously to the Board of Directors.

Shortly afterwards, TDA’s executive director ordered all employees who had been involved in the anonymous communications to report to her as a requirement of their employment. When no one came forward, the executive director hired a forensic scientist to examine certain employees’ computers; after the examination revealed a fragment of the petition on Clark’s work computer, the executive director fired Clark for “participating in this anonymous e-mail scheme” and ignoring her request to meet with her. She also alleged that Clark had inappropriately used “the Association’s computer and e-mail system” in violation of TDA’s Electronic Communications Policy. Finally, she asserted that Clark had inappropriately asked TDA’s auditor for information, but admitted that she had not raised the issue before firing him. The executive director also

fired Lockerman for failing to come to her with her knowledge of the facts underlying the petition.

TDA had two somewhat contradictory policies relating to use of the Association's equipment by employees. The Personnel Policy Manual allowed employees to use computer equipment for personal reasons but said personal use was "at their own risk," including the risk of "loss of privacy." TDA's Electronic Communications Policy (ECP), on the other hand, entirely prohibited non-business use of the Association's equipment, including for non-job-related solicitations. The evidence showed, however, that the business-use-only aspect of the ECP was not enforced, as the Association's system was used for personal emails, jokes, and solicitations for the sale of Girl Scout cookies.

The administrative law judge first observed that although Clark's communications were anonymous, "anonymous submissions do not lose the protection of the Act" (citing *Chrysler Credit Corp.*, 241 NLRB 1079 (1979)). The judge also found that the petition constituted concerted activity because it included allegations about "poor management, negligence, and unfair treatment." Moreover, the executive director believed that the petition came from "disgruntled employees who have some issues"; because she understood that it related to "issues" and came from "employees," the judge determined that the executive director also believed the activity was protected by the NLRA.

With respect to the specific justifications for terminating Clark, the judge first concluded that because the executive director failed to conduct further investigation to corroborate her belief that Clark had made inappropriate inquiries of TDA's auditor, and in fact the inquiries were proper, that basis for Clark's discharge was a pretext. In addition, Clark's failure to voluntarily come forward to confess to his involvement in the petition was not a reasonable basis for discharge: "employees are excused from failing to tell the truth when interrogated regarding their protected activities insofar as their responses constitute 'a continuation of . . . [their] protected, concerted activities.'"⁷

Moreover, TDA failed to present any evidence that it would have fired Clark even in the absence of his protected activity – particularly as the allegations regarding communications with the auditor were pretextual, and the executive director conceded that Clark would not have been fired for using the electronic communications system for emails about Girl Scout cookies. The judge concluded by noting that *Register-Guard* did not immunize TDA because Clark "would not have been discharged absent his protected activity."

d. *Next Steps?*

It is not yet clear what direction labor law will take in the wake of *Register-Guard*. As an initial matter, the decision leaves open a number of unanswered questions. As one commentator has observed:

⁷ Quoting *Earle Industries*, 315 NLRB 310, 315 (1994).

On the administrative level, there remain a number of additional unanswered legal issues stemming from *Register-Guard* that will have to be resolved by the Board and the courts in future cases:

- 1) whether an employer can apply a computer use anti-solicitation policy to employee owned electronic communication devices while on break inside an employer's premises or vehicle;
- 2) whether an employer can prohibit union solicitations when employees receive other organization solicitations on personal hotmail or yahoo accounts accessed at the workplace during breaks;
- 3) whether the use of monitoring software targeted at non-work related email can constitute unlawful surveillance under the NLRA;
- 4) whether an employer can prohibit employees from reading union-related email or accessing union-related websites while permitting such activities relating to other organizations;
- 5) whether an employer can lawfully require employees to take affirmative steps to be removed from a union listserv while permitting employees to receive emails from other listservs; and
- 6) the impact of potential future state laws regulating employer computer use policies.⁸

In addition, NLRB member (and now chair) Wilma Liebman has herself criticized the Board for making “little sustained effort to adjust its legal doctrines to preserve worker protections in a ruthlessly competitive economy. . . . [L]abor law policymakers and enforcers have done too little, too late.” Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. LAW 569, 589 (2007).

With the inauguration of a new administration and the beginnings of a more union-friendly NLRB, it is entirely possible that the Board find an opportunity to revisit and overturn the *Register Guard* decision. The Board’s and other courts’ decisions will be worth watching closely in the coming years to ascertain the protected status of email exchanges relating to concerted activity.

4. NLRB Guidance on NLRA-Protected Rights and Political Activity

Finally, a July 2008 memorandum from the General Counsel of the NLRB bears mentioning.⁹ The memorandum provides guidance on the intersection of political activity and employees’ rights to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” as protected by Section 7 of the

⁸ William A. Herbert, *The Electronic Workplace: To Live Outside the Law You Must Be Honest*, 12 EMPL. RTS. & EMPLOY. POL’Y J. 49, 98-99 (2008) (footnotes omitted).

⁹ Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy (Memorandum GC 08-10, July 22, 2008). See http://www.nlr.gov/Research/Memos/general_counsel_memos.aspx; click on the first memorandum listed under year 2008.

National Labor Relations Act. In the memorandum, the General Counsel advises that where there is a “direct nexus” between the subject of political advocacy and a “specifically identified employment concern of the participating employees,” the political advocacy is protected.

The memo uses *Kaiser Engineers*, 213 NLRB 752, 755 (1974), *enf’d*. 538 F.2d 1379 (9th Cir. 1976), as an example. In *Kaiser*, a Kaiser Engineers employee wrote to Congress to oppose a competitor’s efforts to obtain visas for foreign engineers; the Board held (and the U.S. Court of Appeals for the Ninth Circuit agreed) that the employee was engaged in protected activity because the letter was, in the General Counsel’s words, “motivated by a concern that an influx of foreign engineers would threaten U.S. engineers’ job security” and was therefore for the “mutual aid or protection” of Kaiser’s and other engineers. As the General Counsel put it, the Board has often found that “employee appeals to legislators or governmental agencies were protected, so long as the substance of those appeals was directly related to employee working conditions.” As a corollary, even literature distribution on a political issue may be protected by the Act; in *Motorola Inc.*, 305 NLRB 580, n.1 (1991), *enf. denied in pert. part* 991 F.2d 278 (5th Cir. 1993), the Board held that an employer’s ban on distribution of literature suggesting messages to the city council regarding mandatory drug testing violated Section 8(a)(1).¹⁰

By contrast, however, complaints to governmental bodies that involve, for instance, safety of persons who are not employees are not protected by Section 7. *See Five Star Transportation, Inc.*, 349 NLRB No. 8, slip op. at 3 (2007), *enfd.* 522 F.3d 46 (1st Cir. 2008); *Waters of Orchard Park*, 341 NLRB 642, 643-44 (2004). Similarly, distribution of literature that is “purely political,” with no reference to employment-related issues, does not constitute activity for “mutual aid or protection.” *See, e.g., Ford Motor Co.*, 221 NLRB 663, 666 (1975), *enfd. mem.* 546 F.2d 418 (3d Cir. 1976).

The General Counsel closed by observing that even when political advocacy constitutes “mutual aid or protection” under Section 7, it still may not be protected because of the means used to carry it out. Thus, when employees leave the workplace during work time to engage in a political demonstration, the activity is not protected because, unlike in the case of strikes (which are protected), the subject of the demonstration is outside of the employer’s control.

The General Counsel distilled several principles from the Board cases surveyed:

- “non-disruptive political advocacy for or against a specific issue related to a specifically identified employment concern, that takes place during the employees’ own time and in nonwork areas, is protected;

¹⁰ The Fifth Circuit denied enforcement of the Board’s decision on the grounds that employees involved were acting as members of an outside political organization. 991 F.2d at 285. The General Counsel opined, however, that “[t]his approach is questionable, as the Court focused on the status of the groups involved rather than the substance of the advocacy.”

- on-duty political advocacy for or against a specific issue related to a specifically identified employment concern is subject to restrictions imposed by lawful and neutrally-applied work rules; and
- leaving or stopping work to engage in political advocacy for or against a specific issue related to a specifically identified employment concern may also be subject to restrictions imposed by lawful and neutrally-applied work rules.”

The General Counsel therefore directed that in matters involving political advocacy that might be protected under Section 7, the NLRB Regional Director

should first determine the purpose and subject matter of the advocacy. With respect to advocacy directed to legislators, the Region should investigate whether there is a specific legislative proposal or enacted provision at issue or whether the advocacy is more diffuse in its scope. With respect to complaints or testimony to administrative and regulatory agencies, the Region should determine the subject matter of those appeals and the specific employee concerns underlying those appeals. In the case of political campaigning, the Region should determine if the advocacy relates to specific issues or more generally to the election of a particular candidate or slate of candidates.

After determining the subject matter of the advocacy, the Region should investigate any asserted nexus between that subject matter and a specific employment-related interest, working condition, or ongoing labor-management dispute. Advocacy that is more diffuse in scope tends to be more attenuated from employment-related concerns.

The Region should then investigate the means employed. Political activity related to employment concerns that occurs during nonwork time and in nonwork areas is generally protected. On the other hand, on-duty political advocacy is subject to restrictions imposed by lawful, neutrally-applied work rules. As in any case, the Region should also investigate whether any discipline imposed was consistent with or a departure from a neutral, nondiscriminatory policy and the employer's past practice.

II. Agency fee and Restrictions on Union fees

1. *Locke v. Karass*, 129 S. Ct. 798 (2009)

Last year the Supreme Court clarified the circumstances under which unions may collect agency fees from employees who are not members of a bargaining unit, where those charges include fees for extra-unit activities such as litigation by a national union. In a unanimous decision, the Court ruled that fees for national litigation activity could be charged as long as: 1) the subject of the litigation was such that it would be chargeable if

the litigation were local (i.e., it was related to collective bargaining rather than political activities); and 2) the litigation charge was reciprocal in nature (i.e., a pooling arrangement existed where the local would have access to the same resource if and when needed).

The case arose when the State of Maine entered into a collective bargaining agreement (CBA) in 2003 with its designated exclusive bargaining agent, the Maine State Employees Association. The CBA included a new provision requiring non-member employees to pay a “service fee” as a condition of their employment. A group of non-member employees filed a grievance and a lawsuit seeking an injunction against the “service fee” and alleging that the fee violated their First, Fourth, and Fifth Amendment rights under the U.S. Constitution. The District Court rejected the plaintiffs’ arguments, finding that the CBA had provided reasonable notice and detail of the fee and that it protected the money by depositing it in an escrow account until any challenges to calculation of the service fee were settled, in accordance with *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Locke v. Karass*, 425 F. Supp. 2d 137 (D. Me. 2006).

On appeal, the plaintiffs focused their claims on the portion of the proposed fees that was inserted into a national pool to support litigation related to other bargaining units, alleging that this portion violated their First Amendment rights. Relying heavily on the “chargeability test” in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), a three-part test for determining which union expenditures can be charged to nonmembers,¹¹ the First Circuit affirmed the District Court’s decision. The appellate court ruled that neither party disputed that the litigation charges were “germane” to collective bargaining activities; the state had an interest in maintaining labor peace; and the fee did not significantly add to the burdening of free speech inherent in an agency or union shop. *Locke v. Karass*, 498 F.3d 49 (1st Cir. 2007).

The Supreme Court took the case in order to address a circuit split that had developed after *Lehnert*, in which the Court was unable to reach a majority decision on the chargeability of national litigation expenses.

In his unanimous opinion in *Locke*, Justice Breyer briefly reviewed the Court’s decisions establishing the constitutionality of representative units’ collecting “agency” or “service” fees from non-member employees, *see, e.g., Railway Employees’ Department v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), before discussing its further refinement of the constitutional question and answer in *Lehnert* and *Ellis v. Brotherhood of Ry.*, 466 U.S. 435 (1984).

Both the *Lehnert* and *Ellis* decisions addressed the constitutionality of “service fees,” with the *Ellis* Court finding that local unions could charge nonmembers for

¹¹ According to the *Lehnert* Court, “chargeable activities must (1) be ‘germane’ to collective-bargaining activity; (2) be justified by the government’s vital policy interest in labor peace and avoiding ‘free-riders’; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.” 500 U.S. at 519.

litigation expenses incidental to the local union's negotiation or administration of a collective-bargaining agreement. The *Ellis* decision did not, however, specifically address the constitutionality of litigation fees paid to a national union in a pooling arrangement, but did contain language prohibiting charging litigation fees to nonmembers for litigation "not having such connection with the bargaining unit."

In *Lehnert*, a majority of the Court found general affiliation fees constitutional, but a plurality of four found that extra-unit litigation appeared to be more like lobbying than like collective bargaining activities and was therefore not chargeable to nonmembers. A circuit split among the federal appellate courts thereafter developed, where the Tenth Circuit rejected fees for "national" litigation while the Third and Sixth Circuits upheld fees for litigation costs incurred by affiliate unions connected with a cost-sharing agreement.

In unanimously upholding the First Circuit's decision, the *Locke* Court unveiled the two-part review described above for determining the constitutionality of charging "agency fees," inclusive of affiliation fees and litigation costs, to nonmembers. That is, fees for national litigation activity could be charged as long as: 1) the subject of the litigation was such that it would be chargeable if the litigation were local (i.e., it was related to collective bargaining rather than political activities); and 2) the litigation charge was reciprocal in nature (i.e., a pooling arrangement existed where the local would have access to the same resource if and when needed).

A concurring opinion written by Justice Alito and joined by Chief Justice Roberts and Justice Scalia appears to invite additional litigation to clarify the definition of "reciprocity" as required by the second part of the review. In his concurring opinion, Justice Alito acknowledges that the *Locke* case does not require the court to analyze or define what is meant by a charge being "reciprocal in nature." He intimates, however, that given the Government's interest in having national unions "bear the burden" of showing that charges to nonmembers of a local are in fact "reciprocal in nature,"¹² and because of the importance of the First Amendment rights involved, the court should one day address what constitutes reciprocity or a bona fide pooling arrangement. 129 S.Ct. at 808 (citations omitted).

2. *Ysursa v. Pocatello Education Association et al.*, 129 S. Ct. 1093 (2009)

In 2003, the Idaho legislature passed the Voluntary Contributions Act (VCA), which, among other things, amended a statute authorizing automatic payroll deductions for union dues. The effect of the VCA was to prohibit payroll deductions for union "political activities." The VCA prohibited such deductions for state, local and private employees and imposed criminal penalties for violations of the law. Prior to its enactment, several unions filed suit challenging the constitutionality of the VCA, arguing that it infringed upon unions' First Amendment rights to engage in political speech.

¹² The United States had submitted an amicus brief in this case arguing that once a nonmember challenges an expenditure, the burden should be on the union to prove that the expenditure was made pursuant to a pooling arrangement that is similar to an insurance policy for the local.

The U.S. District Court for the District of Idaho ruled that the VCA's prohibition on automatic payroll deductions for private and local government employees unconstitutionally restricted speech, but it upheld the payroll deduction prohibition for state employees, following the Supreme Court's "anti-subsidy" rule. The Supreme Court has held that while the First Amendment protects an individual's right to be free from government incursion (in this case, incursion upon individuals' political speech via their union), it does not force the Government to "subsidize" the exercise of those rights. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983). As the district court concluded, "the State is under no First Amendment obligation to subsidize speech by providing, at its own expense, payroll deductions for the purpose of paying union dues or association fees for State employees." *Pocatello Educ. Ass'n v. Heideman*, 2005 U.S. Dist. LEXIS 34494 at *8 (D. Idaho Nov. 23, 2005). Therefore, the District Court found the VCA constitutional as applied to the payroll process for state government employees.

The State of Idaho appealed the District Court decision as it applied to payroll deductions for local government employees, arguing that a local government's payroll system belongs to the state and that the content of speech could therefore be constitutionally restricted. *See Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007). The U.S. Court of Appeals for the Ninth Circuit upheld the district court's decision, explaining that the State had failed to establish that it was a "proprietor" of local governments or their payroll systems and that the state therefore did not have control over the payroll system. The court also rejected the State's alternative argument that it "pervasively" manages local governments or their payroll systems.

The State then appealed the Ninth Circuit decision to the U.S. Supreme Court. The Supreme Court reversed the Ninth Circuit and found that the payroll deduction prohibition was constitutional as applied to local government employees.

In its analysis, the Court ruled that the VCA does not infringe on a union's First Amendment right to engage in political speech but merely prohibits state subsidy of such speech through state payment of the cost for the payroll deduction process: "While publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, Idaho is under no obligation to aid the unions in their political activities. And the State's decision not to do so is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor." 129 S. Ct. at 1098. Since the law did not infringe on unions' speech rights, the Court declared that the State was required only to demonstrate a rational basis to justify the ban, which it had: "Idaho does not suppress political speech but simply declines to promote it through public employer checkoffs for political activities.... The ban on such deductions plainly serves the State's interest in separating public employment from political activities." *Id.* at 1099.

The Court also ruled the ban on payroll deductions constitutional as to local government employees because local governments are a "subordinate unit of government

created by the State” and are not analogous to a private corporation subject to state regulation. *See, e.g., Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530 (1980)). As the Court stated:

A private corporation enjoys constitutional protections, but a political subdivision, “created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.” . . . Given the relationship between the State and its political subdivisions . . . it is immaterial how the State allocates funding or management responsibilities between the different levels of government. The question is whether the State must affirmatively assist political speech by allowing public employers to administer payroll deductions for political activities. For the reasons set forth in this opinion, the answer is no.

129 S.Ct. at 1101 (citations omitted).

III. Discrimination

1. *Meacham v. Knolls Power Atomic Laboratory*, 128 S. Ct. 2395 (2008)

This case arose when the Knolls Atomic Power Laboratory (KAPL) instituted a layoff of thirty-one employees, thirty of whom (including all twenty-eight plaintiffs) were over forty years of age. The employees sued KAPL under the Age Discrimination in Employment Act (ADEA), claiming that KAPL violated the law by creating a layoff plan that had a disproportionate effect, or “disparate impact,” on older workers. KAPL attempted to show that reasonable age-neutral criteria determined which employees would be laid off, without regard to their age.

Initially, the employees’ suit was successful; the jury hearing their case found that KAPL could have achieved the same cost-saving results without disproportionately affecting older workers. KAPL appealed to the U.S. Court of Appeals for the Second Circuit. The Second Circuit concluded that if an employer in an ADEA disparate-impact case claims that it based an adverse employment decision (i.e., termination) on “reasonable factors other than age,” it is up to the affected employees to demonstrate that their employer’s claim is a pretext for age discrimination. Because the employees could not demonstrate that, the court determined that judgment should have been awarded to KAPL and the jury’s award to the employees vacated. The employees then appealed the Second Circuit’s decision to the Supreme Court, which agreed in early 2008 to hear the appeal.¹³

¹³ The AAUP submitted an amicus brief with the AARP and the National Employment Lawyers Association in support of the employees, arguing that an employer’s “reasonable factors other than age” defense is an affirmative defense, which means that the party raising the defense is required to persuade the court or a jury that it is the best explanation of the facts. Thus, if an employer asserts that its decision to terminate an employer or group of employees protected by

The Supreme Court held in June 2008 that when an employer makes an employment decision that has a disproportionate impact on older workers, and alleges that the decision was based on “reasonable factors other than age” (RFOA), the employer must both produce the relevant facts and persuade the jury or the judge about those factors; employees are not obligated to show that such factors did not exist.

After reviewing other statutes and additional legislative and case history, the Court again said firmly, “Congress understands the phrase the same way we naturally read it, as a clear signal that a defense to what is ‘otherwise prohibited’ is an affirmative defense, entirely the responsibility of the party raising it.” The majority also concluded that the “business necessity test” – in which an employer can defend an otherwise discriminatory action by showing that there was a business necessity for it – “should have no place in ADEA disparate-impact cases.”

The Court did add some reassuring words for employers, noting that ADEA plaintiffs are still required to “isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities”; for instance, an ADEA challenge by an employee could be rejected on the grounds that the employee had only pointed out that a pay plan was less generous to older workers and “ha[d] not identified any specific test, requirement, or practice within the pay plan that ha[d] an adverse impact on older workers.” The Court concluded that the additional burden imposed by its decision (and by the balance already set by Congress) will come “mainly in cases where the reasonableness of the non-age factor is obscure for some reason, [where] the employer will have more evidence to reveal and more convincing to do in going from production to persuasion.”

2. ***Crawford v. Metropolitan Government of Nashville***, 129 S. Ct. 846 (2009)

The petitioner in this Title VII case, Vicky Crawford, was a thirty-one-year employee of the Metropolitan Government of Nashville and Davidson County, Tennessee (“Metro”), who worked in the employee relations office of the Nashville school system. In 2001, the Metro Human Resources Department learned that employees in the office where Crawford worked had complained about the inappropriate conduct of their manager. Metro investigated these complaints and interviewed Crawford (who was not one of the original complainants) regarding the manager’s conduct. During the interview, Crawford reported that the manager had made sexually explicit remarks and gestures towards her. Two other employees provided similar accounts of the manager’s conduct.

the ADEA was based on “reasonable factors other than age,” the employer itself should bear the burden of demonstrating those facts and their relevance to the employment decision. This is because it would be impractical to place the burden of disproving an employer’s defense on employees, particularly when the employer controls all of the evidence regarding its decision-making process and motivations. The brief also noted that the Second Circuit’s decision, if adopted by the Supreme Court, would damage the protections the ADEA was designed to afford older workers by allowing employers to shield violations of the law behind the walls of a defense that they can raise without having to prove.

Ultimately, Metro took no disciplinary action against the manager, but the two other employees who had disclosed the manager's misconduct were quickly discharged on other grounds. Crawford herself was terminated in January 2003 on grounds that ultimately proved unfounded. Crawford filed a lawsuit claiming retaliation in violation of Title VII of the Civil Rights Act of 1964, which prohibits discrimination and harassment in employment and makes it an "unlawful employment practice" for an employer to discriminate against an employee (including by termination) "because [the employee] has opposed any practice made an unlawful employment practice . . . or because he has . . . participated in any manner in an investigation" under Title VII.

Crawford claimed that her cooperation in Metro's internal investigation constituted both "opposition" to a practice made unlawful by Title VII and "participation" in a Title VII investigation – both actions explicitly protected by Title VII. Crawford therefore argued that Metro violated both the "opposition" and "protection" clauses of Title VII when it discharged her for cooperating in its investigation.

The federal trial court rejected Crawford's claims that either Title VII's opposition or participation clause applied to her and ruled in favor of Metro. Crawford appealed and the United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. The appeals court ruled that Crawford's actions did not constitute "opposition" under Title VII because Crawford allegedly did not take an "active" and "consistent" stance against her manager's discriminatory acts. The court also held that Crawford's "participation" in Metro's internal investigation was not protected activity under the participation clause because no EEOC charge had yet been filed. According to the court, the "participation" clause only protects employees who agree to help their employer investigate discrimination after "an employee . . . [has] filed a charge with the EEOC or otherwise instigated proceedings under Title VII."

After the Sixth Circuit issued its decision, Crawford asked the U.S. Supreme Court to review the Sixth Circuit's reasoning, and the Supreme Court agreed.¹⁴ In the higher education context, a decision by the Supreme Court upholding the Sixth Circuit's ruling would have put at risk faculty members and other employees who participate in an internal harassment or discrimination investigation before an EEOC charge is filed, and

¹⁴ The AAUP joined in an amicus brief in support of Crawford filed by a coalition consisting of the AAUP, the National Employment Lawyers Association, the National Employment Law Project, and Public Justice, P.C. The brief argued that Congress intended Title VII's "participation" and "opposition" clauses to be very broadly defined, to provide an incentive to participate in discrimination investigations or oppose acts of discrimination. The brief also noted that the Sixth Circuit's opinion would expose not only employees but also employers to increased risk and uncertainty. If an employer could not assure its employees that they would not be disciplined for participating in an internal investigation prior to the filing of an EEOC charge, then employees would protect themselves by filing EEOC charges immediately. Employers would thus be deprived of the ability to address potentially discriminatory situations without government involvement.

could inhibit the ability of faculty grievance committees to accurately investigate and assess harassment- or discrimination-related grievances.

In early 2009, the Supreme Court unanimously reversed and remanded the Sixth Circuit decision. The Supreme Court reviewed the conflict among federal appeals courts and held that the “opposition” clause of Title VII’s anti-retaliation provisions protects an employee who testifies in an internal investigation of alleged harassment. The Court ruled that Title VII’s protection “extends to an employee who speaks out about discrimination during an employer’s internal investigation.” The Supreme Court ruling did not reach the issue of whether the “participation clause” of the anti-retaliation provisions also protects such an employee.

3. *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008)

This case involved a lawsuit by Anup Engquist, a former employee of the Oregon Department of Agriculture (“ODA”), against the ODA. Engquist’s case arose when she angered her supervisor in the ODA by reporting his abusive behavior to superiors. The supervisor retaliated by arranging a restructure within the ODA that resulted in Engquist’s discharge. Engquist sued the ODA, asserting, among other things, that the ODA had violated Engquist’s rights under the Equal Protection Clause of the Constitution by treating her differently from her co-workers without a justifiable rationale. This theory is known as an Equal Protection “class of one” claim, because it focuses on the employee as an individual rather than as a member of a “protected class” – i.e., a class defined by race, national origin, or gender. The theory was first accepted by the Supreme Court in 2000, in a case involving a city’s zoning decision. Since then, a number of federal courts have allowed public employees to use the theory in employment cases (though no employees have been successful).

Engquist won her case at trial and was awarded substantial compensatory and punitive damages. The ODA appealed, however, and the U.S. Court of Appeals for the Ninth Circuit reversed the verdict, concluding that the “class of one” Equal Protection theory should be limited to circumstances where the government acts as a regulator and not where it acts as an employer. The majority reasoned that the Equal Protection clause provides more protection against arbitrary government action to “ordinary citizens” than it does to “public employees.” The Ninth Circuit also expressed its concern that applying the Equal Protection clause to government employees would erode the state-employee “employment at will” doctrine and, in addition, would result in increased litigation. Engquist appealed the decision to the United States Supreme Court, and the court took the case to resolve the issue.¹⁵

In June 2008, the Supreme Court concluded in a 6-3 decision that “a ‘class-of-one’ theory of equal protection has no place in the public employment context.” The

¹⁵ The AAUP, in a coalition with several other organizations, submitted an amicus brief asserting that public employees are entitled to Equal Protection rights against arbitrary government action and arguing that a “class of one” challenge may be the only method for a public employee to challenge an arbitrary or vindictive employment decision.

majority (through Chief Justice Roberts) reasoned that “there is a crucial difference . . . between the government exercising ‘the power to regulate or license, as lawmaker,’ and the government acting ‘as proprietor, to manage [its] internal operations;’” when the government acts as employer, it has “far broader powers than does the government as sovereign.” The Court based this assertion on the fact that when the government acts as an employer, it hires employees to carry out official duties with efficiency and integrity, and “the government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.” The majority analogized to other contexts in which the government has “greater leeway” in dealing with its own employees than it does in dealing with citizens at large, including the Fourth Amendment, Due Process clause, and First Amendment contexts; the Court called the public-employee speech cases, including *Pickering* and *Connick*, “particularly instructive.”

According to the majority, this precedent in the public-employee context established two main principles: “First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.”

The majority contended that where decisions are not based on a prohibited consideration – i.e., race or sex – and are by their nature discretionary, there is no Equal Protection violation. The majority then reasoned that “this principle applies most clearly in the employment context, for employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. . . . Unlike the context of arm’s-length regulation . . . treating seemingly similarly situated individuals differently in the employment context is par for the course.” Recognition of a class-of-one claim would be “simply contrary to the concept of at-will employment,” in which an employee “may be terminated for a good reason, bad reason, or no reason at all.”

The Court acknowledged that Congress and all states have replaced at-will employment with some statutory protection, but held that “a government’s decision to limit the ability of public employers to fire at will is an act of legislative grace, not constitutional mandate.” The Equal Protection clause therefore could not provide additional protection for individual employees – particularly because Congress had already excluded some employees from federal employment protections, and that “careful work” would be undone by extension of the Equal Protection Clause to class-of-one claims.

Finally, the majority invoked the danger of a flood of litigation, suggesting that if governmental employees needed to argue “only that they were treated by their employers worse than other employees similarly situated,” any personnel action “will suddenly become the basis for a federal constitutional claim.” The Court acknowledged that most

of the claims would not prevail, because of the various elements of proof and the high burden of demonstrating that a government employment decision is not “rational,” but opined that the “practical problem” with permitting class-of-one claims in the employment context “is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack.” Quoting *Garcetti v. Ceballos*, the Court concluded that “the Equal Protection Clause does not require ‘this displacement of managerial discretion by judicial supervision.’”

Justice Stevens dissented (joined by Justices Souter and Ginsburg), arguing that “instead of using a scalpel to confine so-called ‘class of one’ claims to cases involving a complete absence of any conceivable rational basis for the adverse action and the differential treatment of the plaintiff, the Court adopts an unnecessarily broad rule that tolerates arbitrary and irrational decisions in the employment context.” The dissent also rejected the majority’s contention that at-will employment remains the norm, and criticized the Court for “misconstru[ing] the Constitution in order to make it even easier to dismiss unmeritorious claims.”

4. ***Holcomb v. Iona College***, 521 F.3d 130 (2d Cir. 2008)

Craig Holcomb was the assistant head coach of Iona College’s basketball team. After Iona terminated Mr. Holcomb, he sued Iona, alleging that his termination was at least in part motivated by the fact that he was white and his wife was African-American. He supplied multiple pieces of evidence to demonstrate that the termination was racially-motivated, including that both he and an African-American colleague were fired while a white man not in an interracial relationship was retained; the decision-makers knew of Holcomb’s relationship; and at least one of the decision-makers had also tried to reduce the number of African-Americans present at basketball program events for the purpose of alumni relations and fundraising. The district court held that the fact that another white employee in an interracial relationship was kept on was not dispositive, because “[i]t was agreed all around that [that employee] was simply too expensive to fire, with over five years left on his contract, whether or not he was in a relationship with a black woman.”

The U.S. Court of Appeals for the Second Circuit reversed a lower court’s determination that Mr. Holcomb had not stated a claim for discrimination based on his rights of free association. The Second Circuit held that there may be a violation of Title VII where an employer takes action against an employee who is not in a protected category (i.e., a minority race, gender, etc.) but is in a relationship with a person in a protected category, if the termination is due at least in part to that relationship. The court reasoned that “where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s *own* race.”

The court did not rule definitively in Holcomb's favor; the decision meant that Holcomb's lawsuit could proceed to the jury.

IV. Faculty Members' Property Interests

1. *Gunasekera v. Irwin*, 551 F.3d 461 (6th Cir. 2009)

Jay Gunasekera was a professor of mechanical engineering at Ohio University; as of 2004, he had worked at OU for more than twenty years, been chair of the department for fifteen, and had Graduate Faculty status, which allowed him to supervise graduate students' thesis work. That year, there was a scandal over plagiarism; after the dean of the engineering college commissioned a report on the plagiarism, the provost of the university held a press conference at which he singled out Dr. Gunasekera for "ignoring [his] ethical responsibilities and contributing to an atmosphere of negligence toward issues of academic misconduct." In response to the report, OU suspended Dr. Gunasekera's Graduate Faculty status for three years and prohibited him from advising graduate students.

Gunasekera sued the dean and provost in federal district court, alleging that the provost and the dean of the college had violated his due process rights by (1) depriving him of his property interest in his Graduate Faculty status without "notice and a meaningful opportunity to be heard" and (2) depriving him of his liberty by "publiciz[ing] accusations about his role in plagiarism by his graduate student advisees" without giving him a "meaningful opportunity to clear his name."

The district court found in favor of the provost and dean on a variety of grounds, including holding that Gunasekera had no property interest in his Graduate Faculty status and that even if Gunasekera had been deprived of a liberty interest, "due process does not entitle him to a hearing beyond" what was already provided by the provost and dean.

Gunasekera appealed, arguing among other things that (1) he had a property interest in his Graduate Faculty status and was deprived of that interest without due process, and (2) the name-clearing hearing he was offered did not satisfy due process because it was not public.

In support of his first claim, Gunasekera alleged that by university custom, faculty members automatically maintain Graduate Faculty status as long as they satisfy four university-required criteria (Ph.D., Group I faculty status, a certain amount of teaching, and a certain number of publications or service as investigator). He argued that those criteria limited the university's discretion to name Graduate Faculty and that "in actual practice . . . professors retain their appointment so long as they satisfy those criteria," and that he thus had a protected property interest in his status.

In reversing the district court's decision, the U.S. Court of Appeals for the Sixth Circuit observed: "In the context of university employment, the Supreme Court has held that 'rules and understandings, promulgated and fostered by state officials' can form the foundation of a protected property interest. *Perry v. Sindermann*, 408 U.S. 593, 602-03

(1972). Similarly, we have held that an employer’s custom and practice can form the basis for a protected property interest. *Christian v. Belcher*, 888 F.2d 410, 417 (6th Cir. 1989).”

The appeals court rejected the district court’s holding that Gunasekera did not have a property interest because university officials’ discretion was not entirely restrained; as the appeals panel put it, “Gunasekera’s argument . . . turn[s] . . . on his ability to show that a common practice and understanding had developed which gave him a legitimate claim to Graduate Faculty status so long as he met the stated conditions.” In addition, OU admitted that it had never revoked or suspended any other faculty member’s Graduate Faculty status.

Finally, the appeals court observed that Gunasekera alleged that because of his loss of Graduate Faculty status, he had lost both pay (a summer salary research stipend) and benefits (such as a reduced teaching load), which added to the presumption of deprivation of property. Because OU’s lawyer admitted that Gunasekera had not been given either a pre- or post-deprivation hearing regarding his loss of Graduate Faculty status, the appeals court reversed the district court’s dismissal of Gunasekera’s property-interest claim.

With respect to Gunasekera’s second claim, regarding a name-clearing hearing, the university had admitted that Gunasekera had a “protected liberty interest” in such a hearing, so the only question for the court was what process was due and whether the hearing had to be public. (The appeals court also noted that even in the absence of the university’s admission, Gunasekera would have a protected liberty interest in the hearing under the Sixth Circuit’s five-part test, because: “the accusations regarding plagiarism were connected to his suspension (and . . . [his] suspension deprived him of benefits and pay); the University alleged more than simple incompetence; the allegations were public; Gunasekera claims that the statements were false, and the University called a press conference to publicize its charges.”)

The circuit court had previously held that “a name-clearing hearing need only provide an opportunity to clear one’s name and need not comply with formal procedures to be valid.” *Chilingirian v. Boris*, 882 F.2d 200, 206 (6th Cir. 1989). Using a three-part test articulated by the Supreme Court, the appeals court concluded that: “where, as here, the employer has inflicted a public stigma on an employee, the only way that an employee can clear his name of the public stigma is through publicity”; “publicity adds a significant benefit to the hearing, and without publicity the hearing cannot perform its name-clearing function”; and a public name-clearing hearing would not necessarily impose a significant burden on the government. The appeals court left it to the district court to determine the “exact parameters of the name-clearing hearing,” and added that “concerns for the privacy of students implicated in plagiarism” could shape the precise nature of the required publicity.

Significantly, the appeals court also held that while the dean and provost were not individually liable for the name-clearing hearing claim, they were individually liable for

failing to give Gunasekera a pre- or post-deprivation hearing for his Graduate Faculty status.

V. Employment Benefits for Contingent Faculty

1. *Indiana State University v. LaFief*, 888 N.E.2d 184 (Ind. 2008)

In *LaFief*, a split Indiana Supreme Court decided that an adjunct professor who was non-renewed when his one-year employment contract expired was eligible for unemployment insurance benefits.

The plaintiff in this case, William LaFief, was appointed an assistant professor at Indiana State University for the 2004-05 academic year and was reappointed for 2005-06. At the conclusion of his second contract in 2006, the University informed him that he would not be renewed. He subsequently filed for unemployment benefits and the University challenged his eligibility.

At the first step of the adjudication process, an administrative law judge determined that the expiration and non-renewal of LaFief's employment contract was not a "discharge," which would have entitled him to benefits under Indiana's unemployment statute. A review board reversed this decision on the ground that the University's decision not to reappoint LaFief was essentially a "discharge." An Indiana appeals court reversed this decision yet again because it agreed with the administrative law judge's initial determination. LaFief and the Indiana department responsible for unemployment insurance appealed the ruling to the Indiana Supreme Court.

In a brief decision, a three-justice majority of the Indiana Supreme Court held that LaFief was entitled to benefits under Indiana's Unemployment Compensation Act ("Act"). The Court noted that the Act is intended to provide benefits for persons "unemployed through no fault of their own." The statute provides that an applicant for benefits is eligible if he or she is unemployed, has paid into the program sufficiently within the applicable time period, and has complied with requirements to actively seek new employment. The Court concluded that the Act does not require that an employee must be "discharged" to receive benefits; an otherwise eligible employee can be disqualified from receiving benefits only if he voluntarily quits his employment without good cause, was terminated for just cause, or failed to accept suitable work offered him.

The Court then applied the Act's requirements to LaFief's circumstances to conclude that he was eligible. Although LaFief "had warning that his employment could terminate upon the contract's expiration," that "does not change the fact that at the end of the year he became unemployed" through no fault of his own. Accordingly, the Court held, "[t]he termination of his employment was no more voluntary than the termination of an employee at will, who is presumably on notice that his employment could terminate at any time."

In a final note, the Court observed that while LaFief was entitled to benefits, this ruling did not apply to persons who contractually agree to mandatory vacation periods or temporary shutdowns with “reasonable assurance” that they will continue to be employed after the mandatory vacation period or shutdown ends. This means that contingent faculty who have no contract for work over the summer months are not entitled to unemployment compensation during the hiatus from work if they have a “reasonable assurance” of continued work in the fall.

Two dissenting justices objected to the majority’s ruling on the ground that because, in their words, LaFief had “voluntarily agreed” that his employment would terminate upon the expiration of the academic year, he was responsible for his own unemployment and could not, therefore, claim benefits under the Act.

The *LaFief* case appears to establish somewhat unusual precedent, although some other state unemployment boards and courts – most notably in California – have similarly held that the end of an employment contract, or even a break in employment between the spring and fall terms, may entitle an employee to unemployment benefits.