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Annual Legal Update[1]

Aaron Nisenson
Senior Counsel
American Association of University Professors

I. Introduction

This year was an active, if mixed one, from the Supreme Court. In the most important case for public sector labor unions, the Supreme Court declined requests to radically alter agency fee law, but refused to allow the charging of agency fees to certain "partial-public" employees (*Harris, infra* at pg. 25.) The Supreme Court also ruled that a public employee's speech that may concern their job, but is not ordinarily within the scope of their duties, is subject to First Amendment protection. (*Lane, infra* at pg. 2.) In addition, the Court invalidated a number of NLRB decisions, finding that the recess appointments in question were not valid, while preserving the ability of the President to make recess appointments in certain circumstances. (*Noel Canning, infra* at pg. 17).

Similarly, other issues of importance to faculty have been decided by the lower Courts. The Ninth Circuit explicitly recognized that speech related to scholarship or teaching was not subject to the *Garcetti* job duties test, and is entitled to First Amendment protection (*Demers, infra* at pg. 4); the Virginia Supreme Court ruled that academic research is protected from disclosure under the Virginia Freedom of Information Act (*ATI, infra* at pg. 8); and the Kentucky Supreme Court ruled that religious higher education institutions are not immune from suits to enforce university handbooks (*Kant, infra* at pg. 10).

In addition, the National Labor Relations Board is reconsidering some of the negative decisions that have affected faculty members in the private sector. Pending before the Board are cases addressing whether faculty members are employees who are covered by the National Labor

[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.

Relations Act (and can therefore unionize) or whether they are managers excluded from coverage (*Point Park University* and *Pacific Lutheran University, infra* at pg. 20) and whether and when religiously affiliated institutions are subject to Board jurisdiction (*Pacific Lutheran University, infra* at pg. 19). Similarly, while the Board case addressing whether graduate student assistants are employees under the NLRA was resolved by the parties and therefore withdrawn (*NYU, infra* at pg. 24) the Board asked for briefs on this issue in the Northwestern University football players case. (*Northwestern University, infra* at pg. 22)

In June of 2013, the U.S Supreme Court issued five decisions of importance to faculty members and institutions: in *Fisher (infra* at pg. 14), the Court reaffirmed the legal standard applicable to affirmative action in higher education admissions; in two employment law cases, *Nassar* and *Vance, (infra* at pg. 14-15) the Court addressed the standard of proof in retaliation cases and the issue of supervisory authority; and in *Windsor* and *Hollingsworth, (infra* at pg. 7-8) the Court addressed the issue of gay marriage. Finally, there were a number of significant lower court decisions on issues including copyright law, First Amendment protections, FOIA requests and tenure contracts.

II. First Amendment and Speech Rights for Faculty and other Academic Professionals

Lane v. Franks, 189 L. Ed. 2d 312 (U.S. 2014)

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

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

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

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

The Court held that Lane's speech was entitled to First Amendment protection. The Court explained that under *Garcetti*, the initial inquiry was into whether the case involved speech as a citizen, which may trigger First Amendment protection, or speech as an employee, which would not trigger such protection. In *Lane* the Court provided a more detailed explanation of employee versus citizen speech, and expanded the range of speech that is protected. The Court explained that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee--rather than citizen--speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." And the Court found that "Lane's sworn testimony is speech as a citizen."

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

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

Demers v. Austin, 746 F.3d 402 (9th Cir. Wash. Jan. 29, 2014)(Important note, previous opinion dated September 4, 2013 and published at 729 F.3d 1011 was withdrawn and substituted with this opinion.)

In this important decision, the Ninth Circuit Court of Appeals reinforced the First Amendment protections for academic speech by faculty members. Adopting an approach advanced in AAUP's amicus brief, the court emphasized the seminal importance of academic speech. Accordingly, the court concluded that the *Garcetti* analysis did not apply to "speech related to scholarship or teaching," and therefore the First Amendment could protect this speech even when undertaken "pursuant to the official duties" of a teacher and professor.

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

The district court dismissed Demers' First Amendment claim on the ground that Demers made his comments in connection with his duties as a faculty member. Unlike most recent cases involving free speech infringement at public universities, the district court's analysis did not center on the language from *Garcetti v. Ceballos,* 547 U.S. 410 (2006). Instead, the court applied a five part test set out by the Ninth Circuit in a series of public employee speech cases and found that Demers was not speaking as a private citizen on matters of public concern. Therefore, the district court found his speech was not protected by the First Amendment.

Demers appealed to the Ninth Circuit. The AAUP joined with the Thomas Jefferson Center for the Protection of Free Expression to file an *amicus* brief in support of Demers. The *amicus* brief argued that academic speech was not governed by the *Garcetti* analysis, but instead was governed by the balancing test established in *Pickering v. Board of Education,* 391 US 563 (1968). In two opinions, the Ninth Circuit agreed and issued a ruling that vigorously affirmed that the First Amendment protects the academic speech of faculty members.

In an initial opinion issued on September 4, 2013, the Ninth Circuit held that *Garcetti* did not apply to "teaching and writing on academic matters by teachers employed by the state," even when undertaken "pursuant to the official duties" of a teacher or professor. *Demers v. Austin,* 729 F.3d 1011 (September 4, 2013). Instead, as argued in the *amicus* brief, the court held that academic employee speech on such matters was protected under the *Pickering* balancing test. The court found that the pamphlet prepared by Demers was protected as it addressed a matter of public concern but remanded the case for further proceedings. The University filed a petition for panel rehearing and a petition for rehearing *en banc.*

On January 29, 2014, the U.S. Court of Appeals for the Ninth Circuit issued an opinion denying the petition for panel rehearing and the petition for rehearing *en banc* and withdrawing and modifying its previous opinion. Originally, the court held that "teaching and writing on academic matters" by publicly-employed teachers could be protected by the First Amendment because they are governed by *Pickering v. Board of Education*, not by *Garcetti v. Ceballos*. In its 2014 superseding opinion, the Ninth Circuit expanded that ruling to hold that *Garcetti* does not apply to "speech related to scholarship or teaching" and reaffirmed that "*Garcetti* does not – indeed, consistent with the First Amendment, cannot – apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."

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

A. Other Recent First Amendment Cases

Golembiewski v. Logie, 516 Fed. Appx. 476 (6th Cir. May 27, 2013) (not recommended for publication), cert denied, 134 S. Ct. 213 (2013), rehearing denied, 134 S. Ct. 816 (2013)

A state university employee's petition to rescind her university's employee- attendance policy was an employee grievance concerning internal office policy. Thus, it was not a matter of public concern upon which the employee could base a claim that she was terminated in violation of her First Amendment right to free speech. This was true although the employee submitted her petition to a state employment board and the petition was related union related.

Turkish Coalition of America, Inc. v. Bruininks, 678 F.3d 617 (8th Cir. 2012)

In February 2012, the U.S. Court of Appeals for the Eighth Circuit ruled that the University of Minnesota (the University) did not violate the First Amendment rights of the Turkish Coalition of America (the Turkish Coalition) by labeling its website "unreliable" for the purposes of student research. Because the University did not block students' access to the Turkish Coalition's website,

but instead only discouraged reliance on the website's materials, the court ruled that the tenets of academic freedom precluded the Turkish Coalition's First Amendment challenge. Noting an "absence of allegations that the challenged actions posed an obstacle to students' access to the materials on the [Turkish Coalition's] website or made those materials substantially unavailable at the university," the court found that academic freedom protected the actions of the defendants.

Palmer v. Penfield Central School District, 918 F. Supp. 2d 192 (W.D.N.Y. 2013)

The U.S. District Court for the Western District of New York found that an elementary school teacher's complaint that her school district discriminates against African American students was not protected speech under the First Amendment. Noting that the teacher's statements (i) were made during a mandatory grade-level meeting and (ii) were "related to a matter that was directly connected to, and arose out of, her duties as a teacher," the court held that the teacher did not speak as a citizen on a matter of public concern. As a result, the teacher's speech was not protected from discipline from the school district.

Mpoy v. Fenty, 901 F. Supp. 2d 144 (D.D.C. 2012)

The U.S. District Court for the District of Columbia held that a teacher's e-mail to the Chancellor of the D.C. public school system, which criticized the "classroom facilities, supplies, teaching assistants, and test scores" at the teacher's school, did not constitute protected speech under the First Amendment. Questioning whether the academic freedom exception outlined in Garcetti is applicable outside of the higher education context, the court held that the exception "surely would not apply in a case involving speech that does not relate to either scholarship or material taught." Further, citing the "form and context" in which the teacher's complaint was made, the court ruled that the teacher's e-mail was speech by a public employee; thus, the teacher was not protected from discipline as the result of his e-mail.

Garvin v. Detroit Board of Education, 2013 Mich. App. LEXIS 391 (Mich. Ct. App. 2013) appeal denied 494 Mich. 883 (Mich. 2013)

A Michigan Court of Appeals held that a public school teacher's speech, made in the form of a report of student sexual assault to Child Protective Services, was protected by the First Amendment. Finding that (i) the speech involved a matter of public concern, (ii) the speech was not made by the teacher in her professional capacity, and (iii) "the societal interests advanced by [the] speech outweighed the [school district's] interests in operating efficiently and effectively," the court held that the First Amendment protected the teacher from retaliation stemming from her speech.

B. Supreme Court Decisions on Gay Marriage

United States v. Windsor, 133 S. Ct. 2675 (2013)

This case involved a challenge to the Defense of Marriage Act, a federal statute that defined marriage as only between a man and a woman. The statute limited federal benefits arising from marriage, such as the marriage benefits under the tax code, to such marriages. This limitation was in place even if gay couples were legally married in a given state. The Court ruled 5 to 4, with Justice Kennedy authoring the opinion, that this law was unconstitutional because it violated the Due Process clause of the Fifth Amendment. The Court found that the statute unconstitutionally singled out for adverse treatment a class of persons even though the individual states had decided to protect and honor such marriages. As the Court noted "DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." While this decision is an important one, the Court did not rule that gay persons had a right to be married, instead this is still a decision for individual state legislatures. Here is the concluding section of the decision.

> The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.
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> What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.
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> The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. See *Bolling*, 347 U. S., at 499–500; *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 217–218 (1995). While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.
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> The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom

the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)

This case involved a challenge to California Proposition 8, which had overturned a gay marriage statute and had outlawed gay marriage in the State of California. There was a challenge brought to Proposition 8, and the US District Court found that Proposition 8 was unconstitutional. Importantly, the State of California did not appeal the decision, instead an outside group pursued the appeal. The Supreme Court ruled that the decision of the district court could not be challenged by this outside group. Therefore, the appellate courts had no jurisdiction to hear any appeals and the district court decision was final and binding.

While this case has the political effect of legalizing gay marriage in California, the Court's ruling was based on procedural grounds and the Court did not address the substance of whether Proposition 8 was unconstitutional. This distinction is exemplified by the differences in the Justices who made up the majority in Hollingsworth versus the Justices who ruled in the DOMA case: in particular, Justices Roberts and Scalia joined the majority in Hollingsworth but not in the DOMA case while Justices Kennedy and Sotomayor dissented in Hollingsworth. Thus while this case has important political implications, and may have a procedural impact on cases in general, it does not address the underlying issue of the constitutionality of gay marriage.

III. FOIA/Subpoenas and Academic Freedom

***The American Tradition Institute and Honorable Delegate Robert Marshall v. Rector & Visitors of the University of Virginia & Michael Mann,* 756 S.E.2d 435 (Va. 2014)**

In this case the Virginia Supreme Court unanimously ruled that a professor's climate research records were exempt from disclosure under the Virginia Freedom of Information Act as academic research records. The Court explained that the exclusion of University research records from disclosure was intended to prevent "harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression." While the decision was limited to a Virginia statute, it provided a strong rationale for the defense of academic records from disclosure.

The case began in 2011, when the American Tradition Institute served a FOI request on the University of Virginia regarding Professor Michael Mann's climate research. This request mirrored the subpoena previously served on the University by Attorney General Cuccinelli. The University supplied some records, but took the position that the majority of the records were not subject to public disclosures. Thereafter, ATI petitioned to compel the production of these

documents. Professor Michael Mann sought to intervene, arguing that the emails in question were his and therefore he should have standing in any litigation relevant to any document release. AAUP submitted a letter to the trial court, the 31st Judicial Circuit Court of Virginia, in support of Mann's intervention, and the court granted him standing.

AAUP and the Union of Concerned Scientists subsequently filed a joint amicus brief with the Circuit Court. On April 2, 2013 the Circuit Court held that all of the records sought by petitioners qualified for exclusion under the Virginia FOIA exemption for "data, records or information of a proprietary nature produced or collected by or for faculty of staff of public institutions of higher education….. in the conduct of or as a result of study or research on medical, scientific or scholarly issues, whether sponsored by the institution alone or in conjunction with a governmental body, where such data, records or information has not been publicly released, copyrighted or patented" or under the exemption for personnel records. The court also ruled that purely personal email messages are not public records under the Virginia FOIA.

The Virginia Supreme Court granted a petition for review and the AAUP, in partnership with the Union of Concerned Scientists, filed a brief with the court supporting Professor Mann and UVA and arguing that granting access to the private materials would have a severe chilling effect on scientists and other scholars and researchers. The brief urged that "in evaluating disclosure under FOIA, the public's right to know must be balanced against the significant risk of chilling academic freedom that FOIA requests may pose." The brief also argued that enforcement of broad FOIA requests that seek correspondence with other academics, as ATI sought here, "will invariably chill intellectual debate among researchers and scientists." Also, exposing researchers' "initial thoughts, suspicions, and hypotheses" to public scrutiny would "inhibit researchers from speaking freely with colleagues, with no discernible countervailing benefit."

In April 2014, the Virginia Supreme Court issued a unanimous decision upholding the trial court's decision that none of the requested records were subject to disclosure. The primary issue was whether the research records were "proprietary" under the statute. The Court found that the legislature wanted to ensure that public universities were not at a competitive disadvantage in relation to private universities. The Court noted that this applied not only to financial injury, but also to "undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression." The Court also cited the numerous affidavits attesting to the harmful nature of the disclosures, quoting extensively from one that discussed the threats to possible collaborations with faculty at public institutions. Therefore, the Court found that the term proprietary was intended to have a broad definition that resulted in the exclusion from disclosure of the requested research material.

IV. Tenure, Due Process, and Breach of Contract

A. Tenure – Breach of Contract

***Kant v. Lexington Theological Seminary,* 426 S.W.3d 587 (Ky. 2014); *and Kirby v. Lexington Theol. Seminary,* 426 S.W.3d 597 (Ky. 2014)**

The Kentucky Supreme Court recently issued two decisions strongly affirming the rights of tenured faculty members at religious institutions and echoing arguments made by AAUP in an *amicus* brief filed with the court. In two companion cases the Kentucky Supreme Court ruled that religious institutions are generally bound by tenure contracts, including faculty handbooks, and that faculty members may sue if these contracts are breached, even in some instances in which the faculty member is a minister.

One of the two cases involved Laurence Kant, a tenured Professor of Religious Studies at Lexington Theological Seminary, which employed him to teach courses on several religious and historical subjects. In 2009, the Seminary terminated Kant's employment in violation of the terms of the Faculty Handbook. Kant challenged his termination by filing suit for breach of contract and breach of implied covenants of good faith and fair dealing. Similarly, the Seminary terminated Professor Jimmy Kirby, who filed suit for breach of contract, breach of good faith and fair dealing, and for race discrimination in violation of Kentucky law. Two trial courts summarily dismissed Kant's and Kirby's claims, holding that the contract claims were barred by the "ministerial exception"—a judicially created "principle whereby the secular courts have no competence to review the employment-related claims of ministers against their employing faith communities[.]" *Kirby* at * 11. The lower courts also held that they had no jurisdiction to interpret the contract under the "ecclesiastical abstention doctrine," under which "the secular courts have no jurisdiction over ecclesiastical controversies and . . . will not interfere with religious judicature or with any decision of a church tribunal relating to its internal affairs, as in matters of discipline or excision, or of purely ecclesiastical cognizance." *Kirby* at * 53. The Kentucky Court of Appeals affirmed the decisions below and both professors filed separate appeals with the Kentucky Supreme Court.

AAUP filed an *amicus* brief in support of Kant's appeal to the Kentucky Supreme Court, arguing that the Seminary could not use the ministerial exception to avoid its voluntarily negotiated tenure contract obligations. Specifically, AAUP argued that the issue at the heart of the case—whether the contract permitted the Seminary to eliminate tenure and terminate Kant due to financial exigency—could be decided based on "neutral principles of law" that would not require the Court to interfere with the Seminary's constitutional right to select its own ministers or otherwise to intrude on matters of church doctrine. While the Court did not formally join the Kant and Kirby cases, it heard arguments on the same day and relied upon the arguments in AAUP's amicus brief in reaching its decision in both Kirby and Kant.

On April 17, 2014, the Kentucky Supreme Court issued unanimous decisions in both cases. Although the Court adopted the ministerial exception doctrine as outlined by the U.S. Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,* 132 S. Ct. 694 (2012), it flatly rejected the reasoning of the Kentucky courts below and permitted both professors to

proceed with their cases. The Court viewed the ministerial exception as narrow, contrary to the expansive interpretation offered by Seminary. In particular, the Court stated "We reject a categorical application of the ministerial exception that would treat all seminary professors as ministers under the law." *Kant* at *2-3. Instead, the Court emphasized that the "primary focus under the law is on the nature of the particular employee's work for the religious institution." *Kant* at *22. Accordingly, the court found that Kant was not a minister, because he taught history of religion, a primarily secular field. The court concluded that "When an employee operates in a non-ministerial capacity . . . the employee should be entitled to full legal redress. As a result, the ministerial exception does not bar Kant's contractual claims." *Kant* at *23.

The court explicitly stated that neither the ministerial exception nor the related ecclesiastical abstention doctrine would preclude claims where employees, and even ministers (like Kirby), sought to enforce contractual rights not involving an interpretation of church doctrine. In language echoing AAUP's *amicus* brief, the court explained:

> "[W]hen the case merely involves a church, or even a minister, but does not require the interpretation of actual church doctrine, courts need not invoke the ecclesiastical abstention doctrine." Indeed, if "neutral principles of law" or "objective, well-established concepts . . . familiar to lawyers and judges" may be applied, the case—on its face—presents no constitutional infirmity. Of course, neutral principles of law can be applied to the breach of contract claim presented in the instant case; but, more importantly, Kant's claim involves no consideration of or entanglement in church doctrine. We reiterate that the intent of ecclesiastical abstention is not to render "civil and property rights . . . unenforceable in the civil court simply because the parties involved might be the church and members, officers, or the ministry of the church."

Kant at *24-25.

V. Discrimination and Affirmative Action

A. Affirmative Action in Admissions

***Schuette v. Coalition to Defend Affirmative Action,* 188 L. Ed. 2d 613 (2014)**

In this case the U.S. Supreme Court overturned a lower court ruling that had found unconstitutional provisions of an amendment to the Michigan Constitution banning affirmative action affecting Michigan's public higher education institutions. The Court noted that the question was ". . . not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions." The Court held that because there was no specific injury, voters had the right to determine whether race-based preferences should be permitted by state entities and therefore the amendment banning affirmative action was constitutional. The Court made clear, however, that this ruling does not change the

principle outlined in Fisher v. University of Texas that, "the consideration of race in admissions is permissible, provided that certain conditions are met."

This affirmative action case comprised two separate lawsuits challenging a November 2006 amendment to the Michigan Constitution prohibiting all "discriminat[ion] against or grant[ing] preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The constitutional amendment effected two significant changes to the admissions policies at Michigan's public higher education institutions. It "eliminated the consideration of race, sex, color, ethnicity, or national origin in individualized admissions decisions"—although other admissions criterion, such as grades, athletic ability, geographic diversity, or family alumni connections were not prohibited. And, it effectively prevented Michigan's public higher education institutions or their boards from revisiting this issue except by repeal or modification of the Michigan Constitution.

The plaintiffs/respondents contend that the Michigan constitutional amendment violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In March 2008, a federal district court ruled that the amendment was constitutional, and the plaintiffs appealed to the Sixth Circuit Court of Appeals. In July 2011, a panel of the Sixth Circuit Court of Appeals reversed the district court's ruling, holding that the portions of the amendment that affect Michigan's public higher education institutions "impermissibly alter the political process in violation of the Equal Protection Clause." The Sixth Circuit granted Michigan Attorney General Bill Schuette's petition for an en banc review of the panel's decision, and in November 2012, the Sixth Circuit, in a remarkably divided opinion, reversed the district court's judgment, finding the provisions of the amendment affecting Michigan's public higher education institutions are unconstitutional.

The Supreme Court of the United States granted Schuette's petition for writ of certiorari in March 2013. The issue before the Supreme Court was "[w]hether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions." Schuette argued that "because Section 26 of the Michigan Constitution lacks discriminatory intent it is not a racial classification, and thus the Equal Protection Clause and political-restructuring doctrine do not apply." Respondent Coalition to Defend Affirmative Action contended, however, that "Section 26 contains racial classifications because it targets racially-conscious admissions plans in public schools."

The AAUP joined a coalition brief, authored by American Council on Education and joined by 47 other higher education related organizations, which was submitted on August 30, 2013. The brief argued that while Schuette and his supporting amici raise policy questions about the educational benefits of racially diverse student enrollments and offer commentary on the methods they believe colleges and universities should employ to attain diversity, the constitutionality of the pursuit of racial diversity in higher education is not at issue in this case. The issue was whether the Michigan amendment distorts the political process against racial and ethnic minority voters in Michigan, thereby violating the Fourteenth Amendment to the United States Constitution.

The brief argued that the constraints Schuette and his amici supporters propose on the lawful tools by which colleges and universities may attain diversity are at odds with the Supreme Court's decisions in Fisher v. Texas and Grutter v. Bollinger and the "longstanding… tradition of governmental forbearance in higher education." Further, that "whether and how, within the bounds of the Equal Protection Clause, to pursue the educational benefits of a diverse student body are questions of academic policy and practice properly assigned to the judgment of colleges and universities." The brief reiterated the Supreme Court's decision in Grutter, in which it endorsed "deference to institutional judgment that student diversity is a compelling interest, reasoning that those responsible for higher education are best qualified to evaluate the cumulative information – related, for instance, to campus dynamics, cognitive processes, nurturance of moral reasoning, and pursuit of the institution's particular educational mission –necessary to make that judgment." The brief admonished that courts and States should "resist substitut[ing] their own notions of sound educational policy for those of the school authorities which they review," and concludes that "overrid[ing] those academic judgments by State constitutional amendment would truncate educators' traditional authority, an authority that educators have exercised to the immense benefit of this nation from the nation's beginnings to the present day."

On April 22, 2014, the Supreme Court issued a decision overturning the appellate court decision and finding the ban on affirmative action constitutional. The Court took pains to note that it was not ruling on the constitutionality of affirmative action itself. The Court explained. "Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. The consideration of race in admissions presents complex questions, in part addressed last Term in *Fisher v. University of Texas at Austin, 570 U. S. ---, 133 S. Ct. 2411, 186 L. Ed. 2d 474 (2013)*. In *Fisher*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in *Fisher*, that principle is not challenged. The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions."

The Court proceeded to find that the amendment to the Michigan Constitution was itself constitutional. In doing so the Court found that because there was no specific injury, voters had the right to determine whether race-based preferences should be permitted by state entities and therefore the amendment banning affirmative action was constitutional. The opinion of the Court concluded, "This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters."

Fisher v. University of Texas, 133 S. Ct. 2411 (2013)

In this case, the U.S. Supreme Court generally upheld the constitutionally of affirmative action plans as implemented under the Court's previous decisions. The Court generally reaffirmed its prior holdings that found that diversity in educational institutions was a compelling state interest that could necessitate the use of an affirmative action program. However, the Court returned the case to the appeals court finding that the lower court had applied the wrong standard of proof in determining whether the affirmative action plan was necessary to attain the goal of diversity.

In August 2012, the AAUP joined in a coalition *amicus* brief submitted to the Supreme Court and drafted by the American Council on Education. On June 24, 2013 the Supreme Court ruled 7 to 1 to remand the case because the lower court did not apply to proper standard of proof when evaluating the claims. In particular, the Court found that the Fifth Circuit erred in granting deference to the University's decision to use race as a factor to attain diversity. As the Court explained, the "University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference." Slip op. at 10.

However, most importantly, the Court did NOT rule that affirmative action was inherently unconstitutional, as many had feared. Instead, the Court primarily reaffirmed its 2003 holding in *Grutter*, which has been the law of the land for the last 10 years. The Court also reaffirmed some of the fundamental holdings of *Grutter*. For example the Court reiterated that "student body diversity is a compelling state interest that can justify the use of race in university admissions." Slip op. at 7 (*Quoting Grutter* at 325.) Similarly, the Court found that it was appropriate to accord universities deference on whether "such diversity is essential to its educational mission." Slip op. at 9.

B. "Mixed Motive" Instructions and Discrimination Statutes

Nassar v. University of Texas Southwestern Medical Center, 133 S. Ct. 2517 (2013)

In this case the Supreme Court limited the standard of proof in retaliation cases to the narrower "but for" causation standard.

On June 24, 2013 the Court ruled 5 to 4 that it was appropriate to use "but for" causation, and not mixed motive causation, in Title VII retaliation cases. This ruling benefits employers and was contrary to the position argued by the AAUP in an amicus brief. The American Council on Education (ACE) filed an amicus brief in support of UTSW arguing that AAUP policies supported the higher burden of proof. The AAUP filed an *amicus* brief in response, arguing that ACE had misinterpreted AAUP policies and that in fact AAUP policies supported the but for standard in retaliation cases. The Court did not reach the issue of whether there a different standard should be applied to faculty members based on AAUP policies. That said, it is a relatively modest change in the burden of proof in such cases. In addition, the Court did not take the invitation from some *amicus* briefs to find that all similarly worded statutes would be interpreted in the same fashion.

Such a ruling would have constituted a major change for legal claims under other statutes, such as the NLRA or the FLSA.

C. Supervisor Liability Under Title VII

Vance v. Ball State University, 133 S. Ct. 2434 (2013)

In this case the Supreme Court addressed a claim of harassment brought by a cafeteria worker against another employee. The issue in Vance was whether the employee engaging in the harassment was a supervisor or a co-worker. Generally, an employer is accountable under Title VII when one of its supervisors harasses an employee. However, if the harasser was only a co-worker, the employer would be liable only if it was negligent in failing to prevent the harassment.

The Supreme Court adopted a relatively narrow definition of supervisor, finding that that because the alleged harasser did not have the power to make certain formal employment decisions, such as hiring, firing, or promoting, she was not a "supervisor" under Title VII, even though she did direct Ms. Vance's day-to-day activities. Notably the Court's narrow definition does not apply when there is a tangible employment action such as a termination or a demotion.

VI. Intellectual Property

A. Patent and Copyright Cases

Cambridge University Press v. Becker, 2012 U.S. Dist. LEXIS 123154 (N.D. Ga. 2012), appeal docketed, No. 12-14676 (11th Cir. Sept. 12, 2012)

This case arose when professors at Georgia State University (GSU) engaged in the copying and distribution of excerpts of copyrighted academic works through GSU's course management system for use in their courses. In April 2008 Cambridge University Press, Oxford University Press, and Sage Publishers (the Publishers) filed a copyright infringement action challenging these uses. Among the affirmative defenses that GSU asserted in their Answer was that any copying of the material was a fair use.

During the course of the case, more than twenty professors were accused of infringement and deposed to justify their use of electronic reserves. In September 2010, the court directed that the Publishers prove "a sufficient number of instances of infringement of Plaintiffs' copyrights to show such ongoing and continuous misuse." In May 2012, the district court issued a 350-page decision. It found only 74 claimed uses from 64 of Plaintiffs' works even potentially infringing, and applied its conception of fair-use principles to these claims. The district court held that nearly all of the uses in question were fair use, and non-infringing, as GSU faculty used modest amounts of the texts in question for non-profit educational purposes. Ultimately the court found that the publisher's had proven only five infringements and even these were "caused" by the 2009 Policy's failure to limit copying to "decidedly small excerpts" (as defined by the court); to prohibit the use

of multiple chapters from the same book; or to "provide sufficient guidance in determining the 'actual or potential effect on the market or the value for the copyrighted work.'

In August 2012, the court issued an order providing for declaratory and injunctive relief, essentially limited to ordering GSU to "maintain copyright policies for Georgia State University which are not inconsistent" with the court's previous orders. The court also held that the GSU was the "prevailing party" under 17 U.S.C. § 505 because they "prevailed on all but five of the 99 copyright claims which were at issue" when the trial began. This conclusion led the court to find that GSU were entitled to reasonable attorneys' fees and costs because the Publishers' "failure to narrow their individual infringement claims significantly increased the cost of defending the suit." In September 2012, the district court awarded the GSU $2,861,348.71 in attorneys' fees and $85,746.39 in costs and entered a final judgment that also incorporated its prior rulings on the merits.

The Publishers filed an appeal to the Eleventh Circuit Court of Appeals. In April 2013 the AAUP submitted an *amicus* brief in support of GSU. The AAUP urged the Court to affirm the district court's judgment, but also to clarify that district courts assessing fair use claims may alternatively conduct a transformative use analysis to determine whether the use was fair. A transformative use analysis compares the purpose for which the professors use copyrighted material in their teaching with the original purpose for which the work was intended. The brief explained that in cases where the materials encompass more than a modest excerpt, the use may nonetheless be transformative, and the failure to consider whether the use was transformative would burden or restrict countless highly expressive uses that have long been an essential teaching tool. No decision has yet been issued by the Eleventh Circuit.

Author's Guild, Inc. v. HathiTrust, 12-4547-CV, 2014 WL 2576342 (2d Cir. June 10, 2014)

In this case the Second Circuit recently ruled that various universities (collectively referred to as "HathiTrust") did not violate the Copyright Act of 1976 when they digitally reproduced books, owned by the universities' respective libraries, as the doctrine of "fair use" allowed them to create a full-text searchable database of copyrighted works and to provide those works in formats accessible to those with disabilities.

HathiTrust, a collection of over sixty universities worldwide including the University of Michigan, the University of California, the University of Wisconsin, Indiana University, and Cornell University, has agreements with Google, Inc. that permits "Google to create digital copies of works in the Universities' libraries in exchange for which Google provides digital copies to [HathiTrust]." HathiTrust stores the digital copies of the works in the HathiTrust Digital Library (HDL), which is used by its member institutions in three ways: for "(1) full-text searches; (2) preservation; and (3) access for people with certified print disabilities." (There is no indication from the court's opinion that digital copies in the HDL are used outside of the library setting for purposes other than those enumerated.) The full-text search function allows users to conduct term-based searches across all the works in the HDL; however, where works are not in the public domain

or have not been authorized for use by the copyright owner, the term-based search only indicates the page number on which the term appears. Digital preservation of the works in the HDL helps member universities "preserve their collections in the face of normal deterioration during circulation, natural disasters, or other catastrophes." Finally, the function providing access to print-disabled individuals, or individuals with visual disabilities, allows disabled "students to navigate [materials] . . . just as a sighted person would."

The plaintiffs asserted that HathiTrust's digital reproduction of the universities' works constituted copyright infringement. The U.S. district court for the Southern District of New York disagreed with this assertion. The court found that HathiTrust successfully defended its right to use the works under the fair use exception outlined in the Copyright Act. Weighing four factors relevant to evaluating a claim of fair use—namely, (i) the purpose and character of the use of the works, (ii) the nature of the copyrighted works, (iii) the amount of the work copied, and (iv) the impact on the market for or value of the works—the court held that the uses of the works in the HDL constituted fair use and, thus, did not constitute copyright infringement.

The court found in regard to the first factor that the creation of a full-text searchable database as a "quintessentially transformative use" because it created new uses for the books rather than merely replicating or repackaging the books. Regarding the second and third factors, the court found that despite the fact HDL creates and maintains copies of the works at four different locations, these copies are reasonably necessary in order to facilitate the HDL's legitimate, transformative uses. As to the fourth factor, the court found that the full-text search function does not serve as substitute for the books that are being searched. The HathiTrust does not display to the user any text at all from the original work. Instead, it displays only the page number on which the search term is found and the number of times the term appears in the work. The Authors Guild was unable to identify any non-speculative harm to its members' potential market. It rejected the Authors Guild's argument that the HathiTrust's project could impair the potential market for digitally licensing books for search, which could potentially develop in the future, holding that lost licensing revenue from such a market did not count because the full-text search did not serve as a substitute for the original books.

Further, the court acknowledged that a subset of the HDL's collection—"previously published non-dramatic literary works"—were specifically protected by the Chafee Amendment to the Copyright Act. The Chafee Amendment, when read in conjunction with the Americans with Disabilities Act, requires educational institutions to make such works available in special formats for persons with disabilities.

VII. Collective Bargaining Cases and Issues

A. NLRB Authority

1. Recess Appointments

Noel Canning v. NLRB, 189 L. Ed. 2d 538 (U.S. June 26, 2014)

On June 26, 2014, the U.S Supreme Court unanimously invalidated three appointments to the NLRB because they did not meet the requirements of the Recess Appointments Clause.

The case arose when, in January 2012, President Obama filled three vacancies on the National Labor Relations Board (NLRB) through recess appointments, after a Senate minority had used the filibuster rule to block a Senate vote on the nominees. Under the Constitution's Recess Appointments Clause, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session." U.S. Const. art II, § 2, cl. 3. The three NLRB appointments preserved a quorum in the agency, allowing it to conduct business. During this period, from December 17, 2011 to and January 23, 2012, the Senate held *pro forma* sessions during which no business was conducted but the Senate was not adjourned for more than three days. The President asserted that the Senate was in recess despite these *pro forma* sessions, giving him authority to exercise his recess-appointment power during this period.

Following these recess appointments, the NLRB issued a ruling that Noel Canning, a Pepsi bottling firm in Washington State, illegally refused to enter a collective bargaining agreement with the Teamsters. The company filed a Petition for Review in the United States Court of Appeals for the D.C. Circuit, challenging the validity of the "recess" appointments, and thus the Board's quorum. A three-judge panel found that the recess appointments to the NLRB were unconstitutional, and therefore it "could not lawfully act, as it did not have a quorum." While Noel Canning's petition challenged the validity of using recess appointments during *pro forma* sessions of the Senate, the D.C. Circuit issued a more sweeping decision, ruling that the President can only exercise his recess appointment power during *intersession* recesses that occur between formal sessions of Congress, and not during *intrasession* recesses that occur within a session of Congress, despite long historical practice to the contrary. The Court further held that the President may only use recess appointments for vacancies that arose during the recess, and not for positions that became vacant while Congress was in session and remained vacant when a recess occurred. The National Labor Relations Board petitioned the U.S. Supreme Court for certiorari, and the Supreme Court agreed to take the case in June 2013.

The U.S Supreme Court unanimously invalidated three appointments to the NLRB because they did not meet the requirements of the Recess Appointments Clause. However, the Court divided by a vote of 5-4 on what types of recess appointments are permissible. The majority held in its controlling opinion that recess appointments can be made during any recess of at least ten days, regardless of whether the recess is an intersession recess or an intrasession recess and regardless of when the vacancies being filled arose.

Justice Breyer explained: "The Recess Appointments Clause responds to a structural difference between the Executive and Legislative Branches: The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable. We believe that the Clause's text, standing alone, is ambiguous. It does not resolve whether the President may make appointments during intra-session recesses, or whether he may fill pre-recess vacancies. But the broader reading better serves the Clause's structural function. Moreover, that broader reading is reinforced by centuries of history, which we are hesitant to disturb. We thus hold that the Constitution empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length."

However, the Court invalidated the NLRB appointments at issue in the case because the Senate had held "pro forma" sessions that broke a lengthy recess into smaller ones that were too short for the recess appointment power to apply.

The concurring justices would have only permitted recess appointments during intersession recesses and only when the vacancies arose during the same recess in which they would be filled. Justice Scalia stated: "To prevent the President's recess-appointment power from nullifying the Senate's role in the appointment process, the Constitution cabins that power in two significant ways. First, it may be exercised only in 'the Recess of the Senate,' that is, the intermission between two formal legislative sessions. Second, it may be used to fill only those vacancies that 'happen during the Recess,' that is, offices that become vacant during that intermission. Both conditions are clear from the Constitution's text and structure, and both were well understood at the founding."

There were roughly 430 cases decided by the Board with the invalid appointments. Decisions of the Board during this period are technically invalid. However, many of these cases have been settled or finalized and are therefore not affected by the Court's decision. Thus, NLRB spokesman Tony Wagner said the board has identified roughly 100 decisions that must be reviewed in the wake of the high court's ruling.

The NLRB's current board members (all of whom received appropriate Senate confirmation) must decide whether to revisit these cases and "redecide" them so as to make them effective. Since the current Board is similar in makeup to the one with the invalid appointments, as a practical matter, the Board is expected to re-adopt the holdings in future proceedings. However, the additional work on these cases may slow the Board's decision making on other cases, including the important higher education cases such as *Pacific Lutheran* and *Northwestern*.

2. Religiously Affiliated Institutions

Pacific Lutheran University v. Service Employees International Union, Local 925, N.L.R.B. Case No.: 19-RC-102521

The pending Board case of Pacific Lutheran University raised two issues. First, the appropriate standards under *Yeshiva* for determining whether faculty are managers and are

therefore not employees covered by the Act. (This issue is discussed below.) Second, when self-identified religiously affiliated institutions are exempt from NLRB jurisdiction. *Pacific Lutheran University,* 2014 NLRB LEXIS 90 (Feb. 10, 2014).

The issue of whether, and when, religiously affiliated institutions should be subject to Board jurisdiction was addressed by the Supreme Court in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). As the Regional Director explained, in *Catholic Bishop,* the Supreme Court held that the Act must be construed to exclude church-operated schools, because to do otherwise "will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Catholic Bishop,* 440 U.S. at 502. Such an inquiry by the Board would violate the First Amendment. *Id.* Although it invoked the doctrine of constitutional avoidance, the Court nevertheless posited that Board assertion of jurisdiction over church-operated schools would "'give rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.'" *Id. (quoting Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

There are two predominant tests for determining the application of *Catholic Bishops*, the test used by the Board and the test used by the D.C. Circuit Court of Appeals. The Board now applies a "substantial religious character" test on a case-by-case basis to assess whether, under *Catholic Bishop,* exercise of the Board's jurisdiction presents a significant risk of infringing the First Amendment, *Trustees of St. Joseph's College*, 282 NLRB 65, 68 (1986). The Board considers all relevant aspects of the school's organization and function, including "the purpose of the employer's operations, the role of unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction." *Univ. of Great Falls*, 331 NLRB at 1664-65. Important factors include the organization's mission statement, whether and to what degree curriculum requirements emphasize the associated faith, requirements that faculty teach or endorse the faith's doctrine, significant funding by the religious organization, governance by a religious organization or religious doctrine, and requirements for (or preference given to) administrators, faculty, or students who are members of the faith associated with the institution. *Id*. at 1664-65*; Ecclesiastical Maintenance Services*, 325 NLRB 629 (1998).

On the other hand, the D.C. Circuit applies a three part bright line rule. In particular, the D.C. Circuit's *University of Great Falls* sets forth three-part test as a bright-line rule for determining whether the Board has jurisdiction "without delving into matters of religious doctrine or motive." *University of Great Falls v. NLRB*, 278 F.3d 1335, 1344-45 (D.C. Cir. 2002); *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009). Under this test, a school is exempt from the Board's jurisdiction if it:

> (1) holds itself out to students, faculty and the community as providing a religious educational environment;
>
> (2) is organized as a nonprofit; and
>
> (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.

Univ. of Great Falls, 278 F.3d at 1344-1345.

In Pacific Lutheran, the Regional Director found that under either test the University was subject to Board jurisdiction. The University requested review which was granted by the Board. Moreover, the Board requested the submission of amicus briefs on the religious exemption issue, and posed two questions related to religiously affiliated educational institutions.

1. What is the test the Board should apply under Catholic Bishop to determine whether self-identified "religiously affiliated educational institutions" are exempt from the Board's jurisdiction?

2. What factors should the Board consider in determining the appropriate standard for evaluating jurisdiction under Catholic Bishop?

Thus, the Board may be considering issuing a substantial decision involving religiously affiliated colleges and universities. Amicus briefs in Pacific Lutheran are due no later than March 28, 2014.

B. Faculty, Graduate Assistants and Players Coverage as Employees Entitled to Collective Bargaining Representation

1. Faculty as Managers

Point Park University v. Newspaper Guild of Pittsburgh/Communication Workers of America Local 38061, AFL-CIO, CLC, N.L.R.B. Case No.: 06-RC-012276 (Private Institute Faculty Organizing)

Pacific Lutheran University v. Service Employees International Union, Local 925, N.L.R.B. Case No.: 19-RC-102521

In two different cases, *Point Park* and *Pacific Lutheran* the Board invited briefs from interested parties on the questions regarding whether university faculty members seeking to be represented by a union are employees covered by the National Labor Relations Act or excluded as managers. The two invitations for briefs in the two cases raised similar questions regarding the managerial exclusion. *Compare Pacific Lutheran University*, 2014 NLRB LEXIS 90 (Feb. 10, 2014) and *Point Park University*, 2012 NLRB LEXIS 292 (May 22, 2012). The amicus briefs in *Point Park* were filed in July 2012 and the briefs in *Pacific Lutheran* are due no later than March 28, 204. In both cases, faculty members petitioned for an election and voted in favor of representation by a union, and the university challenged the decision to hold the election, claiming that some or all of the faculty members were managers and therefore ineligible for union representation.

In *Point Park* AAUP submitted an amicus brief in July 2012, urging the NLRB to develop a legal definition of employee status "in a manner that accurately reflects employment relationships in universities and colleges and that respects the rights of college and university employees to exercise their rights to organize and engage in collective bargaining."[2] AAUP's brief

[2] *Point Park University v. Newspaper Guild of Pittsburgh/ Communication Workers of America Local 38061, AFL-CIO, CLC*, NLRB Case No.: 06-RC-012276, Amicus Curiae Brief of American Association of University Professors

stressed the extent to which the erosion of faculty power that union advocates at Point Park have cited reflects broad trends. "The application of a corporate model of management has resulted in significant changes in university institutional structure and distribution of authority. There has been a major expansion of the administrative hierarchy, which exercises greater unilateral authority over academic affairs," the brief states. AAUP also points out that, "This organizational structure stands in stark contrast to the *Yeshiva* majority's description of the university as a collegial institution primarily driven by the internal decision-making authority of its faculty. Further, university administrators increasingly are making decisions in response to external market concerns, rather than consulting with, relying on, or following faculty recommendations. Thus, university decision-making is increasingly made unilaterally by high-level administrators who are driven by external market factors in setting and implementing policy on such issues as program development or discontinuance, student admissions, tuition hikes, and university-industry relationships. As a result, the faculty have experienced a continually shrinking scope of influence over academic matters."

In addition to AAUP's brief, amicus briefs were filed by Matthew Finkin, Joel Cutcher-Gershenfeld, and Thomas A. Kochan (as impartial employment and labor relations scholars); Dr. Michael Hoerger, PhD, social scientist; Higher Education Council of the Employment Law Alliance; National Education Association; Newspaper Guild of Pittsburgh, CWA, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations; American Council on Education, National Association of Independent Colleges and Universities, Council of Independent Colleges, Association of Independent Colleges and Universities of Pennsylvania, College and University Professional Association for Human Resources, and Association of American Universities; The Center for the Analysis of Small Business Labor Policy, Inc.; Louis Benedict, MBA, J.D., Ph.D. (Higher Education Administrator); and National Right to Work Legal Defense and Education Foundation, Inc.[3]

2. Graduate Assistants Right to Organize

Northwestern University and College Athletes Players Association (CAPA), Case No. 13-RC-121359 (March 26, 2014)

AAUP filed an amicus brief with the National Labor Relations Board arguing that graduate assistants at private sector institutions should be considered employees with collective bargaining rights. The Board invited amicus briefs in the Northwestern University football players case to address several important issues, including whether the Board should modify or overrule its 2004 decision in *Brown University*, which found that graduate assistants were not employees and

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http://www.aaup.org/NR/rdonlyres/CFE2A35C-44AC-4F87-975D-E405CF5D5209/0/PointParkamicus.pdf (last accessed 7/23/2012)

[3] *Point Park University v. Newspaper Guild of Pittsburgh/ Communication Workers of America Local 38061, AFL-CIO, CLC*, NLRB Case No.: 06-RC-012276 http://www.nlrb.gov/case/06-RC-012276 (last accessed 7/23/2012)

therefore were not eligible for unionization. 342 NLRB 483 (2004). In the *amicus* brief the AAUP argued that the Board should overrule the test of employee status applied in *Brown* to graduate assistants, but did not take a position as to whether or not the unionization of college football players was appropriate.

This case arose when football players at Northwestern University sought to unionize. The University argued that the football players were not "employees" under the National Labor Relations Act (NLRA) and therefore were not allowed to choose whether to be represented by a union. The Regional Director for the Board had to determine whether players were "employees" as defined by the NLRA. The Board normally applies the common law definition under which a person who performs services for another under a contract of hire, subject to the other's control or right of control, and in return for payment, is an employee. The Regional Director found that under this common law test, the football players were employees under the NLRA.

However, the University also argued that the football players were not employees under the Board's decision in *Brown*, in which the Board found that graduate assistants were not employees and therefore had no right to unionize. The Regional Director responded that *Brown* was inapplicable "because the players' football-related duties are unrelated to their academic studies unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements." Regional Director Decision at 18 *citing Brown University, 342 NLRB 483 (2004).* The Regional Director further found that even applying the test articulated in *Brown*, the football players would be considered employees. Accordingly, the Regional Director held that the scholarship football players are "employees" and therefore are entitled to choose whether or not to be represented by a union for the purposes of collective-bargaining.

The University appealed to the National Labor Relations Board, and on April 24, 2014, the Board granted the University's request for review. On May 12, 2014 the Board issued a Notice and Invitation to File Briefs inviting *amici* parties to address one or more of six questions. One of the questions involved whether the *Brown* test, which impacts the bargaining rights of graduate assistants and other student-employees, should be modified or overruled: "Insofar as the Board's decision in *Brown University*, 342 NLRB 483 (2004), maybe applicable to this case, should the Board adhere to, modify, or overrule the test of employee status applied in that case, and if so, on what basis?" Thus, while the Northwestern case involved football players, a Board decision to modify or overrule *Brown* would significantly impact the rights of graduate assistants and other similar student-employees.

AAUP had previously filed *amicus* briefs before the Board arguing that graduate assistants should be granted collective bargaining rights. Since the issue was raised by the Board in the Northwestern University case, AAUP filed an *amicus* brief arguing that the general rule established in *Brown*, that the deprived graduate assistants of collective bargaining rights, should be overruled. The brief explained

> The policy reasons cited by the *Brown University* majority do not justify implying a special "graduate student assistant" exception to the statutory definition of "employee." Therefore,

> the Board should overrule *Brown University* and return to its understanding that, where "the fulfillment of the duties of a graduate assistant requires performance of work, controlled by the Employer, and in exchange for consideration," "the graduate assistants are statutory employees, notwithstanding that they simultaneously are enrolled as students." *New York University*, 332 NLRB 1205, 1207, 1209 (2000).

The *amicus* brief took particular issue with the argument that academic freedom justified depriving graduate assistants of the right to unionize. As the brief argued,

> At its core, the *Brown University* test of employee status is based on an erroneous understanding of the relationship between academic freedom and collective bargaining. . . . Indeed, interim developments provide further support for the notion that collective bargaining is compatible with academic freedom. These include the NYU administration's decision to voluntarily recognize its graduate assistant union and a new research study that is the first to provide a cross-campus comparison of how faculty-student relationships and academic freedom fare at unionized *and* non-unionized campuses.

Therefore, the brief concluded that "the Board should overrule the test of employee status applied in *Brown University* and return to its well-reasoned *NYU* decision, which found collective bargaining by graduate assistants compatible with academic freedom."

New York University v. GSOC/UAW, N.L.R.B. Case No.: 02-RC-023481; Polytechnic Institute of New York University v. International Union, United Automobile Aerospace, and Agricultural Implement Workers of America (UAW), N.L.R.B. Case No.: 29-RC-012054

These cases addressed the question of whether are employees who have collective bargaining rights, but were rendered moot and withdrawn as the parties settled based on an agreement to allow a vote by the graduate assistants on whether to organize with the UAW. In June 2012, the Board invited briefs from interested parties on the question of whether graduate student assistants may be statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. The Board specifically invited parties to address whether the Board should modify or overrule its decision in *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants are not statutory employees because they "have a primarily educational, not economic, relationship with their university," and whether, if the Board finds that graduate student assistants *may* be statutory employees, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974).

AAUP co-signed with the AFL-CIO, AFT, and NEA, on an amicus brief which was filed on July 23, 2012, and argued that the Board should overrule *Brown University* and return to its

prior determination that graduate student assistants who "'must perform work, controlled by the Employer, and in exchange for consideration'" are statutory employees, "'notwithstanding that they are simultaneously enrolled as students.'" However, the union and NYU resolved their disputes and the union requested to withdraw the election petition. Accordingly, on December 5, 2013, the Board held that the requests for review were moot and would not be ruled on by the Board.

B. Agency Fee

Harris v. Quinn, 189 L. Ed. 2d 620 (U.S. 2014)

On June 30, 2014, the Supreme Court issued its much awaited decision in the *Harris* case in which the plaintiffs requested that the Court rule unconstitutional the charging of agency fees in the public sector. Fortunately, the Court rejected these attempts to alter the agency fee jurisprudence as it has existed in the public sector for over 35 years since the Court issued its seminal decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Here, in a 5 to 4 opinion issued by Justice Alito, the Court questioned the foundation of *Abood*, but specifically stated that it was unnecessary for the Court to reach the argument that *Abood* should be overruled. Instead, the Court ruled that agency fees could not be imposed on certain "partial-public" employees, a category that likely has little applicability to faculty members at public institutions. Accordingly, the general agency fee jurisprudence as it applies to most AAUP Chapters and members should continue undisturbed.

In its decision the Court focused on the unique employment status of the individuals in question, who were personal assistants providing homecare services to Medicaid recipients. While the state compensated the individuals, the majority noted that the employer was normally considered the person receiving the care and that the government had little role in the individuals' employment. It also noted that the state classified the individuals as state employees "solely for the purpose" of being covered by the state labor law but did not consider them state employees "for any other purpose." Accordingly, the Court held that these individuals were not "full-fledged public employees" but were instead "partial-public or quasi-public employees." The majority then held that the authorization to charge agency fees under *Abood* did not extend to such employees and the imposition of agency fees could not be justified under other First Amendment principles. However, as the dissent explained, "[s]ave for an unfortunate hiving off of ostensibly 'partial-public' employees, *Abood* remains the law." Because the ruling applied only to "partial-public employees," it is unlikely to have a significant impact on agency fee jurisprudence applicable to faculty members at public institutions.

However, there are some disturbing undercurrents in the decision. First, the five justice majority clearly questions the rationale supporting *Abood*, and it did not reaffirm *Abood* and Justice Alito has all but invited further challenges to *Abood* in general. Second, the Court created a new category of "partial-public employees." This category, while not well defined, would seem to have limited application to current faculty members, whether on full-time, part-time or on contingent

appointments. However, there could be attempts to create such "partial-public" employees as a result of this decision. Third, the Court raised the issue of the scope of bargaining as supporting agency fee under *Abood*. This could lead to some confusion regarding *Abood* in situations where bargaining rights are limited. Fourth, the case illustrates the danger in creating special classes of "employees," whether the classes are created in the interests of unions or by employers seeking to avoid the application of certain laws. Finally, and perhaps most importantly, when combined with recent legislative changes in Michigan and other states, this case illustrates the fragility of agency fee provisions and the need for AAUP Chapters to continue to seek to expand the percentage of active and engaged chapter members.