2015 AAUP Summer Institute

July 23, 2015
Annual Legal Update[1]

Aaron Nisenson
Senior Counsel
American Association of University Professors

[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.

I. Introduction

This year has seen several significant changes affecting the rights of faculty members in both private and public sector institutions. Most importantly, in *Pacific Lutheran University* the NLRB modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities; and second, whether certain faculty members are managers, who are excluded from protection of the Act. Both changes helped improve the prospects for unionizing faculty in the private sector, as reflected in decisions from the NLRB Regional Directors (who decide election cases in the first instance.)

In addition, the NLRB published a decision allowing the use of employers' email systems for union organizing (*Purple Communications*). Finally, while the case addressing whether graduate student assistants are employees under the NLRA was resolved by the parties and therefore withdrawn (*NYU*), this issue is under consideration in the Northwestern University football players' case (*Northwestern University*) and in two recently filed election petitions involving graduate students at Columbia University and the New School.

Meanwhile, the Supreme 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*). While hundreds of NLRB decisions were invalidated, in many of the cases, the Board has issued decisions largely concordant with the prior Board rulings in the cases. The U.S. Supreme Court also declined requests to radically alter agency fee law (*Harris)* but has agreed to hear another case that challenges the rights of unions in the public sector to charge agency fee (*Friedrichs*).

This year was also an active one for cases involving the First Amendment Rights of public sector faculty members. Most importantly, the Supreme Court 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*). The federal appeals court for the Seventh Circuit dramatically expanded the scope of academic freedom and expression for adjuncts and part-time faculty as well as full-time senior professors. (*Mead*). 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*). In the state courts, Courts in Virginia, West Virginia, and Arizona that academic research records can be protected from disclosure under state Freedom of Information Act. Interesting decisions were also issued by state courts and labor relations boards in public sector collective bargaining cases.

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

A. Garcetti / Citizen Speech

***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 he 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.

B. Faculty Speech

Cutler v. Stephen F. Austin State Univ., 767 F.3d 462 (5th Cir. 2014)

In this case, the Fifth Circuit Court of Appeals ruled that the termination of a faculty member for stating that a member of congress was a "fear monger" violated the First Amendment. Christian Cutler brought a 42 U.S.C. § 1983 action against university officials at Stephen F. Austin State University, alleging that he was fired in retaliation for exercising protected speech after telling a member of U.S. Representative Louie Gohmert's staff that Rep. Gohmert was a "fear monger." Cutler, the director of the University's art galleries, claimed that a member of Rep. Gohmert's staff called Cutler to invite him to judge a high school art exhibition that would be hosted by Rep. Gohmert in Tyler, Texas. Cutler asked for more details, but never received any. He then researched Rep. Gohmert on the internet, formed a negative impression of him, and decided to decline the invitation to judge the contest. Following an exchange of messages with members of Rep. Gohmert's staff, Cutler told a staff member he

was not interested in judging the art show and made the "fear monger" comment. Cutler then received a letter from Rep. Gohmert, copying university president Dr. Baker Pattillo, expressing disappointment that the University would not host the competition. The university then gave Cutler a letter of termination. After Cutler was given the opportunity to resign and did so, he filed suit.

The Fifth Circuit concluded that the law was clearly established and gave Defendants fair warning that terminating Cutler on the basis of his speech to Rep. Gohmert would violate Cutler's First Amendment rights. In reaching that decision, the Court assumed that Cutler alleged a violation of his First Amendment rights because Defendants had effectively abandoned any argument that he did not. Based on the undisputed facts and making all reasonable inferences in Cutler's favor, the Fifth Circuit found that several of its pre-2010 decisions, which applied the general rule announced in Garcetti v. Ceballos, 547 U.S. 410 (2006), to new fact patterns, should have given Defendants a clear warning that terminating Cutler because of his speech to Rep. Gohmert's office would violate Cutler's First Amendment rights. Cutler's speech was made externally to a staff member of a public official about participating in an event that was not within his job requirements. The concerns Cutler expressed during those conversations were unrelated to his job and emanated from his views as a citizen.

***Keating v. Univ. of S.D.*, 569 Fed. Appx. 469 (8th Cir. S.D. 2014)**

The U.S. Court of Appeals for the Eighth Circuit ruled that a civility clause was not unconstitutionally vague and could be used to support the termination of a faculty member. The civility clause contained within the University of South Dakota's (USD) employment policy is not facially void for vagueness or impermissibly vague as applied to the petitioner's conduct relating to an email he sent calling his supervisor a "lieing [sic], back-stabbing sneak." The clause states, "Faculty members are responsible for discharging their instructional, scholarly and service duties civilly, constructively and in an informed manner." Christopher Keating filed suit against the University and several of its employees, alleging that the non-renewal of his contract in light of the email violated a variety of constitutional provisions. The Eighth Circuit held that because the civility clause "articulates a . . . comprehensive set of expectations that, taken together, provides employees meaningful notice of the conduct required by the policy," it is not facially unconstitutional. In reference to Keating's conduct, the Court upheld USD's decision not to renew Keating's contract because he reasonably should have recognized that the language he used in the email, combined with his express refusal to comply with a direction from his supervisor, ran afoul of the civility clause requirements.

***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 U.S. Court of Appeals for the Ninth Circuit 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.

***Benison v. Ross*, 765 F.3d 649 (6th Cir. Mich. 2014)**

The U.S. Court of Appeals for the Sixth Circuit ruled that retaliation against a faculty member as a result of her husband's activity could be protected under the First Amendment. Kathleen Benison was a tenured professor of geology at Central Michigan University ("CMU"). In 2011, Kathleen's husband Christopher Benison, an under-graduate student at CMU, sponsored a vote of no confidence in the president and provost of the university. Subsequently, the Geology Department refused a salary supplement to Kathleen, a tenured professor of geology at the University who had previously been approved to take a 2012 spring semester sabbatical. Kathleen then resigned from her position and refused to repay the compensation and benefits that she had received during the sabbatical, which included her husband's tuition.

The University filed suit against her, claiming that Kathleen had breached her commitment to return to the University after her sabbatical. The Benisons filed suit alleging that the president of CMU, and the provost and dean, retaliated against them because of Christopher's sponsorship of the no-confidence resolution. The Sixth Circuit found sufficient evidence to create a genuine dispute of material fact regarding whether CMU filed a lawsuit against Kathleen Benison and placed a hold on Christopher Benison's transcript in retaliation for Christopher's exercise of his First Amendment rights.

***Frieder v. Morehead State Univ.*, 770 F.3d 428 (6th Cir. Ky. 2014)**

The U.S. Court of Appeals for the Sixth Circuit affirmed a ruling in favor of defendant, Morehead State University. Frieder was a tenure-track professor at the University who was evaluated for tenure based on three factors: teaching, professional achievement, and service to the university. His evaluations for professional achievement and service to the university were excellent but reviews of his teaching abilities were "abysmal." After being denied tenure, Frieder sued claiming that the University retaliated against his exercise of free speech. Frieder argued that his evaluators retaliated against his "idiosyncratic teaching methods," which allegedly involved “context appropriate uses of the middle finger.” The court concluded that Frieder's First Amendment claim failed because he did not show any connection between the tenure decision and his exercise of free speech. The court explained, “Even if we assume for the sake of argument and against our better judgment that the Constitution protects Frieder's one-finger salute in this instance, a free speech retaliation claim still requires retaliation--a showing that his gesture motivated the university's tenure decision.”

C. Union Speech

***Meade v. Moraine Valley Cmty. College*, 770 F.3d 680 (7th Cir. Ill. 2014)**

The U.S. Court of Appeals for the Seventh Circuit (based in Chicago) dramatically expanded the scope of academic freedom and expression for adjuncts and part-time faculty as well as full-time senior professors. This quite unexpected (and unanimous) ruling greatly enhanced recently established constitutional protection for outspoken critics of public college and university administrators. It reinforced and enhanced recent and congenial decisions in two other federal circuits in cases from Washington (*Demers*) and North Carolina (*Adams*). The court specifically relied on a sympathetic view of the Supreme Court’s judgment in the *Garcetti* case, expressly invoking the justices’ “reservation” of free speech and press protections for academic speakers and writers. The three-judge panel unanimously declared that an Illinois community college could not summarily dismiss an

adjunct teacher for criticizing the administration, at least as long as the issues she had raised publicly and visibly constituted “matters of public concern.”

The federal appeals court also noted that even a contingent or part-time teacher had a reasonable expectation of continuing employment at the institution. The appellate court for the Seventh Circuit ruled in a sympathetic opinion that Robin Meade, the outspoken critic and active union officer, was “not alone in expressing concern about the treatment of adjuncts.” The panel added that “colleges and universities across the country are targets of increasing coverage and criticism regarding their use of adjunct faculty.” In this regard, the court broke important new ground not only with regard to academic freedom and professorial free expression, but even more strikingly in its novel embrace of the needs and interests of adjuncts and part-timers.

***Meagher v. Andover Sch. Comm.*, Case No. 13-11307-JGD, 2015 U.S. Dist. LEXIS 42176 (D. Mass. Mar. 31, 2015)**

In this case, a U.S. District in Massachusetts ruled that speech made by a teacher as a union representative was protected under the First Amendment finding that the *Garcetti* test did not apply because speech was not a part of her normal employment duties as clarified in *Lane v. Franks*.

This case arose out of the September 2012 termination of the plaintiff, Jennifer Meagher ("Meagher"), from her employment as a tenured teacher at Andover High School ("AHS") in Andover, Massachusetts. Prior to her termination, Meagher and other members of the teachers' union, the Andover Education Association ("AEA" or "Union"), were involved in contentious negotiations with the Andover School Committee over a new collective bargaining agreement. In addition, AHS was engaged in the process of seeking re-accreditation pursuant to the standards established by the New England Association of Schools and Colleges ("NEASC"). The accreditation process centered on a self-study, which required teachers and administrators at AHS to conduct evaluations of the school's programs, prepare separate reports addressing one of seven accreditation standards, and present the reports to the faculty for approval. Under the NEASC guidelines, each report required approval by a two-thirds majority vote of the faculty. It was undisputed that Meagher was discharged from employment, effective September 17, 2012, because she sent an email to approximately sixty other teachers in which she urged them to enter an "abstain" vote on the ballots for each of the self-study reports as a means of putting the accreditation process on hold and using it to gain leverage in the collective bargaining negotiations. Meagher alleged that the decision to terminate her for writing and distributing the email to her colleagues constituted unlawful retaliation for, and otherwise interfered with, the exercise of her First Amendment right to engage in free speech.

The fundamental issue was whether Meagher's email to her colleagues is entitled to protection under the First Amendment. Pursuant to *Garcetti v. Ceballos*, her speech would be

protected if she were speaking as a citizen on a matter of public concern rather than pursuant to her duties as a teacher when she distributed the communication, and if the value of her speech was not outweighed by the defendants' interest in preventing unnecessary disruptions to the efficient operation of the Andover public schools.

In reviewing the facts, the court found that Meagher was speaking as a citizen.

> The record on summary judgment establishes that Meagher was speaking as a citizen, and not an employee of the Andover School Department, when she distributed the June 10, 2012 email at issue in this case. There is no dispute that Meagher wrote the email on her personal, home computer, and distributed it to her colleagues using her personal email account. Moreover, there is no dispute that she sent the communication during non-working hours, that she contacted the recipients using their personal email accounts, and that the email concerned issues that were addressed in the press and triggered considerable discussion among members of the local com-munity. The substance of the email, in which Meagher advocated use of the "abstain" option on the ballots for the self-study reports as a means of delaying the NEASC re-accreditation process and gaining leverage in the contract dispute between the Union and the ASC, would not have given objective observers the impression that Meagher was representing her employer when she communicated with her colleagues. . . . Accordingly, the record demonstrates that Meagher was working in her capacity as a Union activist rather than in her capacity as a high school English teacher, when she distributed the communication in question.

The court also found that the value of Meagher's speech outweighed any interest that the defendants had in preventing unnecessary disruptions and inefficiencies in the workplace. Therefore, the court found that Meagher's speech was protected and that her termination violated her rights under the First Amendment.

III. FOIA/Subpoenas and Academic Freedom

Energy & Environment Legal Institute v. Arizona Board of Regents, No. C2013-4963, (Arizona Superior Court, Pima County, March 24, 2015)

A recent court decision from Arizona validated the AAUP's continuing support for the academic freedom rights of faculty members engaged in research by finding, as the AAUP argued in its amicus brief, that records requests for faculty research materials could be rejected because of the chilling effects of such disclosures. The case arose from a public records request

involving University of Arizona faculty members engaged in climate research submitted by the Energy and Environment Legal Institute, a legal foundation seeking to "put false science on trial." The AAUP submitted an amicus brief raising "the significant chilling effects that will result from forcing scholars and institutions to disclose collegial academic communications and internal deliberative materials." The court ruled that the university could withhold the records, accepting as the primary reason that producing the documents "would have a chilling effect on the ability and likelihood of professors and scientists engaging in frank exchanges of ideas and information."

This case involves a lawsuit brought by Plaintiff/Petitioner Energy & Environment Legal Institute in the Superior Court for the State of Arizona. E & E is a "free market" legal foundation that is using public records requests in a campaign against climate science. E & E previously paired with the American Tradition Institute to prosecute similar cases involving public records requests of faculty members at institutions including the University of Virginia. In that instance, the AAUP filed an amicus brief opposing the ATI records request. The case resulted in a significant victory with the Virginia Supreme Court affirming the University's withholding of the records. *See American Tradition Institute v. Rector and Visitors of the University of Virginia*, 756 S.E.2d 435 (Va. 2014).

In this case, E & E submitted public records requests that targeted two University of Arizona faculty members, climate researchers Professors Malcolm Hughes and Jonathan Overpeck. E & E sought emails authored by or either addressed or copied to them. The emails were, in turn, linked to eight other individuals, each of whom is or was then a professor or researcher at another private or public university. As E & E counsel has stated, the suit is supposedly intended to "put false science on trial" and E & E vows to "keep peppering universities around the country with similar requests under state open records laws."

The AAUP felt it was important to file an amicus brief presenting its arguments that AAUP principles of academic freedom should play a central role in the application of public records law to academic researchers' materials. The brief was drafted by AAUP General Counsel and Committee A Member Risa Lieberwitz, with input from AAUP Litigation Committee members, local Arizona Counsel Don Awerkamp and others. The brief argued, "when public records requests target information that implicates principles of academic freedom, courts must balance the public's general right to disclosure against the significant chilling effects that will result from forcing scholars and institutions to disclose collegial academic communications and internal deliberative materials."

One key consideration under Arizona law is whether disclosure is "in the best interests of the state." The brief specifically addressed this issue, explaining, "The best interests of the state include protecting the university's mission to carry out high quality academic research. Academic freedom is essential to this university mission, to enable researchers to freely and fully engage in inquiry and research that may be controversial or even unpopular. Individual

researchers and the community of scholars, as a whole, must have academic freedom to create a thriving and ongoing exchange of debate, dispute, and cooperation in research projects and programs. Requiring disclosure of collegial communications and internal academic records will have a chilling effect on academic freedom that harms academic research, the university's mission and the public interest. Under such conditions, the interests in privacy and the best interests of the state outweigh the general interest in disclosure. "

On March 24, 2015, the Arizona state trial court ruled that the University (called "AzBOR" in the decision) did not have to disclose the records. The decision noted that the argument regarding the potential chilling effect of the disclosures was key to the decision. As the court explained,

> The primary reason AzBOR claims as the basis for not producing these documents is that to do so would have a chilling effect on the ability and likelihood of professors and scientists engaging in frank exchanges of ideas and information. AzBOR enlisted the help of an impressive array of scholars, academic administrators, professors, etc., who, ... provide compelling support of its position.

The court further noted, "When the release of information would have an important and harmful effect on the duties of a State agency or officer, there is discretion not to release the requested documents." And the court ultimately ruled that it "cannot conclude that by withholding the remaining emails for the reasons stated, AzBOR abused its discretion or acted arbitrarily or capriciously."

***Highland Mining Company v. West Virginia University School of Medicine*, 2015 W. Va. LEXIS 679 (W.V. S Ct. May 21 2015)**

The Supreme Court of Appeals of West Virginia shielded from disclosure a former West Virginia University researcher's records of his work concerning the health effects of mountaintop-removal mining. The order the granting in part and denying in part Highland Mining Company's (Highland) request for documents related to several articles co-authored by a professor from the West Virginia University School of Medicine (WVU). The scholar, Michael Hendryx, led a research project that found that people living near mountaintop-removal mines faced higher risks of cancer and premature death. A mining company had sued the university for access to records of Mr. Hendryx's research.

The court held that pursuant to the West Virginia Freedom of Information Act (FOIA), WVU may use FOIA's "internal memorandum" exemption to withhold documents that reflect the professor's deliberative process. The court explained that the "involuntary public disclosure" of the professor's research documents "would expose the decision-making process in such a way as to hinder candid discussion of WVU's faculty and undermine WVU's ability to

perform its operations". However, the court also ruled that the University could not invoke FOIA's "personal privacy" exemption to protect documents containing anonymous peer review comments of the draft articles (although those documents would be exempt from disclosure under the "internal memoranda" exemption). Finally, the court concluded that WVU may not claim an "academic freedom" privilege to avoid the plain language of FOIA because the state does not have an academic-freedom exemption to its public-records law.

***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. (See 2014 Legal Update for further details regarding the Court's decision.)

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.

***Storti v. University of Washington*, 330 P.3d 159 (2014).**

The Supreme Court of Washington ruled that the University's promise of an annual raise to meritorious faculty did create an enforceable unilateral contract. However, the University's suspension of the raise did not constitute a breach of that contract. The court reasoned that contracts are defined first and foremost by their terms, and the terms of this contract warned faculty that the policy could be reevaluated in response to changing economic conditions.

In 2000, the University of Washington (U.W.) instituted a salary policy that awarded an annual two percent raise to all faculty who had performed meritoriously in the year prior. This policy was later incorporated into the U.W. faculty handbook. U.W. has twice suspended this salary policy. In the first case, U.W. suspended the policy for the 2002-2003 academic year by simply excluding the raises from its 2002-2003 budget. Following the litigation in which the professors prevailed (and received back pay), U.W. reinstated the salary policy until after the 2009 academic year, when it was again suspended by executive order. The second suspension forms the basis for the instant case. Here, the same professors argued that while the university has the power to suspend the salary policy, it cannot do so retroactively by retracting its promise after faculty had substantially performed.

The Supreme Court found that the professors established an enforceable unilateral contract based on U.W.'s promise to extend raises for meritorious performance, however, the terms of the contract included a funding cautions provision that warned faculty of potential "reevaluation" of the salary policy. The crux of the issue was the meaning of the word, "reevaluate" as used in the funding cautions language. The professors were on notice for the potential for reevaluation, and the salary policy was properly reevaluated in accordance with the terms of the contract and the broader faculty handbook. The court held that the term "reevaluate" must be interpreted in light of the entire faculty handbook which specified

procedures for implementing and enforcing executive orders and because U.W. followed these procedures for reevaluation, its suspension of the salary policy did not breach its contract with the professors.

B. Tenure – Constitutionality

***Vergara, et al. v. State of California, et al. and California Teachers Association and California Federation of Teachers,* Case No. BC484642 (Calif. Superior Ct., Los Angeles, June 10, 2014)**

This case arises from Plaintiffs' claims, filed in May, 2012, in the Los Angeles Superior Court of California, claiming that five statutes in the California Education Code violate the equal protection provisions of the California Constitution, Art. I §7 and Art. IV §16. The challenged statutes establish: a two-year probationary period during which new teachers may be terminated without cause, Educ. Code §44929.21(b) [referred to by the court as "Permanent Employment Statute"]; due process protections for non-probationary teachers facing termination for cause, §§44934, 44938 [referred to by the court as "Dismissal Statutes"], 44944; and procedures for implementing budget-based reductions-in-force, §44955 [referred to by the course as "Last-In-First Out (LIFO)"].

Superior Court Judge Treu described the Plaintiffs' claims as follows:

> Plaintiffs claim that the Challenged Statutes result in grossly ineffective teachers obtaining and retaining permanent employment, and that these teachers are disproportionately situated in schools serving predominately low-income and minority students. Plaintiffs' equal protection claims assert that the Challenged Statutes violate their fundamental rights to equality of education by adversely affecting the quality of the education they are afforded by the state." (p. 3)

After an eight-week bench trial, Judge Treu, in a short 16-page opinion containing only superficial analysis, adopted the Plaintiffs' theories in full, striking down each challenged statute as unconstitutional. Judge Treu concluded that the Plaintiffs had proven their constitutional claims by a preponderance of the evidence, and that the Defendants had failed to prove, under a "strict scrutiny" standard, that the State "has a compelling interest which justifies [the Challenged Statutes] but that the distinctions drawn by the law[s] are necessary to further [their] purpose" (p. 8, emphasis in original, quoting Serrano v. Priest, 5. Cal. 3d 584, 597(1971)). As discussed further below, a major flaw in the Court's analysis is the use of the strict scrutiny standard, as there was no evidence that the statutes were enacted or applied with any discriminatory intent toward any identifiable group, nor any evidence that the statutes impaired a fundamental right.

Judge Treu accepted wholesale Plaintiffs' expert witnesses' testimony, which was only briefly summarized in the Court's opinion. Based on this testimony, the Court concluded that "the specific effect of grossly ineffective teachers on students…shocks the conscience" and that "there are a significant number of grossly ineffective teachers currently active in California classrooms" who have "a direct, real, appreciable, and negative impact on a significant number of California students…." Although he did not cite evidence showing a causal link between the statutes and students' constitutional rights, Judge Treu held that the statutes unconstitutionally impact students' fundamental right to equality of education and disproportionately burden poor and minority students. He concluded that: the two-year probationary statute did not allow school districts sufficient time to determine the competence of probationary teachers; the dismissal statutes were costly and time-consuming to administer and provided an unnecessary level of "über due process," which discourages school districts from dismissing "grossly ineffective" teachers; and the reductions-in-force statute could require a school district to lay off competent junior teachers while retaining incompetent senior teachers.

Judge Treu stayed his ruling pending appeal. The State Defendants and Intervenors California Teachers Association and California Federation of Teachers have appealed to the Court of Appeal of the State of California for the Second Appellate District.

C. Faculty Handbooks

Report of the NLRB General Counsel Concerning Employer Rules, NLRB GC 15_04, (NLRB General Counsel March 18, 2015)

The General Counsel for the National Labor Relations Board recently published a guidance memorandum that provides specific examples of lawful and unlawful employee handbook rules in the areas of confidentiality, professionalism and employee conduct, use of company logos, copyrights and trademarks, conflicts of interest, photography and recording, and interaction with the media and other third parties.

The NLRB and its General Counsel have aggressively scrutinized many frequently used employee handbook provisions for potentially infringing on the right of employees to engage in concerted activity protected under Section 7 of the National Labor Relations Act (NLRA). In addition to the right to engage in union organizing, Section 7 activity includes the right to discuss, challenge, question, and advocate changes in wages, hours, and other terms and conditions of employment in both unionized and non-unionized work environments. The NLRB will deem an employee handbook provision to violate the NLRA if it specifically prohibits Section 7 activity or if "employees would reasonably construe" the rule as prohibiting such activity. It is this "reasonably construe" language that has resulted in many common employee handbook provisions being declared unlawful by the NLRB.

The guidance section that may be most applicable to faculty members is one that addresses the legality of employer rules regarding the conduct of employees towards the University and supervisors or management. The General Counsel explained.

> Employees also have the Section 7 right to criticize or protest their employer's labor policies or treatment of employees. Thus, rules that can reasonably be read to prohibit protected concerted criticism of the employer will be found unlawfully overbroad. For instance, a rule that prohibits employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. *See Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014). Moreover, employee criticism of an employer will not lose the Act's protection simply because the criticism is false or defamatory, so a rule that bans false statements will be found unlawfully overbroad unless it specifies that only maliciously false statements are prohibited. Id. at 4. On the other hand, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors, but not the employer or management, will generally be found lawful, because employers have a legitimate business interest in having employees act professionally and courteously in their dealings with coworkers, customers, employer business partners, and other third parties.

Similar language may be used in University policies or handbooks, particularly in relation to “civility clauses.” However, employees should be cautious as this is a complicated area, and simply because it appears a portion of the manual may be covered by the above does not mean that a faculty member can avoid termination for violating the manual.

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 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 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." (See 2014 Legal Update for further details regarding the Court's decision.)

VI. Intellectual Property

A. Patent and Copyright Cases

***Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. Ga. 2014)**

The Eleventh Circuit Court of Appeals expounded upon the test used to determine the "fair use" exception to copyright protection. The district court initially held that faculty members' use of certain electronic course reserves and electronic course sites to make excerpts from academic books available to students at Georgia State University (GSU) was "fair use." AAUP submitted an amicus brief to the Circuit Court urging it to affirm the district court's ruling and to clarify that a "transformative use" analysis may also be used to determine "fair use." The Circuit Court reversed the district court's decision, agreeing with much of the district court's fair use analysis, but not with how it applied that analysis: "The District Court did err by giving each of the four fair use factors [purpose of the new use, the nature of the original work, the amount of the work being used, and the impact on the new use on the market for the original work] equal weight, and by treating the four factors mechanistically. The District Court should have undertaken a holistic analysis which carefully balanced the four factors." (See 2014 Legal Update for further details regarding the Court's decision.)

***Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. N.Y. 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. (See 2014 Legal Update for further details regarding the Court's decision.)

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. (See 2014 Legal Update for further details regarding the Court's decision.)

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 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.

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.

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. NLRB spokesman Tony Wagner said the board has identified roughly 100 decisions that are still pending and must be reviewed in the wake of the high court's ruling.

Generally, after the *Noel Canning* decision was issued, the Board issued an order in many of the pending cases setting aside the vacated Decision and Order, and retaining the case on its docket for further action as appropriate. The Board has subsequently been addressing these cases on an individual basis. In many of the cases, the Board has issued decisions largely concordant with the prior Board rulings in the cases, adopting the reasoning of the vacated decisions, with short summaries of the rationale in the original board decision.

For example in *Grand Canyon Education, Inc. d/b/a Grand Canyon University*, 28-CA-022938, et al.; 362 NLRB No. 13 (February 2, 2015), the Board explained:

> In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 164, which is incorporated herein by reference.

In addressing a specific finding, the Board highlighted the issue and adopted the reasoning of the prior decision. "We agree with the analysis in the vacated Decision and Order regarding Human Resources Business Partner Rhonda Pigati's questioning of employee Gloria Johnson, and we find that it violated Section 8(a)(1) of the Act for the reasons stated therein."

2. Religiously Affiliated Institutions

***Pacific Lutheran University*, 361 NLRB No. 157 (December 16, 2014)**

On Saturday, December 20, 2014, the National Labor Relations Board published a significant decision involving the organizing rights of private-sector faculty members. In *Pacific Lutheran University*, the Board modified the standards used to determine two important issues affecting the ability of faculty members at private-sector higher education institutions to unionize under the National Labor Relations Act: first, whether certain institutions and their faculty members are exempted from coverage of the Act due to their religious activities; and second, whether certain faculty members are managers, who are excluded from protection of the Act. *See infra*.

The question of whether faculty members in religious institutions are subject to jurisdiction and coverage of the Act has long been a significant issue, with the Supreme Court's 1979 decision in *Catholic Bishops* serving as the foundation for any analysis. In *Pacific Lutheran University*, the Board established a two-part test for determining jurisdiction. First, whether "as a threshold matter, [the university] holds itself out as providing a religious educational environment"; and if so, then, second, whether "it holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school's religious educational environment."

The employer and its supporters argued that only the threshold question of whether the university was a bona fide religious institution was relevant, in which case the Act would not apply to any faculty members. The Board responded that this argument "overreaches because it focuses solely on the nature of the institution, without considering whether the petitioned-for faculty members act in support of the school's religious mission." Therefore, the Board established a standard that examines whether faculty members play a role in supporting the school's religious environment.

In so doing, the Board recognized concerns that inquiry into faculty members' individual duties in religious institutions may involve examining the institution's religious beliefs, which could intrude on the institution's First Amendment rights. To avoid this issue the new standard focuses on what the institution "holds out" with respect to faculty members. The Board explained, "We shall decline jurisdiction if the university 'holds out' its faculty members, in communications to current or potential students and faculty members, and the community at large, as performing a specific role in creating or maintaining the university's religious purpose or mission."

The Board also found that that faculty must be "held out as performing a *specific religious function*," such as integrating the institution's religious teachings into coursework or engaging in religious indoctrination (emphasis in original). This would not be satisfied by general statements that faculty are to support religious goals, or that they must adhere to an institution's commitment to diversity or academic freedom.

Applying this standard, the Board found that while Pacific Lutheran University held itself out as providing a religious educational environment, the petitioned-for faculty members were not performing a specific religious function. Therefore, the Board asserted jurisdiction and turned to the question of whether certain of the faculty members were managerial employees.

Following the issuance of the *Pacific Lutheran University* decision, the Board remanded a number of cases involving whether to exercise jurisdiction over faculty members at self-identified religious colleges and universities. In these cases, the Board generally explained:

> the Board issued its decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), which specifically addressed the standard the Board will apply for determining, in accordance with *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), when we should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities. Accordingly, the Board remands this proceeding to the Regional Director for further appropriate action consistent with *Pacific Lutheran University*, including reopening the record, if necessary. . . . [Note 2]. Members Miscimarra and Johnson stated that they adhere to their dissenting view in *Pacific Lutheran University*, but nevertheless agree that a remand is appropriate in this case.

Saint Xavier University, Case No. 13-RC-22025 (February 3, 2015). *See also Islamic Saudi Academy*, Case No. 05-RC-080474 (February 26, 2015); *Seattle University*, Case No. 19-RC-122863 (February 3, 2015); *Manhattan College*, Case No. 02-RC-023543 (February 3, 2015); *Duquesne University of the Holy Spirit*, Case No. 06-RC-080933 (February 12, 2015). The Regional Directors are issuing decisions based on these remands.

***Saint Xavier University*, NLRB Case No. 13-RC-022025 (NLRB Reg. Dir. June 1, 2015)**

On June 1, 2015, the NLRB Region 13 Director, applying the test articulated in the recent *Pacific Lutheran University* decision, issued a supplemental decision and order rejecting Saint Xavier University's argument that the NLRB's assertion of jurisdiction would violate the university's First Amendment right to the free exercise of religion.

The supplemental decision and order stemmed from a February 3, 2015 remand of the case from the NLRB Board following its decision in Pacific Lutheran University. The remand called for the Regional Director to reexamine Saint Xavier University's jurisdictional objections premised on its religious-affiliation under the refined standards articulated in Pacific Lutheran University.

Following the February 2015 remand, the NLRB Region 13 Director reopened the record to permit the parties an opportunity to present contemporary evidence, and to brief the applicable law. Before the Regional Director, the university reasserted its jurisdictional objection and argued that the refined standards under Pacific Lutheran University were insufficient to satisfy the First Amendment.

The NLRB Regional Director found that the university met the initial test under Pacific Lutheran University of holding itself out as providing a religious educational environment based upon publicly available statements including its mission statement, mission commentary, philosophy statement and vision statement along with its registration as a Catholic university and the religious iconography in many classrooms.

The NLRB Regional Director, however, rejected the university's contention that it holds out the petitioned-for adjunct faculty as performing a specific religious function. In support of his conclusion, the Regional Director referenced the content of the faculty handbook, job postings, and faculty evaluation criteria. In addition, the Regional Director cited to the lack of evidence in the record showing that faculty members are required to serve as religious advisors, engage in religious training or conform with the institution's religious tenets.

Lastly, the Regional Director rejected the university's arguments concerning the adjunct faculty in the Department of Religious Studies. The Regional Director concluded that there was no evidence in record to suggest that adjuncts teaching religious studies must espouse any particular religion. He did, however, agree with the university's contention that adjunct faculty in the school's Pastoral Ministry Institute are held out as performing a specific religious function

but concluded that no adjunct faculty member had taught a course in that institute at the time the original election was held.

Based upon his findings, the Regional Director ordered that the impounded ballots from the 2011 elections should be counted, a tally of ballots prepared, and an appropriate certification or order of dismissal be issued.

***Duquesne University of the Holy Spirit*, NLRB Case No. 06-RC-080933 (NLRB Reg. Dir. June 5, 2015)**

On June 5, 2015, the NLRB Region 6 Director, applying the test articulated in the recent *Pacific Lutheran University* decision, issued a decision, recommendation and order rejecting Duquesne University's objection to the NLRB asserting jurisdiction over a representation petition filed by the United Steelworkers seeking to represent a unit of some of the university's part-time adjunct faculty.

In May 2012, after entering into a stipulated election agreement, the university objected to the NLRB's assertion of jurisdiction on grounds that it is a religiously-affiliated institution of higher learning. A mail ballot election was conducted by the NLRB in September 2012. It demonstrated that 50 eligible faculty members had voted in favor of unionization with 9 voting against.

Following the September 2012 tally of ballots, Duquesne University sought to have the election vacated on the grounds that the NLRB's assertion of jurisdiction violated the First Amendment because of the school's religious affiliation. The case remained pending with the NLRB Board at the time of the decision in *Pacific Lutheran University*.

On February 12, 2015, the Duquesne University case was remanded by the NLRB to the Regional Director to reexamine the jurisdictional objection under the refined standards articulated in *Pacific Lutheran University*.

Following a hearing, the Regional 6 Director found that the university had met the threshold test of demonstrating it holds itself out as an institution that provides a religious educational environment. However, she concluded that there was insufficient evidence in the record to conclude that the university holds out the adjunct professors as performing any religious function aimed at creating or maintaining the religious educational environment or that they are excepted to the university's religious mission.

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

1. Faculty as Managers

***Pacific Lutheran University*, 361 NLRB No. 157 (December 16, 2014)**

In *Pacific Lutheran University*, the Board also modified the standards used to determine whether certain faculty members are managers, who are excluded from protection of the Act. This question arises from the Supreme Court's decision in *Yeshiva*, where the Court found that in certain circumstances faculty may be considered "managers" who are excluded from the protections of the Act. The Board noted that the application of *Yeshiva* previously involved an open-ended and uncertain set of criteria for making decisions regarding whether faculty were managers. This led to significant complications in determining whether the test was met and created uncertainty for all of the parties.

Further, in explaining the need for the new standard, the Board specifically highlighted, as AAUP had in its amicus brief, the increasing corporatization of the university. The Board stated, "Indeed our experience applying *Yeshiva* has generally shown that colleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority away from the faculty in a way that was contemplated in *Yeshiva*, but found not to exist at Yeshiva University itself. Such considerations are relevant to our assessment of whether the faculty constitute managerial employees."

In *Pacific Lutheran University*, the Board sought to create a simpler framework for determining whether faculty members served as managers. The Board explained that under the new standard, "where a party asserts that university faculty are managerial employees, we will examine the faculty's participation in the following areas of decision making: academic programs, enrollment management, finances, academic policy, and personnel policies and decisions." The Board will give greater weight to the first three areas, as these are "areas of policy making that affect the university as whole." The Board "will then determine, in the context of the university's decision making structure and the nature of the faculty's employment relationship with the university, whether the faculty actually control or make effective recommendation over those areas. If they do, we will find that they are managerial employees and, therefore, excluded from the Act's protections."

The Board emphasized that to be found managers, faculty must in fact have actual control or make effective recommendations over policy areas. This requires that "the party asserting managerial status must prove actual—rather than mere paper—authority. . . . A faculty handbook may state that the faculty has authority over or responsibility for a particular decision-making area, but it must be demonstrated that the faculty exercises such authority *in fact*." Proof requires "specific evidence or testimony regarding the nature and number of

faculty decisions or recommendations in a particular decision making area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed." Further, the Board used strong language in defining "effective" as meaning that "recommendations must almost always be followed by the administration" or "routinely become operative without independent review by the administration.

Following the issuance of the *Pacific Lutheran University* decision, the Board remanded a number of cases involving whether faculty members are managers under *Yeshiva*. In these cases, the Board generally explained:

> On December 16, 2014, the Board issued its decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), which specifically addressed the standard the Board will apply for determining, in accordance with *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), when faculty members are managerial employees, whose rights to engage in collective bargaining are not protected by the Act.
>
> Accordingly, the Board remands this proceeding to the Regional Director for further appropriate action consistent with *Pacific Lutheran University*, including reopening the record, if necessary. . . . [Note 2] Members Miscimarra and Johnson adhere to their separate opinions in *Pacific Lutheran University*. Nevertheless, they agree with their colleagues that a remand is appropriate.

Point Park University, Case No. 06-RC-01226 (February 25, 2015).[2] *See also Seattle University*, Case No. 19-RC-122863 (February 3, 2015).

---

[2] The Board in *Point Park* 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. *Point Park University,* 2012 NLRB LEXIS 292 (May 22, 2012)(Invitation to file amicus briefs). 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." This issue was instead addressed in *Pacific Lutheran University* and therefore the Board remanded Point Park for further proceedings in light of the *Pacific Lutheran* decision. *Point Park University*, Case No. 06-RC-01226 (February 25, 2015).

The Regional Directors are issuing decisions based on these remands. For example, as the National Center reported, on March 3, 2015, Regional Director Ronald K. Hooks issued a supplemental decision and order in *Seattle University*. In the decision, Regional Director Hooks reexamined the evidence in the existing record based on the revised standards and analysis in *Pacific Lutheran University*. The Regional Director rejected the university's claim that the contingent faculty were managerial, finding that they lack authority, or effective control concerning the primary and secondary areas of decision making identified in *Pacific Lutheran University*.

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 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." As of July 9, 2015, no decision had been issued by the NLRB.

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.

***Columbia University*, NLRB Case No. 02-RC-143012 (March 13, 2015); *The New School*, NLRB Case No. 02-RC-143009 (March 13, 2015)**

The Board issued decisions on March 13, 2015 reversing and remanding decisions by NLRB Region 2 Director Karen P. Fernbach to dismiss representation petitions filed by UAW affiliates seeking to unionize graduate assistants and other students who provide instructional services at Columbia University and at The New School. Both petitions were filed as test cases aimed at having the Board reconsider and reverse its holding in *Brown University*, 342 NLRB 483 (2004) that graduate students were not "employees" for purpose of Section 2(3) of the National Labor Relations Act (NLRA). The Region 2 Director rejected both petitions, without a hearing or argument, based on the Board's decision in *Brown.*

The Union appealed, and the Board concluded that the cases raised substantial issues under the NLRA, and cases should not have been decided without a hearing. In so doing, the Board allowed the parties to provide evidence and argument regarding whether the *Brown* case should be reconsidered or reversed.

C. Employee Rights to Use Email

***Purple Communications*, 361 NLRB No. 126 (Dec. 11, 2014)**

The National Labor Relations Board recently issued a decision significantly expanding the right of employees to use their employers' e-mail systems for union organizing and other activities protected by Section 7 of the National Labor Relations Act.

In *Purple Communications* the board explained that "the use of email as a common form of workplace communication has expanded dramatically in recent years." Therefore the board ruled that "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems." While the case addressed communications supporting the union during an organizing drive, given the board's expansion of protected activity, this also includes communications critical of the employer's employment-related policies, practices and management decisions.

Therefore, employees who are given access to their employer's e-mail system for business purposes now will be able to use that system on non-working time to engage in a wide range of protected communications, including union support and comments critical of the employer's employment-related policies and management decisions. While the board did not directly address other types of electronic equipment and communications, such as instant messaging or texting from employer-owned smartphones and other devices, the board noted that a similar analysis would potentially apply.

However, there are limitations to the decision. First, since the decision was issued by the NLRB, under the statute protecting private-sector employees, it only applies to private-sector employees. Second, the board only addressed employee use of work e-mail, and did not extend the protection to cover use by non-employees. Third, the protected use was limited to non-work time, and absent discrimination against the union it does not give the employees right to use the work e-mail during work time. Fourth, the employer may in certain limited circumstances prohibit or limit the use of work e-mail on non-work time. Finally, this ruling will likely be appealed and could be overturned by the courts.

Nonetheless, this is a major step forward for the rights of faculty members in private institutions. E-mail is one of the primary ways in which faculty speak to each other in the modern world. The ability to use email to communicate is essential to faculty, particularly contingent faculty, who are often dispersed and may not be able to speak directly to each other regularly. This decision recognizes this reality and provides private-sector faculty members' use of work email to communicate with each other about union matters will be protected.

D. Bargaining Units

Lesley University, NLRB Case No. 01-RC-148228 (NLRB Reg. Dir. April 8, 2015)

On April 8, 2015, NLRB Regional Director Jonathan B. Kreisberg issued a decision and direction of election concerning a representation petition filed by SEIU that seeks to represent a unit of approximately 181 full-time and regular part-time core faculty employed by Lesley University including faculty with titles of Instructor, Assistant Professor, Associate Professor,

Professor, and University Professor. In its petition, SEIU seeks to also represent in the proposed unit approximately 14 faculty employed in the same titles but under temporary contracts.

In his decision, Regional Director Kriesberg rejected the objection by Lesley University to the inclusion of the temporary faculty in the proposed unit finding that the temporary faculty had a community of interest with the core faculty because they perform many of the same duties including teaching, curriculum development, advising students, participating in departmental meetings and serving on faculty committees. In addition, the two faculty groups was found to enjoy many of the same terms and conditions of employment. While temporary faculty serve under contracts for a one-year term, Regional Director Kreisberg concluded that they had a reasonable expectation of continued employment noting that 35 per cent of temporary faculty have served for a least two consecutive years notwithstanding their one-year temporary appointments.

E. NLRB Elections

NLRB Election Rules, 29 CFR Parts 101, 102, and 103*; Guidance Memorandum on Representation Case Procedure Changes Effective April 14_ 2015*, NLRB GC 15_06, (NLRB General Counsel, April 6 2015).

In December 2015 the NLRB issued revisions to union election rules that should vastly simplify and expedite the election process. Previously, the results of elections could be tied up for years in pointless litigation, delaying the results of a democratic process, a situation that would be intolerable in any other context. Specifically, the rule includes the following: Provides for electronic filing and transmission of election petitions and other documents; Ensures that employees, employers and unions receive timely information they need to understand and participate in the representation case process; Eliminates or reduces unnecessary litigation, duplication and delay; Adopts best practices and uniform procedures across regions; Requires that additional contact information (personal telephone numbers and email addresses) be included in voter lists, to the extent that information is available to the employer, in order to enhance information sharing by permitting other parties to the election to communicate with voters about the election; and Allows parties to consolidate all election-related appeals to the Board into a single appeals process. Cumulatively, these changes will likely reduce the time from the filing of a representation petition to the holding of an election to between 10 and 20 days.

Some of the new provisions are particularly important for faculty members. For example, the new election rules also require that employers provide the union with personal email addresses and phone numbers for employees. This is particularly important for reaching

out to contingent faculty, who often perform most of their work off campus. Also, unions must be aware that the NLRB representation hearing and election process is extremely fast paced and the NLRB will rarely grant requests for extensions of time. Therefore, ***unions should be fully aware of the revised rules and prepared for the hearing and election process prior to filing any election petition with the NLRB***.

VIII. Collective Bargaining Cases and Issues – Public Sector

A. Bargaining Units

***State of New Jersey v. Council of New Jersey State College Locals, AFT,* 2015 N.J. Super. Unpub. LEXIS 322 (Superior. Ct., Appellate Div. Feb. 20, 2015)**

An intermediate New Jersey appellate court has overturned a decision by the New Jersey Public Employment Relations Commission (PERC) dismissing representation petitions for the unionization of approximately 600 managers at nine New Jersey state colleges and universities. The court concluded that PERC acted arbitrarily by dismissing the representation cases without conducting an investigatory hearing to gather evidence to determine whether the employees in the at-issue positions perform duties and functions that would make them subject to the statutory exclusion of "managerial executives." Unless the court decision is reversed, the cases will return to PERC for a hearing to determine the managerial status of each position. Notably, the New Jersey public sector collective bargaining law, unlike the NLRA includes a specific definition concerning the managerial exemption to the right to unionize for purposes of collective bargaining.

B. Union Access to Email

***PSU, AAUP v. PSU*, Case No. UP-013-14, Oregon Employment Relations Board (April 17, 2015)**

The Oregon Employment Relations Board found that Portland State University (PSU) unlawfully interfered with, restrained, or coerced employees represented by the Portland State University Chapter American Association of University Professors (Association) in the exercise of their collective bargaining rights. The Association filed an unfair labor practice complaint against PSU, alleging that the University violated state labor law by announcing, two days before an Association strike vote, that it would disable log-in credentials to University-provided e-mail and other electronic accounts for any striking faculty members. The Board concluded that the University's statement would "naturally and probably" chill the employees in exercising their statutorily-guaranteed rights, including the strike-authorization vote, because Association-represented employees are highly dependent on being able to access the Odin system for their

organizing efforts. In addition to issuing a cease and desist order, the Board ordered the University to post and circulate the ruling to Association-represented employees.

C. Contracts – Limitations on Part-Time Employees

***Board of Higher Education and Mass. State College Assoc.*, Case No. SUP-08-5396 (Mass. CERB February 6, 2015)**

The Massachusetts Commonwealth Employment Relations Board (CERB) issued a decision on February 6, 2015 affirming a Hearing Officer's conclusion that the Board of Higher Education (Board) engaged in an unfair labor practice by repudiating a provision of the collective bargaining agreement with the Massachusetts State College Association/MTA/NEA (Association) and a prior grievance decision concerning the employment of part-time faculty.

The Board is the statutory employer for the state's nine public colleges. Under Article XX of the contract, college departments with six or more full-time faculty are limited in the percentage of part-time faculty they may hire. However, from academic year 2001-2002 through 2007-2008, eight colleges had academic departments in violation of the percentage limitation on the employment of part-time faculty. During contract negotiations in 2007, the Association rejected a Board proposal to delete Article XX. CERB found that despite making express commitments, the colleges persisted in employing part-time faculty beyond the negotiated limitations in the agreement.

D. Exclusive Representation

***Jarvis v. Cuomo*, 2015 U.S. Dist. LEXIS 56443 (N.D.N.Y Apr. 30, 2015)**

In this case the United States District Court held that the designation of a public sector union as the exclusive representative of all employees within a bargaining unit did not violated any of the employees' constitutional rights.

This was one of several lawsuits in which anti-union plaintiffs challenged the long established rights of unions to exclusively represent employees in public sector bargaining. The District Court noted that in *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271, 104 S. Ct. 1058, 79 L. Ed. 2d 299 (1984) the Supreme Court had explicitly addressed this issue and found that such activity "in no way restrained [the plaintiffs'] freedom to speak on any education-related issue or their freedom to associate or not associate with whom they please, including the exclusive representative." *Id*. at 288. The court explained that the Supreme Court had held:

> [The plaintiffs] are free to form whatever advocacy groups they like. They are not required to become members of MCCFA . . . [The plaintiffs] may well feel some pressure

> to join the exclusive representative in order to give them the opportunity to serve on the 'meet and confer' committees or to give them a voice in the representative's adoption of positions on particular issues. That pressure, however, is no different from the pressure they may feel to join MCCFA because of its unique status in the 'meet and negotiate' process, a status the Court has summarily approved. Moreover, the pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom.

Id. at 289-90.

For the same reasons, the designation of CSEA as the exclusive representative of child care providers does not deprive Plaintiffs of their associational rights. Plaintiffs are not compelled to join CSEA, and are free to associate with whomever they choose and otherwise express their views. This includes the right "to meet or correspond with any state agency with regard to any matter of relevance." N.Y. Labor Law § 695-g(5).

Plaintiffs claim that the associational argument in Knight "concerned only whether excluding employees from union bargaining sessions impinged on their associational rights because it indirectly pressures employees to join the union." Plaintiffs assert that their argument is distinguishable because Plaintiffs are asserting a "right not to be forced to associate with CSEA against their will." Id. at 18. However, Knight's holding is broader than Plaintiffs suggest. The Supreme Court's language indicates that it broadly considered whether exclusive representation by MCCFA infringed the plaintiffs' associational rights. Knight, 465 U.S. at 288. The Court explicitly stated that Minnesota had not restrained the plaintiffs' "freedom to associate or not to associate with whom they please," id. at 288, and that the plaintiffs were "free to form whatever advocacy groups they like," id. at 289. Plaintiffs focus on the Court's framing of the issue as whether "Minnesota's restriction of participation in 'meet and confer' sessions to the faculty's exclusive representative" infringed the plaintiffs' associational rights. *Citing Knight*, 465 U.S. at 288. However, the fact that in the context of the PELRA the exclusive representative participates in the "meet and confer" sessions does not mean that the Court's consideration of the impact on the plaintiffs' associational rights was so limited. Two other district courts have similarly read Knight as addressing whether exclusive representation by a union infringes non-members' associational rights. *See D'Agostino v. Patrick*, No. 14-cv-11866, 2015 U.S. Dist. LEXIS 31170, 2015 WL 1137893, at *3-5 (D. Mass. Mar. 13, 2015); *Bierman v. Dayton,* No. 14-3021, 2014 U.S. Dist. LEXIS 150504, 2014 WL 5438505, at *7 (D. Minn. Oct. 22, 2014)

E. 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. 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.

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.

***Friedrichs v. California Teachers Association,* U.S. Supreme Court Case No. 14-915, cert. granted (June 29, 2015)**

The Supreme Court granted certiorari, and thereby agreed to hear an appeal, in a case titled *Friedrichs* that raises questions regarding whether and under what circumstances agency fee is constitutional in the public sector. Agency fee has been deemed constitutional since the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*. Last year in *Harris v. Quinn*, the Supreme Court declined to overrule *Abood*, though it raised questions regarding its vitality. The Supreme Court will issue a decision in *Friedrichs* during the 2015–16 term, most likely in the spring or summer of 2016. A decision in *Friedrichs* could prohibit agency fee for public sector unions.

The entire Court of Appeals decision was one paragraph, with one sentence addressing the substance of the appeal.

> Upon review, the court finds that the questions resented in this appeal are so insubstantial as not to require further argument, because they are governed by controlling Supreme Court and Ninth Circuit precedent. See United States v. Hooton, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard for summary affirmance); Abood v. Detroit Bd. Of Ed., 431 U.S. 209, 232 (1977) (allowing public-sector agency shop); Mitchell v. L.A. Unified Sch. Dist., 963 F.2d 258, 263 (9th Cir. 1992) (allowing opt-out regime).

The Supreme Court accepted two questions for review: (1) Whether Abood v. Detroit Board of Education should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment; and (2) whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

Given the questions before the Court there are three potential outcomes. First, the Court could answer no to both questions, and leave the law status quo. Second, the Court could answer the first question in the affirmative, and it would overrule *Abood* and prohibit agency fee in the public sector. This would impose a right to work style system nationwide in the public sector. (This would render the second question before the Court moot.) Third, the Court could answer the first question no, thereby allowing agency fee, but could answer the second question yes. The second question addresses the current law regarding agency fee payers and objectors. Under the current law, non-members can be charged a rate equivalent to full union dues unless they affirmatively object. Once a non-member formally objects, they can only be charged the agency fee rate. This creates an "opt-out" situation in which non-members must affirmatively opt out to pay the lower agency fee rate. If the Court answered the second

question yes, then agency fee would still be permissible, but all non-members would be considered objectors automatically and could therefore only be charged the lower agency fee rate.

We will be watching this case closely and anticipate participating in the case by joining in an amicus brief filed before the court. We will keep our collective bargaining chapters informed of important developments. We hope for the best outcome—an affirmation from the Supreme Court of the constitutionality of charging all bargaining unit members for the costs of representing them. But we must also be prepared for an unfavorable ruling, and we will be ready to act. The best defense against an unfavorable outcome is wall-to-wall membership, and the best preparation for an uncertain future is to build strong unions that can stand up for public higher education for the common good.