PURSUANT TO PROFESSORIAL DUTIES

BY

NORA ANNE DEVLIN

A dissertation submitted to the

School of Graduate Studies

Rutgers, The State University of New Jersey

In partial fulfillment of the requirements

For the degree of

Doctor of Philosophy

Graduate Program in Higher Education

Written under the direction of Barbara A. Lee

And approved by

_____

_____

_____

_____

NEW BRUNSWICK, NEW JERSEY

MAY 2023

ABSTRACT OF THE DISSERTATION

PURSUANT TO PROFESSORIAL DUTIES

BY NORA ANNE DEVLIN

DISSERTATION DIRECTOR:

BARBARA A. LEE

In *Garcetti v. Ceballos* (2006), the Supreme Court of the United States held that public employees are not protected by the First Amendment when they speak pursuant to their official duties. The dissenting justices raised the question of how this precedent might be inappropriately applied to faculty at public colleges and universities. This dissertation builds on over a century of scholarly literature on academic freedom and faculty free speech to review the discursive and legal implications of courts' decisions in faculty free speech cases from 2006-2020. Using a conceptual framework informed by legal scholars Robert Post, J. Peter Byrne, and Judith Areen, this dissertation analyzes the faculty free speech jurisprudence and the conceptualizations of academic freedom that do and do not inform the courts in their decisions. As Areen has noted, how courts deal with faculty speech on matters relating to institutional governance raises important questions about how the courts understand shared governance structures in higher education. This dissertation argues that when faculty speech is determined by one's faculty peers (according to institutional policies and procedures) to serve the educational mission of the institution, that speech should be protected under the First Amendment.

Keywords: Academic freedom, First Amendment, Free Speech, Faculty, Professors, Higher Education, Constitutional Law

DEDICATION

This dissertation is dedicated to Dr. Carl E. Sherrick, the first and only one of my direct ancestors to earn a PhD, my beloved Pop-pop, my first professor, who despite having to raise his own salary for four decades was still the most ethical, generous, and kindhearted man I have ever known. I love learning from faculty because I first loved learning from my Pop.

ACKNOWLEDGMENTS

I am writing these acknowledgements well before the dissertation is complete, for no other reason than it is easier to write the acknowledgments than to do the actual work of writing a dissertation. First, a disclaimer: as every good legal scholar knows, it is important to clarify that these acknowledgements are not an exhaustive list of all of the people deserving of my gratitude for their support and encouragement throughout this difficult process—if you, reader, spoke with me even once or twice between 2020-2023, you likely helped push me towards the completion of this mammoth project. Even those who actively discouraged me or left me feeling hurt should be acknowledged for contributing to my petty desire to prove that I could do this thing (but that is all the thanks I will be giving to those people).

An enormous thank you to my committee, especially my dissertation chair, Professor Barbara Lee, for agreeing to go on this journey with me over multiple years even through a multi-year pandemic. I could not have done this without your support and belief in me, Professors Justice, Hawkins, and Lugg. And to my committee, thank you for letting me use bluebook style and footnoting,[1] allowing me to keep some of my sassy commentary in the dissertation, and for reading this incredibly long document.

To my family, especially my siblings, parents, aunts, uncles, cousins, and my many ancestors who I feel looking out for me, thank you for your love, your encouragement, and your faith in me. A special thank you to the Wacky Sisters (Kathy, Diana, Mama) who never fail to make me laugh even on the lowest of days. To all my

[1] A special footnote shoutout to Frank Bennett (@fgbjr on Twitter) who developed and maintains Juris-M the legal version of Zotero, and who has personally edited his code to make it work for me *multiple times* in the past three and a half years.

niblings, Stella, Iris, Ellie, Liam, Levi, Lily, and James, thank you for bringing joy and laughter into my heart every time I see your faces. Everything I do, this dissertation included, is to model what it is to be a good ancestor for you, so that you might do the same. I am so blessed to have your light in my life.

To my loving, dear, compassionate, and *patient* friends, especially the ones who have endured my many many messages (Tay, Liz, et. al.), thank you for believing in me, and loving me through this crazy time. The rosebuds (too many to name), the work hours crew (Hazel—Architect of Arguments, Lydia—The Composed and Meaningful, Serena, Becca), the writing buddies (Heather, Na'ama), the summer writing accountability group (Carolyn), DnD crew (Dana, Ross, Jamie, Rae, Tom, and Kalina) and my Honors College family (Becca, Angelina, Peter, James, Liz, Jordyn, and your families), you all have been absolute rocks for me. I could not be more grateful for your love, encouragement, and regular check-ins these past few years. I could not have done any of this without you. To Kevin and Ali, without whom I know I would have given up, thank you for sticking up for me and believing in me. Thank you to Liz (and Chris) for feeding me and encouraging me to find hobbies that bring me joy and help me feel accomplished at the end of the day even if I get no new words on the page. And thank you to my academic twitter friends, and especially to Raúl Pacheco-Vega whose blog has given me the motivation and courage to write even on the hardest days.

Most importantly, to Pat, my best choice in life, my closest friend, my love and my heart. I could not have written a single page of this dissertation if you had not believed in me from the start. You have known me since I was just fourteen, and you saw even then that I could and would accomplish hard things on my own—but then you chose

to join me and help me do even greater things with you by my side. I am so much more today than I ever could have been without you, and I could not be more grateful. Every day that I was down, you believed in me, and every day whether I was crushing it or banging my head against my desk, you celebrated my victories. You fed me, you did my laundry, you went with me to the gym, you took on the full brunt of the household chores and you regularly asked what else you could do to help. Even when things were hard for us, even when we both faced so many rejections, you never doubted me—you never lost faith that I would be able to accomplish such an ambitious and monumental task. Thank you for making me belly laugh every day, for telling me stories, for playing games with me, and reminding me to have fun. Thank you for loving me through all the personal hells I've locked myself in and all the strange new realizations I've had during this test of endurance and persistence. There is no one I would rather have by my side, every single day, loving me and believing in me, than you. You are my everything. I love you all the face.

To my cats, Best Kat, Calico, Tabby, Hoagie, and Hildy. You never asked me how my dissertation was coming along. You never cared whether I'd written anything that day. You never complained that I spent too much time writing. Thank you for that. And of course, thank you for your supportive cuddles and purrs while I worked and while I recharged. You and Pat made my daily life while dissertating something to cherish and enjoy rather than endure. I am so grateful for Best Kat's short life on this mortal plane, and that she chose to spend so much of her eight short years curled up next to me. I could not have made it through that loss without Calico and Tabby, who gave lots of extra

cuddles and purrs, and (begrudgingly) made room for two new kittens after we lost Best Kat. And a special thanks to Lydia for reminding me to include this important paragraph.

Finally, an acknowledgement to all the people whose dissertations and theses I've been acknowledged (and cited!) in (past, present, and future). You are the people I do this research for, and your appreciation of my support is what keeps me going when things get hard. Also, you are helping me reach my goal to be in as many theses as possible. Thank you for seeing my passion and desire to help as coming from a place of love, and for listening when I told you I believed you could do it. You inspire me every day to work harder to make higher education more just and more human.

TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

Pursuant to Professorial Duties: Faculty Free-Speech Cases Post-*Garcetti v. Ceballos*

0. Introduction

While perhaps not always a matter of one's First Amendment rights to free expression, the concern for faculty's freedom to speak their mind has been essential to the concept of American academic freedom since at least the late 1800s.[2] The genealogy of faculty freedom of expression has been traced by historians and legal scholars alike over the last century.[3] The distinction between academic freedom and freedom of speech is actually quite simple. Academic freedom, commonly understood by faculty as a contractual right to free expression on topics and in contexts related to a faculty member's research and teaching, has been defined and enshrined in such collective statements as the AAUP's 1915 declaration of principles and the AAUP's *1940 Statement on Academic Freedom and Tenure*.[4] Meanwhile, the right to freedom of expression under the First Amendment is a protection only from the government (or state actors) and therefore extends only to employees of public institutions.[5]

---

[2] RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (Columbia University Press 1955); Edwin RA Seligman et al., *AAUP's 1915 Declaration of Principles*.

[3] HOFSTADTER & METZGER, *supra* note 2; Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L. J. 945 (2009); Timothy Reese Cain, *A Historiography of Academic Freedom for American Faculty, 1865–1941, in* HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 157 (Michael B. Paulsen ed., Springer International Publishing 2016); T CAIN, ESTABLISHING ACADEMIC FREEDOM: POLITICS, PRINCIPLES, AND THE DEVELOPMENT OF CORE VALUES. (Palgrave Macmillan 2016); ELLEN SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES (Oxford University Press 1986); MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (Yale University Press 2009).

[4] Seligman et al., *supra* note 2; American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP (1940).

[5] U.S. CONST. amend. I.

0.0. Cacophonous Voices: Three Perspectives

Despite such a simple distinction, the voices of the free speech and academic freedom discussions are discordant because there are, in fact, three distinct perspectives (the unionist, administrator, and scholarly) with conflicting constituencies and priorities that breed confusion and prevent clear communication when discussing issues of faculty freedom of expression. When debating faculty speech concerns, academic freedom scholars revert to theoretical questions,[6] whereas unionists tend to rely on the threats of neoliberal and right-wing ideologies to faculty free expression,[7] and administrators rely on legal considerations (threats of lawsuits against the institution).[8] Each perspective is discussed in turn.

Scholars[9] of academic freedom (and to some degree freedom of speech as well) are often rooted in humanistic or legal traditions.[10] These perspectives tend to leave

---

[6] SIGAL R. BEN-PORATH, FREE SPEECH ON CAMPUS (University of Pennsylvania Press Jul. 2017); KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH (Princeton University Press Feb. 2019).

[7] CARY NELSON, NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM (NYU Press 2011).

[8] See, for example, Jonathan Holloway, *On Academic Freedom and Free Speech*, RUTGERS UNIVERSITY, https://www.rutgers.edu/president/academic-freedom-free-speech (last visited Mar. 7, 2023); Robert Barchi, *Rutgers President on Free Speech and Academic Freedom | Office of the President*, RUTGERS UNIVERSITY, https://web.archive.org/web/20191218071923/https://president.rutgers.edu/public-remarks/speeches-and-writings/rutgers-president-free-speech-and-academic-freedom (last visited Aug. 14, 2020).

[9] For the purposes of this dissertation, the researcher does her best to differentiate the humanistic and legal approaches to academic freedom scholarship wherever possible, though some scholarship tends to blur these distinctions. Whenever it says "academic freedom scholars" this should be understood to include both legal and humanistic scholarship. One example of a scholar whose work blurs the distinction between legal and humanistic scholarship is Robert Post who has a PhD in Philosophy in addition to being a renowned First Amendment scholar and Yale law professor. Another example is Stanley Fish whose PhD is in English but whose recent publications have been more legal in nature.

[10] Areen, *supra* note 3; ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (Yale University Press Reprint edition ed. Apr. 2013); ROBERT M. O'NEIL, ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER, AND THE UNIVERSITY (Harvard University Press Feb. 2008); Robert M. O'Neil, *Academic Freedom as a "Canonical Value,"* 76 SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY 437

something to be desired when it comes to acknowledging how speech can harm people.[11] The legal scholarship applying the First Amendment to faculty traces its origins to mid-twentieth century court cases brought against McCarthy-era statutes and state actors that usurped the autonomy of colleges and universities to hire whomever they pleased[12] regardless of political party membership or political beliefs, past or present.[13] The humanistic and philosophical perspectives find their origins most commonly with Immanuel Kant[14] and John Stuart Mill.[15]

The contemporary talking points of the unionists (mainly the AAUP/AFT and their members), often draw attention to the structural effects of neoliberal policies on academic labor relations.[16] For instance, academic labor advocates regularly point to how the drastic increase in non-tenure-track (NTT) faculty[17] inevitably has a chilling effect for the majority of faculty.[18] Similarly, the structure of the academic workplace, often described as a system of shared or divided governance,[19] places governance-related

---

(2009); Robert M. O'Neil, *Academic Freedom to Deny the Truth: Beyond the Holocaust*, 101 MINN. L. REV. 2065 (2016–2017); HENRY REICHMAN, THE FUTURE OF ACADEMIC FREEDOM (Johns Hopkins University Press Apr. 2019); WHITTINGTON, *supra* note 6; ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS (Yale University Press Sep. 2017); FINKIN & POST, *supra* note 3; BEN-PORATH, *supra* note 6.

[11] For such a discussion, see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); MARI J. MATSUDA, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Westview Press 1993).

[12] *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589 (1967).

[13] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

[14] POST, *supra* note 10; Judith Butler, *Critique, Dissent, Disciplinarity*, 35 CRITICAL INQUIRY 773 (Jan. 2009); Areen, *supra* note 3; IMMANUEL KANT, THE CONFLICT OF THE FACULTIES (Mary J. Gregor trans., University of Nebraska Press 1992).

[15] WHITTINGTON, *supra* note 6, at 37–39.

[16] See, for example, Larry G. Gerber, *College and University Governance*, 101 ACADEME, Jan.–Feb. 2015, at 31.

[17] More than two-thirds of instructional faculty are non-tenure-track. ADRIANNA KEZAR ET AL., THE GIG ACADEMY: MAPPING LABOR IN THE NEOLIBERAL UNIVERSITY 43 (JHU Press Oct. 2019).

[18] NELSON, *supra* note 7; KEITH HOELLER, EQUALITY FOR CONTINGENT FACULTY: OVERCOMING THE TWO-TIER SYSTEM (Vanderbilt University Press 2014).

[19] CHRISTOPHER NEWFIELD, IVY AND INDUSTRY: BUSINESS AND THE MAKING OF THE AMERICAN UNIVERSITY, 1880–1980 80 (Duke University Press 2003).

speech into a grey area,[20] where protection for speech is unclear under academic freedom, and even less clear under the First Amendment. When issues arise and parties are forced to take action, often faculty and administrative perspectives clash and exacerbate the already heightened tensions inherent to a divided governance structure.[21] This is the context in which many faculty free speech cases take root and are brought before the courts.

Analysis of faculty speech cases by those most committed to a legal perspective (e.g., lawyers and the administrators they advise, law professors, judges) often fails to recognize the fundamental misunderstandings of the academic profession, organizational and governance structures within academia, or the job descriptions of academics, leading to bad law and propagating false images of academe. For example, the vast majority of faculty are NTT part-time instructors.[22] NTT faculty have fewer legal protections

---

[20] Areen, *supra* note 3, at 988.

[21] Increasingly, especially since the murder of George Floyd in June 2020, Black faculty and students and other students and faculty of color have gained traction in calling attention to structural racism within the academy beyond simply labeling a racist (Eric Rasmusen) a racist as Indiana University Provost Lauren Robel did in November 2019 (see, Lauren Robel, *On the First Amendment*, INDIANA UNIVERSITY BLOOMINGTON, https://provost.indiana.edu/statements/archive/first-amendment.html (last visited Jul. 14, 2020).). This focus on structural racism as upheld by a right to free expression is a fourth perspective that is being taken up by unions more so than humanistic or legal scholars writing about academic freedom, though it has also been present in these traditions as well. This perspective is rarely (if ever) raised in the literature on academic freedom, and more commonly raised in scholarship on free speech. While bigoted speech and the harms it causes is central to the Rasmusen case at Indiana University, the number of court decisions dealing with this kind of speech in the time period covered in this dissertation remains unknown at the writing of this proposal, therefore this perspective is discussed only as it relates to the context of higher education and faculty labor specifically.

[22] Non-tenure-track faculty members made up no less than an average of 56% of all faculty across institutional types according to 2018 data. See Almanac 2019, *Tenure Status of Full-Time and Part-Time Faculty Members, Fall 2017*, THE CHRONICLE OF HIGHER EDUCATION (Aug. 18, 2019), https://www.chronicle.com/article/Tenure-Status-of-Faculty/246310. Informed by Timothy Reese Cain's review of Campus Unions for an ASHE Higher Education Report, this dissertation will distinguish between tenure-track (TT) and non-tenure-track (NTT) faculty to emphasize the different working conditions for TT and NTT faculty. Timothy Reese Cain, *Campus Unions: Organized Faculty and Graduate Students in U.S. Higher Education*, 43 ASHE HIGHER EDUCATION REPORT 1, 23 (Wiley Periodicals, Inc 0 2017).

compared with tenure-track (TT) faculty and can be dismissed or non-renewed at-will without cause.[23] The current First Amendment caselaw provides virtually no relief for dismissed NTT faculty unless they can provide proof that the employer stated that the protected speech was the cause of the dismissal—a highly unlikely occurrence.

While the situation for part-time NTT faculty is mostly clear (albeit bleak)[24] the controlling precedent for full-time faculty is much murkier. Since 2006, federal courts have grappled with the standard set by *Garcetti v. Ceballos*,[25] a Supreme Court case in which the free speech rights of public employees were drastically and summarily curtailed. Since *Garcetti* the Federal Circuits have mainly decided public employee speech cases independently of each other, creating even more uncertainty around faculty speech law. Many legal scholars have commented on the continued confusion and have expressed concern for the (lack of) protections available to faculty.[26] Thus, not only are

---

[23] Gary Rhoades, *Bargaining Quality in Part-Time Faculty Working Conditions: Beyond Just-In-Time Employment and Just-At-Will Non-Renewal*, 4 JOURNAL OF COLLECTIVE BARGAINING IN THE ACADEMY 1. (Feb. 2013), https://thekeep.eiu.edu/jcba/vol4/iss1/4; and see further discussion in Timothy Reese Cain, *supra* note 22, at 112.

[24] In a preliminary analysis of adjunct cases, the author found that adjunct faculty's speech related to teaching was not protected in virtually any of the cases reviewed. Nora Devlin, *Labor as Contingent as Free Speech? Adjunct First Amendment Cases Since 2006* (Mar. 2020).

[25] *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

[26] Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145–190 (2009), *available at* https://heinonline.org/HOL/P?h=hein.journals/jcolunly36&i=159; Neal H Hutchens & Jeffrey C Sun, *The Tenuous Legal Status of First Amendment Protection for Individual Academic Freedom*, 7 JOURNAL OF THE PROFESSORIATE 25 (2013); Oren R. Griffin, *Academic Freedom and Professional Speech in the Post-Garcetti World*, 37 SEATTLE U. L. REV. 1–54 (2013), *available at* https://heinonline.org/HOL/P?h=hein.journals/sealr37&i=85; Hilary Habib, *Academic Freedom and the First Amendment in the Garcetti Era Note*, 22 S. CAL. INTERDISC. L.J. 509–552 (2012), *available at* https://heinonline.org/HOL/P?h=hein.journals/scid22&i=533; Darryn Cathryn Beckstrom, *Reconciling the Public Employee Speech Doctrine and Academic Speech after Garcetti v. Ceballos Note*, 94 MINN. L. REV. 1202–1238 (2009), *available at* https://heinonline.org/HOL/P?h=hein.journals/mnlr94&i=1216; Robert M. O'Neil, *Academic Speech in the Post-Garcetti Environment Symposium: Public Citizens, Public Servants: Free Speech in the Post-Garcetti Workplace*, 7 FIRST AMEND. L. REV. 1–21 (2008); Suzanne R. Houle, *Is Academic Freedom in Modern America on Its Last Legs after Garcetti v. Ceballos*, 40 CAP. U.L REV. 265

the three discordant voices in the discussions of freedom of expression for faculty speaking over each other, but the courts themselves have also added a dissonant din to the ongoing cacophony. There are therefore two main problems to which this dissertation seeks to bring clarity if not harmony: the first problem is discursive, the second is legal. Discursively, this dissertation aims to clarify and understand the three perspectives (unionist, administrative, and scholarly) and subsequently seek a theoretical argument which finds common ground rooted in the overlapping interests of all three constituencies—the educational mission of all institutions of higher education, defined as the common institutional aim of knowledge creation and dissemination. Legally, this dissertation aims to clarify the courts' applications of *Garcetti* to faculty speech cases, lay out the national faculty free speech jurisprudence post-*Garcetti,* and make an argument for a mission-centered approach to faculty speech cases.

Using a conceptual framework informed by First Amendment theories developed by legal scholars such as Robert Post, Judith Areen, and J. Peter Byrne,[27] this dissertation will analyze the federal faculty free speech cases filed between 2006 and 2020 to understand how courts conceive of faculty speech protections post-*Garcetti*. The purpose of this investigation is to develop a compelling legal and theoretical argument, rooted in meticulously examined literature and caselaw, that can turn the shaky, uneven ground of current faculty free speech jurisprudence into a mission-centered theory of First Amendment academic freedom. The thesis of this dissertation is that the apparent conflict

---

(2012); Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 J.C. & U.L. 75–98 (2008), *available at* https://heinonline.org/HOL/P?h=hein.journals/jcolunly35&i=87; Sheldon Nahmod, *Academic freedom and the post-Garcetti blues*, 7 FIRST AMEND. L. REV. 54 (2008).

[27] See *infra* Section 1.1.

between scholarly perspectives on academic freedom and First Amendment freedom of expression jurisprudence can be weakened if not resolved through a theory of faculty speech that centers on the educational missions of institutions of higher education.[28] This mission-centered perspective will be compared with the perspectives and rationales offered in the literature on academic freedom and faculty freedom of expression, as well as those put forth in the courts by parties, expert witnesses, attorneys, and judges.

The sections that follow describe a dissertation project that relies on legal theories of the First Amendment and specifically First Amendment academic freedom to argue for a mission-centered framework for understanding, interpreting, and deciding faculty free speech cases. The first chapter provides an overview of the First Amendment conceptual framework which builds on the work of legal scholars of academic freedom and free speech. The second chapter is organized into six parts and reviews the literature on multiple aspects of academic freedom and the context of free speech cases. The third chapter—an overview of the study, its goals and research questions, and methods—follows the literature review. The fourth chapter lays out the faculty speech jurisprudence across all twelve federal circuits by summarizing each of the 162 cases analyzed for this dissertation. The fifth chapter offers quantitative and qualitative analyses and findings of this study. The sixth chapter provides a number of critiques and recommendations based on the findings of the dissertation. Finally, chapter seven concludes with a summary and recommendations for future research.

---

[28] The mission-centered theory advocated in this dissertation is built on the mission-centered theories espoused in Areen, *supra* note 2; and POST, *supra* note 8, among others. See *infra* Sections 1.1-1.3.

1. Conceptual Framework – Theories of the First Amendment and Academic Freedom

This section lays out the conceptual framework informing this dissertation project beginning with theories of constitutional interpretation. The first subsection explains how legal scholars have theorized the governmental authority of institutions like public colleges and universities. The second subsection connects the issues of authority with the (First Amendment) values of those institutions. The final subsection takes a particular value of colleges and universities—shared governance—and explains how legal scholars have conceptualized this value's relationship to the First Amendment. This section concludes by echoing Areen's reconceptualization of academic freedom and judicial deference as inhering to faculty, rather than an institution's board, based on Post's understanding of governmental authority.

The Supreme Court of the United States is the body tasked with the final interpretation of the U.S. constitution. The lower courts must make sense of the relevant facts of each case on their dockets in light of the Supreme Court's interpretations of the constitution. Academic freedom, a concept of "special concern" to the First Amendment has been fitted into the broader framework of the SCOTUS's constitutional interpretation and First Amendment jurisprudence. Thus, the law of the land is determined based on how each case or topic fits within a broader framework of Constitutional interpretation. Erwin Chemerinsky explains that neither originalist nor non-originalist theories of constitutional interpretation are monoliths but vary from justice to justice and court to

court.[29] Originalists generally idealize placing limits on judicial intervention, whereas non-originalists believe courts can play a role in taking into account the evolution of moral, cultural, and technological contexts that open the door for new interpretations of the constitution's phrasing. Since education is never mentioned in the constitution, any discussion of academic freedom by the courts will be at least tinged by non-originalism.[30]

When it comes to academic freedom cases, courts do not regularly reference the scholarly literature on academic freedom's cultural, philosophical, historical, and legal definitions, theories, or consequences; instead, the courts depend on constitutional and First Amendment frameworks for interpreting the law, and then fit academic freedom into those frameworks.

1.0. Governmental Authority

In 1987, Robert Post wrote that the public forum doctrine's approach to understanding governmental authority under the First Amendment was fundamentally deficient.[31] The question in public forum cases, he asserted, should not be about the forum in which the speech is made, but instead should be about the authority by which the government claims to be regulating the speech.[32] He argued that managerial authority is that authority the government has to ensure that government institutions fulfill their missions.[33] In contrast, Post defines the governance authority of the government as the

---

[29] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 11–13 (Wolters Kluwer 4 edition ed. Jun. 2013).
[30] A truly originalist stance by the Supreme Court would be simply not to take any case regarding education, thus any actual discussion would inevitably include some non-originalist interpretation.
[31] Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).
[32] *Id.* at 1833.
[33] *Id.* at 1769–70.

authority to govern citizens (or the public).[34] Post's theory asserts that when exercising its governance authority, the government presumptively has no valid interest in regulating speech that does not fall under the exceptions already enumerated within the common law (e.g., harassment, true threats, obscenity, etc.).[35]

Table 1 – Governmental Authorities

Robert Post's Two Types of Government Authority (to restrict expression)		
Types of Authority	Governing	Managerial
Over whom:	General Public/ Citizens	Government Employees
When:	Anytime	When carrying out a legitimate government function
Factors weighed:	Citizens' First Amendment Rights vs. Legitimate Government's Interest	Employee's Constitutional Rights vs. Legitimate Government Function
Example:	No littering in parks	No playing bingo during work hours

On the other hand, Post states that when operating within the government's managerial authority, judicial deference is appropriate insofar as the control of speech is asserted in pursuit of the institutional purpose/mission within a context that "requires flexibility and discretion to function effectively."[36] Post's understanding aligns with Justice Stevens's concurrence in *Widmar v. Vincent*[37] who wrote that academicians routinely must make decisions based on the educational mission of the institution and a public forum standard is inappropriately applied to such decisions.[38] Post, like Justice

[34] *Id.* at 1775.
[35] Post, *supra* note 31, at 1833.
[36] *Id.* at 1834.
[37] *Widmar v. Vincent*, 454 U.S. 263 (1981).
[38] *Id.* at 277–81.

Stevens, argues that managerial authority rests on the idea that carrying out the institutional mission requires some degree of discretion in speech regulation. For the purposes of this project, the mission of faculty is defined as: to disseminate knowledge through teaching and research, and to govern the organization in such a way that prioritizes the academic/educational mission over business operations, politics, bureaucratic mechanisms, or other concerns. Thus, in a higher education context, speech regulation is certainly required for an institution to achieve its mission, as discerning robust and rigorous argument from the late-night ramblings of an overcaffeinated typist is much of the work of teaching and scholarship.[39] In later works, Post argues that rigor in scholarship is not only an academic value, but a First Amendment value as well.

1.1. Values and Authorities

Post argues in his 2013 book on academic freedom that, in the context of universities, there are two constitutional values at play when considering First Amendment cases.[40] The first is democratic legitimation—which requires the governing authority to allow all people unrestricted autonomy when participating in public discourse.[41] For democracy to thrive, no one's voice can be silenced by the government just because of the content of their speech. Post explains that the governance authority which more directly threatens democratic legitimation is not at stake within the context of universities.[42] Rather, the value of democratic competence—the ability of the people in a

---

[39] As I imagine my readers will agree they are doing right now.
[40] POST, *supra* note 10.
[41] *Id.* at 11.
[42] *Id.* at 31.

democracy to control their own (disciplinary) knowledge production and (through education) thus cognitively empower the people—defines the context of universities.[43]

Post theorizes that the constitutional value of democratic competence justifies institutional academic freedom as much as faculty academic freedom (for individual faculty members).[44] The production of knowledge through self-regulating disciplines is precisely what occurs within universities. When universities are public institutions (arms of the state) this can raise issues of managerial authority, for instance, when the president of a university believes it is in the best interest of the institution for one of its faculty members to be disciplined for what she wrote on twitter because it is incompatible with the university's mission. Post avers that in this scenario the managerial authority of the university must only be conceived as the authority to weigh the fulfillment of the institution's function over the free speech rights of the individual.[45] The institution's function in the case of the university must be understood as the educational mission—to create and disseminate knowledge according to disciplinary norms and processes. If the speech of the faculty member furthers or is irrelevant to that mission, then the institution lacks authority. If the speech of the faculty member does in fact prevent the university from fulfilling its mission, the authority of the institution outweighs the faculty member's freedom of speech. But as Post clarifies, asking whether academic freedom inheres in individual faculty members or in the institution’s board or administrators is the wrong question; for Post, academic freedom inheres in the academic profession.[46]

---

[43] *Id.* at 35–36.
[44] POST, *supra* note 10.
[45] Post, *supra* note 31, at 1834.
[46] POST, *supra* note 10, at 79–80.

In contrast, J. Peter Byrne's classic piece argues that constitutional academic freedom inheres instead to the institution for the sake of its own self-governance free from governmental interference.[47] Horwitz agrees that constitutional academic freedom is an institutional right and offers a theory of First Amendment institutions (universities, libraries, newspapers, churches, and associations) that justifies their differential treatment from other institutions (e.g., K-12 schools, businesses, etc.).[48] Horwitz's justification relies on three criteria—to qualify as a First Amendment institution, the institution must: (1) play a structural role in public discourse, (2) be stable and established, and (3) be self-regulating (essentially).[49] The structural role in public discourse is the primary factor in determining whether an institution ought to be afforded judicial deference, yet as another legal scholar pointed out, the university "complicates the kind of categorical line-drawing on which [Horwitz's] institutionalist approach depends."[50] Indeed, the First Amendment protection advanced by Horwitz is not tailored to protecting the self-regulation of these institutions, but instead focused on ensuring the protection of the institution's fundamental role in informing and influencing public discourse. The problem with such an argument when applied to universities is that, despite its "institutional" emphasis, it fails to address the intra-institutional issue of shared governance—a context in which many faculty speech cases are apt to arise.

---

[47] J. Peter Byrne, *Academic Freedom: A" Special Concern of the First Amendment"*, 99 YALE L.J. 251 (1989).
[48] PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (Harvard University Press 2013).
[49] *Id.* at 82–88.
[50] John D. Inazu, *Institutions in Context*, 50 TULSA L. REV. 491, 496 (2014–2015).

1.2. Shared Governance and the First Amendment

One important aspect of Areen's conceptualization of the university is that the academy is made up of faculty who participate in the governance of the institution,[51] as asserted in the AAUP's original 1915 Declaration of Principles.[52] By defining the institution by the faculty it houses, Areen's understanding of the academy bridges the gap between Post's professional right to academic freedom and Byrne and Horwitz's institutional right. The shared governance structure common to higher education is such that the faculty carry out the educational mission while the administration and board members handle the business operations.[53] The work of the president is to fund the institution through charisma and delegate to capable administrators.[54] The work of the provost is to ensure the academic mission is and can be fulfilled through the work of the faculty by creating a culture that maintains a healthy and satisfying workplace.

For Areen, expressions related to all academic matters deserve academic freedom protections as a special concern of the First Amendment.[55] In any case where faculty members sue their public colleges or universities for infringing on their freedom of speech, the case falls under a category of managerial authority that Areen calls "government as educator" where the government acts in its capacity as an educational institution rather than governing the general public.[56] Areen's theory calls for two

---

[51] Areen, *supra* note 3, at 957–67.
[52] Am. Ass'n of Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, VII BULL. AM. ASS'N. UNIV. PROFESSORS 487 (1922).
[53] NEWFIELD, *supra* note 19, at 80–81.
[54] JAMES J. DUDERSTADT, THE VIEW FROM THE HELM: LEADING THE AMERICAN UNIVERSITY DURING AN ERA OF CHANGE 27–28, 285–86, 306 (University of Michigan Press 2007).
[55] Areen, *supra* note 3, at 990–91.
[56] Areen, *supra* note 3.

important changes to the First Amendment employee speech jurisprudence. First, Areen's theory calls on courts to recognize that in addition to research and teaching, faculty "have a professional obligation to oversee core academic matters in their institutions."[57] Second, the theory demands that academic speech expressed during teaching, research, or shared governance duties be protected from retaliation by government actors (administrators, trustees, politicians, etc.). Connecting back to Post's authorities, the institutional function for which the government is granted managerial authority within colleges and universities is the educational mission—the work of which is carried out primarily by the faculty.[58]

When neoliberal interests and practices seem to take hold of university administration and business operations, the faculty are the ones who have to fight to carry out the educational mission and prioritize the academic workplace and structures over the market mentality of the administration or regulators/legislators.[59] Logically this means rallying around NTT faculty members to provide them with the same contractual due process and academic freedom as TT faculty. This ensures that all faculty members, NTTs included, are held to the same disciplinary standards and peer review as everyone else, with the same protections that provides. This is justified because democratic competence requires rigorous disciplinary standards to ensure that the production of knowledge is sustained through practices independent from the government's political or economic biases/interests. Yet the two-tiers of faculty persist, and prioritization of TT

---

[57] *Id.* at 999.
[58] NEWFIELD, *supra* note 19, at 80.
[59] *Id.* at 80–81.

faculty protections over NTT faculty gains in joint bargaining units continues to pose a substantial obstacle to a united faculty advocacy of the shared educational mission.[60]

Within the case law to date, the courts' deference towards universities has generally inhered with the administration rather than the faculty;[61] however, this dissertation argues that based on the bifurcation of responsibilities between administrators and faculty which bestows faculty with the work of carrying out the educational mission of the institution, the deference of the courts ought to be awarded to the faculty rather than the administration. This aligns with Areen's understanding as government as educator, as she states "the doctrine of government-as-educator, in contrast to the public-employee speech doctrine of government-as-employer, would provide First Amendment protection for the speech of individual faculty members as long as the speech concerned research, teaching, or faculty governance matters."[62] Furthermore, Areen's government-as-educator doctrine would grant deference to academic decisions made or authorized by the faculty (or a faculty committee); this contrasts with certain high profile cases since *Garcetti* in which courts overturned academic decisions made by faculty (e.g., *Adams v. The Trustees of UNC-Wilmington*).[63] Likewise, Post's assertion (that institutions ought to be primarily afforded deference in accordance with their need to carry out their missions) logically extends to this

---

[60] Timothy Reese Cain, *supra* note 22, at 117.
[61] See, for instance, James D. Jorgensen & Lelia B. Helms, *Academic Freedom, the First Amendment and Competing Stakeholders: The Dynamics of a Changing Balance*, 32 THE REVIEW OF HIGHER EDUCATION 1, 8–9 (Johns Hopkins University Press Aug. 2008).
[62] Areen, *supra* note 3, at 994.
[63] *Adams v. Trustees of the Univ. of NC-Wilmington*, 640 F. 3d 550 (4th Cir. 2011). Analysis of this case in the dissertation will also include a discussion of Paul Horwitz's structural institutionalist approach to the First Amendment as developed in his book First Amendment Institutions.HORWITZ, *supra* note 48.

dissertation's argument that judicial deference ought to be awarded to the party who is most responsible for the institutional missions, which in higher education is the faculty.

2. Review of Academic Freedom Literature

2.0. Defining Academic Freedom

For at least thirty years legal scholars have argued that multiple definitions of academic freedom[64] and the failure of the courts to operationalize academic freedom in any meaningful way have led to convoluted and uncertain precedents.[65] A review of the literature reveals a significant disconnect between professional understandings of academic freedom as inhered to an individual (as defined and defended by the AAUP) and legal understandings of academic freedom as constitutional protection for institutions.

Academic freedom relies on the premise that the educational mission of the institution is properly carried out by the faculty, while the business, politics, and operations are left in the hands of administrators and governing boards.[66] This is not to say that administrators do not carry out the educational mission of the university; however, it is to say that the operations and business of the organization are the main priority of administrators. Rightly so, of course, as it would be impossible to fulfill the educational mission if there were no students to attend classes, no class schedule, no committees to determine tenure or promotion, no compliance offices, no paychecks, and

---

[64] Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988); David Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (Jul. 1990).
[65] Byrne, *supra* note 47, at 253; Todd A. DeMitchell, *Commentary: Academic Freedom—Whose Rights? The Professor's or the University's?*, 168 ED. LAW. REP. 1, 2 (2002).
[66] NEWFIELD, *supra* note 100 at 80–81.

so on. The fact that administrative work is essential to the carrying out of the institution's educational mission is hardly debatable. Instead, this project's definition of academic freedom highlights the fact that the work of educating, inquiring, and all other academic affairs, primarily rests with the faculty.

Academic freedom must protect academia from threats both within and outside the academy.[67] Faculty need protection from the pressures and influences of the board,

---

[67] While using the term "threat" like many other scholars of academic freedom—See, for example O'NEIL, *supra* note 33; CARY NELSON, NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM (2011); HENRY REICHMAN, THE FUTURE OF ACADEMIC FREEDOM (2019)—the author acknowledges that the term implies something of a siege or attack by an opposing force, rather than a constant tension with some of these forces. In some instances, these constant tensions are somewhat necessary; the financial solvency of an institution must be balanced with its primary focus on education, because capitalism does not suddenly stop when one enters campus. On the other hand, political maneuvering by legislatures to defund academic programs or research centers need not be a constant tension in order for universities to carry out their work. Indeed, in the author's opinion, this kind of behavior is aptly labeled an attack, and thus the legislators continue to pose a threat in places like North Carolina; for example, see Zoë Carpenter, *How A Right-Wing Political Machine Is Dismantling Higher Education in North Carolina*, THE NATION (Jun. 8, 2015), https://www.thenation.com/article/how-right-wing-political-machine-dismantling-higher-education-north-carolina/; Valerie Strauss, *No More Poverty*

the administration, and the students within their institution, as well as protection from the government, legislators, private foundations and corporations, and the public outside the institution. Similarly, the institution needs to be protected from threats to their funding or governance by the public, the legislators, the government (bureaucrats, courts, elected officials), and other public figures.

For the purposes of this research, therefore, academic freedom is defined as: the freedom of colleges and universities to make academic decisions autonomously and free from non-academic interference, specifically as it relates to carrying out their educational missions. In other words, academic freedom protects the academic procedures and academic governance of institutions of higher education from undue influences originating outside of the scholarly profession. The definition offered here aims to highlight the similarities between the academic freedom protections offered both to scholars and to institutions, while allowing for distinctions between the ways the protections operate as well.

The following literature review describes how academic freedom has been understood, studied, and applied in scholarly and legal discourses. This review surveys the literature on the following six topics:

1. Development/history of academic freedom,
2. Constitutional academic freedom
3. Intramural speech

---

in North Carolina? UNC Panel Wants to Close School's Poverty Center, WASH. POST (Feb. 19, 2015), https://wapo.st/2lx4JOG.

4. Academic Freedom in the caselaw

5. Humanistic discourse of academic freedom

6. Academic labor and employment context

Throughout the literature review, two threads are woven into most if not all of the sections. The first thread is the concept of shared governance. The second thread is the mission of colleges and universities, specifically their educational or academic missions and how this mission is carried out and protected according to shared governance and academic freedom policies. These two threads tie the reviewed literature to the context in which faculty speech cases and academic freedom issues arise and situate the literature in relationship to the mission-centered framework that this dissertation advances.

The developmental literature (1) establishes the historical context in which academic freedom has developed over the last century. The historians who have done this work and the scholars who cite them emphasize how individual cases, institutions, and organizations alike have played roles in building a common understanding of academic freedom within the academy.

The Constitutional literature (2) offers a theory of Constitutional academic freedom as pronounced by the (justices of the) U.S. Supreme Court. This literature differs from legal scholars' own theories of constitutional academic freedom (which were detailed in the conceptual framework section above) by focusing solely on scholarship discussing how courts have understood academic freedom to be a special concern of the First Amendment. The intramural speech literature (3) is closely linked to the constitutional literature; in this scholarship, researchers clarify the differences between and ambiguities within how the courts and the scholarship conceptualize intramural

speech. Similarly, the legal literature (4) is dedicated to the scholarship on academic freedom court cases. It reveals that the caselaw regarding academic freedom has never been very cohesive; indeed, the first mention of academic freedom by a Supreme Court justice was in a 1952 dissent by Douglas in *Adler v. Board of Education*[68] and the legacy of dissent around this issue has persisted ever since. The humanistic literature (5) consists of the contemporary discourse around academic freedom. Many of these scholars serve actively in the American Association of University Professors (AAUP), the largest professorial union in the nation. The discourse in this literature exhibits a bias towards professionalism, arguing that when respected as professionals, professors are empowered to work towards the common good.[69] Unionist scholars commonly emphasize threats to the profession, especially from government and administrative actors who question the autonomy of the tenured professoriate. Finally, the labor and employment literature (6) emphasizes the employment context and labor issues faced by faculty in higher education. This scholarship describes the academic labor market, organizational structure, workplace expectations, and culture and the issues arising from the confluence of these unique features.

2.1. Academic Freedom: History and Context

This section discusses how shared governance and self-regulation were essential motivating values in the development of academic freedom in the U.S. which continue to shape speech controversies today.[70] In 1955, Hofstadter and Metzger published their

---

[68] *Adler v. Board of Ed. of City of New York*, 342 U.S. 485, 508 (1952).
[69] Heather Steffen, *Imagining Academic Labor in the US University*, 51 NEW LIT. HIST. 115, 116 (2020).
[70] HANS-JOERG TIEDE & MICHAEL BÉRUBÉ, UNIVERSITY REFORM: THE FOUNDING OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ch. ch. 2 (Johns Hopkins University Press 2015).

classic history of academic freedom, *The Development of Academic Freedom in the United States*.[71] In the first volume, Hofstadter traces the origins of the profession of "professor" to medieval Europe, where faculty acted as a unified corporation, striking and even moving the entire faculty to a new city when outside forces threatened their autonomy.[72] Hofstadter explains that the pressure to conform to the standards of the medieval faculty came from within their own ranks, rather than from any single external influence.[73] Scholars, then, were not members of an institution so much as part of a self-governing profession.

Yet the first discussion of "academic freedom" as a topic traces its roots to the German words *lehrfreiheit* and *lernfreiheit*, the freedom to inquire and teach, and the freedom to learn respectively, which gained prominence in the early nineteenth century.[74] The American concept of academic freedom was developed out of these Germanic ideals, and many scholars have tried their hand at and given up on a definition of this murky concept. What has been very clearly and at times concisely documented is the history and development of academic freedom in the United States.

---

[71] Richard Hofstadter & Walter P. Metzger, The Development of Academic Freedom in the United States (1955), https://catalog.hathitrust.org/Record/001116454 (last visited Mar 12, 2018).

[72] *Id.* at 8–11.

[73] *Id.* at 10.

[74] FINKIN & POST, *supra* note 3, at 19.

The history and historiography of academic freedom in the U.S. has been detailed at myriad units of analysis and during nearly every time period since its inception. Hofstadter & Metzger's classic follows the development of academic freedom up to the founding of the AAUP in the 1910's.[75] Ellen Schrecker has written a classic on the history of academic freedom during the McCarthy era which follows the individual academic freedom cases and their many players in tandem with the larger cultural, academic, and societal trends of the time.[76] Situated between the two, Timothy Reese Cain's work focuses on the AAUP, AFT, and other national and regional organizations that played a part in defining, if not securing, the profession and its academic freedom protections in the intervening years between World War I and the anti-communist purges of the 1940's-50's.[77] Since 1915, the AAUP has published numerous statements that have served not only to professionalize the roles of higher education faculty, but to codify and enumerate the standards and expectations of institutions, students, and faculty alike. The AAUP's publications are so routinely cited[78] that it is hard to find scholarship on academic freedom that does not cite either the 1915 Declaration or the 1940 statement.

---

[75] HOFSTADTER & METZGER, *supra* note 2.
[76] SCHRECKER, *supra* note 3.
[77] T CAIN, *supra* note 3; See also, Timothy Reese Cain, *supra* note 3, at 157–215, which synthesizes the histories on faculty academic freedom cases in the same time period as his monograph. Readers will find the reference list to be an outstanding resource. Cain's dissertation, Timothy Reese Cain, *Academic Freedom in an Age of Organization, 1913–1941* (University of Michigan 2005) is the most comprehensive resource I have found for any scholar looking to spelunk in the caverns of century-old gems of academic freedom sources.
[78] FINKIN & POST, *supra* note 3; Areen, *supra* note 3; Byrne, *supra* note 47; Timothy Reese Cain, *"Friendly Public Sentiment" and the Threats to Academic Freedom*, 58 HISTORY OF EDUCATION QUARTERLY 428 (Aug. 2018); RICHARD DEGEORGE ET AL., ACADEMIC FREEDOM AND TENURE: ETHICAL ISSUES (Rowman & Littlefield Publishers Inc. 1997); CHEMERINSKY & GILLMAN, *supra* note 10; Ralph F. Fuchs, *Academic Freedom. Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431 (1963); Robert M. O'Neil, *Academic Freedom as a "Canonical Value," supra* note 10; Ellen Schrecker, *Subversives, Squeaky Wheels, and "Special Obligations": Threats to Academic Freedom, 1890–1960*, 76

Policies surrounding faculty governance developed as changes in the economy and industry necessitated increases in managerial staff as colleges grew into universities at the turn of the twentieth century.[79] Tenure and faculty governance were interwoven with the concept of academic freedom in the U.S. even in the earliest publication of the AAUP, the *1915 Declaration of Principles*. This document written by the founders of the AAUP has an extensive history, but is most often linked to the Edward Ross case at Stanford whereupon both Seligman and Lovejoy (principal authors of the *Declaration*) took action in support of Ross.[80] In the *Declaration,* the founders of the AAUP purposefully described faculty as "appointees, but not in any proper sense employees."[81] The founders explained that the "appointing authorities" are not fit to judge faculty members' performances of their professional functions, noting that faculty instead answer to the public itself and "the judgment of his [*sic*] own profession."[82] The disjuncture between faculty who prioritized public service or research for its own sake, and administrators and trustees who most valued the function of the university to inculcate students with liberal culture required a structural mechanism for managing these

---

SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY 513 (2009); Joan W. Scott, *Knowledge, Power, and Academic Freedom*, 76 SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY 451 (2009); Rajini Srikanth, *The Axis of Power and Academic Freedom*, 19 JOURNAL OF ASIAN AMERICAN STUDIES 105 (Feb. 2016); NELSON, *supra* note 7; ROBERT M. O'NEIL, ACADEMIC FREEDOM IN THE WIRED WORLD, *supra* note 10; REICHMAN, *supra* note 10; STEVEN G. OLSWANG & BARBARA A. LEE, FACULTY FREEDOMS AND INSTITUTIONAL ACCOUNTABILITY :INTERACTIONS AND CONFLICTS / (Washington, D.C. : 1984); STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION (University of Chicago Press Oct. 2014).

[79] NEWFIELD, *supra* note 19, at 75–76.

[80] Robert C. Post, *The Structure of Academic Freedom*, *in* ACADEMIC FREEDOM AFTER SEPTEMBER 11, 61, 65 (Beshara Doumani ed., Zone Books Feb. 2006); HOFSTADTER & METZGER, *supra* note 2, at 436–45.

[81] B. Robert Kreiser, *Appendix I: 1915 Declaration of Principles on Academic Freedom and Academic Tenure*, *in* POLICY DOCUMENTS & REPORTS 291, 295 (Ninth ed. 2001).

[82] *Id.*

divergent values; enter, shared (divided) governance.[83] Burton Clark distinguishes the division in university governance as having two sides: business affairs and academic affairs.[84] Newfield writes that while faculty are authorized to make academic decisions "which they could prevent from being driven by procedural or financial concerns," academic life was (and is) still greatly shaped by political and financial influences beyond the faculty's reach.[85]

The general theory of academic freedom proposed and affirmed in the AAUP's *1915 Declaration* and *1940 Statement* positions faculty as professionals within self-regulating disciplines. The development of this theory of academic freedom was rooted from the start in administrative or trustee censorship of faculty speech. According to the AAUP's founders, purporting that research could be conducted in universities in which scholars were bound by public opinion or generally accepted beliefs was absolutely erroneous.[86] Yet the establishment of the AAUP's longstanding Committee A on Academic Freedom did little to prevent the new wave of censorship and persecution of faculty during the McCarthy era following the second World War. At the time *Adler v. Board of Education*[87] made it to the U.S. Supreme Court in 1952, the AAUP had failed to censure a single institution in response to violations of academic freedom and civil

---

[83] LAURENCE R. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY (University of Chicago Press 1965); NEWFIELD, *supra* note 19.
[84] BURTON R. CLARK, THE ACADEMIC LIFE: SMALL WORLDS, DIFFERENT WORLDS 157 (Carnegie Foundation for the Advancement of Teaching ; Available from the Princeton University Press 1987).
[85] NEWFIELD, *supra* note 19, at 81.
[86] Post, *supra* note 80, at 68.
[87] *Adler v. Board of Ed. of City of New York*, 342 U.S. 485 (1952).

liberties across the nation.[88] The next section discusses how the courts came to define academic freedom.

2.2. Constitutional Academic Freedom and Faculty Free Expression

"The relationship between First Amendment free speech and academic freedom is not always clear and is still evolving"[89]

While academic freedom activists began making a case for contractual faculty speech protections as early as the turn of the 20th century, it was not until the 1960s that the Supreme Court addressed the concept of academic freedom. Byrne's classic work on constitutional academic freedom provides the necessary history and context to understand the differences between contractual academic freedom and constitutional academic freedom.[90] Since Byrne published his article three decades ago, many other legal scholars have elaborated on this distinction.[91] Most legal scholars writing about constitutional academic freedom and the courts shed light on one or more of three topics, 1) the history of how academic freedom was established in the courts, 2) the difference between individual and institutional academic freedom (also known as contractual and constitutional academic freedom respectively), and 3) how constitutional academic freedom claims have been applied in the courts. This section reviews these three topics

---

[88] SCHRECKER, *supra* note 3, at 314–15.
[89] Ellen M. Babbitt et al., *Shared Governance: New Pressure Points in the Faculty/Institutional Relationship*, 41 J.C. & U.L. 93, 99 (2015).
[90] Byrne, *supra* note 47.
[91] Babbitt et al., *supra* note 89; Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty after Garcetti*, 33 JC & UL 313 (2007); DeMitchell, *supra* note 65; Marjorie Heins, *"Priests of Our Democracy": The Origins of First Amendment Academic Freedom*, 38 JOURNAL OF SUPREME COURT HISTORY 386 (Nov. 2013); Stacy E. Smith, *Who Owns Academic Freedom: The Standard for Academic Free Speech at Public Universities The Washington and Lee Law Alumni Association Student Notes Colloquium*, 59 WASH. & LEE L. REV. 299 (2002).

and concludes by discussing how a bifurcated understanding of academic freedom has led to conceptual confusion on top of legal confusion.

Byrne tells us that the first mention of academic freedom in the Supreme Court is in Justice Douglas's dissent in *Adler v. Board of Education*[92] in 1952.[93] Five years later, Chief Justice Warren and Justice Frankfurter wrote about academic freedom in the opinions issued in *Sweezy v. New Hampshire*.[94] Warren explained that government surveillance of faculty breeds distrust and fear, chilling speech and threatening academic freedom.[95] Frankfurter quoted South African academics in his concurrence, citing four facets of academic freedom which included the freedom to decide autonomously: who can teach, what can be taught, how it can be taught, and who can be admitted as students.[96] Frankfurter's emphasis on the institutional freedoms of a university, rather than the individual freedom of the faculty member (which was more relevant to the case at hand) has been referenced ever since as the establishment of an institutional academic freedom rather than a liberty of individual faculty.[97] It was not until a full decade later in *Keyishian v. Board of Regents*[98] that the court officially identified academic freedom as a "special concern of the First Amendment."[99]

During the McCarthy era, many professors in the United States were interrogated by government officials about their political beliefs and many were fired for employing

---

[92] *Adler v. Board of Ed. of City of New York*, 342 U.S. 485.
[93] Byrne, *supra* note 47, at 290.
[94] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); See also the discussion of these cases in Byrne, *supra* note 47, at 288–93.
[95] Heins, *supra* note 91, at 399.
[96] *Id.* at 400; *Sweezy v. N.H.*, 354 U.S. at 263.
[97] Jorgensen & Helms, *supra* note 61, at 6, 7.
[98] *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589 (1967). For dissection of this case, see Heins, *supra* note 91.
[99] Byrne, *supra* note 47.

their Constitutional right to not self-incriminate.[100] In *Keyishian v. Board of Regents of the University of the State of New York*,[101] the U.S. Supreme Court stated that academic freedom is "of transcendent value" and a "special concern of the First Amendment."[102] The court explained that the threat of political or governmental interference in academic governance poses a great threat to professors' and students' freedoms of thought, inquiry, and expression.[103] Byrne, like the Court, justifies this special Constitutional right available only to academic institutions as the only way to ensure the carrying out of the public missions of universities—to educate with a "commitment to the pursuit of truth and the incontrovertibility of dogma."[104]

As Byrne points out, the court's Constitutional interpretation consists of a freedom from government interference for *institutions* (*i.e.*, colleges and universities) rather than a freedom of individual faculty or students (see Table 2).[105] Thus the legal doctrine of academic freedom—what Byrne calls "constitutional academic freedom" (as opposed to the contractual academic freedom of faculty) based on where the freedom is enshrined—is sometimes called *institutional academic freedom* (as opposed to faculty academic freedom enshrined in contracts) to describe the entity protected by the

---

[100] SCHRECKER, *supra* note 3; For a discussion of three cases at Rutgers, see, PAUL G. E. CLEMENS, RUTGERS SINCE 1945 11–15 (Rutgers University Press Aug. 2015).

[101] Keyishian v. Board of Regents of Univ. of State of NY, *supra* note 28.

[102] *Id.* at 603.

[103] *Keyishian v. Bd. of Regents of Univ. of State of NY*, 385 U.S. 589; See also, Jorgensen & Helms, *supra* note 61, at 1.

[104] Byrne, *supra* note 29 at 265.

[105] *Id.* at 298.

doctrine.[106] Metzger explains that academic freedom for individual faculty hinges on institutional neutrality while constitutional academic freedom hinges on institutional autonomy.[107] Nevertheless, Byrne's point is important— according to the Supreme Court, the Constitution protects universities and colleges from government interference in academic affairs. Thus, within the university, judgments of speech ought to be governed by institutional policy free from the undue influence of non-academics and (especially) government officials. The legal distinction made between these two types of academic freedom does not seem to depend on the facts of the case. For instance, Jorgensen and Helms point out that Frankfurter's four freedoms of the university as enumerated in *Sweezy* [108] mainly focused on "institutional" freedoms despite the facts of the case dealing with individual academic freedom.[109] Still, Rabban argued that constitutional academic freedom should extend to individual faculty's speech related to their scholarly expertise and teaching policy[110] over a decade before the Court carved out the same

Types of Academic Freedom:	**Institutional**	**Individual**
Where is the protection codified?	Courts/ Constitution	Contracts/ AAUP declaration and statement
Protection from whom?	Government actors (legislators)	Administrators/ Trustees
Protection for whom?	Institutional actors (Trustees, Administrators)	Faculty members
Example:	Cases challenging race-based admissions policies	Faculty research requires admin permission

[106] *Id.* at 255.

[107] Metzger, *supra* note 64, at 1322.
[108] *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).
[109] Jorgensen & Helms, *supra* note 61, at 6.
[110] Rabban, *supra* note 64, at 300.

professorial duties in *Garcetti*.[111]

Table 2 – Types of Academic Freedom

Prior to and since *Garcetti* in 2006, the Supreme Court has mostly affirmed constitutional academic freedom in the context of race-based admissions cases (*Bakke, Grutter, Gratz, Fisher I* & *II*)/.[112] In these cases, the court weighed the First Amendment academic freedom of the university defendant against the Fourteenth Amendment rights of the plaintiffs. Despite the divergence of constitutional academic freedom from professional/individual conceptions of academic freedom evidenced in these race-based admissions cases, Justice Kennedy's potential carveout in *Garcetti* for faculty at public institutions who speak and write pursuant to their teaching and scholarship duties[113] muddies that distinction by acknowledging the possible First Amendment interests of faculty writing or speaking pursuant to their official duties.[114] Even though Kennedy's acknowledgement of faculty free speech interests can be read as a carveout, it can also easily be read as simply the dicta that it is. *Garcetti* in some ways reopens the question of how constitutional academic freedom is defined, when previously the existence of individual academic freedom under the First Amendment had been rarely acknowledged by the Supreme Court.

---

[111] *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).
[112] *University of California Regents v. Bakke*, No. 76-811 438 U.S. 265 (1978); *Grutter v. Bollinger*, No. 02-241 539 U.S. 306; *Gratz v. Bollinger*, No. 02-516 539 U.S. 244 (2003); *Fisher v. University of Texas at Austin*, No. 11-345 133 S. Ct. 2411 (2013); No. 14-981 136 S. Ct. 2198 (2016).
[113] *Garcetti v. Ceballos*, 547 U.S. at 425.
[114] To be fair, muddying waters does seem to have been Justice Kennedy's modus operandi.

As discussed in the conceptual framework section, this dissertation's rationale for why academic freedom is a special concern of the First Amendment is based on Post's assertion of a constitutional value of democratic competence; this rationale differs from those offered by the Supreme Court. They have included the need for a "marketplace of ideas,"[115] the need to protect the ability of the institution to carry out its educational mission with a diverse student body,[116] and the need for public institutions which can produce expert knowledge outside of the government's control.[117] While the court's rationales are generally in alignment with the AAUP's rationales for individual academic freedom, later sections will show that courts have rarely found that their rationales justified constitutional protections for individual faculty.

2.3. Academic Freedom in the Caselaw

This section discusses the scholarship which analyzes how courts have applied their own understandings and rationales for institutional autonomy and faculty academic freedom over the last half century. Legal scholars like LeRoy, O'Neil, Byrne, and others have done extensive analyses of courts' academic freedom decisions over the years.[118] Since *Garcetti v. Ceballos* was decided in 2006,[119] additional legal scholarship has

---

[115] *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589, 603 (1967).
[116] *University of California Regents v. Bakke*, No. 76-811 438 U.S. 265; *Grutter v. Bollinger*, No. 02-241 539 U.S. 306; *Gratz v. Bollinger*, No. 02-516 539 U.S. 244; *Fisher v. University of Texas at Austin*, No. 11-345 133 S. Ct. 2411; No. 14-981 136 S. Ct. 2198.
[117] POST, *supra* note 10.
[118] For instance, see Michael H. LeRoy, *How Courts View Academic Freedom*, 42 J.C. & U.L. 1 (2016); M. K. Feaga & P. A. Zirkel, *Academic Freedom of Faculty Members: A Follow-up Outcomes Analysis*, 209 WEST'S EDUCATION LAW REPORTER 597 (2006); DeMitchell, *supra* note 65; Byrne, *supra* note 47; J. Peter Byrne, *Constitutional Academic Freedom after Grutter: Getting Real about the Four Freedoms of a University Horowitz, Churchill, Columbia - What Next for Academic Freedom,* 77 U. COLO. L. REV. 929 (2006); Robert M. O'Neil, *Academic Freedom as a "Canonical Value," supra* note 10; Robert M. O'Neil, *supra* note 26; Robert M. O'Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept*, 36 J.C. & U.L. 729 (2009–2010); Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791 (2009–2010).
[119] *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

questioned how academic freedom cases have been and might continue to be limited by post-*Garcetti* legal reasoning.[120] Robert Post wrote in 2013, "taken literally, […] the conclusion of *Garcetti* would abolish constitutional academic freedom."[121] Regardless of the year the study was conducted, legal scholars tend to reiterate the distinction between faculty academic freedom as understood by the professoriate (or the AAUP) and the Constitutional academic freedom applied by the courts.[122] Most[123] legal scholars argue that teaching and scholarship-related speech made by faculty at public colleges and universities should be protected under First Amendment academic freedom.[124]

In contrast, the courts do not often recognize protection for faculty speech of any kind. LeRoy's 2016 article *How the Courts View Academic Freedom* is an empirical study of 339 faculty First Amendment rulings in 210 published court opinions from 1964-2014.[125] His analysis revealed that 73% of all rulings favored the institution/defendant rather than the faculty plaintiff.[126] Based on his research, LeRoy

---

[120] Griffin, *supra* note 26; Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943 (2016–2017); Robert M. O'Neil et al., *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*, 95 ACADEME, 2009, at 67; Cope, *supra* note 91; Houle, *supra* note 26; Bridget R. Nugent & Julee T. Flood, *Rescuing Academic Freedom for Garcetti v. Ceballos: An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*, 40 J.C. & U.L. 115 (2014); Niehoff, *supra* note 26.

[121] Robert C. Post, *Why Bother with Academic Freedom*, 9 FIU L. REV. 9, 16–17 (2013).

[122] Griffin, *supra* note 26, at 54 (stating that the higher education community ought to define individual academic freedom for the courts proactively).

[123] The notorious exception is Stanley Fish. He does seem to agree with other scholars that faculty academic freedom is worth protecting, but prefers that this protection be contractual rather than constitutional. It would appear that he is simply averse to the idea that academic speech might merit some governmental protection to which other citizens or workers would not be entitled, which he calls "exceptionalism." This is ironic, since throughout this literature review, Stanley Fish is virtually always the exception to the trend.

[124] See, for instance, Rabban, *supra* note 64; Areen, *supra* note 3; Nugent & Flood, *supra* note 120; Jorgensen & Helms, *supra* note 61; Griffin, *supra* note 26.

[125] LeRoy, *supra* note 118, at 3.

[126] *Id.*

concluded that the courts and faculty have very different understandings of academic freedom; the courts' understanding of academic freedom appeared to greatly favor institutional autonomy over faculty expression.[127] Despite LeRoy's thorough approach to constructing his comprehensive database of cases, his methods and presentation are at times dubious.[128] Nevertheless, LeRoy's systematic approach to coding and entering the hundreds of rulings on faculty First Amendment cases reveals, in no uncertain terms, the courts' bias toward college and university defendants.

While LeRoy's article shows that there is certainly a bias towards the defendants,[129] that does not necessarily mean that the plaintiff's cases are not taken seriously in the courts. Rather, it means the law is generally interpreted as not on the side of the plaintiff. That plaintiffs are self-selecting implies that more litigious persons are more likely to sue their employers and therefore end up in court.[130] Plaintiffs and defendants may employ attorneys who are paid by the hour and are more interested in invoicing than settlement. One or both parties may also be motivated by ego or self-

---

[127] *Id.* at 4, 41.

[128] LeRoy, *supra* note 118. For instance, Findings 9-11 concern overall win rates of institutions by circuit, but do not take into account the dates of the cases (pre-*Waters* compared to post-*Waters*), despite his assertion in findings 3-7 that win rates changed from pre-*Waters* to post-*Waters*. If these changes were significant enough to report, would it not merit breaking out pre- and post-*Waters* cases in the overall win rates by circuits, or at least reporting to your readers that you did in fact do an ANOVA of the dates of the cases by circuit and found no significant differences in variance? Additionally, it may have been helpful to have compared each circuit's win rate for institutions to the overall percentage for all circuits to find if any particular circuits varied significantly from the rest. Instead, the majority of the 'findings' were descriptive statistics or χ^2 statistics meaning he mainly used only cross-tabs rather than assessing the pre- and post-*Waters* differences through a more sophisticated test that could draw on the actual dates of the cases rather than categories. Most unfortunate was LeRoy's use of tables and charts that showed the same data, when the charts should have shown the percentages as described in the text, rather than the counts already provided in the tables.

[129] These claims are corroborated by the analysis in White, *supra* note 118.

[130] And anyone who has met a "more litigious person" is likely to believe that this person was not always right to take something to court. Surely this self-selection bias could aid in tipping the scales towards the defendants.

righteousness rather than justice or a desire for the path of least resistance. Still, since settlement is almost always preferable for all parties and attorneys know this, the fact that these cases reached the bench to begin with can indicate that attorneys on both sides were willing to take the odds.[131]

Within the courts, the kinds of faculty (intramural) speech protected under the First Amendment are not always clear.[132] In one 2013 examination of post-*Garcetti* cases, Griffin found courts make "a distinction as to speech that centers on core academic matters, such as teaching and scholarship, verses [*sic*] speech that involves administrative and managerial concerns."[133] Yet not all teaching-related speech has been protected.[134] While research-related speech has been protected,[135] speech related to professional ethics by faculty in professional schools (e.g., medical doctors) has been found to be "employee speech" that is not protected by the First Amendment.[136] Indeed, distinguishing when speech is made as an employee, as a citizen, or even as a professional—if such an

---

[131] Finding an attorney willing to take a gamble (however unlikely the desired outcome) could be compared to finding a squirrel in a tree in New Jersey. You might have to check a few trees, but they are not likely to disappoint. In other words, there are at least as many foolish attorneys as foolish faculty.
[132] Babbitt et al., *supra* note 89, at 99.
[133] Griffin, *supra* note 26, at 54.
[134] See, for instance, the Second Circuit case, *Bhattacharya v. Rockland Community College*, 719 Fed. Appx. 26 (Summary Order) (2d Cir. 2017) (finding that the adjunct plaintiff's refusal to acquiesce to students' demands that he abet cheating or lower his academic expectations of his students which resulted in a retaliatory anonymous student complaint was not protected under the First Amendment because his speech did not relate to "teaching" but rather "classroom discipline" and therefore failed the citizen/employee test).
[135] Babbitt et al., *supra* note 89, at 101 citing; *Demers v. Austin*, 746 F. 3d 402 (9th Cir. 2014).
[136] Two examples include, *Abcarian v. McDonald*, 617 F. 3d 931 (7th Cir. 2010); *Nuovo v. The Ohio State University*, 726 F. Supp. 2d 829 (S.D. Ohio 2010).

identity or role exists outside of one's employment[137]—is not clear cut, especially when it comes to faculty speech.[138]

The potential *Garcetti* carve out[139] provides for teaching and research-related speech, but does not explicitly address shared-governance speech.[140] Bard succinctly describes the resulting situation, "The question, then, is whether having the status of a faculty member at a public university creates an exception to Garcetti that does not apply to other public employees. It is on this point that lower courts are split."[141] While Areen[142] and other legal scholars make cases for shared governance speech to be protected under this caveat,[143] other legal scholars like Kevin Cope[144] fail to address governance speech at all when describing approaches to applying *Garcetti* to faculty speech cases. Scott Bauries takes a hardline stance, asserting that such an exception for publicly-employed academics is inconsistent with First Amendment doctrinal structure.[145] Still, the lower courts remain split over how to classify faculty speech relating to the operations, organization, or governance of their institutions.[146]

---

[137] Of course, professional certifications can be and often are maintained independent of employment (e.g., doctors, lawyers, therapists, social workers, teachers, etc.), though renewal can depend on working a certain number of hours.
[138] Amar & Brownstein, *supra* note 120, at 1974.
[139] *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).
[140] Griffin, *supra* note 26, at 50.
[141] Jennifer S. Bard, *The Professor as Whistleblower: The Tangled World of Constitutional and Statutory Protections*, 13 DARTMOUTH L.J. 163, 185 (2015).
[142] Areen, *supra* note 3, at 0.
[143] See, for example, Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125 (2009–2010); Robert M. O'Neil, *supra* note 118.
[144] Cope, *supra* note 91.
[145] Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment Symposium Edition on Education Law*, 83 MISS. L.J. 677, 743 (2014).
[146] For example, just within the 9th Circuit these two competing interpretations produce very distinct results: *Demers v. Austin*, 746 F. 3d 402 (9th Cir. 2014), finding the plaintiff's speech about restructuring the

Governance-related speech falls under the umbrella of intramural speech, a hotly debated topic in the literature, as discussed in the next section.[147]

2.4. Academic Freedom and Intramural Speech: Scholarly Literature

While intramural expression (literally: between walls) can be broadly understood as speech internal to a particular organization or institution, legal scholars and courts have disagreed about the nuances of what constitutes intramural expression for faculty at public institutions and which instances of intramural expression (if any) ought to be protected under contractual academic freedom protections or the First Amendment. This section describes how the concept of intramural expression has been differently defined in academic freedom scholarship and in the courts. Legal and unionist scholars offer multiple reasons for protecting all or some intramural speech under academic freedom.[148] On the other hand, the courts offer very different arguments for what intramural speech should and should not be protected, if any.

Academic freedom scholars Matthew Finkin (former chairperson of the AAUP's Committee A on Academic Freedom)[149] and Robert Post (current Committee A member)[150] offer the following definition in their book *For the Common Good*;

---

university was covered under the carve out for scholarship; *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), finding that a professor's criticisms of his colleagues and departmental practices were pursuant to official duties and were therefore not protected speech. *Demers* was a Circuit Court decision while *Hong* was decided at the district court level.

[147] See Section 2.3 *supra*.

[148] Although some of the most-cited academic freedom scholars have been criticized for their more trade-oriented writing's failure to constitute scholarship at times; see, J. Peter Byrne, *Neo-orthodoxy in Academic Freedom Book Review*, 88 TEX. L. REV. 143–170 (2009), critiquing FINKIN AND POST, *supra* note 7 and STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME (2008).

[149] See page 18 of Finkin's CV here, listing service as Committee A chair from 1980-1990, https://law.illinois.edu/wp-content/uploads/faculty/vitae/Finkin.pdf?v1486489864

[150] See the current AAUP listing of Committee A members, https://www.aaup.org/about/committees#CommA

"'intramural expression,' … concerns faculty speech that does not involve disciplinary expertise but is instead about the action, policy, or personnel of a faculty member's home institution."[151] According to the authors, this can include both expressions regarding one's college or university employer in the public sphere (e.g., in a newspaper, on twitter, at a protest at city hall) and expressions in one's role as a faculty member (e.g., in a faculty senate motion).[152] In characterizing faculty intramural expression to include both public sphere speech and speech made pursuant to one's employee role, Finkin and Post distinguish their definition from that used by the courts (which will be discussed in further detail below). Among legal scholars, the delineation between extramural and intramural speech and their corresponding protections is most often defined by the rationale used for why faculty speech should or should not be protected. Simply put, one's theory of academic freedom determines what expressions do and do not merit protection.

Among the many books and articles on academic freedom surveyed for this project,[153] relatively few offered discussions of the particular concept of intramural speech. Finkin and Post's *For the Common Good* dedicates a full chapter to intramural

---

[151] FINKIN & POST, *supra* note 3, at 113.
[152] *Id.*
[153] For instance, NELSON, *supra* note 7; FISH, *supra* note 148; FISH, *supra* note 78; FINKIN & POST, *supra* note 3; POST, *supra* note 10; AKEEL BILGRAMI & JONATHAN R. COLE, WHO'S AFRAID OF ACADEMIC FREEDOM? (Columbia University Press Feb. 2015); WHO'S AFRAID OF ACADEMIC FREEDOM? (Akeel Bilgrami & Jonathan R. Cole eds., Columbia University Press Feb. 2015; ROBERT M. O'NEIL, ACADEMIC FREEDOM IN THE WIRED WORLD, *supra* note 10; REICHMAN, *supra* note 10; LOUIS MENAND III, THE FUTURE OF ACADEMIC FREEDOM (University of Chicago Press Dec. 1996); JOAN WALLACH SCOTT, KNOWLEDGE, POWER, AND ACADEMIC FREEDOM (Columbia University Press Jan. 2019); DEGEORGE ET AL., *supra* note 78; SCHRECKER, *supra* note 3; T CAIN, *supra* note 3.

speech and is widely cited in the literature.[154] The authors argue that the "common good" (which they believe higher education institutions seek to serve) is clarified or made visible through open debate and discussion including all opinions and perspectives. Meanwhile, facilitating these debates, or at least codifying their resultant clarifications of the common good, Finkin and Post imply, is the role of an institution's board. They go on to argue that by virtue of the faculty's disciplinary and institutional knowledge, as well as their commitment to their institution, the faculty are essential to these dialogues.[155]

Rabban, on the other hand, argues that intramural expressions should be protected differently depending on the topic in question.[156] Rabban argues that academic freedom should protect only that intramural speech which deals with the professional functions of faculty (which for him includes teaching, research, and institutional service functions).[157] Olivas asserts that a "professorial function" approach to academic speech regulation would harmonize with Rabban's approach and still hold faculty to the standards of professional behavior agreed upon by their disciplinary peers.[158] Jones similarly asserts that only the duties unique to professors should be protected under an academic freedom exception and the rest would fall under *Garcetti*.[159] Rabban argues that academic freedom is justified by the "distinctive public benefit derived from the specialized expertise of

---

[154] For a small sample of some of the works that cite Finkin & Post see, JOHN PALFREY, SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION (MIT Press Oct. 2017); Amar & Brownstein, *supra* note 120; WHITTINGTON, *supra* note 6; NELSON, *supra* note 7; T CAIN, *supra* note 3; FISH, *supra* note 78; Areen, *supra* note 3; REICHMAN, *supra* note 10.
[155] FINKIN & POST, *supra* note 3, at 124–26.
[156] David M. Rabban, *Academic Freedom, Professionalism, and Intramural Speech*, 1994 NEW DIRECTIONS FOR HIGHER EDUCATION 77 (1994).
[157] *Id.* at 86.
[158] Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835, 1843–46 (Stanford Law Review 1993).
[159] Victoria Jones, *Developing a Speech Standard for Public University Faculty in the Academic Environment* 23–24 (Jan. 2017).

professors in advancing knowledge and critical inquiry."[160] Rabban states that typically investment policies are not the domain of faculty (rather they are the domain of trustees), so faculty expression on this topic should not be protected. Any intramural expression that cannot be obviously or logically justified by this same benefit to the public, Rabban argues, should be protected under the same statutory or constitutional sources that protect non-academic employee speech. On the other hand, Rabban concedes that "distinctions between categories may produce difficult borderline cases." For instance, when the investment policies disrupt educational purposes or when a faculty member's area of scholarly research is university investment policies. Still, Rabban holds firm that the theory for intramural speech ought to be rooted in the public benefit derived from the work of professors in advancing knowledge.

Robert Post's 1987 law review piece on the public forum doctrine provides a bridge between Rabban's and Finkin and Post's reliance on AAUP doctrine and arguments by other legal scholars who rely more heavily on jurisprudential sources. Post first argued in this article that anytime expression can be said to be made in pursuit of a public institution's mission, then it ought to be protected speech.[161] The issue with this sort of judicial review is that sometimes a faculty's expression can be many logical steps removed from the obvious university aims of educating students and the public and conducting research. For instance, a faculty member from the English department commenting on the institution's investment strategies may be clear cut for Rabban from the start, but Post's theory requires further information. Post would argue that shared

---

[160] Rabban, *supra* note 156, at 86.
[161] Post, *supra* note 31, at 1779–80.

governance requires that faculty have equal say in matters pertaining to the governance of the institution; even if they have no authority to make the decisions in the business operations, they have the responsibility to speak truth to power regarding those decisions when it could hamper or harm the faculty's ability to carry out the educational mission.[162] Post's argument, like Rabban's and Finkin and Posts's arguments discussed above, is well supported by the AAUP's 1915 Declaration.

In contrast, Stanley Fish critiques reliance on the 1915 Declaration and the 1940 Joint Statement in his book *Versions of Academic Freedom*.[163] He argues that the AAUP's stance has long been that academics believe themselves exceptional (in wisdom,[164] in responsibility,[165] in calling[166]), thus arguing for special privileges that are not afforded to other workers, which Fish vehemently argues is beyond distasteful. Fish similarly faults Finkin and Post for what he purports is rampant exceptionalism inherent to the individual personalities of faculty members.[167] He also mischaracterizes Post's most recent book, claiming that Post's claims can be boiled down to "popular opinion is unredeemable unless academics correct and refine it."[168] On the other hand, Fish only somewhat disagrees with Areen, Tepper and White, Rabban, and Horwitz, because while

---

[162] Despite Post's thirty-two year-old extremely thorough review of the failure of the public forum doctrine overall, and specifically in employee speech cases, there are still scholars advocating for thinking of academia as a limited public forum to address academic freedom concerns in light of *Garcetti*. See, for example, Beckstrom, *supra* note 26; Richard E. Levy, *The Tweet Hereafter: Social Media and the Free Speech Rights of Kansas Public University Employees*, 24 KAN. J.L. & PUB. POL'Y 78 (2014–2015).
[163] FISH, *supra* note 78.
[164] *Id.* at 96.
[165] *Id.* at 82.
[166] *Id.* at 3.
[167] *Id.* at 74.
[168] *Id.* at 47. It should be noted, however, that if the statements made by the United States President (say about ingesting detergent or cleaning solution) are at all representative of "popular opinion" then the clearly hyperbolic stance "popular opinion is unredeemable unless academics correct and refine it" is much more reasonable than Fish intended.

they say that academics can be like other employees (which Fish believes is the only proper stance), these scholars also acknowledge that academics should be protected by academic freedom when working to advance the educational mission of the institution.[169] Given Fish's belief that academics should be treated equally as other workers, one might expect Fish to find fault with the exception conceded in *Garcetti* that the protections afforded publicly employed academics whose teaching and scholarship are made pursuant to their official duties would not be decided at that time by the Supreme Court. Instead, Fish does mental gymnastics to assert that this explicit *exception* does not constitute *exceptionalism* because it recognizes that outside of teaching and scholarship, academic public employees can and should still be treated the same as all other public employees.[170]

2.4.1. Analyzing the Courts' Understandings of Intramural Speech

As discussed in the introduction, in the 2006 Supreme Court case *Garcetti v. Ceballos*[171] First Amendment speech protections for public employees were markedly weakened. Despite Justice Kennedy writing for the majority that the court would leave open questions about whether the *Garcetti* precedent would apply to public college and university faculty members, many legal scholars have expressed concerns about how *Garcetti* has been and may still be applied until the U.S. Supreme Court makes an explicit ruling one way or another on faculty speech.[172] Legal scholars see *Garcetti*'s

---

[169] *Id.* at 91–92.
[170] *Id.* at 88–89.
[171] *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
[172] See, for instance, Areen, *supra* note 3; Hutchens, *supra* note 26; Hutchens & Sun, *supra* note 26; Christy Hutchison, *Anatomy of a Free Speech Lawsuit: Demers against Washington State University*

standard as problematic because it introduced into the public employee jurisprudence a new test to exclude automatically an immense amount of speech (*all* speech made pursuant to one's official duties) before an employee's freedom of speech could be balanced against the institution's interests in suppressing speech.[173] As the preceding discussion has shown, the speech restricted by *Garcetti* is precisely intramural speech; by 2012 Dr. Roberts argued there was already evidence that professors' intramural speech (at public institutions) had also been restricted under *Garcetti*.[174] The subsection that follows examines the scholarship on faculty intramural speech in light of *Garcetti.*

When philosophical ideas about academic freedom enter the Post-*Garcetti* legal arena, opposing stances can result in the same outcomes. For instance, the anti-exceptionalist himself, Stanley Fish, argues that under the common sense ruling of *Garcetti*, faculty have no special privilege to criticize their employers at work as it would be expression made pursuant to their official duties and for which they can and should be appropriately disciplined.[175] Yet compare Fish's stance to the exceedingly "exceptionalist" bent of Eastman and Boyles who, in interpreting the 1915 Declaration, write that "academics act on [the institution's] behalf when they act as academics," and go on to state that the institution and its faculty are in a mutually constitutive relationship

---

(2014), 17 JOURNAL OF BEHAVIORAL AND APPLIED MANAGEMENT (2017); Jorgensen & Helms, *supra* note 61; Robert M. O'Neil, *supra* note 26; Robert Roberts, *Developments in the Law: Garcetti v. Ceballos and the Workplace Freedom of Speech Rights of Public Employees*, 67 PUBLIC ADMINISTRATION REVIEW 662 (Jul. 2007).

[173] Hutchison, *supra* note 172, at 246.

[174] Robert North Roberts, *The Deconstitutionalization of Academic Freedom After Garcetti v. Ceballos?*, 32 REVIEW OF PUBLIC PERSONNEL ADMINISTRATION 45 (Mar. 2012).

[175] FISH, *supra* note 78, at 90.

with both only existing because of the relationship.[176] The exceptionalism of Eastman and Boyles's argument becomes irrelevant when it is placed within the *Garcetti* framework; whenever the faculty are acting on the institution's behalf, those who have been granted the power to control the institution's rhetoric and statements can (and should) require that faculty obey their policies about speaking on behalf of the institution. If that is *always* the case—as Eastman and Boyles posit, because academics can *only* act on behalf of their academic institution—then there are no exceptions to when faculty should be treated differently. Rather, to state that there should be an exception for expressions related to teaching and scholarship (which even Fish concedes[177]) is to recognize the constitutional value of protecting intramural speech for all those who are entrusted with the work of writing or speaking within their scholarly or professional disciplines pursuant to their official duties.[178]

O'Neil[179] explicitly lists several reasons why academics ought not be subject to *Garcetti*'s official duties test, arguing that the official duties of an assistant professor are simply not familiar to judges in the way Ceballos's duties as an assistant district attorney's duties were.[180] One of O'Neil's arguments for why academics ought to be

---

[176] Nicholas J. Eastman & Deron Boyles, *In Defense of Academic Freedom and Faculty Governance: John Dewey, the 100th Anniversary of the AAUP, and the Threat of Corporatization*, 31 EDUCATION AND CULTURE 17, 27 (Jan. 2015).
[177] FISH, *supra* note 78, at 88–89.
[178] This would include publicly employed medical doctors, attorneys, judges, academics, accountants, as well as artists, writers, playwrights, etc.
[179] Robert M. O'Neil, *supra* note 26.
[180] Unsurprisingly, Fish offers a mostly circular rebuttal to O'Neil's claim, writing that judges are perfectly capable of understanding an academic's duties so long as they understand multiple exceptional aspects of an academic's job that are unlike other jobs (i.e., teaching and research) and each merit varying degrees of speech protection. FISH, *supra* note 78, at 90. Obviously, Fish's "so long as" is exactly O'Neil's point; if the judge does not understand the "so long as" clause, the judge does not understand academic labor and cannot clearly determine an academic's duties.

treated differently from other public employees under the law is that the courts have already been treating them differently. O'Neil cites the case *NLRB v. Yeshiva*[181] in which the Supreme Court held that because faculty at Yeshiva University participated in shared governance, they were essentially managerial employees and thus the institution was not required by law to recognize their unionization. The Supreme Court's conclusion that faculty are more than simply employees is similar to the common refrain in the academic freedom literature that originally comes from the AAUP's 1915 Declaration of Principles:[182] faculty are not "employees," but rather appointees of the institution.[183] In the same vein, Tepper and White[184] note that shared governance essentially demands that faculty speak out about policies and operations of their institutions;[185] yet as O'Neil notes it would be very difficult to find a list of an academic's official duties anywhere that is so specific as to delineate, for example, whether voicing concerns related to departments' overreliance on NTT faculty is related to her "teaching" duties or her shared governance duties.[186] Thus this *Garcetti* caveat for faculty teaching and scholarly speech does not clarify what intramural speech is and is not subject to *Garcetti* (and presumably also *Connick*[187] and *Pickering*[188]). One might argue that even Jones's standard (only speech made pursuant to duties unique to professors) would need to account for shared governance as a unique organizational feature binding faculty to duties (like critiquing

---

[181] *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).
[182] Am. Ass'n of Univ. Professors, *supra* note 52.
[183] *Id.* at 495.
[184] Tepper & White, *supra* note 143.
[185] *Id.* at 148.
[186] Robert M. O'Neil, *supra* note 26, at 19. See also, *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007).
[187] *Connick v. Myers*, 461 U.S. 138 (1982).
[188] *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968).

policy decisions or offering alternative solutions to institutional issues) that other professionals are not expected, or even allowed to carry out.[189]

For this reason, Judith Areen argues that a separate First Amendment test for educational institutions should be instituted.[190] Areen avers that instead of falling under "government as employer," faculty speech cases should fall under a "government as educator" jurisprudence.[191] She argues that because faculty are the only university actors qualified to represent themselves and their disciplines in shared governance, scholarship, and teaching, faculty involvement in disciplinary decisions should be a determining factor in faculty free speech suits against colleges and universities.[192] In simpler terms, Areen argues that if a president's or board's decision to discipline goes beyond the recommendations made by a faculty committee, the court should defer to the faculty rather than the administration.[193] This dissertation will argue, in part, that Areen's missing a piece of the argument, which is that because the faculty are responsible for the educational mission of the institution, the faculty should be given judicial deference in speech cases rather than the administration.[194]

2.5. Conceptions of Academic Freedom

In addition to legal (constitutional, contractual) conceptions of academic freedom, humanities scholars have written extensively on their own understandings of academic

---

[189] Jones, *supra* note 159, at 21–25.
[190] Areen, *supra* note 3.
[191] *Id.* at 990–1000.
[192] *Id.* at 995–96.
[193] *Id.* at 996.
[194] Or at least neither party should be assumed to be the sole side responsible for promoting the educational mission; neither side should receive deference if the faculty do not receive deference as the party which has been clearly delegated the duty of carrying out the educational mission.

freedom as a cultural, philosophical, and historical concept that they must protect and preserve. Carvalho writes in the post-9/11 moment about homeland security, neoliberalism, No Child Left Behind, and invisible wars in his introduction to the *Works & Days* journal's 2008-2009 four-issue compilation on academic freedom and intellectual activism.[195] This introduction exemplifies not only the cultural milieu of the U.S. during the George W. Bush presidency, but also intellectuals' mentality around "academic and democratic freedoms" amidst widespread uncertainty about the future of the country post-9/11.[196]

As Carvalho notes, one particular case catalyzed fervent discussion around academic freedom and freedom of speech: *Churchill v. University of Colorado at Boulder*.[197] The particulars of the case will be analyzed in the full dissertation; what is worth highlighting here is the discussion it catalyzed throughout the humanities literature on academic freedom post-9/11. While legal scholars look to *Garcetti* as the most recent catalyst for discussions of academic freedom protections,[198] for a variety of reasons, 9/11

---

[195] Edward J. Carvalho, *"The Crystallizing of a Consensus": Confronting Visible and Invisible Wars on Post-9/11 Academic Freedom*, 26–27 WORKS & DAYS 7, 17–18 (Edward J. Carvalho ed., 2009).
[196] *Id.* at 19.
[197] *Churchill v. Univ. of Colorado at Boulder*, 285 P. 3d 986 (Colorado Supreme Court 2012).
[198] See, for instance, Nugent & Flood, *supra* note 120; Niehoff, *supra* note 26; O'Neil et al., *supra* note 120; Houle, *supra* note 26; Griffin, *supra* note 26; Tepper & White, *supra* note 143; Robert M. O'Neil, *supra* note 26; Beckstrom, *supra* note 26; Habib, *supra* note 26; Matthew Jay Hertzog, *The Misapplication of Garcetti in Higher Education*, 2015 BYU EDUC. & L.J. 203 (2015); Rachel Levinson, *Academic Freedom, Shared Governance, and the First Amendment after Garcetti v. Ceballos* 1 (AAUP Feb. 2011); Nahmod, *supra* note 26; Lauren K. Ross, *Pursuing Academic Freedom After Garcetti v. Ceballos*, 91 TEX. L. REV. 1253 (Apr. 2013); Larry D. Spurgeon, *The Endangered Citizen Servant: Garcetti versus the Public Interest and Academic Freedom*, 39 J.C. & U.L. 405 (2013).

became the touchstone for academic freedom discussions among humanities[199] scholars.[200]

According to humanities scholars, the early twenty-first century policy arena contained numerous threats to American civil liberties, including academic freedom.[201] Humanities scholars repeatedly point to radical conservatives like David Horowitz who have been given a great deal of television airtime to decry the alleged progressive/communist ideologues on university faculties who are brainwashing students.[202] With the onset of multiple wars and armed conflicts along with the passing of the Patriot Act, and the revelation that the government had been spying on its own citizens for years,[203] Bush-era policies heightened tensions between conservative politicians and progressive academics on multiple fronts, with Post even calling this period a "time of national crisis."[204] The questioning of disciplinary authority[205] by conservatives continues even two decades since President (G. W.) Bush took office, as

---

[199] See, for instance, ACADEMIC FREEDOM IN THE POST-9/11 ERA (E. Carvalho & D. Downing eds., Palgrave Macmillan US 2010); ACADEMIC FREEDOM AFTER SEPTEMBER 11, *supra* note 153.
[200] It should be noted that a few legal scholars, namely Robert Post and Robert O'Neil, have contributed to both humanities (post-9/11) and legal (post-Garcetti) literatures. While some might argue that Stanley Fish is a humanities scholar who has contributed to the legal literature, I tend to think this argument is only meritorious insofar as Fish has created opportunities for legal scholars like (J.) Peter Byrne to publish on the many failings of his arguments. For instance, see, J. Peter Byrne, *The Social Value of Academic Freedom Defended Symposium: Academic Freedom for the Next 100 Years*, 91 IND. L.J. 5 (2015–2016); Byrne, *supra* note 148.
[201] Carvalho, *supra* note 195; John K. Wilson, *Marketing McCarthyism: The Media's Role in the War on Academic Freedom*, 26–27 WORKS & DAYS 125 (Edward J. Carvalho ed., 2009); Robert F. Barsky, *Academia in the Era of Homeland Security*, 26–27 WORKS & DAYS 95 (Edward J. Carvalho ed., 2009).
[202] Michael Bérubé, *Academic Freedom as Fragile as Ever*, 26–27 WORKS & DAYS 73 (Edward J. Carvalho ed., 2009); Robert C. Post, *Debating Disciplinarity*, 35 CRITICAL INQUIRY 749 (Jan. 2009); NELSON, *supra* note 7; Mark Bousquet, *Take Your Ritalin and Shut Up*, 26–27 WORKS & DAYS 437 (Edward J. Carvalho ed., 2009); Wilson, *supra* note 201.
[203] Carvalho, *supra* note 195, at 9.
[204] Post, *supra* note 80, at 63.
[205] Post, *supra* note 202.

evidenced by a recent AAUP publication defending expertise.[206] For humanities scholars, especially cultural studies scholars, the threats to academic freedom are political and cultural, and thus their understanding of academic freedom is also political and cultural. They defend academic freedom as a cultural institution, and as a political necessity to ensure disciplinary expertise is not transformed into state-approved propaganda.

Today's humanists follow a tradition of thinking about academic freedom that developed at the turn of the twentieth century when the concept was touted by the likes of John Dewey[207] and W.E.B. Du Bois.[208] In 1902, John Dewey wrote that academic freedom includes a corresponding responsibility to communicate one's scholarly conclusions in such a way as not to "rasp the feelings of everyone" or mix up an idea's "scientific merits" with "extraneous and passion-inflaming factors."[209] Likewise, Robert Post has cautioned that certain philosophical debates about the origins of "authority" within the humanities—whether charismatic rather than disciplinary—can be used as evidence of why universities no longer deserve academic freedom; Post warns scholars of the peril they could put themselves in by taking up such debates publicly.[210] Nevertheless, the philosophical debates continue unabated; Post himself debates with renowned philosopher and gender theorist Judith Butler about academic freedom on

---

[206] AAUP Committee A, *In Defense of Knowledge and Higher Education* 1 (Jan. 2020).
[207] John Dewey, *Academic Freedom*, 23 EDUCATIONAL REVIEW 1, 9 (1902).
[208] W. E. B. Du Bois, Academic Freedom, Address at University of Wisconsin (Apr. 26, 1952), *in* W. E. B. DU BOIS PAPERS (MS 312) SPECIAL COLLECTIONS AND UNIVERSITY ARCHIVES, UNIVERSITY OF MASSACHUSETTS AMHERST LIBRARIES 2–3 (Apr. 1952), *available at* http://credo.library.umass.edu/view/full/mums312-b202-i029 (visited Jun. 5, 2020).
[209] Dewey, *supra* note 207, at 7.
[210] Post, *supra* note 202, at 770. Post argues that reliance on charismatic authority for humanistic scholars (e.g., English professors) might support a claim that faculty are not really experts, and thus the public could call for their dismissal.

multiple occasions.[211] Starting in 2006, Post has written about academic freedom as a structuring of the faculty-employer relationship so as to protect faculty from administrative interference in academic work and decisions.[212] Butler has responded by contending that Post has repeatedly failed to consider the structuring of faculty work around disciplinary norms which must be interrogated and revised while also being the main justification for academic freedom protections.[213] While Butler returns over and over to the exceptionalism of the humanities for its "evaluative process" that does not simply apply "preestablished norm[s],"[214] she still takes for granted the process of peer review, which Post would say is precisely the sort of disciplinary norm upon which academic freedom is justified. Butler writes,

> When academic work is reviewed, so are professional norms; not only does the work imply a relationship to those norms, but those norms are also often redefined in light of the work itself. Indeed, such scenes of evaluation constitute the successive moments in the history of a set of norms; establish norms as historically changeable and socially negotiated.[215]

In explicating how disciplinary "norms" are established and revised, Butler argues they are not "norms" in any static sense as she alleges Post has claimed. Nevertheless, the

---

[211] Post, *supra* note 202; Butler, *supra* note 14; Post, *supra* note 80; Judith Butler, *Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom*, *in* ACADEMIC FREEDOM AFTER SEPTEMBER 11, 107 (Beshara Doumani ed., Zone Books Feb. 2006); AAUP Committee A, *supra* note 206; Judith Butler, *A Dissenting View from the Humanities on the AAUP's Statement on Knowledge*, 106 ACADEME, Spring 2020, at 22. Note that Robert Post, as a member of Committee A, participated in the draft of the statement from which Butler dissents.
[212] Post, *supra* note 80; Post, *supra* note 202.
[213] Butler, *Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom*, *supra* note 211; Butler, *supra* note 14.
[214] Butler, *Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom*, *supra* note 211, at 120–22.
[215] *Id.* at 120.

norm which is undeniably established is that of peer review of written work. While this practice may look different from one field to another even within similar disciplines, it is undeniably a professional academic norm within all but a few academic disciplines.[216]

While philosophers participate in conceptual debates, historians have painstakingly documented and interpreted these debates, often describing the tensions and paradoxes that philosophers and cultural theorists eschew for a purer stance.[217] Historical perspectives on academic freedom recount the many instances of the violation of academic freedom in the United States.[218] Thus, historians tend to describe academic freedom through variations on a theme, depicted in instances of repression[219] over the course of the last century. For an example, one need only look to the books on academic freedom written by historians; academic freedom is described, narrated, and depicted through a discussion of the discourse and events accompanying its invocation[220] rather than simply debated (by philosophers) or defended (by cultural theorists).[221] Yet while the detailed narration of events and cases separates historical conceptions of academic freedom from philosophical and cultural conceptions, historians utilize the same imagery

---

[216] Most notably and most relevant to this research is the exception of peer review in legal scholarship. Nevertheless, legal scholars (employed as such) often elicit feedback from and give feedback to other scholars on draft articles prior to publication. Similarly, monographs published in university presses undergo peer review as part of the publication process. And candidates for tenure and promotion must undergo peer review by their departmental colleagues as well as established faculty in their subfields.
[217] REICHMAN, *supra* note 10, at 50; Scott, *supra* note 78; SCOTT, *supra* note 153; Metzger, *supra* note 64, at 1322.
[218] Timothy Reese Cain, *supra* note 3; See also, SCHRECKER, *supra* note 3; Schrecker, *supra* note 78.
[219] SCOTT, *supra* note 153, at 5.
[220] SCHRECKER, *supra* note 3, at 359–60, note 5; See also, Metzger, *supra* note 64, at 1265.
[221] For additional examples, see, REICHMAN, *supra* note 10; Scott, *supra* note 78; Steve Fuller, *The Genealogy of Judgement: Towards a Deep History of Academic Freedom*, BRITISH JOURNAL OF EDUCATIONAL STUDIES 164 (2009).

to describe the "assaults" on academic freedom as their colleagues in other humanistic disciplines.[222]

Historians Henry Reichman and Joan W. Scott, who currently serve on the AAUP's Committee A on Academic Freedom and Tenure, each published a book on academic freedom in 2019. Reichman concludes his discussion of theories of academic freedom by highlighting Scott's writings on the tensions inherent to binding professional autonomy to the common/public good, and legitimizing scholarship through conservative practices which innovative or novel approaches to research will inevitably challenge.[223] Scott explains the tension between knowledge and power by analyzing the 1915 Declaration's assignment of "corresponding duties," writing that they were, "in fact an attempt to bring into being in the very person of the professor the boundary between knowledge and power, thought and action, truth and politics, upon which the principle of academic freedom rested."[224] She cogently argues that the tension between knowledge and power is addressed, but not resolved, by the AAUP's theory of academic freedom.[225] Scott concludes her meditation on knowledge and power with the affirmation that the ideal of academic freedom is necessary precisely because though we will never quite reach it, it is in the striving that we can get close; without such an ideal, power will dictate knowledge.[226]

---

[222] SCOTT, *supra* note 153, at 1; See also, Eastman & Boyles, *supra* note 176, at 34; REICHMAN, *supra* note 10, at 8.
[223] REICHMAN, *supra* note 10, at 50; See also Scott, *supra* note 78.
[224] SCOTT, *supra* note 153, at 53.
[225] *Id.* at 48.
[226] *Id.* at 66.

Humanities scholars emphasize very different aspects of the academic freedom discussion than do legal scholars, attorneys, or judges. The humanities discourse often centers on external "threats" to faculty autonomy, while legal scholarship and the courts emphasize questions about what is reasonable or permissible within a legal framework. This disjuncture between legal and humanities approaches to academic freedom becomes all the more visible when one considers the context in which faculty lawsuits occur, which is the subject of the next and final section of this literature review.

2.6. Faculty Labor and Employment Contextualizing Academic Freedom Cases

The labor and employment context in which higher education faculty work is characterized by a constellation of factors, including the unique job of faculty member/professor, as well as the confounding legal landscape for employment (especially discrimination) cases in higher education amidst a segmented faculty labor market. These factors shaping the academic employment context are often misunderstood or mischaracterized by courts and can lead to a disjuncture between courts' understandings of academic values and faculty's actual values. Despite attorneys and judges having attended college and even graduate school, many courts have trouble ascertaining what exactly constitutes a public employee's official duties;[227] this is especially true for public college and university faculty.[228] This section reviews the scholarly literature about the labor and employment context for faculty, paying special attention to how the conditions, legal understanding, and market segmentation of

---

[227] Elizabeth M. Ellis, *Garcetti v. Ceballos: Public Employees Left to Decide Your Conscience or Your Job Note*, 41 IND. L. REV. 187, 208 (2008).
[228] See, for example, *Freyd v. Univ. of Oregon*, 384 F. Supp. 3d 1284, 1290–94 (U.S. District Court for the District of Oregon 2019).

academic labor shape who becomes faculty, who of those faculty members are in positions to sue their university, and how faculty can be mischaracterized by the courts.

2.6.1. The Job of Faculty

In their tenure or promotion applications, faculty at public colleges and universities are judged on a dossier of work in three broad categories: teaching, research, and service (to their institution and to their discipline).[229] The emphasis placed on each category varies by institutional type (research university, small liberal arts college, etc.), while the specific contributions expected also vary by discipline.[230] The broad criteria for tenure are normally explicitly stated in a faculty handbook, but courts have been known to look at actual work performed in addition to expectations.[231] When courts lack understanding of academic traditions and values, they can decide cases without having all of the relevant information about the academic labor context. The following three sub-sections discuss this academic labor context. Section 2.6.1.1 discusses how the Supreme Court mistakenly assessed academic labor in the 1979 *NLRB v. Yeshiva University*[232] decision. In contrast, 2.6.1.2 describes how academics are assessed by their peers and institutions for hiring and tenure. Finally, 2.6.1.3 elaborates on the contrasting academic value systems of scholars and their institutions.

---

[229] Kerry Ann O'Meara, *Inside the Panopticon: Studying Academic Reward Systems, in* HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 161, 178 (J. C. Smart & M. B. Paulsen eds., 2011); M. Kevin Eagan Jr & Jason C. Garvey, *Stressing Out: Connecting Race, Gender, and Stress with Faculty Productivity*, 86 THE JOURNAL OF HIGHER EDUCATION 923, 923 (The Ohio State University Press Oct. 2015).
[230] O'Meara, *supra* note 229, at 172–80; Shirley M. Clark & Mary E. Corcoran, *Faculty Renewal and Change*, 16 NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH 19, 21 (0 1989).
[231] *Freyd v. Univ. of Oregon*, 384 F. Supp. 3d at 1293–94; Ellis, *supra* note 227, at 204.
[232] *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

2.6.1.1. Judicial Interpretation of Academic Work

Institutional oversight of faculty service, specifically when participating in shared governance, is a special area of concern in free speech cases, as it is often misunderstood by non-academics and especially judges and attorneys.[233] A prime example is the ruling in *NLRB v. Yeshiva University*, wherein the Supreme Court ruled that faculty at Yeshiva University were not entitled to unionization under the National Labor Relations Act (NLRA) because the job of faculty included too many managerial duties.[234] Despite all parties agreeing that faculty were professional employees (a category afforded unionization rights under the NLRA), the court believed that faculty participation in shared governance was "an exertion of … managerial power."[235] Faculty speech related to teaching and research is often subject to the review of their departmental or disciplinary peers; in contrast, when participating in shared governance, faculty speech is subject to the critique and scrutiny of administrators and faculty from divergent disciplinary or methodological backgrounds. The governance structure of colleges and universities requires that the whole faculty (who carry out the educational mission) participate unhindered in governance to counterbalance the priorities and viewpoints of the administrators tasked with business operations. According to Griffin, the core professorial function is "advancing the university's academic mission without abandoning the institution's responsibility to embrace ethical and professional standards."[236] In other words, it is the work of the professoriate to hold one another and their institutions

---

[233] Areen, *supra* note 3, at 981–82.
[234] *NLRB v. Yeshiva Univ.*, 444 U.S. 672; See also, Barbara A. Lee, *Faculty Role in Academic Governance and the Managerial Exclusion: Impact of the Yeshiva University Decision*, 7 J.C. & U.L. 222 (1980–1981).
[235] Lee, *supra* note 234, at 238.
[236] Griffin, *supra* note 26, at 53.

accountable to ethical and professional standards. An organizational structure rife with tension,[237] shared governance also creates many opportunities for misunderstanding, miscommunication, and mistrust. Because their role in shared governance was understood by the Supreme Court as "already managing the institution" at Yeshiva University, the faculty was not covered by the NLRA, exacerbating the tensions inherent to shared governance.[238]

2.6.1.2. Assessment of Academic Work

Judges might assume that academic work mirrors other professional labor as in law or medicine. On the contrary, this section reviews the actual institutional processes and structures unique to academia related to hiring and promotion.

Unlike most professionals, faculty in higher education undergo evaluations by numerous evaluators. Each work product—a book, article, or other publication—undergoes some form of peer review, leading to its rejection, or revision, publication, and assessment upon application for promotion. Promotion and tenure applications are scrutinized by many sets of eyes, at the departmental, decanal, full faculty, and presidential or board levels.[239] Non-standard merit raises likewise depend on an unusual form of peer review, namely, offers of employment at a higher salary by other academic institutions.[240] Nevertheless, the success of individual faculty members hinges on peer

---

[237] ROBERT M. HENDRICKSON ET AL., ACADEMIC LEADERSHIP AND GOVERNANCE OF HIGHER EDUCATION: A GUIDE FOR TRUSTEES, LEADERS, AND ASPIRING LEADERS OF TWO- AND FOUR-YEAR INSTITUTIONS 45 (Stylus Publishing, LLC Apr. 2013).
[238] Lee, *supra* note 234, at 229.
[239] CLARK, *supra* note 84, at 154.
[240] Aloysius Siow, *Tenure and Other Unusual Personnel Practices in Academia*, 14 J.L. ECON. & ORG. 152, 160–64 (Oxford University Press 1998).

review of not only research products, but also of teaching effectiveness and service commitments.[241]

In order to land a tenure-track job and thus be given access to institutional governance processes, early-career scholars must make it through a rigorous gauntlet of obstacles to prove they are worthy of the responsibilities of a faculty member; these experiences often serve to shape the mindsets and expectations of faculty members throughout their careers.[242] Despite attempts by some administrators to streamline organizational processes in higher education institutions, academic job market processes, publish-or-perish culture, and the academic hiring timeline are uniquely uncompromising, inconsistent, and stressful for early career scholars.[243] Applicants are told they are uniquely responsible for marketing themselves as the best possible candidate, when in fact the academic job market is shaped by casualization of faculty and notions of "fit" that fail to reflect individual applicants' characteristics or achievements.[244] While cover letters and resumes are par for the course in most corporate contexts, applications for academic positions require many additional documents (e.g., multiple academic references; teaching, research, and diversity statements; example syllabi; a writing sample); in one study, applicants listed the amount of time spent on applications as one of the most frustrating aspects of the job search.[245] The division of

---

[241] In professional schools (e.g., nursing, medicine/dentistry, business, or law), professional societies may also have standards of ethics and professionalism to which faculty are held accountable.
[242] Clark & Corcoran, *supra* note 230, at 24; Frank Donoghue, *Competing in Academia*, *in* THE LAST PROFESSORS 24, 28 (Fordham University Press 2018).
[243] Donoghue, *supra* note 242, at 32.
[244] *Id.* at 40.
[245] Jason D Fernandes et al., *A Survey-Based Analysis of the Academic Job Market*, 9 ELIFE 1, 16 (Helena Pérez Valle et al. eds., eLife Sciences Publications, Ltd Jun. 2020).

labor among institutional human resources and the hiring department often reflects institutions' most dysfunctional aspects of their shared governance structures such that qualified applicants are never alerted of their rejection or the closing of a search. In a study of over 300 academic job applicants with PhDs, the applicants had submitted over 7600 applications and had received only 2920 formal rejection messages (38% of all applications).[246] The authors note that very rarely did any formal rejection messages include feedback on how the candidate might improve.[247] Many recent graduates of doctoral programs who apply for tenure-track jobs do not receive any offers,[248] and thus must take offers for teaching-track positions (full-time but with significantly less pay), take a(nother) post-doc, work as a part-time lecturer,[249] or leave academia altogether. While tenured humanists rarely recognize the tragic state of the academic job market for humanities positions, some simply advise early-career scholars to "tread water" which "can only mean accepting an indefinite series of adjunct appointments, thus helping the system of casualization perpetuate itself."[250]

If hired, the tenure track notoriously requires a great deal of focused effort and many sacrifices, especially in one's personal life, as detailed in numerous books on how to get tenure;[251] however, even prior to a tenure-track position, most aspiring academics

---

[246] *Id.*
[247] *Id.*
[248] Over 30% of doctorate earners in 2018 did not have definite employment commitments upon graduation. National Science Foundation, *Survey of Earned Doctorates: Doctorate Recipients from U.S. Universities 2018*, No. Special Report NSF 20-301, 32, Data Tables: Table 42 (Dec. 2019).
[249] Part-time lecturers often must cobble together a livable wage by re-creating a full-time teaching load between multiple colleges and universities. See KEZAR ET AL., *supra* note 17, at 44.
[250] Donoghue, *supra* note 242, at 35.
[251] MICHAEL S. HARRIS, HOW TO GET TENURE: STRATEGIES FOR SUCCESSFULLY NAVIGATING THE PROCESS (Routledge 1 edition ed. Jun. 2018); RUSSELL JAMES, TENURE HACKS: THE 12 SECRETS OF MAKING

are expected to spend at least one year in post-doctoral fellowships which are chronically underpaid.[252] In 2018, the median annual salary for post-doctoral fellowships—which of course require an earned doctorate—ranged from $47,000-$53,000 depending on field of study.[253] As graduate school expenses often must be paid out of an inadequate stipend if not out-of-pocket, many recent doctoral graduates also accrue debt (student loans, credit cards, etc.) with more than half of those earning doctorates in education owing on average over $50,000 in debt upon graduation according to the 2018 Survey of Earned Doctorates.[254] Research has shown that those who finish PhDs in English "have spent an average of twelve of their peak earning years *borrowing* money to supplement meager graduate stipends and assistantships."[255] It should be clear that few faculty or aspiring faculty are motivated to pursue this career because of an anticipated financial pay-off.[256]

TENURE (CreateSpace Independent Publishing Platform Jan. 2014); VIOLET JEAN, HOW TO GET TENURE: LIFE AS AN ASSISTANT PROFESSOR (Editor World LLC Oct. 2017); KAREN KELSKY, THE PROFESSOR IS IN: THE ESSENTIAL GUIDE TO TURNING YOUR PH.D. INTO A JOB (Three Rivers Press Aug. 2015); JAMES M. LANG, LIFE ON THE TENURE TRACK: LESSONS FROM THE FIRST YEAR (Johns Hopkins University Press 1st edition ed. May 2005); WRITTEN/UNWRITTEN: DIVERSITY AND THE HIDDEN TRUTHS OF TENURE (Patricia A. Matthew ed., University of North Carolina Press 1 edition ed. Nov. 2016); DAVID D. PERLMUTTER, PROMOTION AND TENURE CONFIDENTIAL (Harvard University Press 1 edition ed. Nov. 2010); RENA SELTZER & FRANCES ROSENBLUTH, THE COACH'S GUIDE FOR WOMEN PROFESSORS: WHO WANT A SUCCESSFUL CAREER AND A WELL-BALANCED LIFE (Stylus Publishing Jul. 2015); KERRY ANN ROCKQUEMORE & TRACEY LASZLOFFY, THE BLACK ACADEMIC'S GUIDE TO WINNING TENURE--WITHOUT LOSING YOUR SOUL (Lynne Rienner Publishers Jul. 2008).

[252] Chris Woolston, *Huge Variations in US Postdoc Salaries Point to Undervalued Workforce*, NATURE (Nature Publishing Group Feb. 2019).

[253] Mathematics and Computer Science had an exceptionally high median salary of $60,000 for post-doctoral fellowships, and thus was noted separately. National Science Foundation, *supra* note 248, at 12–13.

[254] HOELLER, *supra* note 18, at 81; Ben Miller, *Graduate School Debt: Ideas for Reducing the $37 Billion in Annual Student Loans That No One Is Talking About* 1 (Center for American Progress Jan. 2020); National Science Foundation, *supra* note 248, at 14–16.

[255] Donoghue, *supra* note 242, at 33.

[256] See Kerry Ann O'Meara, *Beliefs about Post-Tenure Review: The Influence of Autonomy, Collegiality, Career Stage, and Institutional Context*, 75 THE JOURNAL OF HIGHER EDUCATION 178, 193 (Taylor & Francis 2004) ("[F]aculty did not think much of the 'rewards' related to post-tenure review. In most cases faculty received between $1,200 to $3,000 in professional development funds associated with post-tenure review, a sum not considered significant enough by faculty to act as an incentive to influence work performance").

Donoghue describes attempting to get a tenure-track job in academia in the twenty-first century as "a unique kind of competition in which the stakes are extremely high and the rules are never fully explained."[257] To make things worse, academic capitalism incentivizes faculty to prioritize themselves and their own financial interests over junior scholars as Slaughter and Rhoades have shown.[258] Early-career scholars who have faced extremely stressful or even traumatic challenges while working towards their career goals may—rightly or wrongly—feel entitled or owed recognition of these decisions they view as sacrifices for academia.

2.6.1.3. Contrasting Academic Values

Academic socialization occurs over the course of many years during which graduate students and early career scholars take "on the values of the group to which [they] aspire."[259] Early-career scholars carry their academic socialization with them into uncompromising (and at times dehumanizing) systems as they continue to watch the unfolding of institutional decisions that do not align with their values. Clearly, the rewards for service to the academy should not be understood as primarily financial.[260] Rather, faculty tend to understand the value of their academic labor in terms of serving the public good.[261] Heather Steffen writes that different conceptions of academic labor

---

[257] Donoghue, *supra* note 242, at 33.
[258] SHEILA SLAUGHTER & GARY RHOADES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION 140 (Johns Hopkins University Press 2004) (discussing a Chemistry professor who waded into unethical waters by hiring a post-doc into a business in which he was an investor and creating a conflict of interest).
[259] Clark & Corcoran, *supra* note 230, at 23.
[260] In 2018, the median salary for doctorate recipients with definite employment in academia was no higher than $83,000 (for engineering and business), but in most fields the median academic starting salary was under $70,000. Industry starting salaries for all PhDs except for the arts and humanities were at least $15,000 per year higher than academic salaries. National Science Foundation, *supra* note 248, at 23.
[261] Steffen, *supra* note 69, at 120, 123, 126, 134; FINKIN & POST, *supra* note 3.

reflect the range of shared values held by faculty members that define their perspectives on their work.[262] Despite faculty having a variety of different perspectives on or theories of academic labor, the four philosophies Steffen discusses (professionalist, unionist, vocationalist, and entrepreneurial) all share common values of humane working conditions, reasonable pay for their labor, as well as teaching, research, and public service, albeit to varying degrees.[263] Unfortunately, other constituencies (students, administrators, trustees, the public, etc.) that make up the pluralistic university (or what Clark Kerr called the multiversity) tend not to share the same values as the faculty.[264] Indeed, even since the 1800's the divergence of administrative and faculty values has been the cause of tension.[265] As Veysey describes, faculty desires for intellectual refuge from public opinion clash with administrators' value for public approval and popularity.[266]

The pay differential between faculty who carry out the mission of the institution (the vast majority of whom are not on the tenure-track and thus make even less than their tenure-track colleagues) and the administrators charged with the business operations is often extravagant as well.[267] Yet administrators were often faculty themselves at one time and receive little to no formal training in how to manage, let alone develop, employees.[268] Underprepared managers, the differential attribution of value, and the tension inherent to

---

[262] Heather Steffen, *Inventing Our University: Student-Faculty Collaboration in Critical University Studies*, 108 RADICAL TEACHER 19, 116, 120, 124 (2017).
[263] Steffen, *supra* note 69, at 116, 120–21, 124, 128–29, 130–32.
[264] Clark Kerr, *THE IDEA OF A MULTIVERSITY, in* THE USES OF THE UNIVERSITY 1, 27 (Harvard University Press 2001).
[265] VEYSEY, *supra* note 83, at 17.
[266] *Id.*
[267] BENJAMIN GINSBERG, THE FALL OF THE FACULTY 23–24 (Oxford University Press, Incorporated 2011).
[268] Barbara A. Lee & Kathleen A. Rinehart, *Dealing with Troublesome College Faculty and Staff: Legal and Policy Issues*, 37 J.C. & U.L. 359, 360 (2010–2011).

the shared governance model, combine to easily foment distrust and suspicion, exacerbating divisions between academic administrators and workers. Furthermore, increased competition in the academic job market has led to increased expectations of faculty research output and productivity leading to increased stress[269] and potential resentment towards senior faculty who met lower standards to achieve tenure.[270] Small issues snowball into enormous problems when mishandled or ignored (as often happens with poor managers). When faculty sue their institutions for violations of their Constitutional rights, the cases arise in this fraught and conflicted context.

2.6.2. Faculty Employment Cases

In his essay on academic freedom, John Dewey (1902) describes "freedom of work" as "an intangible, undefinable affair; something which is in the atmosphere and operates as a continuous and unconscious stimulus."[271] A lack of freedom of work may also be described as a continuous and unconscious stimulus, and often in certain employment cases, like whistleblowing or discrimination cases,[272] this is what employees describe. The changes in law over the last 60 years that have resulted in increased antidiscrimination protections and federal regulations have been met with a need to ensure institutional compliance at a much larger scale. The most obvious way to ensure the compliance of public institutions would be to protect employees who report noncompliance or wrongdoing; yet, according to Bard, the reality could hardly be further

---

[269] Eagan Jr & Garvey, *supra* note 229, at 923–24.
[270] Lee writes more about this double standard in Barbara A. Lee, *A New Generation of Tenure Problems: Legal Issues and Institutional Responses*, *in* SCHOOL LAW UPDATE 97, 98–99 (Thomas N. Jones & Darel P. Semler eds., 0 1986).
[271] Dewey, *supra* note 207, at 10.
[272] Bard, *supra* note 141, at 169.

from it.[273] Indeed, protections for whistleblowers are an extremely confusing patchwork of state and institutional policies that can only be triggered under specific circumstances of which most people are completely unaware.

Boards and administrators mainly have non-academic motives in censoring faculty speech.[274] Fuchs argues that the organizational and hierarchical structure of colleges and universities (faculty reporting to administrators and administrators reporting to the governing board) has fundamentally shaped the development of academic freedom protections.[275] College and university governing boards, not the faculty, are the body represented by institutional counsel, and for this reason a university cannot prevail against its own board.[276] Thus "litigation as a means of settling internal controversies [...] seems to have extremely limited possibilities."[277] In other words, the potential for litigation to effect the kind of structural changes that could fundamentally redistribute boards' power to other (potentially more democratic) stakeholders, like the faculty has not yet been tested. What we do know is that the current structure makes efforts towards reconciling after internal disputes quite difficult.

One example of this difficulty is found in how institutions leverage academic deference to "get away with" hostile work environments. Constitutional academic freedom is often touted as a reason for courts to employ "academic deference"—defined as when a court defers to the academic institution's judgment on the case— when

---

[273] *Id.* at 279.
[274] Fuchs, *supra* note 78, at 437.
[275] *Id.* at 445.
[276] Rodney A. Smolla, *Academic Freedom and Political Correctness in Uncivil Times Symposium: Essay*, 14 FIRST AMEND. L. REV. 267, 291 (2015–2016).
[277] Fuchs, *supra* note 78, at 445.

colleges and universities find themselves embroiled in employment lawsuits. Yet Moss writes that "the bulk of the 'academic deference' precedents are gender discrimination cases" illustrating the barrier posed by courts' interpretations of academic freedom to "redress the gender segregation that has proven so persistent in academia."[278] It is easy to see how the institution's defense based on academic freedom can read as simply the institution defending their discriminatory structures or behaviors.

Legal scholars have written that employment cases against colleges and universities reflect the shared values in higher education (academic freedom and freedom of inquiry) that shape conflict averse organizational cultures.[279] While such a culture can lead to both speech and discrimination (and subsequent retaliation) cases, Bard distinguishes these two types of employment suits.[280] Bard argues that whistleblowing suits "involve matters of public concern" whereas discrimination suits consist of "issues of concern only to the individual employee claiming discrimination."[281] This characterization of discrimination suits as "individual" issues fails to account for the fact that racism, ableism, sexism, transphobia, and heteronormativity/homophobia are systemic, instead conceiving of discrimination in terms of discrete acts or behaviors against a single plaintiff.[282]

---

[278] Scott Moss, *Against Academic Deference: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 3 (Mar. 2006).
[279] Bard, *supra* note 141, at 169; Lee & Rinehart, *supra* note 268, at 360.
[280] Bard, *supra* note 141, at 169.
[281] *Id.*
[282] IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 18 (Random House Publishing Group Aug. 2019); Sandra Styres, *Reconciliaction: Reconciling Contestation in the Academy - Sandra Styres*, POWER AND EDUCATION 3–6 (Apr. 2020).

Labor disputes in academia, per Julius and DiGiovanni, are attributable to similarities rather than differences between faculty and administrators.[283] These authors argue that "the role of faculty and administration in shared governance matters has never been clearly delineated."[284] This naturally results in claim-staking of responsibilities and the inevitable disagreements that thus arise from the overlapping "jurisdictional territories of faculty versus those who 'manage' the academic enterprise."[285] The many employment suits reviewed in the literature generally stem from an incongruity of institutional policy/action and professional/academic values. Despite its elitist and capitalist origins, many within the academy still buy into the altruistic and democratic values they themselves espouse.[286]

2.6.3. Labor market segmentation

Because of continued academic labor segmentation, faculty who have been disillusioned by the cavernous gap between expressed and observed institutional values through personal experience with discrimination still make up a minority of the professoriate.[287] Academic labor is segmented based on race, gender, and discipline, as well as based on an individual faculty member's ability to develop marketable research products. Labor segmentation in academia intensifies rifts and tensions already inherent

---

[283] Daniel Julius & Nicholas DiGiovanni, *Academic Collective Bargaining: Status, Process, and Prospects*, 3 ACADEMIC LABOR: RESEARCH AND ARTISTRY 140 (Nov. 2019), https://digitalcommons.humboldt.edu/alra/vol3/iss1/11.
[284] *Id.*
[285] *Id.* at 175.
[286] Steffen, *supra* note 69; POST, *supra* note 10; FINKIN & POST, *supra* note 3.
[287] Although, as Kezar, DePaola, and Scott describe, the exploitation of academic labor is becoming clearer and clearer for even those who are not victims of systemic discrimination based on race, gender, or sexual orientation. KEZAR ET AL., *supra* note 17.

in a divided governance model, while also breeding dissension and distrust among faculty peers.

Liera attributes the overrepresentation of white faculty and underrepresentation of Black, Latinx, and Native American faculty to institutional failures to interrogate their organizational cultures of niceness.[288] Liera defines the culture of niceness as "the organizational norm that talking about race, White privilege, and equity is not nice because it makes people feel uncomfortable."[289] This culture of niceness, Liera explains, perpetuates, legitimizes, and normalizes "colorblind routines [...] rooted in norms of interracial comfort, familiarity, and trust, which organizational actors repackage as race-neutral objective merit, professionalism, collegiality and teamwork, which are reflective components of a culture of niceness."[290] Thus, behavior which superficially reads as politeness or collegiality actually serves to mask the racialized norms of the academy.

Given this pervasive culture of "niceness" in academia, it should come as no surprise that "collegiality" can be weaponized to enforce silence around equity issues; those who raise concerns about equity with other faculty or administrators can be ostracized for acting outside norms of niceness.[291] While ostracizing is most commonly wielded against women and racially minoritized faculty, it often fails to amount to illegal harassment under a "but-for" theory of discrimination, and thus rarely results in

---

[288] Román Liera, *Moving Beyond a Culture of Niceness in Faculty Hiring to Advance Racial Equity*, AMERICAN EDUCATIONAL RESEARCH JOURNAL 0002831219888624, 1–2 (American Educational Research Association Dec. 2019).
[289] *Id.* at 2.
[290] *Id.*
[291] *Id.* at 19.

successful litigation.[292] This is because even a white male colleague challenging norms of niceness around discriminatory practices, policies, or realities could be silenced, thus under the "but-for-race" and/or "but-for-gender" theories of discrimination, the wrongdoing cannot be proved. Likewise, when on-the-job speech is labeled as not collegial, regardless of how directly it serves the mission of the institution to speak about the issues in question, there is (presumably) no legal protection available for public employees under *Garcetti.*

Yet while service work is riskier for women and racially minoritized faculty for exactly the reason that *Garcetti* offers no legal protection for governance-related speech, white women and racially minoritized faculty (and especially women of color faculty) spend much more time on service than their white male colleagues.[293] Given the systemic nature of these unequal expectations, it makes sense that minoritized and female faculty seek spaces where they can feel safe to speak their minds in accordance with their values. As Eagan and Garvey explain, when stress caused by experiencing discrimination results in faculty who are unable to be productive, they may choose to leave their positions.[294] This can mean looking for departments and institutions that treat them with more respect (e.g., humanities and social sciences, ethnic and gender studies departments, HBCUs,

---

[292] Crenshaw describes a "but-for" theory of discrimination as the theory that "but for" one's status as a woman *or* as a Black person, one would not have been treated differently than a white male peer. If one is both a woman *and* Black, Crenshaw notes, the "but-for" theory will fail to recognize discrimination. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 151 (1989).

[293] Brenda Lloyd-Jones, *African-American Women in the Professoriate: Addressing Social Exclusion and Scholarly Marginalization through Mentoring*, 22 MENTORING & TUTORING: PARTNERSHIP IN LEARNING 269, 274 (Aug. 2014).

[294] Eagan Jr & Garvey, *supra* note 229, at 946.

women's colleges and smaller 2 and 4 year colleges where there are more faculty who look like them) or leaving academia altogether.[295]

Departments are also segmented into distinct labor markets which over-value positivistic hard sciences and undervalue humanistic and social research.[296] The battle for recognition of the intellectual contributions— even within humanistic and social research—of women, people of color, and especially women of color has been ongoing for centuries.[297] This preference towards positivism, and especially those sciences which produce marketable goods (i.e., engineering), became especially pronounced with the widespread implementation of neoliberal policies at the highest ranks of institutional administration and government.[298]

As this section detailed, the structures of academic institutions start out inequitable. "Neutral" policies that aim to treat faculty the same based on race, gender, discipline, or marketability simply affirm the social order that pre-existed the diversification of faculty. Unspoken norms and values are at the heart of this, and these very same unspoken norms and values (what Liera calls the culture of niceness) shape how the academy deals with confrontations and the need for meaningful and structural changes for equity.

---

[295] Kimberly A. Griffin, *Institutional Barriers, Strategies, and Benefits to Increasing the Representation of Women and Men of Color in the Professoriate*, *in* HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH: VOLUME 35, 277, 285–86 (Laura W. Perna ed., Springer International Publishing 2020).
[296] Kelly Ochs Rosinger et al., *Organizational Segmentation and the Prestige Economy: Deprofessionalization in High-and Low-Resource Departments*, 87 THE JOURNAL OF HIGHER EDUCATION 27, 28–29 (2016). One concerning application of this reasoning within the courts can be found in *Freyd v. Univ. of Oregon*, 384 F. Supp. 3d 1284, 1288–89 (U.S. District Court for the District of Oregon 2019), stating that 4 male comparators "perform work duties that are significantly different than those performed by Professor Freyd."
[297] BRITTNEY C. COOPER, BEYOND RESPECTABILITY : THE INTELLECTUAL THOUGHT OF RACE WOMEN (University of Illinois Press 2017).
[298] SLAUGHTER & RHOADES, *supra* note 258, at 20–22.

3. Methodology

3.0. The Study

The American Educational Research Association (AERA) has written that humanities-oriented research brings together "multiple and interdisciplinary literatures [which] may be viewed as joining conversations in which issues related to [education] are addressed."[299] In accordance with AERA's standards for humanities-oriented research, this proposal has discussed the various voices from multiple disciplines speaking over one another in the debates about free speech and academic freedom. To further the scholarly and legal conversation about faculty speech, this project aims to develop a mission-centered framework, informed by academic freedom scholarship and legal opinions, that can be used to analyze and decide faculty free speech cases. This section discusses the planned methods for data collection and analysis for this research project. The section begins with a discussion of the research question and why this inquiry matters to the field of higher education followed by the proposed methods of data collection and analysis. The final section explains how the analysis of court decisions will serve to build a framework for better understanding faculty free speech cases and provides a summary to conclude the proposal.

3.1. Goals and Research Questions

As stated in the introduction, this dissertation pursues two main goals: the first is to address the discursive problem, by developing a robust theory of academic freedom and faculty freedom of expression that aligns the interests of the all three voices in the

---

[299] AERA, *Standards for Reporting on Humanities-Oriented Research in AERA Publications*, 38 ED. RESEARCHER 481, 484 (Aug. 2009).

debates around academic freedom (unionist, administrative, and scholarly). The second goal is to address the legal problem produced by the circuit splits post-*Garcetti* by identifying, cataloguing and analyzing outcomes and rationales of all faculty speech cases decided between 2006 and 2020 and developing a robust legal argument for a unifying mission-centered approach to faculty speech cases. The study will accomplish these two goals by relying on legal, social scientific, and humanistic scholarship on academic freedom and freedom of expression while asking and answering the following research questions.

- What rationales have courts used to decide faculty speech cases since *Garcetti* and to what ends?
- How do legal scholars, administrators, and unionists conceptualize academic freedom protections in light of *Garcetti*?
- How do First Amendment scholars conceptualize faculty speech protections?
- How and when do these conceptualizations appear in the caselaw if at all?
- How are scholarly conceptions or terms deployed by parties, expert witnesses, attorneys and judges in these cases?
- What concepts or themes from the caselaw aren't taken up in the theory and vice versa?

In answering these questions, this dissertation will consider the intersecting concepts and discourses implemented by various stakeholders in both institutions of higher education and the judicial system. Through analyzing the rationales given for the First Amendment's protection or lack of protection of faculty expression in these cases, this dissertation will consider the vulnerabilities, rights, and responsibilities of faculty in

conjunction with the educational mission of the institutions of higher education in which they work. By better understanding how these concepts, discourses, and rationales intersect within the court system, this project aims to assert a legal argument for the protection of faculty speech that centers on the educational mission of public colleges and universities.

3.2. Methods

Due to the distinctively interdisciplinary aims of this research, the data collection and especially data analysis will go beyond simply considering the facts and outcomes of each case. This section lays out the planned methods for data collection and inclusion criteria, as well as the plans and rationale for the methods of data analysis.

3.2.1. Data Collection

As of October 2019, a list of nearly fifty faculty First Amendment cases has been compiled. Preliminary analysis of approximately 15-20 cases was presented at the AAUP national conference on Higher Education in June 2018. In the months since, as opinions have been issued new cases have been added to a Zotero (reference manager) folder. It is possible that the completed dissertation will analyze, in the end, upwards of 60 cases.

Final identification and inclusion of cases will be carried out systematically to ensure the inclusion of all possible cases. Cases will be identified through keyword searches of four databases: Google scholar, LexisNexis, WestLaw, and Duke's Campus Speech database.[300] Keyword permutations will be tracked, and each new case included in the study will be tagged with the keywords that resulted in its identification. After

[300] Search terms are still to be determined but will certainly include various permutations of: Garcetti v. Ceballos, faculty, free speech, First Amendment, professor, adjunct, lecturer, instructor, college, university, etc.

saturation is achieved using one database, the same searches will be conducted on each of the other databases until no new cases can be identified.

Cases will also be compiled from the references in scholarly articles written about faculty free speech cases since 2006 (see diagram below). LeRoy's article on faculty speech contains a seemingly comprehensive list of references through 2015 which will serve as a foundation. Additional references from other articles to cases decided since 2015 will be included as well. During analysis, cases may reference other cases not previously identified through searches or scholarship. If these cases fit the criteria for the analytic sample, they will be added to the database as well. Similarly, the data collection process will be iterative, as additional cases could be decided at any time—databases will be searched periodically to ensure newly decided cases are included in the dataset. The project dataset will include an entry for each time a case appears in search results or in reference lists, to reveal which cases were most challenging to identify.

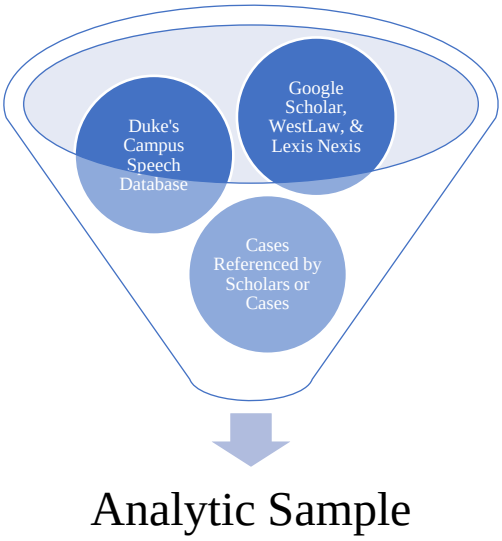


Figure 1: Where Cases Were Identified

3.2.1.1. Inclusion Criteria

Cases are automatically included in the dataset if all three of the following criteria are met:

1. The plaintiff was identified as a faculty member (tenure-track, non-tenure-track, part-time lecturer, adjunct, or librarian are considered faculty members)
2. The employer defendant was a public institution of higher education (and thus subject to the First Amendment)
3. The case was decided (at least in part) by a court (not settled out of court).

Other cases that do not meet criterion 3, may also be included if filings were made available online through the Foundation for Individual Rights and Expression (FIRE) or other similar agencies. The documents analyzed will include court opinions and decisions on motions. In cases that appear to be especially interesting, unusual, or important, supporting briefs or evidence, expert witness statements, or amicus briefs may be included to analyze how such information affected (or not) the court's opinion.[301] Cases and their corresponding documents will be tracked in an excel spreadsheet.[302] The analysis of case citations between opinions will also be noted and analyzed through a spreadsheet and eventually a wiki which will produce a map of the entire citation record.

3.2.2. Data Analysis

Most analyses of court cases are conducted for the benefit of lawyers. Studies of court cases, especially those in education, which are geared towards non-lawyers are normally conducted according to social science (e.g., sociology, economics, or

---

[301] The "PACER" or "RECAP" services are where I would likely find these supporting documents.
[302]Notes and citation information will also be stored in cloud storage.

psychology) standards. This study differs from both of these approaches. The analysis in this dissertation will be conducted according to humanities-oriented research standards, rather than social science standards. AERA's publication on humanities-oriented research standards states, "Humanities-oriented research in education attempts to gain an understanding of the explicit and implicit messages and meanings of education, to point out the tensions and contradictions among them, and to compare and critique them on ethical or other value-oriented grounds."[303] In this way, AERA acknowledges that humanities-oriented research is more often defined by "the problems they investigate than by their methods."[304]

Rather than applying a theoretical framework, the purpose of the analysis in this study is more philosophical as it involves, "making sense of the current educational situation, broadly considered, and proposing better ways to educate that are responsive to the realities of the situation and to the range of ideals that it activates."[305] Van Dijk calls this approach critical discourse analysis which focuses on elites and top-down power arrangements (such as in the judiciary) to understand power and dominance as evidenced through discursive strategies.[306] Fairclough notes that critical discourse analysis requires investigation of power relations and discourses as co-constitutive elements of reality which flow into each other.[307] As AERA's humanities-oriented research standards state,

---

[303] AERA, *supra* note 299, at 482.
[304] *Id.* at 483.
[305] Eric Bredo, *How Can Philosophy of Education Be Both Viable and Good?*, 52 EDUCATIONAL THEORY 263, 271 (2002).
[306] Teun A. van Dijk, *Principles of Critical Discourse Analysis*, 4 DISCOURSE & SOCIETY 249, 250 (Apr. 1993).
[307] NORMAN FAIRCLOUGH, CRITICAL DISCOURSE ANALYSIS: THE CRITICAL STUDY OF LANGUAGE 4 (Routledge Sep. 2013).

an ethical consideration in humanistic research is "whose versions of events are privileged and who decides which events or aspects are included and/or omitted."[308] Importantly, in court cases, the attorneys and especially judges have the power to control the narrative and construct the official record with little to no oversight or accountability from others. Using critical analysis enables the researcher to investigate the research questions with attention to the ideals activated by the current educational situation(s) described in both court cases and the scholarly and unionist literatures.

Analyzing the current landscape of faculty speech cases allows the researcher to see how the courts, institutions, and faculty have responded to and defined the realities of higher education and the values reflected by these realities. This level of analysis is written up as theory which provides "the perspective which will enable the educational profession to see [its problems] in their proper relationship to each other and to the task of education as a whole."[309] The analysis of court cases in this study will be used to build an overarching argument for what knowledge is revealed in the synthesis of these decisions, how that knowledge can be, is being, and should be put to use, and the consequences of such applications of knowledge. Using structural,[310] descriptive,[311] and pattern[312] coding methods, I coded the text of the decisions. When synthesized with the legal scholarly and unionist research, the analysis of the court cases will result in both a theoretical mission-centered argument, as well as a mission-centered legal argument for faculty academic freedom, thus achieving both goals of the dissertation project.

---

[308] AERA, *supra* note 299, at 486.
[309] Archibald W. Anderson, *The Task of Educational Theory*, 1 EDUCATIONAL THEORY 9, 21 (1951).
[310] JOHNNY SALDAÑA, THE CODING MANUAL FOR QUALITATIVE RESEARCHERS 66 (SAGE Oct. 2012).
[311] *Id.* at 70.
[312] *Id.* at 152.

When it comes to analyzing caselaw in higher education, few formal methodologies have been employed by legal scholars.[313] As LaNoue and Lee pointed out in their book analyzing the impact of the litigation process on participants (e.g., faculty plaintiffs, attorneys for the defense and the plaintiff), legal research is not conducted through what social sciences would call a theoretical framework.[314] Indeed, it is very difficult to apply a single theoretical framework to court cases, as each decision is written by a different author, has a different history (prior decisions, e.g.), contains varying numbers of arguments and rationales, and exists within different systems and organizations (within a localized legal system that is part of a larger state or federal system; different institutions). This kind of "data" is extremely messy and does not lend itself well to categorization to allow for easy analysis of trends. Rather, the study of law traditionally seeks to "analyze, criticize and synthesize judicial decisions" attempting "to state what the law is or should be."[315] Legal scholars pay much more attention to jurisprudential or doctrinal concerns than they do to the systemic or organizational, let alone individual consequences of legal decisions.[316]

Often legal scholars and lawyers analyze many cases through a process called "briefing" which seeks to break down the cases into their component parts like the issue, rule of law, application of the law, and the conclusion. This is helpful when trying to identify cases similar to one's client's but leaves out many valuable pieces of information

---

[313] Paul Chynoweth, *Legal Research, in* ADVANCED RESEARCH METHODS IN THE BUILT ENVIRONMENT 28 (2008).
[314] GEORGE R. LANOUE & BARBARA A. LEE, ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION 5–16 (University of Michigan Press Jul. 1987).
[315] *Id.* at 5.
[316] Chynoweth, *supra* note 313, at 31.

that do not fit these four simplistic categories. While this project pays great attention to these same areas, its location at the intersection of the legal system and systems of higher education motivates the author to prioritize the analysis of the systemic and organizational contexts of these cases as well. The implicit assumptions inherent to arguments made by the parties as well as the judge are extremely important considerations in a comprehensive analysis of the application of *Garcetti* to higher education, but within legal scholarship such assumptions are often overlooked. Therefore, this research takes into account assumptions made in court decisions about the nature and structure of colleges and universities as workplaces and schools. In the same vein, while analyzing assumptions, this research centers the fact that wielders of power and privilege operate in both legal and higher education systems to maintain the allocation of both power and privilege.[317] Universities are unique in many ways and indistinguishable from other workplaces in others and many court opinions either over or underreact to the uniqueness of the higher education sector. This trend is likely to be missed or glossed over in a brief done by lawyers who are solely interested in the application of the law. Similarly, this trend may not stand out to legal scholars who are more interested in issues of reasoning or ideology.

3.2.3. Methodological Limitations

The analysis in chapter five shed light onto some of the limitations inherent to the original plan for the database. For instance, it was not immediately obvious what variables to include in the database, but it became clear based on the outline for chapter

---

[317] Estela Mara Bensimon & Catherine Marshall, *Like It Or Not: Feminist Critical Policy Analysis Matters*, 74 THE JOURNAL OF HIGHER EDUCATION 337 (May 2003).

five that each subsection in chapter five should analyze its own variable. The court asks the same series of questions in each First Amendment public employee free speech case, so these questions would naturally make for appropriate variables; however, not all of these variables were originally included in the database, so the quantitative data had not been originally collected during the quantitative data collection phase. This meant returning to data collection well into the analysis portion of the research. In the future, the researcher recommends including a variable in the database for each step or question in the standard jurisprudence. Likewise, future research should include an opinion variable for the motion decided by that opinion, as well as a case variable for the point at which the case was terminated (motion to dismiss, summary judgment, pre-trial settlement, trial, jury verdict, etc.)

Additionally, some relevant cases inevitably will have slipped under the radar. The legal research databases returned over 1,000 cases when searched for this project; the vast majority of these cases did not meet the sample criteria and were thus removed. Lexis+ does not offer a way to export search results to be viewable in excel, and thus requires manually scrolling through hundreds of pages in a word document. Understandably, at least one relevant case that only appeared in Lexis results was missed; however, another relevant case never appeared in any database search results. These two cases took place within the Eleventh Circuit (*Seals* and *Stern v. Auburn University*)[318] and were identified well into the data analysis period after *Stern* was decided by a jury and

[318] See *infra* section 4.11.5. Seals v. Leath (Auburn University) and section 4.11.7. Stern v. Leath (Auburn University)

the verdict was thus reported by Inside Higher Ed.[319] Future comprehensive surveys of caselaw in higher education would be best conducted, at least in the data collection phase, by multiple researchers, thus maximizing the possibility of including all relevant cases and minimizing the possibility of overlooking any.

4. Findings Part I – Faculty Free Speech Jurisprudence Across the Circuits

4.0. The standards for faculty free speech cases

The standard for First Amendment retaliation and censorship[320] cases brought by government employees has mostly been set forth in Supreme Court cases.[321] The questions used for this standard are summarized in Figure 2 below. First, the court applies the standard set forth in *Garcetti* to determine if the public employee's speech was made "pursuant to official duties" or in one's capacity as a citizen.[322] The *Garcetti* court held that these two categories are mutually exclusive, though as described above, whether this standard applies to academic speech related to teaching or scholarship has not yet been decided by the United States Supreme Court.[323] The second question in the public employee free speech analysis is whether the speech addressed a matter of public concern or merely discussed personal [workplace] grievances as set forth in *Connick v. Myers*.[324]

---

[319] Colleen Flaherty, *A Matter of Public Concern*, INSIDE HIGHER ED (Nov. 21, 2022), https://www.insidehighered.com/news/2022/11/21/auburn-professor-awarded-646k-damages-speech-case.
[320] First Amendment retaliation is a claim filed under 42 USC §1983 alleging that the government retaliated against the speaker/plaintiff because of the speaker/plaintiff's protected First Amendment speech (or other First Amendment rights). Retaliation and censorship claims are considered under the same standards, the only difference is the sequence of the actions. If the speaker spoke first and the government acted second (by implementing a policy or disciplining the plaintiff), that is retaliation. If the government acted first, for instance, by creating a policy disciplining faculty for speech made solely in an employee's role as a citizen, then that would constitute censorship also called prior restraint.
[321] *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1982); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563 (1968).
[322] *Garcetti v. Ceballos*, 547 U.S. at 421.
[323] *Id.* at 425.
[324] *Connick v. Myers*, 461 U.S. 138.

The final question in determining whether or not the speech in question is protected by the First Amendment is whether the interest of the government in preventing disruption to its business outweighs the citizen's interest in their free speech—this is also known as the *Pickering* balancing test.[325] Once the court has determined that the employee's speech was protected, the plaintiff must adduce sufficient evidence that the speech was a motivating factor in an adverse employment action suffered by the plaintiff—this is also called the causal link or causal connection.[326]

When it comes to defining an adverse employment action, most Circuits have applied the Title VII retaliation standards to §1983 cases.[327] While the Seventh and Eighth Circuits have their own phrasing, the standard in all but the Fifth Circuit is that the

---

[325] *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563.

[326] *Benison v. Ross*, 771 F. 3d 331, 661 (6th Cir. 2014) explaining that causal links can be shown through direct or circumstantial evidence, but that "in the First Amendment context, a defendant's motivation for taking action against the plaintiff is usually a matter best suited for the jury."

[327] *Zelnik v. Fashion Institute of Technology*, 464 F. 3d 217, 224–29 (Court of Appeals, 2nd Circuit 2006) (applying the "person of ordinary firmness" standard to First Amendment cases in the Second Circuit); *Kahan v. Slippery Rock University of Pennsylvania*, 50 F. Supp. 3d 667, 706 (W.D. Pa. 2014) (applying the "ordinary firmness" standard within the Third Circuit); *Stronach v. Virginia State University*, 631 F. Supp. 2d 743, 752 (Dist. Court 2008) (stating that "the Court utilizes the same analysis for discrimination claims brought pursuant to §1983 as it does for Title VII claims" in the Fourth Circuit); *Benison v. Ross*, 765 F. 3d 649, 658 (6th Cir. 2014) (applying the "ordinary firmness" standard in the Sixth Circuit); *Abdulhadi v. Wong*, N.D. Cal. Civil, 2019 2019 WL 3859008 1, *9 (Aug. 16, 2019) (citing the "ordinary firmness" standard in the Ninth Circuit); *Rodriguez v. Serna*, 2019 WL 2340958, *5 (Dist. Court, D. New Mexico 2019) (applying "ordinary firmness" standard in the Tenth Circuit); *Tracy v. Florida Atlantic University Board of Trustees*, 2017 WL 681977, *6 (applying the "ordinary firmness" standard in the Eleventh Circuit); but see, *Kostic v. Texas A & M University at Commerce*, 11 F.Supp.3d 699, n. 1 (2014) (noting that the Fifth Circuit has not addressed whether the "person of ordinary firmness" standard applies to §1983 retaliation claims); see also, *Abcarian v. McDonald*, 2009 WL 596575, at *5 (N.D. Ill. Mar. 9, 2009) (defining an adverse employment action in the §1983 First Amendment retaliation context as "a deprivation likely to deter free speech" in the Seventh Circuit); and see, *Onyiah v St Cloud State University and Board of Trustees*, 2017 WL 9249434 1, *9 (United States District Court, D. Minnesota.) (stating that in the Eighth Circuit, "an adverse employment action for purposes of a retaliation claim [requires that] such adverse action must be considered material—that is such action would have dissuaded a reasonable worker from engaging in the protected activity.").

adverse action would deter a person of "ordinary firmness" from exercising their constitutional right to free speech.[328]

Once plaintiffs establish a causal link between their protected speech and the adverse employment action they have suffered, the burden shifts to the defendants to provide a legitimate non-retaliatory reason or "adequate justification" for taking the adverse employment action.[329] The *Mt. Healthy* defense is a tactic often employed by defendants that argues that the defendants would have taken the same action absent the protected speech.[330] Plaintiffs can then provide evidence that the defendants' reasoning is pretextual, though this is often a question reserved for a factfinder.[331]

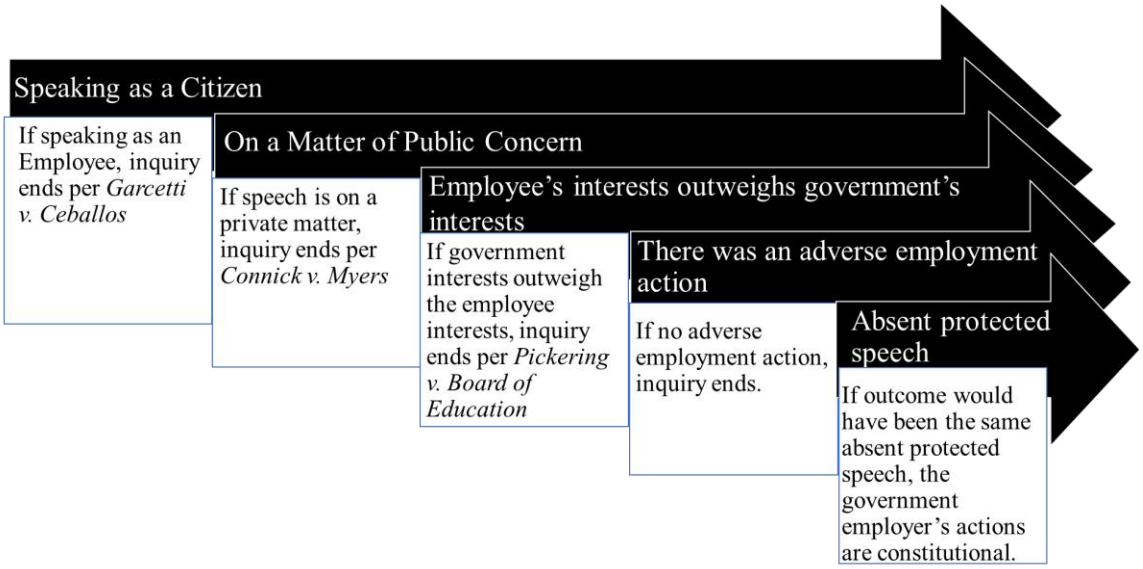


Figure 2: Federal Standard for Public Employee Free Speech Cases

---

[328] See *Id.* As this dissertation only discusses one case from the D.C. Circuit and that case did not deal with public employee speech, whether the D.C. circuit also applies the Title VII standard is not relevant at this time.
[329] *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).
[330] *Alberti v. University of Puerto Rico*, 818 F. Supp. 2d 452, 472 (D.P.R. 2011).
[331] *Kostic*, 11 F.Supp.3d at 729.

Defendants may also argue that they are entitled to qualified immunity.[332] This affirmative defense requires that defendants, as state officials performing discretionary duties,[333] show that reasonable officers in their positions could believe that the plaintiff's right to free speech was not clearly established at the time of the speech.[334] The two questions addressed by the court are thus: was there a violation of a constitutional right? and was that right clearly established such that a reasonable official would have known?[335]

4.1. First Circuit

The jurisprudence in the First Circuit is still unclear as there have only been four faculty speech cases (seven decisions). Unfortunately, the few cases that have been decided within the First Circuit have consisted of mostly problematic precedent when it comes to interpretations of *Garcetti* for faculty plaintiffs. The cases have been organized alphabetically.

4.1.1. Alberti v. University of Puerto Rico

In this case, Alberti, an associate professor and director of the family nurse practitioner (FNP) program at the University of Puerto Rico was fired for speech she made while on the job.[336] The speech in question included a letter to the chancellor complaining about internal issues related to the nursing department and a number of

---

[332] In some cases, brought against a university (as opposed to its representatives, or "persons" as dictated in §1983), the university as an arm of the state was entitled to sovereign (or Eleventh Amendment) immunity—meaning the state cannot be sued without its consent. See, *infra* section *4.2.9.*, for example.
[333] *Yohn v. Coleman*, 639 F. Supp. 2d 776, 788–89 (E.D. Mich. 2009).
[334] See, *Alozie v. Arizona Bd. of Regents*, 431 F. Supp. 3d 1100, 1117 (D. Ariz. 2020); *Weinstein v. University of Connecticut*, 136 F.Supp.3d 221, 234 (D. Conn. 2016).
[335] *Yohn v. Coleman*, 639 F. Supp. 2d 776, 788–89 (E.D. Mich. 2009).
[336] *Alberti v. Univ. of P.R.*, 818 F. Supp. 2d at 457–58.

Alberti's interactions with and complaints relating to a particular student.[337] Alberti had identified this specific student as having committed a HIPPA violation, demanded the student be disciplined, and based on the alleged HIPPA violation Alberti had refused to award a grade for the student's research proposal.[338]

The court found that Alberti's speech was made pursuant to her official duties and thus not protected under *Garcetti*.[339] Furthermore, the court determined that Alberti failed to show that her speech dealt with a matter of public concern, that it outweighed the government's interests in avoiding workplace disruptions, or that the speech in question was a substantial or motivating factor in her termination.[340] The First Circuit Court of Appeals affirmed the district court's finding that Alberti's speech was made "pursuant to her official duties as a teacher and as the [program] director, not as a private citizen" and thus her speech was not protected under the First Amendment.[341]

4.1.2. Coleman v. Great Bay Community College

In this case, Coleman, an adjunct psychology professor repeatedly found fault with the administration's supports for students with mental health concerns.[342] Coleman complained to his superiors about what he perceived as violations of the ADA by the college.[343] As an adjunct professor in the psychology department, Coleman felt he must

---

[337] *Id.* at 471.
[338] *Id.*
[339] *Id.* at 473.
[340] *Id.* at 474.
[341] *Alberti v. Carlo Izquierdo*, 548 Fed.Appx. 625, 638–39 (1st Cir. 2013).
[342] *Coleman v. Great Bay Community College*, 2009 WL 3698398, 1–3 (D.N.H. 2009).
[343] *Id.* at *6. Coleman also alleged violations of the Individuals with Disabilities in Education Act (IDEA) in his complaint, however, the IDEA does not apply to colleges and universities. *Id.* at *5. Nevertheless, given that Coleman worked in a counseling program within a community college, there may have been interaction with K-12 schools in some way (e.g., school counseling) or some of the students may have been dually enrolled in high school and community college. It is also possible Coleman was simply incorrect in his belief that the IDEA had any application to the college whatsoever.

act in accordance with his professional standards of ethics and moral judgment and his understanding of federal law (ADA and IDEA), even though at times this contradicted what his superiors advised he do.[344] Specifically, a student came to Coleman asking for his intervention because she was at risk of suicide; Coleman reported the student to his supervisors and was told he could refer her to a crisis center but have no other contact with the student or her family. [345] Coleman believed these instructions were in violation of the ADA and state and federal codes of ethics for psychologists.[346]

When Coleman was not alerted to the fact that his department was hiring a full-time professor after his department chair had led him to believe he would be, Coleman believed he was retaliated against for his complaints about the department, constraining his ability to fulfill his ethical and legal obligations as a psychologist.[347] Shortly thereafter, his adjunct contract was not renewed.[348]

Coleman filed *pro se*; the judge analyzed his §1983 retaliation claim and found Coleman did not establish any causal link between his speech and the non-hiring or non-renewal.[349] The court also found the defendants' reasoning for not considering Coleman for the full-time position (because they decided not to hire anyone) and for not renewing his contract (because they wanted to shift from a clinical to a theoretical approach) to be sufficiently non-retaliatory.[350] The case was thus dismissed for failure to state a claim.[351]

---

[344] *Id.* at *3. See *supra* note 343 relating to the inclusion of the IDEA in this case.
[345] *Id.* at *3.
[346] *Id.* at *3.
[347] *Id.* at *2-4.
[348] *Id.* at *2.
[349] *Id.* at *6.
[350] *Id.*
[351] *Id.*

4.1.3. Nwaubani v. Grossman

This case was brought by Professor Nwaubani—an associate professor of history who was simultaneously employed as the director of the African and African American Studies (AAAS) program at University of Massachusetts–Dartmouth.[352] Nwaubani mainly focused his efforts on his responsibilities as the AAAS director; this bothered his history department chair who wanted him to participate more in history department events and gave him subpar evaluations.[353] In response to an annual evaluation he received from the history department evaluation committee (containing no AAAS faculty), Nwaubani requested he not be evaluated anymore by history faculty and accused the department of "lynching."[354] That same year, Nwaubani filed a complaint with the university's office of equal opportunity, diversity and outreach regarding his evaluation; the next year he sent an official complaint to the EEOC, alleging discrimination on the basis of race.[355] The university responded, noting that the director position

> is "not a permanent or tenured position" […] In the same response, the University proposed that since 'the bulk' of Nwaubani's work at the University involved his role as Director of AAAS, the committee handling future faculty evaluations for Nwaubani be comprised of AAS-affiliated faculty, independent of the History Department's evaluation process and that the committee submit the evaluation directly to the Dean.[356]

---

[352] *Nwaubani v. Grossman*, 199 F.Supp.3d 367, 369 (D. Mass. 2016).
[353] *Id.* at 371.
[354] *Id.*
[355] *Id.*
[356] *Id.* (citations omitted).

Nwaubani no longer wished to be affiliated with the history department, but the university maintained that his appointment was primarily in the history department.[357] After five years as director of AAAS, Nwaubani was removed from the director position.[358] The removal letter stated that Nwaubani had not complied with the collective-bargaining agreement, specifically citing unreported absences from courses he was teaching as an area of concern that must be addressed to avoid a formal disciplinary process (that could lead to termination for cause).[359] The letter also "requested that Nwaubani 'become a fully functioning member of the History Department.'"[360] In response to this letter, Nwaubani emailed dozens of people and the AAUP, alleging multiple retaliatory actions by the university since his EEOC complaint, including his removal as director of AAAS.[361] The bitter dispute between the dean and Nwaubani then continued for a full year with Nwaubani complaining about his teaching assignments and refusing to respond to official emails regarding his complaints to HR and failure to comply with the collective-bargaining agreement's paperwork requirements.[362] Because Nwaubani did not submit his collective-bargaining agreement-mandated paperwork, the provost asked to speak with him in June.[363] Nwaubani did not respond until September after he had learned that he was not assigned any courses to teach in the fall.[364] He did not respond to requests to meet with the provost, and by January the university placed

---

[357] *Id.* at 372.
[358] *Id.*
[359] *Id.*
[360] *Id.*
[361] *Id.*
[362] *Id.* at 372–74.
[363] *Id.* at 374.
[364] *Id.*

Nwaubani on unpaid leave.[365] Despite receiving clear instructions for how to return to active service, Nwaubani failed to comply and was notified that the provost was recommending termination for cause.[366] Nwaubani filed a grievance, and the union's grievance committee found that Nwaubani was entitled to paid leave including backpay and benefits.[367] That summer Nwaubani once again failed to contact the administration after he was alerted to his pending termination.[368] Nwaubani filed this lawsuit, and soon thereafter Nwaubani received notice that the university would continue to employ him until further notice.[369] Three months later, the president notified Nwaubani of the termination process, but Nwaubani did not respond to the president to request a hearing, so no hearing was ever scheduled.[370] Nwaubani was given two-day's notice of the board of trustees meeting at which his termination would be considered; Nwaubani alleged he did not receive notice until after the meeting had occurred.[371] Nwaubani was thereafter notified that his employment had been terminated for cause.[372]

When it came to the First Amendment retaliation claim, both parties agreed that Nwaubani's formal complaints constituted protected speech and that his termination was an adverse employment action.[373] The defendants argued, and the court agreed, that

---

[365] *Id.*
[366] *Id.*
[367] *Id.* at 375.
[368] *Id.* at 374.
[369] *Id.* at 375.
[370] *Id.*
[371] *Id.* at 376.
[372] *Id.*
[373] *Id.* at 381.

Nwaubani failed to produce evidence of causation.[374] The court stated that even assuming Nwaubani could adduce evidence that his protected conduct was a motivating factor, the court was persuaded that the defendants would have reached the same decision absent the protected conduct.[375] The court found that "Nwaubani's non-compliance with various directives, and with his duties to the History Department, coupled with their negative employment actions prior to his protected conduct, is sufficient for [the defendants] to prevail."[376] Thus the court entered summary judgment for the defendants.[377]

Nwaubani appealed the decision to the First Circuit.[378] The Circuit Court affirmed the district court's reasoning both that Nwaubani could not show a causal link and that the defendants showed that they would have terminated Nwaubani absent the protected conduct.[379]

4.1.4. Reisman v. Associated Faculties of University of Maine

In this case, Reisman was a professor of economics at the University of Maine–Machias who sued the university, its board of trustees, and the faculty union alleging that that the state law authorizing unions elected by the majority of employees to bargain

---

[374] *Id.* The example the court used to support this finding, however, is actually quite supportive of Nwaubani's allegations; the court writes, "The purported facts on which Nwaubani would rely as proof of causation are illusory. For example, concerning Nwaubani's allegation that his annual performance was not evaluated after 2008 as retaliation for his protected activity, he neglects to mention that on May 31, 2012, the defendants told him that because he had not submitted the contractually-mandated paperwork, they were unable to perform his annual evaluation." *Id.* The fact that *four years* after Nwaubani stopped receiving annual evaluations the defendants told him his 2012 evaluation was not given to him because he did not fill out the requisite paperwork seems to support Nwaubani's claim more than the defendants' in this instance.

[375] *Id.* at 381–82.

[376] *Id.* at 382. In asserting Nwaubani's non-compliance predated his complaints, the court skipped over the fact that Nwaubani made formal complaints beginning immediately after he had received his first negative evaluation which he believed to be biased based on race. *Id.* at 371, 382.

[377] *Nwaubani*, 199 F.Supp.3d at 382.

[378] *Nwaubani v. Grossman*, 2017 WL 3973915 (1st Cir. Jun. 21, 2017).

[379] *Id.* at *1.

collectively and exclusively on behalf of all employees violated his First Amendment rights of speech and association.[380] The district court found that the Maine statute in question did "not cloak the Union with the authority to speak on issues of public concern on behalf of employees, such as Reisman, who do not belong to the Union."[381] Because the union was only authorized to speak on behalf of the members of the union, the court found the union was not "Reisman's agent, representative, or spokesperson" and thus "the Act does not compel him, in violation of the First Amendment, to engage in speech or maintain an association with which he disagrees."[382] Reisman appealed this decision to the First Circuit, but the First Circuit affirmed the lower court's dismissal of the case.[383]

4.1.5. Conclusion

In sum, the First Circuit has not decided many faculty free speech cases since 2006, but in the four cases that have been decided, all of the decisions favored the institutional defendants. In *Alberti*, the speech in question was found to have been made pursuant to Alberti's official duties and that it had not addressed a matter of public concern.[384] In *Coleman* and *Nwaubani*, the courts found no evidence of a causal link between the allegedly protected speech and the adverse employment action(s).[385] Reisman's case was unusual in that it made a First Amendment argument, like that in

---

[380] *Reisman v. Associated Faculties of University of Maine*, 939 F.3d 409 (1st Cir. 2019).
[381] *Reisman v. Associated Faculties of University of Maine*, 356 F.Supp.3d 173, 179 (D. Me. 2018).
[382] *Id.*
[383] *Reisman v. Associated Faculties of University of Maine*, 939 F.3d at 410.
[384] *Alberti v. University of Puerto Rico*, 818 F. Supp. 2d 452, 473–74 (D.P.R. 2011).
[385] *Coleman v. Great Bay Community College*, 2009 WL 3698398, *6 (D.N.H. 2009); *Nwaubani v. Grossman*, 199 F.Supp.3d 367, 381–82 (D. Mass. 2016); 2017 WL 3973915, at *1 (1st Cir. Jun. 21, 2017).

Janus,[386] to support ending union representation for faculty at the University of Maine; however, like the other cases in the First Circuit, the defendants prevailed.[387]

4.2. Second Circuit

4.2.1. Citizen Analogue

The Second Circuit Court of Appeals has an interesting jurisprudence for public employee speech, including something they call a "citizen analogue."[388] Simply put, the Second Circuit includes a question in the *Garcetti-Connick-Pickering* analysis to ask if the plaintiff's speech had a citizen analogue. In other words, the Second Circuit precedent requires that courts ask "could a citizen have made analogous speech?" This is based mainly on one paragraph in the *Garcetti* decision which reads in pertinent part,

> Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, [*sic*] or discussing politics with a co-worker. When a public employee speaks pursuant to employment responsibilities, however, *there is no relevant analogue to speech by citizens* who are not government employees.[389]

---

[386] *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018). In *Janus* the Supreme Court ruled that a state employees' union could not deduct dues from non-members if those funds would be used to subsidize union advocacy for positions (or "private speech") with which a non-member disagreed. The Supreme Court found such subsidizing of private speech violated the free speech rights of the non-members who disagree with the union's stances. *Id.* at 2460.
[387] *Reisman v. Associated Faculties of University of Maine*, 939 F.3d at 410.
[388] *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367, 377 (E.D.N.Y. 2010); *Weinstein v. Earley*, 2017 WL 4953901, at *7 (D. Conn. Nov. 1, 2017).
[389] *Garcetti v. Ceballos*, 547 U.S. 410, 423–24 (2006) (emphasis added) (citations omitted).

The Second Circuit has taken this phrase about a "relevant analogue to speech by citizens" and converted it into a full-fledged question in their inquiry into whether or not a public employee's speech could be protected under the First Amendment. As Kleinbrodt explains, this precedent cannot be fully attributed to the phrasing of *Garcetti* because "Garcetti's passing reference to civilian analogues does not lead to the conclusion that any speech containing such an analogue is protected by the First Amendment."[390] Yet the Second Circuit has, in fact, found that just because *there was* a citizen analogue to speech made by a public employee on the job, their speech was protected.[391] This is problematic as well, as scholars like Kleinbrodt point out, since at some level all speech could have a citizen analogue when abstracted enough from the particulars of its context.[392]

Despite the fact that the Second Circuit has a citizen analogue exception to *Garcetti*, only two of the Second Circuit faculty speech cases rely on the citizen analogue language in their decisions (*Isenalumhe* and *Weinstein*).[393] While the language of a citizen analogue comes from the original *Garcetti* decision, the Second Circuit has taken the concept of a citizen analogue and run with it in a different direction than the other circuits.

In *Weinstein*, the U.S. District Court for the District of Connecticut found that the plaintiff's complaints to the office of audit, compliance, and ethics did have a citizen

---

[390] Julian W. Kleinbrodt, *Pro-Whistleblower Reform in the Post-Garcetti Era*, 112 MICH. L. REV. 111, 124 (Oct. 2013).
[391] See *id.* citing *Jackler v. Byrne*, 658 F. 3d 225, 241-242 (Court of Appeals, 2nd Circuit 2011).
[392] Kleinbrodt, *supra* note 381, at 124.
[393] *Isenalumhe v. McDuffie*, 697 F. Supp. 2d at 369–70. (see *supra* section 4.2.7); *Weinstein v. University of Connecticut*, 136 F.Supp.3d 221, 227 (D. Conn. 2016). (see *supra* section 4.2.15).

analogue, whereas the plaintiff's speech within the context of the collective-bargaining agreement's grievance procedure did not have a relevant citizen analogue.[394] Likewise, in *Isenalumhe*, the U.S. district court for the Eastern district of New York found that the plaintiff's speech made pursuant to the union's grievance procedures was not protected since it lacked the relevant citizen analogue.[395]

4.2.2. Appel v. Spiridon

Appel, a full professor of art, supported a colleague in a discrimination suit by testifying to the discrimination she had witnessed.[396] The next semester her departmental colleagues petitioned the administration to investigate Appel's conduct in the workplace.[397] A special assessment committee was convened to investigate Appel's behavior and developed an action plan to address any problems the committee identified; "the final Plan called, in pertinent part, for Appel to undergo a 'neuropsychological and projectives assessments [*sic*].'"[398] Appel refused, believing that the defendants would be entitled to records of the assessments; upon her refusal to undergo these assessments she was suspended without pay.[399] Appel sued claiming First Amendment retaliation for her testimony in the discrimination trial, and the defendants moved for summary judgment.[400] The district court found that the implementation and enforcement of the plan to the point of suspension for failure to undergo psychiatric evaluation warranted an injunction, and also presented an issue of material fact as to whether or not the defendants would have

---

[394] *Weinstein v. Earley*, 2017 WL 4953901, at *7 (D. Conn. Nov. 1, 2017).
[395] *Isenalumhe v. McDuffie*, 697 F. Supp. 2d at 378.
[396] *Appel v. Spiridon*, 2011 WL 3651353 1, *3 (D. Conn.).
[397] *Id.*
[398] *Id.* at *1.
[399] *Id.*
[400] *Id.*

taken the same action in the absence of her protected speech.[401] The behaviors the committee listed as "problematic" were "yelling, accusing and needing instructions to be repeated many times;" however given the tensions in the department, such behaviors are understandable.[402]

The district court found that Appel spoke as a citizen on a matter of public concern when she testified in the discrimination trial and when she filed the instant lawsuit.[403] Likewise, six weeks after Appel filed her lawsuit she was suspended, the court stated, among numerous other adverse employment actions.[404] The court was satisfied with the causal connections alleged between Appel's speech and the retaliatory actions she suffered.[405] In analyzing whether or not the defendants had adequate justification to take the actions they did, the court stated, "The controlling question becomes whether defendants can show indisputably that they would have taken the same adverse actions, namely implementation and enforcement of the Plan and the resulting progressive discipline against Appel, even in the absence of her protected speech."[406] The district court found that there was a genuine issue of material fact presented by whether any progressive discipline arising out of the plan's enforcement was originally based on ill-will to target Appel. [407] The court denied the motion for summary judgment for the First Amendment claims against the dean of human resources and the provost/VPAA.[408]

---

[401] *Appel v. Spiridon*, 2d Cir. Summary Order, 521 Fed. Appx. 9, at *11 (Mar. 27, 2013 Mar. 27, 2013) (No. 1223250).
[402] *Appel v. Spiridon*, 2011 WL 3651353, *4.
[403] *Id.* at *8-9.
[404] *Id.* at *11.
[405] *Id.*
[406] *Id.* at *12.
[407] *Id.*
[408] *Id.* at *20.

The defendants appealed the denial of qualified immunity for the First Amendment claim, but the Court of Appeals for the Second Circuit affirmed the District Court for the District of Connecticut's finding that there was a fact issue related to the treatment of Appel after she had filed her 2006 lawsuit.[409] Specifically the Court of Appeals affirmed that the question remained whether a remediation plan was implemented and enforced for legitimate reasons or was motivated by impermissible retaliation.[410] The case eventually went to trial and the jury found for the defendants.[411]

4.2.3. Berrios v. State University of New York at Stony Brook

Berrios was a research associate professor and director of a research center for microscopy at Stony Brook.[412] In the 1990s, Berrios discovered that a colleague—Malbon—had falsified scientific data.[413] Allegedly, ever since, Malbon had been subjecting Berrios to a hostile work environment by undermining Berrios's career and thwarting his attempts to find permanent employment with the university. [414] In 2003, Berrios filed a claim against the university and Malbon in the New York Court of Claims which was eventually settled in 2006.[415] The settlement stipulated that Berrios would release the university and its employees from all claims arising out of the facts alleged in the in court of claims action.[416] Only two months after signing this release, however,

---

[409] *Appel v. Spiridon*, 2d Cir. Summary Order, 521 Fed. Appx. 9, at 11 (Mar. 27, 2013 Mar. 27, 2013) (No. 1223250).
[410] *Id.*
[411] JURY VERDICT For defendants against plaintiff, *Appel v. spiridon*, No. 06-cv-01177, Doc. 208 (D. Conn. 12-19-13), https://www.courtlistener.com/docket/4848729/appel-v-spiridon/#entry-208.
[412] *Berrios v. State Univ. of New York at Stony Brook*, 518 F. Supp. 2d 409, 412–13 (E.D.N.Y. 2007).
[413] *Id.* at 413.
[414] *Id.*
[415] *Id.* at 412–13.
[416] *Id.* at 413.

Berrios filed the federal lawsuit against the university and Malbon.[417] The facts set forth in Berrios's federal complaint "mirror[ed] those of the Court of Claims action, revolving around the 1995 discovery by Dr. Berrios of the alleged falsification of scientific data by Defendant Malbon."[418] Berrios argued that Malbon's harassment was ongoing and included alleged vandalism to Berrios's home, and spreading false rumors through sexually explicit graffiti that Dr. Berrios had an illicit affair with his research assistant.[419] The defendants moved to dismiss on the grounds of res judicata and/or collateral estoppel, or alternatively, qualified immunity or statute of limitations.[420] The court stated that Berrios's claims would be limited to only those actions taken after 2006 and any other claims would be dismissed on the basis of res judicata.[421]

4.2.4. Bhattacharya v. Rockland Community College

Bhattacharya was an adjunct faculty member in business/economics at RCC.[422] In his complaint, Bhattacharya alleged that a group of five students approached him before the final exam and demanded that he provide them with answers to exam questions.[423] Bhattacharya refused under any circumstance and alleged that the same student(s) anonymously sent a letter to administrators alleging issues with his teaching.[424] In this case, Bhattacharya's speech had to do with his refusal to condone or abet student cheating, and his standards of academic integrity.[425] Bhattacharya was investigated by a

---

[417] *Id.*
[418] *Id.*
[419] *Id.* at 414.
[420] *Id.*
[421] *Id.* at 420.
[422] *Bhattacharya v. Rockland Community College*, 2017 WL 1031279 1, *1 (S.D.N.Y. 2017).
[423] *Id.*
[424] *Id.*
[425] *Id.*

professor whom he believed wanted to take over his classes.[426] The defendants moved to dismiss for failure to state a claim.[427] The district court applied *Garcetti* and found that refusing to permit cheating on an examination was "part of his duties of employment not his 'obligation as a citizen.'"[428] The district court also went on to state that the complaints about student cheating or internal investigations into course grades did not constitute matters of public concern which itself was a fatal flaw in Bhattacharya's argument.[429] Bhattacharya appealed the decision to the Second Circuit Court of Appeals, arguing that *Garcetti* left open the possibility of protected teaching-related speech, but the Second Circuit affirmed the lower court's ruling, writing that "Bhattacharya's speech involved neither scholarship nor teaching […] Rather it involved maintaining class discipline."[430]

4.2.5. Ezuma v. City University of New York

In this case, Professor Ezuma claimed he was unfairly disciplined for his speech about two matters: 1) supporting a fellow faculty member who was sexually harassed by another faculty member while plaintiff served as department chair and 2) "successfully challenging the credentials of another faculty member" who was appointed acting department chair by the college president.[431]

In Fall 2006, Ezuma's department (accounting, economics, and finance) was reconfigured, and the president of Medgar Evers College appointed Professor

---

[426] *Id.*
[427] *Id.*
[428] *Id.* at *4.
[429] *Id.*
[430] *Bhattacharya v. Rockland Community College*, 719 Fed. Appx. 26 (Summary Order) 27 (2d Cir. 2017).
[431] *Ezuma v. City University of New York*, 665 F. Supp. 2d 116, 118–19 (E.D.N.Y. 2009).

Udeogalanya as acting chair.[432] After Udeogalanya was appointed as acting chair, Ezuma reported to "MEC and CUNY administrations" that Udeogalanya did not possess the proper credentials (a doctorate from an accredited program) required of department chairs.[433]

Also in Fall 2006, a student emailed the president of the university to complain about Ezuma's failings as an instructor including refusing to work with students, recycling a test from another university, testing on material that he had never taught, and using a textbook he had written that was confusing.[434] The president reported these accusations to the provost who notified Ezuma of the complaint.[435] Ezuma responded in a typo-riddled email to say the allegations were not true, but the note was virtually illegible.[436] President Jackson told Ezuma not to go to the next class and instead sent the dean of the business school, Provost Williams, and the acting chair of the department, Udeogalanya.[437] Udeogalanya then took over his course for the rest of the term pending an investigation into the student's allegations.[438] The faculty senate tried to create shadow sections of the course so that Ezuma would not be removed from teaching, but all the students transferred into a new section instead of remaining in his section.[439] The administration also said Ezuma could no longer use his own self-published textbook for courses with multiple sections.[440]

---

[432] *Id.* It is unusual for a college president to be so directly involved in reconfiguring a department and especially in appointing an acting department chair.
[433] *Id.* at 119.
[434] *Id.*
[435] *Id.* at 120.
[436] *Id.*
[437] *Id.*
[438] *Id.*
[439] *Id.*
[440] *Id.*

Defendants moved for summary judgment in the case.[441] Ezuma claimed that the defendants had two illegitimate motives for retaliation—for Ezuma's support for his colleague and for exposing Udeogalanya's deficient credentials.[442] Per the judge in this case, "the instant case has nothing to do with academic freedom or a challenged suppression of unpopular ideas. It is, instead, an ordinary retaliation case arising out of a claim of sexual harassment. The speech at issue here could have occurred just as easily in a private office, or on a loading dock. There is nothing more elevated or important under the First Amendment about the discourse at issue here than there was in *Garcetti*."[443] The defendants argued that Ezuma was doing his job when the "protected" speech was made and thus it was not protected work speech and the employer had the right to take action in accordance with its view of that speech.[444]

The court did not find Ezuma's case compelling, instead viewing Ezuma's speech as wholly referable to his job as chair, even and including his conversations with the Attorney General as part of the investigation and court case resulting from the sexual harassment claims.[445] The court recognized a legitimate government interest in ensuring that "open academic warfare" not "affect the [college's] operations."[446] The Federal District Court for the Eastern District of New York granted the defendant's motion for summary judgment and the Second Circuit affirmed.[447] The Second Circuit added only that Ezuma's questioning of Udeogalanya's credentials was more of a personal grievance

---

[441] *Id.*
[442] *Id.* at 127.
[443] *Id.* at 131.
[444] *Id.* at 129.
[445] *Id.* at 129–30. Importantly, this case pre-dated *Lane v. Franks*, 573 U.S. 228 (2014).
[446] *Id.* at 130–31.
[447] *Ezuma v. City University of New York*, 367 F. App'x 178, 179 (2d Cir. 2010).

than a matter of public concern since it expressed his personal dissatisfaction with the institution's choice of an acting chair. [448]

4.2.6. Faghri v. University of Connecticut

In *Faghri v. University of Connecticut,* the Second Circuit Court of Appeals ruled that a public university is not required to retain those who publicly oppose their policies in policy making or management positions.[449] Faghri was a dean of the school of engineering who claimed his First Amendment rights had been infringed when he was demoted because of his outspoken opposition to university policies. [450] The court found that Faghri's speech was not protected by the First Amendment.[451] The university administrators found fault with his vocal opposition to university policies, and about 1 in 4 faculty members within the school of engineering found the dean's leadership to be distasteful to them, resulting in a petition of no-confidence.[452] The fact that Dean Faghri had recently initiated a merger of two departments likely played a role in this no-confidence petition.[453] The district court denied defendants' motion for summary judgment, finding that some of Faghri's statements opposing the establishment of a foreign branch campus and the management of state funds for a university program touched on matters of public concern.[454] The court found that the causal link between the speech and Faghri's removal as dean were dependent on Faghri's credibility, which was a

---

[448] *Id.* at 180.
[449] *Faghri v. University of Connecticut*, 621 F. 3d 92, 97–98 (2d Cir. 2010).
[450] *Id.* at 98. Faghri retained his endowed chair and full professorship. *Id.* at 96.
[451] *Id.*
[452] *Id.* at 95.
[453] *Id.*
[454] *Faghri v. University of Connecticut*, 608 F. Supp. 2d 269, 274 (D. Conn. 2009).

fact issue for a jury, and thus summary judgment was inappropriate.[455] The defendants appealed and the Second Circuit reversed, finding that the defendants were entitled to qualified immunity on the First Amendment claim.[456] The appellate court stated that it is the right of the university to ensure the appointment or continued employment of executives and managers who voice support for, "or at least do not voice opposition to, the university's policies."[457] The Circuit Court explained that the "conclusion might well be different had the university fired Faghri from his professorship […] our reasoning depends upon the fact that it was from a management position that the university removed him."[458]

4.2.7. Filozof v. Monroe Community College

In this case, Filozof was employed from spring 2002-spring 2004 as a tenure-track assistant professor of political science at Monroe Community College in Monroe, NY.[459] In spring 2003 Filozof spoke with the department secretary in a "Shakespearian manner," bowing and kissing her hand.[460] He then commented to a colleague something to the effect of "See Dave, that's the way you have to treat them."[461] The secretary told the department chair about the incident, and she subsequently tried to schedule a meeting with Filozof but he "declined to attend."[462] The chair then conveyed the incident to the sexual harassment officer (SHO) who investigated the complaint and received Filozof's

---

[455] *Id.* at 275.
[456] *Faghri v. University of Connecticut*, 621 F. 3d at 100.
[457] *Id.* at 96.
[458] *Id.* at 98.
[459] *Filozof v. Monroe Community College*, 583 F. Supp. 2d 393, 395 (W.D.N.Y. 2008).
[460] *Id.*
[461] *Id.* at 396.
[462] *Id.*

version of events in writing.[463] The secretary had not found Filozof's conduct to be sexually harassing, but eventually gave into pressure from the chair and SHO to make a formal complaint.[464] The vice president of student services (Salvador) then wrote a memo requiring that Filozof apologize to the secretary, SHO, and department chair, and meet with the vice president of academic services (Glocker) to discuss how he had disrespected the department chair by refusing to meet with her.[465] In Filozof's meeting with Glocker, he was told he would need to have a series of meetings with the department chair to work on his acculturation into the institution and address his lack of respect for the chair.[466] After two meetings between Filozof and his department chair, he received an email from Glocker reiterating that she was "very serious" about Filozof working on being an effective college citizen and learning to work well with his colleagues.[467]

In Fall 2003, when his contract was up for renewal, his department provided a dossier of over 300 pages in support of Filozof's contract renewal.[468] Despite the enthusiastic departmental recommendation, the department chair recommended against renewal citing "interpersonal difficulties;" the dean, vice president, president, and board of trustees all recommended against renewal as well.[469] The dean, in his recommendation against Filozof's renewal, specifically criticized Filozof's "failure to be 'open-minded' with respect to criticisms of his political conservatism: '[d]uring his debriefing of my class observation when I suggested that his approach was philosophically conservative in

---

[463] *Id.*
[464] *Id.*
[465] *Id.*
[466] *Id.*
[467] *Id.*
[468] *Id.*
[469] *Id.* at 396–97.

nature, [Filozof] refused to have an open mind and instead told me that I was wrong—he was right."[470] Filozof found out his contract would not be renewed for the 2004-2005 school year and given the reasons offered by the dean, alleged First Amendment retaliation.[471] In addition to claiming that his First Amendment right to free speech was violated when his contract was not renewed, Filozof also filed claims of discrimination against him based on his male gender and white race.[472]

The defendants moved for summary judgment, but the district court found that there was a genuine issue of material fact as to the causal link between his political views and his contract non-renewal, such that the motivation and justification offered by the defendants ought to be judged on their merits by a jury.[473]

The case went to trial before a jury in June 2009.[474] The jury found for the defendants.[475] Filozof moved for a new trial based on a *Batson* challenge[476] and challenged the trial court's granting of summary judgment on his Title VII claim, but the district court denied his motion.[477] Filozof appealed to the Second Circuit; the Second Circuit denied his appeal and affirmed the district court's judgment, finding his arguments without merit.[478]

---

[470] *Id.*
[471] *Id.* at 397.
[472] *Id.* at 397.
[473] *Id.* at 399–400.
[474] *Filozof v. Monroe Community College*, 411 Fed.Appx. 423, 424 (2d Cir. 2011).
[475] *Id.*
[476] A *Batson* challenge is a challenge to a racially discriminatory use of a preemptory challenge during jury selection. Discussed in *Id.* at 424-425. See also *Batson v. Kentucky*, 476 U.S. 79 (1986). There is a notable irony in a white male plaintiff alleging racial discrimination trying to get a new trial on the basis of a *Batson* challenge.
[477] *Id.*
[478] *Filozof*, 411 Fed.Appx. at 427.

4.2.8. Isenalumhe v. McDuffie

In this 2010 case against an associate dean and former department chair in Nursing at Medgar Evers College (CUNY), two professors (Isenalumhe, a full professor and Gumbs, an assistant professor with tenure) sued for violation of their First Amendment rights to freedom of speech when their criticisms and complaints about their department chair resulted in repeated retaliation.[479] The adverse employment actions in question included a non-teaching administrative position rather than a teaching assignment in Spring 2005 (Gumbs), having personal property stored in a locked office/cabinet to which only the department chair (McDuffie) had the key and refused to open it for them (both), not providing plaintiffs with proper offices or keys to their offices (both), reassignment of preferred courses to less senior faculty (Isenalumhe), and assigning Isenalumhe to a course he was unqualified to teach.[480]

The United States District Court for the Eastern District of New York categorized the allegedly protected speech according to a recent Second Circuit application of *Garcetti*.[481] The court began by categorizing complaints into pre-lawsuit and post-lawsuit speech.[482] Within pre-lawsuit speech, the plaintiff's complaints made in their capacity as committee members as well as their complaints to the faculty union representative and grievance officer were found to not have citizen analogues and thus were made as employees.[483]The third category was formal grievances and chain of command

---

[479] *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367, 369–70 (E.D.N.Y. 2010).
[480] *Id.* at 374.
[481] *Id.* at 376. See specifically, *Weintraub v. Board of Educ. of City of New York*, 593 F. 3d 196 (2d Cir. 2008).
[482] *Isenalumhe v. McDuffie*, 697 F. Supp. 2d at 378.
[483] *Id.*

complaints, which the judge assumed arguendo were made as citizens, but then concluded that this speech did not involve matters of public concern.[484]

The judge acknowledged that the plaintiffs gave reasonable explanations of how their speech did involve matters of public concern, "Isenalumhe asserted that assigning him to teach medical-surgical nursing put patients at risk; Gumbs contended that her administrative assignment violated CUNY bylaws, and that having to leave her door unlocked compromised security."[485] However, the court continued "But to allow these isolated comments to outweigh the overriding personal nature of the complaints would indulge the forbidden presumption that 'all matters which transpire within a government office are of public concern.'"[486] The court then dismissed the post-lawsuit speech because that speech "bore no connection to what they claim as stand-alone adverse employment actions."[487] Likewise, the court stated that for a retaliatory hostile environment theory to be actionable, it must be "severe and pervasive" enough to "deter an individual of ordinary firmness … from exercising his free speech rights."[488] Apparently, the court found that because there was no further retaliation after the filing of the lawsuit, the severe and pervasive standard was not met.[489] Yet, the court then drew the direct comparison between another CUNY case (see section 4.2.4. above) writing, "in *Ezuma*, Judge Cogan described the dispute between plaintiff and defendant as 'open academic warfare.' The metaphor is equally apt here: What began as plaintiffs'

---

[484] *Id.* at 379.
[485] *Id.* at 380.
[486] *Id.*
[487] *Id.*
[488] *Id.*
[489] *Id.* at 381.

displeasure with McDuffie's appointment has become a nearly ten-year war of attrition."[490] The court recognized the plaintiffs' complaints about their department very well may have been justified, but in this case, "the First Amendment does not transform a federal court into a battleground for their resolution."[491] The court thus granted the defendants' motion for summary judgment.[492]

4.2.9. Kohlhausen v. SUNY Rockland Community College

In *Kohlhausen v. SUNY Rockland Community College,* Kohlhausen was a tenure-track philosophy professor and chair of the philosophy and religious studies department.[493] Her direct supervisor and chair of the humanities, Ian Blake Newhem, allegedly rained an onslaught of bile and harassment upon her daily.[494] Witnesses also saw Newhem allegedly walking around the plaintiff's car the day her tires were slashed.[495] Furthermore, Kohlhausen received harassing phone calls from an anonymous caller for months.[496] Kohlhausen reported Newhem's behavior and through her attorney requested a formal investigation.[497] Kohlhausen also reported a series of disruptive incidents by a student in her class to her coworkers and to the appropriate administrator according to school policy.[498] Kohlhausen copied her supervisors on this report, and they

---

[490] *Id.* citing; *Ezuma v. City University of New York*, 665 F. Supp. 2d 116, 130 (E.D.N.Y. 2009). The use of the metaphor of open warfare immediately after saying such a hostile work environment is not "severe and pervasive" is such a lesson in daftness and obliviousness that it defies description. If workplaces are legally permitted to be rife with "open warfare" within our own nation, it seems our department of defense is not doing a very good job of keeping the peace.
[491] *Isenalumhe v. McDuffie*, 697 F. Supp. 2d at 381.
[492] *Id.*
[493] *Kohlhausen v. Suny Rockland Cmty. College*, 2011 U.S. Dist. LEXIS 42055 1, *3 (S.D.N.Y.).
[494] *Id.* at *3-*4. It appears that Newhem has since left his teaching career behind to start his own ghostwriting firm. See, https://www.wcwriters.com/faculty/Newhem_Ian_Blake/index.html.
[495] *Id.* at *6.
[496] *Id.* at *7.
[497] *Id.* at *7-8.
[498] *Id.* at *8.

questioned some of Kohlhausen's students.[499] A month after Kohlhausen's report of the student's disruption, the college president told Kohlhausen that the investigation into Newhem's behavior had concluded without finding any corroborating evidence of her allegations of harassment and retaliation.[500] Little more than one week later, "campus officials came to Kohlhausen's classroom, told her that she had been suspended for the remainder of the academic year, and publicly escorted her off campus. [501] The school said it was suspending Kohlhausen because she had fabricated the '[student issue]' and could not function in SUNY Rockland's collegial environment." [502] Kohlhausen's reappointment was permanently rescinded just two weeks later. [503] Kohlhausen filed the federal lawsuit claiming First Amendment retaliation, along with discrimination and retaliation in violation of Title VII, Title IX and the Fourteenth Amendment.[504]

The court found that the institution was entitled to sovereign immunity in the First Amendment claim, because there was no ongoing violation after Kohlhausen's termination.[505] The free speech retaliation claims against the administrators in their individual capacities survived the motion to dismiss to the extent they were based on Kohlhausen's speech to her colleagues about the student disruption issue.[506] The court applied *Garcetti*, finding that Kohlhausen's speech related to the disruptive student was made according to institutional policy and thus was employee speech without a citizen

---

[499] *Id.*
[500] *Id.*
[501] *Id.* at *9.
[502] *Id.*
[503] *Id.*
[504] *Id.*
[505] *Id.* at *24.
[506] *Id.* at *41.

analogue.[507] Kohlhausen argued that disciplining employees who report suspicious or disruptive behavior disincentivizes reporting; the court found this argument persuasive but explained, that the court "remains bound by the holding in *Garcetti* and its progeny, and thus, […] must dismiss Kohlhausen's First Amendment claims to the extent they stem from reports to her supervisors."[508] Kohlhausen's Title VII and Title IX claims against the institution also survived the motion to dismiss.[509]

4.2.10. Krukenkamp v. State University of New York at Stony Brook

Krukenkamp, a surgeon and former tenured professor of surgery, allegedly blew the whistle on some of the practices at the medical school at SUNY Stony Brook and settled his first lawsuit with SUNY Stony Brook in 2005 for over $2 million.[510] Two years later, Krukenkamp sued again, claiming that the university and medical center retaliated against him in violation of his First Amendment rights (and their signed settlement agreement) after he publicly criticized the state investigation into the medical center's pediatric program.[511] The Second Circuit Court of Appeals ruled on the case in 2010, finding that Krukenkamp had alleged multiple adverse employment actions that a jury could find to have been motivated by his protected speech. [512] Therefore, issues of material fact persisted, so the Circuit Court vacated the district court's grant of summary

---

[507] *Id.* at *39-40.
[508] *Id.* at *41-42.
[509] *Id.* at *49-50. The case was settled in 2011.
[510] *Krukenkamp v. SUNY at Stony Brook*, 2009 WL 10701322, at *1 (E.D.N.Y. Oct. 26, 2009); 2010 395 Fed. Appx. 747, 748–49 (2d Cir.).
[511] *Krukenkamp*, 2010 395 Fed. Appx. at 749.
[512] *Id.* at 751.

judgment in favor of the defendants.[513] The case was eventually settled in 2011 for an additional $150,000 paid to Krukenkamp.[514]

4.2.11. Martin v. Bailey

In *Martin v. Bailey* an adjunct at Southern Connecticut State University (SCSU) had fabricated the majority of his CV from the time he was first hired in 2002; when in Fall 2010 his colleagues failed to find the articles listed under his publications they reported him to human resources.[515] His contract was not renewed after the Fall 2010 semester.[516] While, inarguably, the school should have conducted the investigation into his curriculum vitae prior to hiring him, the fact that they detected the fraud and removed him from his position for it was more than adequate justification.[517] Nevertheless, Martin alleged that he was actually not renewed because at the close of the 2010 spring semester, he had met with a Connecticut state representative (Villano) in his home and discussed with him "issues related to SCSU's governance and spending."[518] He had subsequently told one of his colleagues about this meeting, and alleged that this meeting was the true reason for the non-renewal of his contract.[519]

The court found that Bailey, the associate vice president of human resources and labor relations who oversaw the investigation into Martin, had no knowledge of Martin's allegedly protected speech until Martin filed this lawsuit.[520] The court concluded, "There

---

[513] *Id.*
[514] Order Dismissing Case, *Krukenkamp v. State University of New York at Stony Brook*, No. 07-cv-00992, Doc. 117 (E.D.N.Y. Jul. 8, 2013), https://www.courtlistener.com/docket/4319177/krukenkamp-v-state/#entry-117.
[515] *Martin v. Bailey*, 2015 WL 927716 1, *1 (D. Conn. 2015).
[516] *Id.* at *2.
[517] *Id.* at *4.
[518] *Id.* at *1.
[519] *Id.*
[520] *Id.* at *3.

can be no serious question that the preponderance of evidence shows that plaintiff's employment at SCSU ended at the close of the Fall 2010 semester because of his gross misrepresentations as to his educational background and publications."[521] The court thus granted the defendants' motion for summary judgment. [522]

4.2.12. Mtshali v. New York City College of Technology

In this case, Mtshali, an adjunct professor of African American Literature at New York City College of Technology, applied for two openings for tenure-track assistant professors in the same department where he was teaching knowing that his adjunct role would be eliminated once the full-time faculty members were hired.[523] Mtshali was a finalist among 3 candidates, but in April 2003 the other two finalists were offered the positions.[524] In June 2003 Mtshali spoke as a citizen on a matter of public concern when discussing with coworkers his support for the Iraq War and Colin Powell—a stance his colleagues found distasteful. [525] Mtshali alleged that shortly thereafter the chair of his department told him he would never get a tenure-track appointment in their department because of his support of the war in Iraq. [526] Mtshali filed a lawsuit *pro se* and his §1983 claim survived the defendants' motion to dismiss.[527] The defendants then filed a motion for summary judgment, and the magistrate judge recommended that the district court dismiss all claims with prejudice and grant the defendant's motion for summary

---

[521] *Id.* at *4.
[522] *Id.*
[523] *Mtshali v. New York City College of Technology*, 2008 WL 4755681, *2 (S.D.N.Y. 2008).
[524] *Id.* at *3.
[525] *Id.*
[526] *Id.*
[527] *Id.* at *4.

judgment.[528] The evidence showed that Mtshali was not hired for a tenure-track position because the dean believed the other two finalists for the position were more qualified based on their credentials.[529] Specifically, the dean noted that Mtshali had fewer recent publications and/or ongoing research projects than the other two candidates, as well as noting that Mtshali's doctorate was not in literature but instead in applied linguistics, which the dean felt was less appropriate for a position focused on African American literature.[530] In analyzing the §1983 claim, the court found that the evidence demonstrated that Mtshali's protected speech occurred after the hiring decisions had already been made.[531] Thus, the court stated that "no reasonable fact-finder could conclude that defendants' decision was motivated by [Mtshali's] speech."[532] Finally, the court noted that "academic decisions concerning personnel are entitled to deference when those decisions are not substantial departures from accepted academic norms."[533] In other words, the rationale for hiring the two other candidates over Mtshali was reasonably aligned with academic norms and thus the court should defer to such reasonable academic judgments. The district court adopted the magistrate's recommendations and thus granted the defendants' motion for summary judgment.[534]

---

[528] *Id.* at *9.
[529] *Id.* at *3.
[530] *Id.* The difference between applied linguistics/language disciplines and literature has been known to cause issues in other cases as well (see, *Reiff v. Board of Regents of the University of Wisconsin-System*, 2014 WL 4546041 1, *10-11 (W.D. Wis. 2014) in which a literature professor and a language professor within the same department were compensated differently which the plaintiff attributed to sex discrimination, but the administration attributed to differences in the average salary within the disciplines.).
[531] *Mtshali v. New York City College of Technology*, 2008 WL 4755681, *6.
[532] *Id.* at *7.
[533] *Id.* at *8.
[534] *Id.* at *9.

4.2.13. Rehman v. State University of New York at Stony Brook

In this case, Dr. Rehman was an Assistant Professor of Urology in the School of Medicine at SUNY Stony Brook.[535] Rehman claimed that his department chair repeatedly and wrongly refused to put him up for tenure and promotion.[536] Rehman alleged severe and pervasive mistreatment by his department chair whom Rehman contended had referred to Rehman's religion and race as reasons for such treatment.[537] Some of the alleged mistreatment included "patient safety issues, such as the disruption of the plaintiff's surgeries, the withholding of instruments from the plaintiff during his surgeries, and the knowing falsification of the credentials of certain department members."[538] Rehman wrote a letter to the university president explaining the discrimination he had endured; shortly thereafter, his department chair continued to retaliate until Rehman received a notice of his non-renewal for the following academic year.[539]

The district court found, "that the plaintiff's complaints to Kenny, the President of SUNY Stony Brook, and others regarding billing practices, safety concerns, and credentialing of department members in the Medical Center were related to matters of public welfare, rather than merely to his own grievances, and are sufficient to survive the present motion to dismiss."[540] In assessing Rehman's First Amendment claim, the court cited *Garcetti*, but also noted that Rehman's "primary duties are as physician and

---

[535] *Rehman v. State University of New York at Stony Brook*, 596 F.Supp.2d 643, 647 (E.D.N.Y. 2009).
[536] *Id.* at 647–48.
[537] *Id.* at 648.
[538] *Id.*
[539] *Id.* at 648–49.
[540] *Id.* at 656.

professor" meaning that when he spoke about hospital practices that "was not dictated directly by his duties" and could instead "be viewed as citizen's speech on a matter of public concern."[541] After the defendant's motion to dismiss was denied, the case was settled prior to a jury trial for $250,000.[542]

4.2.14. Shub v. Westchester Community College

In this case, a former tenured associate professor of mathematics failed to show there were disputes over issues of material fact when Westchester Community College was granted summary judgment on his First Amendment claim.[543] Shub claimed he retired in 1999 under a NY state early retirement statute, but WCC claimed Shub resigned in compliance with a settlement in exchange for WCC dropping the charges of sexual harassment against him.[544] Seven years later, he applied for an adjunct position and was denied the position. A legal battle ensued.[545] The union's grievance was

---

[541] *Id.*

[542] Executed Settlement Agreement and General Release at 3, *Rehman M.D. v. State University of New York at Stony Brook*, No. 2:08-cv-00326, Doc. 75-1 (E.D.N.Y.), https://www.courtlistener.com/docket/12704232/rehman-md-v-state/.

[543] *Shub v. Westchester Community College*, 556 F. Supp. 2d 227, 231 (S.D.N.Y. 2008).

[544] *Id.* at 234. The court explained the 1990's sexual harassment claims, writing, "The allegations [against Shub] included complaints that plaintiff: chased a former student in his car; created a petition, for personal reasons, that he claimed was signed by his students; invited a female student to an off-campus meeting at a restaurant where he was the only other person present, asked this student to kiss him, invited her to come to his house and also to go out for a drink and asked her what she would do for an "A" and invited another female student to his house to pick up a recommendation, appeared in his bathrobe when she arrived at the appointed time, and put his arm around her and tried to kiss her. Based on this, the arbitrator determined in a 1990 decision that plaintiff engaged in conduct unbecoming an employee. In this context, the fact that Hankin sought plaintiff's termination is not enough to establish a retaliatory motive for bringing the disciplinary action and cannot serve as an act of retaliation itself." *Id.* at 247.

[545] The college argued that he resigned in accordance with a settlement of prior litigation, which is why they originally denied him the adjunct position. *Id.* at 235. The prior litigation dealt with the fact that Shub had been accused by multiple students of sexual harassment and the institution had asked him to retire rather than continue potentially harassing female students. *Id.* at 247-48. When Shub was denied the adjunct position, he filed a grievance with the union and a federal suit under First Amendment, ADEA discrimination and ADEA retaliation. *Id.* at 231. The County requested that the Supreme Court of New York (County of Westchester) declare Shub's grievance was barred by the prior settlement. *Id.* at 235. The court found that the settlement in question did not explicitly preclude Shub from consideration for future employment. *Id.*

sustained by an arbitrator and Shub was found to be entitled not only to consideration for future employment (on the priority consideration list, per the collective-bargaining agreement, but also for back pay for the semesters that the college had not assigned him courses.[546] Shub received nearly $65,000 in backpay and then was assigned courses as an adjunct from Fall 2002-Fall 2004; he did not teach in 2005.[547]

In Spring 2006, there was an unexpected need for immediate coverage of two sections of a statistics course and one algebra course.[548] Shub and two other applicants were considered for the position.[549] One of the other applicants, Mucci, had taught two consecutive semesters in the previous academic year, and had already been assigned a section of the same statistics course for the same semester.[550] While Mucci's formal education was in engineering rather than mathematics, he was certainly qualified to teach the courses in question.[551] The collective-bargaining agreement stated that "those adjunct faculty who choose not to teach at all for three consecutive semesters (including summer) will be removed from the priority list."[552]

Upon receiving the applications, the adjunct coordinator forwarded the applicants' names to the department chair and to the academic dean who asked if Shub had taught in the last three semesters. [553] The department chair informed the dean that Shub had not taught in the last three semesters, so the dean stated he was no longer on the priority list

---

[546] *Shub v. Westchester Community College*, 556 F. Supp. 2d at 235–36.
[547] *Id.* at 236.
[548] *Id.*
[549] *Id.*
[550] *Id.* at 237.
[551] *Id.*
[552] *Id.*
[553] *Id.*

(per the collective-bargaining agreement); the dean said Mucci would be a better fit since he was already teaching a section of the same course.[554] The final decisionmaker was the department chair, and he decided to hire Mucci. [555] Shub's union grievances were still ongoing.[556]Shub filed his lawsuit after he was not hired to teach in Spring 2006 or any semester after that, arguing, among other things, that as a retiree he should still have been on the priority list, and that he had been retaliated against for his protected speech. The protected speech allegedly consisted of multiple instances in which the plaintiff criticized the current college president during the time Shub was a union leader—decades prior to his retirement, along with his previous civil rights action.[557]

Shub's ADEA claim survived summary judgment; however, on the other two claims summary judgment was awarded to the college.[558] In analyzing the First Amendment retaliation claim, the district court found that like *Garcetti*, Shub had spoken "pursuant to his employment responsibilities," but additionally that Shub's speech did not address matters of public concern.[559] Furthermore, the court found that Shub's attempt to draw a causal connection between his speech in the 1970's and 1980's as a union leader and his denial of the adjunct position in 2006 failed.[560] Finally, the defendants showed that they would have made the decision regardless of Shub's protected activities, and Shub could not produce any evidence to rebut that showing.[561] The court therefore

---

[554] *Id.*
[555] *Id.*
[556] *Id.* at 240–41.
[557] *Id.* at 233, 241.
[558] *Id.* at 231.
[559] *Id.* at 245–46.
[560] *Id.* at 247–48.
[561] *Id.* at 251.

granted the defendants' motion for summary judgment as to the First Amendment retaliation claim.[562]

4.2.15. Weinstein v. University of Connecticut

This case included four different decisions related to the defendants' motion for summary judgment, two at the district court level and two at the appeals court level. The plaintiff, Weinstein, was an "Assistant Professor in Residence" a non-tenure-track full-time position in the management department of the business school at the University of Connecticut.[563] Weinstein also held the title of "Director of the Innovation Accelerator" (IA) which was an "experiential learning center" also within the school of business.[564] In this position, Weinstein sent an email raising concerns he had about changes with the IA model with various colleagues and the dean of the school of business who was instituting these changes.[565] The dean responded to the email (copying all the original recipients) by stating that the proper procedures had been followed to ensure there would be no issues and that he did not want any further "roadblocks" that would be "counterproductive to what we are trying to achieve."[566] Soon thereafter, Weinstein was notified that he would not be re-appointed to his faculty position.[567] Around the same time, Weinstein met with the Director of Compliance and raised a number of concerns related to what he believed to be misunderstandings in applications of the Institutional Review Board policies (by the director of research compliance) to IA programs and also to the department directed by

---

[562] *Id.* at 253.
[563] *Weinstein v. University of Connecticut*, 136 F.Supp.3d 221, 227 (D. Conn. 2016).
[564] *Id.*
[565] *Id.* at 229.
[566] *Id.*
[567] *Id.* at 230.

the dean's wife.[568] Weinstein also specifically spoke to the compliance director about his concern that when the dean appointed his wife to direct a center within the business school that constituted "a potential violation of state ethics rules due to nepotism."[569] The director of compliance later raised this issue with the dean.[570] The next month, the dean informed Weinstein he had been nominated to continue to serve as director of the IA, but that a search was required; Weinstein was informed he would need to submit a cover letter and resume for consideration.[571] Despite this invitation to apply, Weinstein did not submit a resume or letter of interest for the director position; the dean chose another candidate and Weinstein was informed soon thereafter.[572] Weinstein's retained his teaching position until his contract expired the next year.[573] Weinstein subsequently filed suit against the dean claiming, inter alia, violation of his First Amendment rights.[574]

The United States District Court for the District of Connecticut granted the defendant's motion for summary judgment. The district court determined according to the *Pickering* balancing test that while Weinstein had spoken as a citizen on a matter of public concern,[575] the university's interest outweighed Weinstein's interest.[576] Specifically, the court found the university's interest in allowing the dean to discharge his duties and to prioritize faculty morale outweighed Weinstein's interest in the renewal of his contract.[577] Importantly, the court noted that "due to [Weinstein's] high-level position,

---

[568] *Id.* at 229.
[569] *Id.*
[570] *Id.*
[571] *Id.* at 230.
[572] *Id.*
[573] *Id.*
[574] *Id.* at 226.
[575] *Id.* at 232–33.
[576] *Id.* at 234.
[577] *Id.*

[his] criticism of Dean Earley and his appointments had the potential to undermine his authority as dean and his capacity to continue to set policies for the Business School." [578] Furthermore, the district court ruled that the dean was entitled to qualified immunity in light of the fact that Weinstein's complaint about nepotism "spurred an investigation, potentially undermining the Dean's authority on making appointment decisions" and that the dean was therefore justified in treating Weinstein's speech as unprotected.[579]

Weinstein appealed the ruling to the Second Circuit Court of Appeals; the Second Circuit affirmed the district court's ruling on the issues relating to Weinstein's non-renewal as IA director.[580] However, the Second Circuit found that the district court had not ruled on Weinstein's claim relating to the non-renewal of his assistant professor/faculty position.[581] Furthermore, the Circuit Court acknowledged that the district court had not considered Weinstein's grievance filed after the adverse director decision but before his faculty contract ended.[582] The Second Circuit vacated and remanded the remaining summary judgment decision to the lower court for consideration.[583]

On remand, the district court determined: first that the "grievance" speech was a personal grievance not touching on a matter of public concern;[584] and second that Weinstein spoke as an employee since the grievance procedure offered no citizen

---

[578] *Id.* It is not clear why the court was under the impression that a non-tenure-track assistant professor and/or learning center director could be considered an especially "high-level" position.
[579] *Id.* at 235.
[580] *Weinstein v. University of Connecticut*, 676 Fed.Appx. 42, 44–45 (2d Cir. 2017).
[581] *Id.* at 45.
[582] *Id.*
[583] *Id.* at 46.
[584] *Weinstein v. Earley*, 2017 WL 4953901, at *6 (D. Conn. Nov. 1, 2017).

analogue;[585] third, the government interest outweighed Weinstein's interest in free speech;[586] and, fourth, the dean's defense—that he would have taken the same action absent the protected speech—was sufficient to warrant summary judgment.[587] In brief, the trial court assessed the *Garcetti*, *Connick*, and *Pickering* questions and at each stage found the complaint failed to constitute a prima facie case of First Amendment retaliation.

Once again, Weinstein appealed. On appeal, Weinstein argued that the district court had "improperly decided disputed issues of fact in applying the interest-balancing framework" but the Second Circuit determined they need not decide those issues because the dean was entitled to qualified immunity.[588] The Second Circuit stated that reasonably competent officials could at best disagree as to whether or not Weinstein's complaints were addressing a matter of public concern.[589] The Second Circuit thus affirmed the judgment of the district court.[590]

4.2.16. Zelnik v. Fashion Institute of Technology

This is a case in which the plaintiff, Zelnik, sought emeritus status after retiring as a full professor from New York City's Fashion Institute of Technology (FIT).[591] Zelnik was nominated for emeritus status twice by his department and denied both times.[592]

---

[585] *Id.* at *7.
[586] *Id.* at *8-9.
[587] *Id.* at *9.
[588] *Weinstein v. University of Connecticut*, 753 Fed.Appx. 66, 67 (2d Cir. 2018).
[589] *Id.* at 68.
[590] *Id.* This case took way too long to summarize.
[591] *Zelnik v. Fashion Institute of Technology*, 464 F. 3d 217, 219 (2d Cir. 2006). Zelnik had worked as an adjunct at FIT after his retirement (*Id.* at 219) and FIT acknowledged that Zelnik was an employee even though he was retired. *Id.* at 225.
[592] *Id.* at 221–24.

Zelnik sued under the First Amendment[593] because the reason given by FIT for his denying emeritus status was his "slanderous" citizen speech about a proposed project for FIT's campus on a block on which he also owns property.[594] While the institution conceded that the speech was clearly made by a citizen on a matter of public concern, the case was dismissed because, "according to the court, Zelnik failed to demonstrate that denial of emeritus status was a materially adverse change in the terms and conditions of employment."[595] Emeritus status at FIT was determined by the Second Circuit not to be a material change in terms and conditions of employment as the entitlements of retired professors were found to be the same as emeriti.[596] Defendants argued that the emeritus title was simply honorific and carried no benefits.[597] The Second Circuit affirmed the district court's finding that no "jury could conclude that the denial of, or the refusal to consider for, emeritus status would deter an individual of ordinary firmness, situated similarly to Zelnik, from exercising his free speech rights under the facts in this case."[598] The court couched this finding as context-dependent and refused to establish any standard about emeritus status within this opinion, recognizing that many institutions do indeed confer real and material benefits through emeritus status.[599] Thus the court granted summary judgment for FIT, finding that Zelnik failed to allege an adverse employment action in retaliation for his protected speech.[600]

---

[593] *Id.* at 219.
[594] *Id.* at 223.
[595] *Id.* at 224.
[596] *Id.* at 227.
[597] *Id.*
[598] *Id.*
[599] *Id.* at 228.
[600] *Id.* at 224–29.

4.2.17. Conclusion

As detailed in the case summaries above, courts in the Second Circuit have found that faculty speech is protected (under *Garcetti* and *Connick*) when faculty members testified in court,[601] when they reported safety concerns to their colleagues (rather than her supervisors),[602] when they criticized the university in the media,[603] when they openly supported an ongoing war,[604] when they voiced concerns regarding patient safety,[605] and when they publicly opposed a college building project.[606] Nevertheless, all but one of these cases were still decided in the defendants' favor.[607] The plaintiffs often failed because their speech was not protected from the beginning[608] or because they could not establish an appropriate causal link between the protected speech and the adverse actions.[609]

4.3. Third Circuit

The Third Circuit application of *Garcetti v. Ceballos* importantly leaves open the possibility of an academic exception for scholarship,[610] though it has stated that judicial

---

[601] *Appel v. Spiridon*, 2d Cir. Summary Order, 521 Fed. Appx. 9 (Mar. 27, 2013 Mar. 27, 2013) (No. 1223250).
[602] *Kohlhausen v. Suny Rockland Cmty. College*, 2011 U.S. Dist. LEXIS 42055 1 (S.D.N.Y.).
[603] *Krukenkamp v. State University of New York at Stony Brook*, 2010 395 Fed. Appx. 747 (2d Cir.).
[604] *Mtshali v. New York City College of Technology*, 2008 WL 4755681 (S.D.N.Y. 2008).
[605] *Rehman v. State University of New York at Stony Brook*, 596 F.Supp.2d 643 (E.D.N.Y. 2009).
[606] *Zelnik v. Fashion Institute of Technology*, 464 F. 3d 217 (2d Cir. 2006).
[607] The only notable exception being *Rehman*, 596 F.Supp.2d 643.
[608] *Bhattacharya v. Rockland Community College*, 719 Fed. Appx. 26 (Summary Order) (2d Cir. 2017); *Ezuma v. City University of New York*, 367 F. App'x 178; *Faghri v. University of Connecticut*, 621 F. 3d 92 (2d Cir.); *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367 (E.D.N.Y. 2010); *Weinstein v. University of Connecticut*, 676 Fed.Appx. 42 (2d Cir. 2017).
[609] *Mtshali v. New York City College of Technology*, 2008 WL 4755681; *Appel v. Spiridon*, 2d Cir. Summary Order, 521 Fed. Appx. 9 (Mar. 27, 2013 Mar. 27, 2013) (No. 1223250) (later the jury found for the defendants); *Shub v. Westchester Community College*, 556 F. Supp. 2d 227 (2008); *Martin v. Bailey*, 2015 WL 927716 1 (D. Conn. 2015).
[610] *Gorum v. Sessoms*, 561 F. 3d 179, 186 (3d Cir. 2009); *Lada v. Delaware County Community College*, No. 08–cv–4754, 2009 WL 3217183, at *4 (E.D. Pa. Sep. 30, 2009).

deference for teaching-related speech inheres to the institution.[611] Nevertheless, how courts apply *Garcetti* to service and shared governance related speech has differed even within the same district courts. For example, in the 2014 case, *Golovan v. University of Delaware*[612] an assistant professor in the department of animal and food sciences alleged first amendment retaliation by his department chair for speaking out about a colleague's inappropriately intimate relationship with a female graduate student.[613] The Second or First Circuits may well have considered this case a complaint reasonably made by a citizen, but this court held that the Third Circuit sees complaints up the chain of command (about issues related to an employee's workplace duties, safety issues or misconduct by coworkers), as within an employee's official duties.[614] The plaintiff's complaint apparently stated that he made the statement pursuant to the university's antidiscrimination and harassment policy, because he was "required to report said violations."[615]

The answer to whether the speech in this case involved a matter of public concern was quite simple; the court wrote, "there is no doubt that Plaintiffs [*sic*] report addressed a matter of public concern."[616] While Golovan's claim failed to survive the defendants'

---

[611] *Howell v. Millersville University of Pennsylvania*, 749 Fed. Appx. 130. (stating that "a teacher has no constitutional right to "choos[e] [her] own...classroom management techniques in contravention of school policy or dictates" at 136; affirming *Howell v. Millersville University of Pennsylvania*, 283 F. Supp. 3d 309, 339 (United States District Court, E.D. Pennsylvania. 2017) stating that, "the institution, not the teacher, has control over [...] 'who may teach, what may be taught, how it shall be taught, ad who may be admitted to study.'").
[612] *Golovan v. University of Delaware*, 73 F. Supp. 3d 442 (D. Del. 2014).
[613] *Id.* at 448.
[614] *Id.* at 454.
[615] *Id.* This is the aspect that the court in *Bowers* cited in contrast to *Golovan*, wherein Bowers claimed she was not required by any job duty to make the speech she made (or at the very least this question of whether she was required to speak in this capacity was a genuine issue of material fact for a jury to decide). *Bowers v. University of Delaware*, 2020 WL 7025090, at *5 (D. Del. Nov. 30, 2020).
[616] *Golovan v. University of Delaware*, 73 F. Supp. 3d at 454.

motion for summary judgment for other reasons (plaintiff could not establish a causal link between his non-renewal and his harassment reporting), the court's unequivocal application of Third Circuit precedent to state that any "complaints up the chain of command about issues related to an employee's workplace duties-for example, possible safety issues or misconduct by other employees-are within an employee's official duties"[617] is nonetheless concerning because it could potentially be used against faculty who are supporting and carrying out the educational mission when it is most necessary—when doing so is at odds with administrative priorities or demands.

Overall, the Third Circuit jurisprudence has been shaped most by the decision *Gorum v. Sessoms*, [618] as well as many cases (nine out of fifteen) that were brought against individual universities within the Pennsylvania State System of Higher Education (PASSHE).[619] Multiple cases against PASSHE schools involved faculty who blew the whistle on inconsistent or illegal hiring procedures.[620] *Gorum*, as the earliest post-*Garcetti* faculty speech case, set the precedent for the rest of the circuit by leaving open the possibility for an academic exception for teaching and scholarship, but ruling out any exception for service-related speech. The Third Circuit cases are discussed in alphabetical order.

---

[617] *Id.* (citations omitted).
[618] *Gorum v. Sessoms*, 561 F. 3d 179 (3d Cir. 2009).
[619] *Gadling-Cole v. West Chester University*, 868 F.Supp.2d 390 (E.D. Pa. 2012); *Howell v. Millersville University of Pennsylvania*, 749 Fed. Appx. 130 (2018); *Kahan v. Slippery Rock University of Pennsylvania*, 664 Fed.Appx. 170 (2016); *Kazar v. Slippery Rock University of Pennsylvania.*, 679 Fed. Appx. 156 (3d Cir. 2017); *Meyers v. California University of Pennsylvania*, 2014 WL 3890357 1 (W.D. Pa.); *Patra v. Pennsylvania State System of Higher Education*, 779 Fed.Appx. 105; *Plouffe v. Cevallos*, 777 Fed. Appx. 594 (3d Cir. 2019); *Shearn v. West Chester University of Pennsylvania*, 2017 WL 1397236 1 (4/19/17); *Toth v. California University of Pennsylvania*, 844 F. Supp. 2d 611 (W.D. Pa. 2012).
[620] *Gadling-Cole*, 868 F.Supp.2d 390; *Meyers v. California University of Pennsylvania*, 2014 WL 3890357 1; *Plouffe v. Cevallos*, 777 Fed. Appx. 594; *Shearn v. West Chester University of Pennsylvania*, 2017 WL 1397236 1.

4.3.1. Bowers v. University of Delaware

In this case, Bowers was an associate professor of finance at the University of Delaware who sued her institution and two administrators (vice provost and department chair) for retaliating against her in violation of the First Amendment.[621] Bowers stated that while she was a department chair, she reported a colleague's racist comments and noted them in his annual evaluation, and she participated in grievance proceedings brought by her colleague. Bowers contended this was protected speech for which she had been mistreated by her superiors.[622] Allegedly, the defendants retaliated by placing Bowers on involuntary leave, not allowing her to teach during that leave, and defaming her and thus forcing her into an early retirement.[623] The defendants moved to dismiss her complaint for failure to state a claim, and because the claims were barred by the statute of limitations.[624]

In construing the evidence in the light most favorable to Bowers, the District Court for the District of Delaware found that Bowers spoke as a citizen when she went above and beyond her duties to report her colleague's racist comments while she was his department chair.[625] The court likewise concluded that in the private arbitration resulting from her colleague's grievance, Bower's speech was also made as a citizen.[626]

In analyzing whether the complaint established a causal link, the swift succession of the retaliatory acts of the vice provost Kinservik (brushing off her complaints, forcing

---

[621] *Bowers v. University of Delaware*, 2020 WL 7025090, at *1-2 (D. Del. Nov. 30, 2020).
[622] *Id.*
[623] *Id.*
[624] *Id.* at *2.
[625] *Id.* at *5.
[626] *Id.* at *6.

her to undergo psychological testing, and forcing her into an ultimatum of voluntary leave or possible termination) was sufficient for the court to deny the motion to dismiss.[627] The court also recognized that Kinservik's "disparaging comments" about Bowers to other professors could suggest a retaliatory animus (motivating factor).[628] Thus the court denied defendant Kinservik's motion to dismiss.[629]

Regarding the claims against the second defendant (the new department chair), the court determined there was no evidence that the department chair had been aware of Bowers' protected speech when her request to teach during her leave was denied by the department chair.[630] The judge offered the plaintiff leave to file a second amended complaint to address these deficiencies in her first (pro se) filing.[631] The parties filed a joint stipulation of dismissal on June 15, 2022 and the case was terminated the same day.[632]

4.3.2. Gadling-Cole v. West Chester University

This was a case brought by Gadling-Cole, a Black woman social work professor who applied for a tenure-track job in the department where she had been working as an adjunct, only to be denied the position due to her political/religious stance on LGBTQ

---

[627] *Id.* at *7.
[628] *Id.*
[629] *Id.*
[630] *Id.*
[631] *Id.*
[632] See database, *Bowers v. University of Delaware, 1:19-Cv-01883 – CourtListener.Com*, RECAP, https://www.courtlistener.com/docket/16302571/bowers-v-university-of-delaware/ (last visited Jun. 17, 2022).

rights.[633] The case was decided in 2012 (prior to *Obergefell*).[634] The rest of the social work department allegedly targeted her for her religious views.[635] Whether or not the plaintiff's views were ever relevant to her work or her interactions with her colleagues is unclear from the record, but the colleagues were united in their belief that she should not be hired due to her failure to vocally support LGBTQ people.[636] Gadling-Cole also alleged that when she made complaints of racial discrimination, that speech was protected activity.[637] The court found that Gadling-Cole had not shown sufficient evidence that her complaints about racial discrimination were a substantial or motivating factor in the adverse employment actions.[638] Thus, the district court dismissed her First Amendment claim.[639]

4.3.3. Golovan v. University of Delaware

In this case, Golovan, an assistant professor in the College of Agriculture and Natural Resources at the University of Delaware, claimed he had reported an inappropriate relationship between a professor and a student and was subsequently retaliated against.[640] Golovan had reason to believe one of his colleagues was having an

---

[633] *Gadling-Cole v. West Chester University*, 868 F.Supp.2d 390, 392–93 (E.D. Pa. 2012).
[634] *Obergefell v. Hodges*, 576 U.S. 644 (2015). In *Obergefell*, the Supreme Court ruled that the Fourteenth Amendment to the U.S. Constitution protects a right to marriage, and that a marriage (and all the legal rights and privileges a marriage affords) between two people of the same sex or gender must be legally recognized throughout the United States. *Id.* at 644. Public opinion regarding LGBTQ rights has changed drastically and among people in all age cohorts over the last fifteen years; overall public support for same-sex marriage in 2018 was 67% compared to less than 50% in 2010 according to the General Social Survey. Jean M. Twenge & Andrew B. Blake, *Increased Support for Same-Sex Marriage in the US: Disentangling Age, Period, and Cohort Effects*, 68 JOURNAL OF HOMOSEXUALITY 1774, 1778 (Sep. 2021).
[635] *Gadling-Cole*, 868 F.Supp.2d at 392–93.
[636] *Id.* at 392.
[637] *Id.* at 400.
[638] *Id.*
[639] *Id.* Gadling-Cole's Title VII religious discrimination claim went before a jury and the defendants were found to have retaliated against her based on her religious beliefs. She was awarded $7,000.
[640] *Golovan v. University of Delaware*, 73 F. Supp. 3d 442, 448–49 (D. Del. 2014).

affair with a graduate student and reported his concern to the dean and the department chair.[641] Shortly thereafter, multiple members of the department, including the colleague whose relationships were of concern, treated Golovan with hostility. Golovan's contract was subsequently not renewed.[642] In other circuits (like the First or Second) Golovan's complaint reasonably may have been found to have been made by a citizen, but the district court for the District of Delaware stated that the Third Circuit precedent treats complaints up the chain of command (about issues related to an employee's workplace duties, safety issues or misconduct by coworkers) as within an employee's official duties.[643] Furthermore, Golovan's complaint stated that he reported his coworker pursuant to the university's antidiscrimination/harassment policy because he believed he was "required to report said violations."[644] Later, the same district court in *Bowers* distinguished Golovan's complaint from Bowers's, noting that Bowers did not allege that it was within her job duties or pursuant to policy that she report incidences of policy violations by colleagues.[645] Despite the court finding that Golovan's speech was not protected, the court continued to assess whether or not Golovan's complaint alleged a causal link between his speech and his non-renewal.[646] The court found that the university had shown adequate justification for his non-renewal by showing that Golovan's negative performance evaluations predated his protected activity; the record showed "three consecutive subpar annual appraisals and one lackluster two-year review"

---

[641] *Id.* at 448.
[642] *Id.* at 449.
[643] *Id.* at 454.
[644] *Id.*
[645] *Bowers v. University of Delaware*, 2020 WL 7025090, at *5 (D. Del. Nov. 30, 2020).
[646] *Golovan v. University of Delaware*, 73 F. Supp. 3d at 455.

in support of the defendants' legitimate justification.[647] The court thus granted summary judgment in favor of the defendants.[648]

4.3.4. Gorum v. Sessoms

In this case, Gorum, a tenured Delaware State University professor sued his institution and its president (Sessoms) for violating his First Amendment rights.[649] Gorum had changed 48 grades for student athletes (from incompletes, withdrawals, and failing grades to passing grades) without permission of the instructors-of-record, using his authority/capacity as department chair and was subsequently dismissed.[650] The grade changes were discovered when the university registrar initiated an audit "after learning of a grade irregularity in the transcript of a student athlete."[651] Gorum confessed to the changes but defended himself stating that this was common practice among department chairs.[652] Sessoms, the university president, was unconvinced and suspended him while starting dismissal proceedings.[653] Gorum requested a hearing before an ad-hoc disciplinary committee, which determined through discovery that Gorum had committed serious misconduct meriting "condemnation by the academic community."[654] Nevertheless, the committee did not recommend termination due to the general culture of "laxity" at DSU "that perpetuated and encouraged random and uncontrolled

---

[647] *Id.* at 455–56.
[648] *Id.* at 456.
[649] *Gorum v. Sessoms*, 2008 WL 399641 (D. Del. Feb. 12, 2008); 561 F. 3d 179 (3d Cir. 2009).
[650] *Gorum v. Sessoms*, 561 F. 3d at 182.
[651] *Id.*
[652] Id.
[653] Id.
[654] *Gorum v. Sessoms*, 561 F. 3d at 182–83.

manipulations of student grades."[655] The committee explicitly agreed with Gorum that this was a common practice at DSU, noting that he was "the scapegoat (albeit a blamable scapegoat)."[656] Still, the committee recommended serious discipline including a "two-year unpaid suspension, loss of his chair position, and a probationary period thereafter."[657] Sessoms rejected the committee's suggestions and instead dismissed Gorum for cause.[658]

Two years after his dismissal, Gorum filed his suit against Sessoms, claiming that on three occasions Gorum had engaged in speech protected by the First Amendment and it was for this speech that Sessoms had decided to punish him more harshly than the committee recommended.[659] Gorum first claimed that he helped a student athlete in a disciplinary case against him and that the president did not like that.[660] Second, Gorum had been a vocal dissenter in the vote to hire the president for his position.[661] Finally, in his capacity of faculty advisor of a fraternity, Gorum had cancelled the president's scheduled appearance at the fraternity's yearly prayer breakfast (because they had already scheduled another speaker).[662]

The Third Circuit Court of Appeals analyzed the speech claim in light of *Garcetti* and Third Circuit precedent, explaining that it has held "that a claimant's speech might be considered part of his official duties if it relates to 'special knowledge' or 'experience'

---

[655] *Id.* at 183.
[656] *Id.*
[657] *Id.*
[658] Id.
[659] Id.
[660] Id.
[661] Id.
[662] *Id.* at 184.

acquired through his job."[663] In applying this standard, the Third Circuit writes, "Under these prescriptions, Gorum's assistance of [his student] came within the scope of his official duties. It was Gorum's special knowledge of, and experience with, the DSU disciplinary code that made him 'de facto advisor to all DSU students with disciplinary problems.'"[664]

While the court acknowledged the potential carveout in *Garcetti*, it applied the official duties test in this case because it was very clear that the plaintiff's actions were not "speech related to scholarship or teaching."[665] The court found that assisting a student during a disciplinary hearing and revoking the prayer breakfast invitation were not matters of public concern.[666] This raises the issue of determining protection under an academic exception based on component aspects of the faculty job, rather than based on the speech's relationship to the educational mission. In the instances of speech cited by Gorum, he was serving the educational mission in his capacity as faculty member, advisor, or mentor.[667]

The court ruled that none of Gorum's speech was a substantial or motivating factor in the dismissal, and even if it had been, and if the speech had been protected, the court found dispositive that Sessoms would have recommended Gorum's termination

---

[663] *Gorum v. Sessoms*, 561 F. 3d 179, 185 (3d Cir. 2009) (citations omitted).
[664] *Id.* at 186.
[665] *Id.*
[666] I find this somewhat concerning if generalized past the particular facts of this case, as there are certainly arguments to be made that who speaks at events on campus, and how disciplinary matters proceed with student athletes are both matters of wider concern than simply between one or two people. By virtue of the involvement in both events of many various people, they are a matter of community concern, if not public concern fully.
[667] In no way do I mean to imply that Gorum's irresponsible and unethical changing of grades for which he was terminated was justified by the educational mission. I solely seek to point out that by stating that Gorum's legal arguments failed, the court's precedent is concerning if applied to other faculty—the majority of whom do not change dozens of students' grades without their instructor's permission.

irrespective of the hypothetically protected speech, because he believed strongly that Gorum's "highly reprehensible" conduct warranted nothing less than dismissal.[668]

4.3.5. Howell v. Millersville University of Pennsylvania

In this case, Howell, a choral director and professor of music, alleged he was denied promotion, demoted, and suffered a hostile work environment for various unconstitutional reasons, including in retaliation for his free speech. Howell was a professor at one PASSHE school but found out he would be retrenched, so he applied to the corresponding position (Choral Director) at Millersville, which was at the rank of Associate Professor.[669] PASSHE's collective-bargaining agreement only required that the plaintiff be minimally qualified for the position.[670] The faculty of Millersville's music department voted that he was not minimally qualified, despite his doctorate in music with a secondary concentration in choral conducting, because the job posting advertised the applicant at minimum should have completed all the requirements for a doctorate in choral conducting except the dissertation.[671] Despite the music faculty's belief that Howell was not qualified, the university president made the final decision and found Howell minimally qualified.[672] Thus Howell was hired into a department against their own recommendation. Unsurprisingly, the department members were not thrilled with the president's executive decision, and Howell's role as choral director was limited to the Men's Glee Club while an adjunct continued conducting the "more advanced choral

---

[668] *Gorum v. Sessoms*, 561 F. 3d at 188.
[669] *Howell v. Millersville University of Pennsylvania*, 283 F. Supp. 3d 309, 317 (E.D. Pa. 2017).
[670] *Id.*
[671] *Id.*
[672] *Id.*

ensembles."[673] In addition to the department chair's tight leash on Howell's activities, several members of the department met with the dean to complain about Howell as well.[674] This tension continued over the course of multiple years, during which the department faculty continued to express their beliefs that Howell was underqualified for his position.[675] Howell claimed the adverse employment actions he had suffered included, "denial of his promotion application, […] two [misconduct] investigations, a punitively heavy schedule during the 2016-2017 academic year, an interim evaluation for the 2017-2018 academic year, Department[*sic*] questioning of his academic credentials, limited performance opportunities, and a general pattern of antagonism."[676]

The defendants moved for summary judgment and the District Court for the Eastern District of Pennsylvania granted their motion in 2017.[677] Howell claimed that he was retaliated against for his protected speech which fell into four categories, according to the court:

1. Howell's internal criticisms of the music department's governance
2. Howell's social media posts
3. Howell's decisions allegedly made pursuant to academic freedom
4. Howell's 2016 grievance alleging age discrimination and mistreatment.[678]

The court found that Howell failed to establish that the first three categories were protected speech (either due to being made in an employment context rather than as a

---

[673] *Id.*
[674] *Id.* at 319.
[675] *Id.* at 320.
[676] *Id.* at 334.
[677] *Id.* at 316.
[678] *Id.* at 334.

citizen, or failing to address a matter of public concern).[679] Likewise, the court found that Howell failed to establish a causal link between any of the four categories of speech and the alleged retaliation.[680] Furthermore, the defendants showed that they would have taken the same actions had Howell not engaged in that speech.[681]

In 2018, the Third Circuit Court of Appeals affirmed the district court's decision.[682] The Third Circuit specifically affirmed the district court's reasoning that professors do not have a right to "choose [one's] own...classroom management techniques in contravention of school policy or dictates."[683] Overall, the Third Circuit concluded that Howell's speech was not protected, but even if it had been, there was no evidence of a causal link between the allegedly protected speech and the adverse employment actions.[684]

4.3.6. Jorjani v. New Jersey Institute of Technology

Jorjani, an adjunct philosophy professor, sued his employer, NJIT, for First Amendment retaliation when NJIT did not renew his contract.[685] Jorjani, a white supremacist, had been interviewed by someone posing as a graduate student investigating the silencing of alt-right voices in academia; Jorjani's statements in the recording were quoted in the New York Times.[686] The dean and president of NJIT issued a joint statement to the campus community after the story ran, asserting that, as a public

---

[679] *Id.*
[680] *Id.*
[681] *Id.*
[682] *Howell v. Millersville University of Pennsylvania*, 749 Fed. Appx. 130 (3d Cir. 2018).
[683] *Id.* at 136.
[684] *Id.*
[685] *Jorjani v. New Jersey Institute of Technology*, 2019 WL 1125594 (D.N.J. Mar. 12, 2019).
[686] *Id.* at *1.

institution, NJIT would do everything it could to protect the adjunct's freedom of speech and academic freedom while distancing the institution, wherever possible, from his "repugnant" claims.[687] Jorjani's original complaint asserted defamation claims which were dismissed for failure to state a claim.[688]

In an amended complaint, Jorjani claimed that the president and dean of the institution had committed a conspiracy to deny him his First Amendment rights by speaking about his protected speech and issuing a joint statement regarding his protected speech.[689] He also added tortious interference claims against other professors who spoke out against his views.[690] The defendants opposed Jorjani's "motion to amend, arguing the proposed claims are futile."[691] The court denied Jorjani's motion to amend the tortious interference claims.[692] When it came to the conspiracy claims, however, the district court stated that Jorjani need only "provide some factual basis to support the existence of [an] agreement and concerted action."[693] The district court did not address the First Amendment retaliation count yet, noting in a footnote that the court "takes no view" on whether or not there had been a First Amendment violation.[694]

In 2020, Jorjani filed another lawsuit against numerous administrators in a second-but-related case (*Jorjani II*).[695] In the new complaint, Jorjani claimed that many more co-conspirators were involved in the conspiracy to deny him his First Amendment

---

[687] *Id.* at *2.
[688] *Id.* at *8-9.
[689] *Jorjani v. New Jersey Institute of Technology*, 2019 WL 2611128, slip op., 1, *2 (D.N.J. 2019).
[690] *Id.* at *3.
[691] *Id.* at *1.
[692] *Id.* at *3.
[693] *Id.* at *2.
[694] *Id.* n. 2.
[695] *Jorjani v. Deek*, 2020 WL 5422802 (D.N.J. Sep. 10, 2020). The two cases were later consolidated under *Jorjani I* (docket no. 18-cv-11693)

rights to speech and assembly.[696] The court dismissed all claims except two with prejudice.[697] The only two additional co-conspirators found by the court to be plausibly implicated were two NJIT attorneys.[698] The two cases were merged in December 2020. As of June 2022, the §1983 claims have not yet been decided at any level and the case remains active.[699]

4.3.7. Kahan v. Slippery Rock University of Pennsylvania

In this case, Kahan, a tenure-track assistant professor of history at Slippery Rock University of Pennsylvania (a PASSHE school), failed to submit mid-term grades by university-wide deadlines in both the fall and spring semesters of the first year in his position.[700] Upon learning of this, the chair of the history department and dean of humanities revoked their endorsement of the renewal of his contract, leading to the non-renewal of his contract by the deadline mandated by the collective-bargaining agreement.[701] Kahan argued that he was not renewed in retaliation for his interactions with the history department secretary and her son (who had been in Kahan's class).[702]

---

[696] *Id.* at *1.
[697] *Id.* at *2-4.
[698] *Id.* at *4.
[699] In January 2021 the court dealt with two separate issues relating to discovery in the case. The first on Jan 11 dealt with questions relating to attorney client privilege and whether the crime-fraud exception could be used to compel production of approximately 30 of defendants' documents. The court denied Jorjani's motion. *Jason Jorjani v. New Jersey Institute of Technology*, 2021 WL 82325 (D.N.J. Jan. 11, 2021).
The second decision related to the remaining discovery and case management issues in the case. Nearly all of the plaintiff's motions were denied. One motion brought by the defendants is conceivably of interest because the defendants requested all documents in the plaintiff's possession that used 15 identified derogatory terms *and* all communications on the social networks LinkedIn and Facebook during the time of his employment at NJIT. The court granted and denied in part. The court ruled that insofar as the communications included any of the 15 derogatory terms, or involved plaintiff's employment (at NJIT) the request would be granted, but access to his social media communications outside of that scope would not be relevant to the case. *Jason Jorjani v. New Jersey Institute of Technology*, 2021 WL 100207 (D.N.J. Jan. 12, 2021).
[700] *Kahan v. Slippery Rock University of Pennsylvania*, 50 F. Supp. 3d 667, 677 (W.D. Pa. 2014).
[701] *Id.* at 677–78.
[702] *Id.* at 680.

The son of the secretary was in his upper-level history course during his first semester at the institution.[703] Despite the student's documented disability, Kahan initially refused to accommodate him with a reasonable extension for his final paper.[704] The student's parents (the department secretary and her husband) became involved by contacting the disabilities office and the VP for diversity and equal opportunity, which eventually resulted in a reasonable accommodation for the final assignment.[705] Kahan eventually awarded the student a grade of F despite protests by the chair and secretary that he should get a D instead.[706] A second unbiased grader also believed the student's final paper merited an F.[707]

The defendants moved for summary judgment, claiming that Kahan was not renewed because of his poor time management and prioritization; it was revealed that Kahan had failed to submit grades in time because he was teaching at a local community college on the days his grades were due at Slippery Rock.[708] In fact, the department chair said in an email to Kahan, "it was your decision to seek and secure adjunct work and then miss deadlines on the very days you were committed to [Westmoreland County Community College] in Latrobe that caused this mess. You did this to yourself. You treated a difficult full time [*sic*] job as a part-time one."[709] Kahan claimed that eight of his "purported First Amendment academic rights" had been violated.[710] The court found that

---

[703] *Id.* at 681.
[704] *Id.*
[705] *Id.*
[706] *Id.*
[707] *Id.*
[708] *Id.* at 679.
[709] *Id.*
[710] *Id.* at 706.

Kahan's complaint was "insufficient to satisfy Kahan's burden to prove that he engaged in constitutionally protected activity."[711] Despite it being unnecessary—since no protected speech was identified—the court considered the issue of causation as well and found that Kahan failed to establish a causal link between any of his allegedly protected speech and the adverse employment action(s).[712]

Kahan appealed the district court's decision to the Third Circuit. The opinion of the Third Circuit is not precedential as it was decided by only one judge rather than a three-judge panel.[713] The Circuit Court's ruling on the free speech claim does not address the question of protected speech but solely concludes that Kahan failed to establish any causal link between his conflict with the chair and secretary surrounding the secretary's son's grade and the non-renewal of his contract.[714] Per the judge "instead, the evidence demonstrates his contract was not renewed due to his failure to turn in his grades on time."[715]

4.3.8. Kazar v. Slippery Rock University of Pennsylvania

In this case, Kazar, a PhD candidate, was hired by Slippery Rock University for the 2009-10 academic year as a tenure-track assistant professor prior to defending her dissertation, with plans to defend prior to beginning her appointment.[716] Kazar's defense

---

[711] *Id.* at 707. The court continues, "The standards, procedures, and deadlines by which Kahan's renewal was decided were set by the [Collective Bargaining Agreement (CBA)]. Kahan makes no allegation that the CBA itself contained provisions that violated his First Amendment rights, and fails to offer any explanation about how his supervisors' reliance on missed deadlines to justify reversing their decision about renewing his contract implicate his free speech rights." *Id.* at 708. Overall, in the researcher's opinion, the district court's decision was refreshingly well-written.
[712] *Id.* at 709.
[713] *Kahan v. Slippery Rock University of Pennsylvania*, 664 Fed.Appx. 170 (3d Cir. 2016).
[714] *Id.* at 175.
[715] *Id.*
[716] *Kazar v. Slippery Rock University of Pennsylvania.*, 679 Fed. Appx. 156, 158 (3d Cir. 2017).

timeline was held up, and she was transitioned to a lecturer position for the first academic year (the year for which she was first hired).[717] Kazar defended her dissertation the summer after her first year teaching at Slippery Rock, and she was renewed as a tenure-track assistant professor once again; however, she had not yet finished her dissertation revisions, which troubled administrators.[718] Not having completed her edits even by the following spring, the departmental committee gave Kazar a poor evaluation both for her failure to complete her PhD and graduate, and for not meeting expectations in terms of teaching.[719] She received a letter of non-renewal on March 30, 2011.[720] Despite the encouragement of the provost, she did not apply for the lecturer position posted in summer 2011 to replace her teaching slots.[721]

Kazar believed that her involvement in the LGBT support program ("Safe Zone") and her advocacy/identity as a lesbian were unconstitutional factors in her non-renewal and she sued asserting First Amendment retaliation.[722] The district court granted summary judgment in favor of the defendants in 2016 and Kazar appealed the decision to the Third Circuit.[723] The defendants conceded that her speech related to LGBTQ issues and involvement in Safe Zone was made as a citizen on a matter of public concern and was in fact protected.[724] The defendants instead argued that there was no causal link

---

[717] *Id.*
[718] *Id.* at 158–59.
[719] *Id.* at 159. It appears Kazar's colleagues were not so concerned with her teaching as may have been implied to Kazar at first. See, *Kahan*, 664 Fed.Appx. at *8.
[720] *Kazar v. Slippery Rock University of Pennsylvania.*, 679 Fed. Appx. at 159.
[721] *Id.*
[722] *Id.* at 159–60.
[723] *Id.* at 160; *Kazar v. Slippery Rock University of Pennsylvania*, 2016 WL 1247233, *11 (W.D. Pa.).
[724] *Kazar v. Slippery Rock University of Pennsylvania.*, 679 Fed. Appx. at 161.

demonstrating that this speech was a substantial or motivating factor in the plaintiff's non-renewal.[725]

Because the yearly renewal procedure for probationary/contingent faculty is dictated in the collective-bargaining agreement, the court argued that it did not make sense to place much weight on a temporal link between her fall 2010 participation in the safe zone training and the non-renewal in spring 2011.[726] The court stated that this consideration would have happened regardless.[727]

The district court distinguished Kazar's argument that she was not renewed primarily because she did not have her degree in-hand at the time of evaluation, from that of the defendants that she was not renewed because of her *ongoing* failure to complete her degree.[728] The district court thoroughly analyzed the record and determined that there was no evidence whatsoever to indicate a plausible claim of First Amendment retaliation.[729] Instead, the district court explained that the record is very clear that the issue at-hand was her ongoing failure to graduate with her PhD.[730]

The Third Circuit decision in the case is not precedential.[731] The Court of Appeals affirmed the district court's judgment.[732] Reviewing *de novo* the motion for summary judgment on her First Amendment retaliation claim, the Circuit Court found there was no evidence that her protected activity (involvement in the Safe Zone Program) was a

---

[725] *Id.*
[726] *Id.*
[727] *Id.*
[728] *Kazar v. Slippery Rock University of Pennsylvania*, 2016 WL 1247233, *10.
[729] *Id.* at *10-11.
[730] *Id.*
[731] *Kazar v. Slippery Rock University of Pennsylvania.*, 679 Fed. Appx. at 156.
[732] *Id.*

"substantial factor" in the decision not to renew her contract.[733] To test whether this activity was a substantial factor, the court looked for evidence in the record of any of the following three circumstances: 1) a suggestive temporal proximity between the conduct and the adverse employment action, 2) a hostile work environment or pattern of antagonism coupled with timing, or 3) evidence that would provide a basis to infer causation to a trier of fact.[734] The court found that there was no basis on the record from which a juror could conclude that the protected activity was the reason for Kazar's non-renewal.[735] Agreeing with the district court, the Circuit Court judge ruled that the record supports only the finding that SRU did not renew the plaintiff's contract because she had continually failed to complete her PhD.[736]

4.3.9. Lada v. Delaware County Community College

In this case, Lada, a tenure-track assistant professor at Delaware County Community College, claimed violation of her First Amendment right to free speech and discriminatory treatment in violation of the Americans with Disabilities Act.[737] Lada was hired in 2003 and worked through spring 2007 on the tenure-track.[738] In February 2007, after a five-day hospitalization due to complications caused by medications she was taking, Lada was treated disparately by her department supervisor (defendant Railey).[739]

---

[733] *Id.* at 161.
[734] *Id.*
[735] *Id.* at 162.
[736] *Id.* at 161–62.
[737] *Lada v. Delaware County Community College*, No. 08–cv–4754, 2009 WL 3217183, at *1 (E.D. Pa. Sep. 30, 2009).
[738] *Id.* at *3.
[739] *Id.*

When Lada sought support and assistance from her union representative, Railey accused her of being insubordinate.[740] Soon thereafter, Lada was terminated without notice.[741]

The district court noted that when *Garcetti* does not apply, *Pickering*'s two-step analysis should be used to balance the interests of the two parties; however, in this case, the court was uncertain as to which test should apply.[742] The court first chose to consider the "matter of public concern" question as it could be dispositive in either approach.[743] The court found that the speech was not a matter of public concern; however, the court cited Third Circuit precedent stating that if a public employee petitions the government formally that speech shall be protected under the "Petition Clause from retaliation for that activity, even if the petition concerns a matter of solely private concern."[744] The court continued, "Where a formal mechanism of redress such as a lawsuit, grievance, or workers compensation claim is utilized, the public employee plaintiff's speech need not be about a matter of public concern to enjoy First Amendment protection."[745] The court also clarified that informal complaints, or "internal 'complaints up the chain of command' are not petitioning activity."[746] Lada's complaint was not clear as to what kind of grievance mechanism she pursued in seeking the assistance of her union representative in response to the disparate treatment Lada had received, therefore the court ordered the plaintiff to make a more definite statement of her claim.[747]

---

[740] *Id.*
[741] *Id.*
[742] *Id.* at *4.
[743] *Id.*
[744] *Id.* at *5. The Petition Clause refers to the First Amendment right "to petition the government for a redress of grievances." U.S. Const. amend. I.
[745] *Id.*
1[746] *Id.*
[747] *Id.* at *6. Lada filed an amended complaint within one month, and the case continued for another 18 months until it was settled over the course of the first quarter of 2011.

4.3.10. Meyers v. California University of Pennsylvania

In this case, Meyers, a fifty-something Assistant Professor of Graphic Design at CalU, was told his contract would not be renewed after the department chair and the chair's hand-selected evaluation committee allegedly reported unsubstantiated failings in his annual evaluation for his contract renewal.[748] Meyers sued the university, his department chair, and three departmental colleagues for (inter alia) violation of his First Amendment right to free speech.[749] Meyers claimed that his allegedly protected speech was within the context of chairing a hiring committee.[750] After following collective-bargaining agreement procedures, the department chair was dissatisfied with the candidates the committee had recommended for the position and allegedly bullied the department faculty into a re-vote during a three-hour marathon meeting.[751] Meyers was then ordered to revise the list of names sent to the department chair and other administrators (which constituted multiple violations of the collective-bargaining agreement).[752] When Meyers refused and reported the misconduct to the administrative liaison who had been supporting him during the search committee process, he was cast out of the chair's inner-circle or what he called the departmental "boys club."[753] Meyers filed a grievance along with other faculty reporting the hostile and abusive work environment within the department under the department chair's leadership.[754] The

---

[748] *Meyers v. California University of Pennsylvania*, 2013 WL 795059, at *3-4 (W.D. Pa. Mar. 4, 2013).
[749] *Id.* at *4.
[750] *Id.* at *2.
[751] *Id.*
[752] *Id.*
[753] *Id.*
[754] *Id.*

defendants moved to dismiss, and the District Court for the Western District of Pennsylvania ruled on the motion in 2013.[755]

The district court cited *Garcetti* as the controlling precedent for the First Amendment retaliation claim, but only addressed the question of whether the speech dealt with a matter of public concern before denying the motion to dismiss.[756] The defendants argued that the speech was not a matter of public concern because Meyers' speech addressed workplace grievances.[757] The defendants averred that the speech in question dealt only peripherally with issues of public concern, but the court ruled that this was not compelling, and that in the light most favorable to the plaintiff, the evidence supported a reading that his speech addressed "matters of public concern, such as whether a state university was abiding by federal and state law."[758] The court thus denied the dismissal of the §1983 claims.[759]

After discovery, the defendants moved for summary judgment and the judge ruled on this motion in 2014.[760] The judge cited *Gorum v. Sessoms* and *Garcetti* repeatedly to establish the controlling precedent for free speech cases in the Third Circuit.[761] The court noted that in his brief, Meyers focused mainly on the matter of public concern question and failed to address the question of whether the speech was made as a citizen or an employee.[762] The court found that Meyers was performing precisely the service requested

---

[755] *Id.* at *1.
[756] *Id.* at *11.
[757] *Id.*
[758] *Id.*
[759] *Id.*
[760] *Meyers v. California University of Pennsylvania*, 2014 WL 3890357 1 (W.D. Pa.).
[761] *Id.* at *13-14.
[762] *Id.* n. 16.

of him—chairing the search committee—when he raised concerns about gender discrimination in the hiring process, thus his speech was not protected.[763] The judge also noted that by conveying his concerns to administrators (the former chair, office of social equity, associate provost for faculty recruitment, and president), that he was reporting "up the chain of command."[764] The court therefore ruled in favor of the defendants on the First Amendment claim.[765]

4.3.11. Patra v. Pennsylvania State System of Higher Education

In this case, plaintiffs Patra and Vaz were married to each other and both were non-tenured faculty members at Bloomsburg University in the speech pathology department.[766] Patra and Vaz raised concerns with their colleagues and the president of the university about their department's history of fabricating or falsifying graduation statistics.[767] Patra and Vaz also filed multiple EEOC complaints alleging race, religion, and national origin discrimination within their department.[768] The plaintiffs were both not renewed after only four years at the institution.[769]

The district court awarded summary judgment to defendants, but Patra and Vaz appealed to the Third Circuit.[770] The Third Circuit found that the district court erred in holding the *pro se* plaintiffs to too high of a standard, and vacated the district court's

---

[763] *Id.* at *14.
[764] *Id.* It is important to note that Meyers skipped over his direct supervisor (department chair), and the next higher up (dean) and instead spoke to a colleague (former chair), members of the office of social equity, and the associate provost all of which are outside his direct chain of command.
[765] *Id.* at *14-15.
[766] *Patra v. Pennsylvania State System of Higher Education*, 779 Fed.Appx. 105, 106 (3d Cir. 2019).
[767] *Id.*
[768] *Id.* at 106–7.
[769] *Id.* at 107.
[770] *Patra*, 779 Fed.Appx. 105.

order granting summary judgment.[771] On remand, the District Court for the Middle District of Pennsylvania skipped to the question of a causal link, assuming the plaintiffs' activity was protected.[772] The university stated that the legitimate reason for not renewing the plaintiffs' contracts was due to their failure to meet expectations in teaching, scholarship, and service arenas.[773] The court found that the plaintiffs failed to show evidence that this reasoning was pretextual.[774] The court decided that Patra's and Vaz's failure to establish a causal link between their protected speech and the non-renewal of their contracts was dispositive and awarded summary judgment to the defendants.[775]

4.3.12. Plouffe v. Cevallos

In this nine-year-long saga, Plouffe, a criminal justice assistant professor at Kutztown University of Pennsylvania was terminated after he served on a search committee for a temporary faculty role and subsequently filed a whistleblower complaint about policy violations that occurred in the process of the search. [776]

In the district court ruling on the defendants' motion for summary judgment, the court explained that the analysis for First Amendment claims is the same under both the speech clause and the petition clause.[777] In addressing the question of whether the speech was made as an employee pursuant to official duties or as a citizen, the court found that the plaintiff had made his concerns known "up the chain of command" by reporting

---

[771] *Id.* at 107–8.
[772] *Patra v. Pennsylvania State System of Higher Education*, 2020 WL 2745727, at *7-8 (M.D. Pa. May 27, 2020).
[773] *Id.* at *2-4.
[774] *Id.* at *8.
[775] *Id.*
[776] *Plouffe v. Cevallos*, 777 Fed. Appx. 594, 598–99 (3d Cir. 2019).
[777] *Plouffe v. Cevallos*, 2016 WL 1660626, at *7 (E.D. Pa. Apr. 27, 2016).

policy infringements to the Office of Social Equity and the supervisors above his department chair.[778] Despite the Office of Social Equity being outside of the chain of command, the court points to the fact that the plaintiff, "used a procedure established by [the] University to bring his concerns to the attention of the University Administration."[779] The district court found that the practical inquiry as to whether the speech was protected leads the court to designate speech made within a faculty member's professional service roles beyond the strict confines of the classroom as employee speech.[780] Thus, the court granted the defendants' motion for summary judgment.[781]

Plouffe appealed to the Third Circuit; citing *Bradley v. West Chester University*—a case brought by an administrator rather than a faculty plaintiff.[782] The Third Circuit determined that Plouffe spoke as an employee because he was on the search committee as part of his employment and "was only aware of the 'misconduct' he reported because of his role on that committee."[783] The Third Circuit affirmed the district court's judgment finding that Plouffe did not speak as a citizen.[784]

---

[778] *Id.* at *8.
[779] *Id.*
[780] *Id.* at *8-9.
[781] *Id.* at *9.
[782] *Plouffe v. Cevallos*, 777 Fed. Appx. 594, 603 (3d Cir. 2019). The court clearly states that after Plouffe's complaint led to an internal investigation, the Office of Social Equity concluded that the candidate the department had been pushing was ineligible to be hired under the university's own policies, so it is unclear why the court put misconduct in quotation marks in this way. *Id.* at 599
[783] *Plouffe v. Cevallos*, 777 Fed. Appx. 594, 603 (3d Cir. 2019). The court clearly states that after Plouffe's complaint led to an internal investigation, the Office of Social Equity concluded that the candidate the department had been pushing was ineligible to be hired under the university's own policies, so it is unclear why the court put misconduct in quotation marks in this way. *Id.* at 599
[784] *Id.*

4.3.13. Shearn v. West Chester University of Pennsylvania

In this case, Shearn, a "temporary" faculty member who had been teaching four classes per semester for the Spanish department at WCU for 9 straight semesters, was denied the opportunity to teach summer courses over a newly hired adjunct (in contravention of the collective-bargaining agreement seniority policy).[785] Shearn inquired into how collective-bargaining agreement policy might have protected her from this and in meeting with the union found that the collective-bargaining agreement included a clause—11(G)—she had not heard of before.[786] Collective-bargaining agreement Section 11(G) stated that after 10 semesters as a full-time faculty member she would be eligible for a vote by the department faculty to transition her to a tenure-track position.[787] Shearn then organized a meeting of other non-tenure-track faculty to meet with union representatives to learn about this clause. [788] That fall, the Spanish department chair announced searches for new tenure-track lines that would not be filled by current instructors during a faculty meeting.[789] That same semester, another professor in the department raised the question of the tenure-track conversions for the non-tenure-track faculty.[790] In response, the department chair asserted that the department "did not honor" that clause.[791] Later that month, Shearn learned that her teaching schedule for the spring 2014 semester had been cut by 1 course, making her ineligible both for the vote for

---

[785] *Shearn v. West Chester University of Pennsylvania*, 2017 WL 1397236 1, *1-2 (E.D. Pa. 4/19/17).
[786] *Id.* at *2.
[787] *Id.* at *1.
[788] *Id.* at *2.
[789] *Id.*
[790] *Id.* at *3.
[791] *Id.*

tenure-track conversion *and* health insurance on which she and her family relied.[792] Shearn viewed this course reduction as a retaliation for her interest in Section 11(G): she requested the dean's assistance, and when that failed, she filed an employee grievance. [793]

Defendants moved for summary judgment.[794] The district court analyzed Shearn's First Amendment claim and found that Shearn's employee grievance and her meeting with the union president did not address matters of public concern.[795] The court explains that Shearn's primary reason for her actions "was personal and related to the conditions of her employment."[796] The court granted the defendants' motion for summary judgment.[797]

4.3.14. Toth v. California University of Pennsylvania

In this case, an associate professor and president of the faculty union, Toth, felt her dean and interim provost (Madden) treated her inappropriately on multiple occasions, and she believed she was not promoted in part as a result of her negative responses to his behavior.[798] She also claimed the president of the university retaliated against her for her union activities when he denied her promotion.[799]

---

[792] *Id.*
[793] *Id.*
[794] *Id.* at *1.
[795] *Id.* at *11-12. The court does not acknowledge either the meeting held with the union *and* other adjuncts or Shearn's initial email to other temporary professors to gauge interest in such a meeting as potential protected activity that may have prompted retaliation. It is unclear from the court opinion whether these activities were referenced as protected activity in Shearn's filings, since both instances clearly are much more indicative of public concerns than personal grievances.
[796] *Id.* at *11.
[797] *Id.* at *12.
[798] *Toth v. California University of Pennsylvania*, 844 F. Supp. 2d 611, 648 (W.D. Pa. 2012).
[799] *Id.* at 649–54.

On multiple occasions Dr. Toth received invitations to "informal" meetings "over coffee" with Madden which she viewed as unprofessional.[800] After about a year of not meeting (formally or informally) with Madden, the faculty union—for which Toth was president at the time—published a newsletter that commented on system-wide leadership decisions, and Madden wrote an email to her criticizing her involvement in the newsletter.[801] Later that same semester Toth received an invitation from Madden to attend a fundraiser on campus in which one could buy a pie and throw it at Madden. She paid for a pie and threw it at Madden's face, but "Madden responded by hugging Toth tightly and smearing pie cream on her face, hair, neck and chest."[802] Shortly thereafter, Toth was denied promotion to full professor.[803] Toth filed grievances and an EEOC complaint; the grievances led to arbitration resulting in a determination that Madden "had failed to comport with the requirements of the collective-bargaining agreement."[804] The arbitrator ordered the president to reconsider Toth's promotion application without regard to Madden's prior recommendations.[805] The president rejected Toth's applications once again, and Toth filed suit alleging, among other things, First Amendment retaliation and sex discrimination against the university, Madden, and the president.[806]

The defendants filed a motion for summary judgment, and the District Court for the Western District of Pennsylvania found that Toth's claims against Madden were time-

---

[800] *Id.* at 620. Given that Madden had a romantic relationship with another female subordinate whom he quickly promoted, there was precedent for viewing his invitations as potential advances. *Id.* at 629.
[801] *Id.* at 620–21.
[802] *Id.* at 621.
[803] *Id.* at 621–22.
[804] *Id.* at 622–24.
[805] *Id.* at 624.
[806] *Id.*

barred.[807] Similarly, the university was protected under Eleventh Amendment immunity, and the defendants' motion was granted with respect to those claims as well.[808] When it came to the claims against the president, the court found that Toth's evidence of the president's anti-union bias was outdated and lacking in probative value.[809] Because the court determined that Toth could not show a plausible causal link between her promotion denials and her protected activity, summary judgment was granted to the defendant.[810]

4.3.15. Van Duyne v. Stockton University

In this case, Van Duyne, an assistant professor of Writing and First-Year studies (with affiliation in the gender studies department) at Stockton University spoke out against sexual assaults on campus and claimed the university retaliated against her in violation of her First Amendment rights.[811] Specifically, Van Duyne acted as a citizen activist in advocating for survivors of rape and sexual violence (herself included), both on campus and online (on Facebook) beginning in Spring 2018.[812] She was interviewed by a local NPR station (WHYY) and quotes from that interview were published online and on air on September 4, 2018.[813] The article mentioned an alleged assailant on Stockton's campus, with whom plaintiff was not familiar and whom she'd never met. [814] This person proceeded to compile "evidence" against Van Duyne, and she, in good faith, filed a police report "about what she reasonably perceived to be his stalking of her."[815] Van

---

[807] *Id.* at 648–49.
[808] *Id.* at 648.
[809] *Id.* at 653–54.
[810] *Id.* at 649–54.
[811] *Van Duyne v. Stockton University*, 2020 WL 6144769, at *1 (D.N.J. Oct. 20, 2020).
[812] *Id.* at *5.
[813] *Id.*
[814] *Id.*
[815] *Id.* at *6.

Duyne alleged 10 separate instances of speech made as a citizen on matters of public concern for which she believed she was the victim of retaliation by Stockton University.[816]

Van Duyne alleged 9 separate instances of retaliatory conduct by defendants including a baseless Title IX investigation, a finding that she had violated the university policy on sexual misconduct, pressuring her to step down from a leadership position in a campus-wide initiative, falsely accusing her of violating university policies when participating in campus activism, falsely accusing of her of conducting a survey of students without proper approval, threatening her that she should quiet her advocacy to protect her career, issuing an official reprimand related to the policy violation investigation that was included in her personnel file, mandating that she take and retake three trainings on Title IX, harassment and discrimination, and conflict management even though the Title IX investigation found she had not engaged in harassment or discrimination, and assigning Van Duyne "a coach for additional reinforcement and practical application of the identified trainings."[817] The connection between the protected speech and adverse employment actions (e.g. distributing t-shirts on campus with an anti-rape message, and then being accused of violating university policy in doing so, the accusations surrounding the student survey, the findings of sexual harassment policy violations, the required sexual harassment trainings) established a plausible causal link.[818] The court found that the plaintiff had adequately pleaded her First Amendment claim at

---

[816] *Id.*
[817] *Id.*
[818] *Id.* at *6-7.

the motion to dismiss stage and denied the defendants' motion to dismiss her First Amendment claims.[819]

4.3.16. Conclusion

While the Third Circuit covers Pennsylvania, New Jersey, Delaware, and the Virgin Islands, only two cases took place in New Jersey, three in Delaware, and the rest in Pennsylvania. Pennsylvania colleges and universities have played an important role in shaping the faculty free speech jurisprudence, although the Delaware case *Gorum v. Sessoms*[820] has had the most influence on the Third Circuit's approach to these cases. Pennsylvania's PASSHE schools have faced multiple free speech lawsuits since *Garcett*; nevertheless, the defendants have almost always prevailed in these cases because the courts did not find that the plaintiff made constitutionally protected speech.[821] As detailed above, only in *Bowers* and *Lada* were the plaintiffs able to settle their cases; the plaintiff in *Van Duyne* is still coming to a settlement agreement and *Jorjani* is still pending in the courts.

4.4. Fourth Circuit

The Fourth Circuit adopted an academic exception to *Garcetti* in *Adams v. Trustees of University of North Carolina at Wilmington*.[822] This case was one of the earliest instances of a federal appeals court recognizing the academic exception for

---

[819] *Id.* at *7. As of June 2022, the parties are finalizing a settlement according to the docket. See, Text Order, *Van Duyne v. Kesselman*, No. 1:19-cv-21091, Doc. 45 (D.N.J.), https://www.courtlistener.com/docket/16551079/van-duyne-v-kesselman/.
[820] *Gorum v. Sessoms*, 561 F. 3d 179 (3d Cir. 2009).
[821] *Howell v. Millersville University of Pennsylvania*, 283 F. Supp. 3d 309 (E.D. Pa. 2017); 749 Fed. Appx. 130 (3d Cir. 2018); *Kahan v. Slippery Rock University of Pennsylvania*, 50 F. Supp. 3d 667; *Meyers v. California University of Pennsylvania*, 2014 WL 3890357 1 (W.D. Pa.); *Plouffe v. Cevallos*, 777 Fed. Appx. 594 (3d Cir. 2019).
[822] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550 (4th Cir. 2011).

faculty under *Garcetti*. However, understanding the Fourth Circuit's interpretation of the academic exception requires a somewhat detailed summary of the facts of the case in *Adams*.

4.4.1. Adams v. Univ. N.C. – Wilmington

Plaintiff Mike Adams was an associate professor of sociology and criminology at the University of North Carolina-Wilmington (UNCW). In 2000, two years after he had received tenure at UNCW (in 1998), Adams became a Christian and a political conservative.[823] Shortly thereafter, he began voicing concerns "about the propriety of basing hiring decisions on political orientation."[824] Within three years of his conversion, he started writing a blog for a conservative website, in which he criticized the climate of university campuses for political conservatives and Christians.[825] Multiple students and colleagues complained about Adams's views over the years, but he continued to receive good teaching evaluations through to when he applied for a promotion to full professor in July 2006.[826] Adams's application for full professor, specifically his Curriculum Vitae (CV), was evaluated by the departmental promotion committee and found to be lacking in the areas of scholarship and service, and therefore his candidacy was not passed on to the next committee in the promotion process.[827] Adams alleged he was denied a promotion to full professor because his CV referenced his appearances as a national conservative pundit on television and his numerous writings (many of which criticized UNCW

---

[823] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 2010 U.S. Dist. LEXIS 146414 1, *4 (E.D.N.C.).
[824] *Id.* at *5.
[825] *Id.* at *7-*8.
[826] *Id.* at *8-14.
[827] *Id.* at *26-28.

personnel).[828] But as the district court pointed out in its 2010 decision, the "plaintiff included these materials in his application seeking promotion, thus forcing the very people he criticized to make professional judgments about this speech."[829] The district court determined that, despite the fact that the plaintiff's original speech was citizen speech on a matter of public concern, "plaintiff's inclusion of the speech in his application for promotion trumped all earlier actions and marked his speech, at least for promotion purposes, as made pursuant to his official duties."[830] The district court thus granted the defendants' motion for summary judgment on the First Amendment claim.[831] Adams then appealed this decision to the Fourth Circuit.

The central question for the Fourth Circuit in *Adams* was "does the First Amendment protect speech made as a private citizen on a matter of public concern when it is simply referenced in one's CV and materials for promotion to full professor?" The Fourth Circuit determined that if the speech was protected under the First Amendment while it was made, it could not be retroactively "unprotected" simply by being referenced in one's CV.[832] Furthermore, the Fourth Circuit ruled that *Garcetti* does not apply to cases in which college and university faculty speak on matters related to teaching or scholarship.[833] The court of appeals remanded the case for further proceedings.[834]

---

[828] *Id.* at *39.
[829] *Id.*
[830] *Id.* at *40.
[831] *Id.* at *43-*44.
[832] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550, 561–62 (4th Cir. 2011).
[833] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550, 563–64 (4th Cir. 2011).
[834] *Id.* at 566.

The district court subsequently denied the defendants' motion for summary judgment and the case was sent to trial before a jury.[835] After a four-day trial, the jury unanimously found for Adams, "finding that: the plaintiff's speech activity [was] a substantial or motivating factor in the defendants' decision to not promote the plaintiff, [and] the defendants [would not] have reached the same decision not to promote the plaintiff in the absence of the plaintiff's speech activity."[836] The trial court ruled that the university must retroactively promote Adams and pay him backpay.[837] The court additionally ruled that the university must pay Adams over $700,000 in attorneys' fees.[838] The defendants appealed this ruling, but eventually settled with Adams for $50,000 in back pay and $615,000 in attorneys' fees.[839]

4.4.2. Cravey v. Univ. N.C. – Chapel Hill

In this case, Cravey, an associate professor of geography, sued her university employer, the dean, the chancellor, and the department chair after she was denied a promotion to full professor, allegedly in retaliation for her outspokenness about fair and equal treatment of women and minorities.[840] The defendants filed a motion to dismiss, arguing that Cravey failed to allege plausible causation in her free speech claim, but the court disagreed.[841] Cravey had repeatedly spoken out about matters of public concern in

---

[835] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 2013 WL 10128923, at *3 (E.D.N.C. Mar. 22, 2013).
[836] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 2014 WL 7721821, at *1 (District Court Jun. 10, 2014).
[837] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 2014 WL 7721821, at *1 (District Court Jun. 10, 2014).
[838] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 2014 WL 7721821, at *5 (District Court Jun. 10, 2014).
[839] Alliance Defending Freedom, Organization, *Adams v. The Trustees of the University of North Carolina–Wilmington*, ALLIANCE DEFENDING FREEDOM, https://adfmedia.org/case/adams-v-trustees-university-north-carolina-wilmington (last visited Aug. 22, 2022). The exact settlement agreement can be found at https://adfmedialegalfiles.blob.core.windows.net/files/AdamsSettlement.pdf
[840] *Cravey v. Univ. of N.C. at Chapel Hill*, 2018 WL 4471732 1, *1 (M.D.N.C.).
[841] *Id.*

rallies, meetings, op-eds, letters, and more.[842] She had also raised concerns about the sex discrimination in her department, noting that all full professors "were male and did not appear sympathetic to feminist-oriented research and scholarly work such as hers."[843] The court found that Cravey had alleged sufficient evidence in her first amended complaint to plead the claim based on not being assigned the same number of TAs as her colleagues and not being assigned to teach graduate courses in the three years prior to her promotion denial.[844] The defendants did not move to dismiss her First Amendment retaliation claim based on her promotion denial. Cravey's claims against the acting dean of the college in his individual capacity also survived the motion to dismiss, as Cravey stated plainly that the defendant had "accepted [the department chair] and the Department's recommendation to deny [Cravey's] promotion application without engaging in any investigation to determine whether the recommendation was non-discriminatory."[845]

4.4.3. Jensen v. Western Carolina University

In this case, Jensen, an assistant professor of construction management, claimed First Amendment retaliation for his speech when he allegedly reported the sexual harassment of his advisee and another student perpetrated by another faculty member in his department.[846] The university defendants countered that the non-renewal of Jensen's contract and his removal from campus instead had to do with his long and intemperate

---

[842] *Id.*
[843] *Id.* at *7.
[844] *Id.* at *7-8.
[845] *Id.* at *9. The case has since been settled but the terms of the settlement were not published. Stipulation of Dismissal with prejudice, *Cravey v. Univ. of N.C. at Chapel Hill*, No. 1:17-cv-01014, Doc. 39 (District Court Jun. 4, 2020), https://www.courtlistener.com/docket/7894409/cravey-v-university-of-north-carolina-at-chapel-hill/.
[846] *Jensen v. Western Carolina University*, 2012 WL 6728360 1, *6-7 (W.D.N.C.).

history of outbursts and disruptive behavior towards his colleagues and superiors.[847] The university did not contest that Jensen's speech was protected, rather, they argued that he had failed to meet his burden to show that "but for" his speech, he would have been reappointed and would not have been removed from campus following the (failed) departmental committee vote to reappoint him.[848] Most telling was the fact that there was a unanimous vote to recommend against his reappointment and among that committee only one voter was aware of his protected speech.[849] The court agreed that the university would have made the same decision but for the speech in question and because Jensen failed to show otherwise, the judge entered an award of summary judgment for the defendants on the First Amendment claim.[850] Jensen appealed and the Fourth Circuit affirmed.[851]

4.4.4. McReady v. O'Malley

In this case, McReady was a collegiate associate professor of accounting at the University of Maryland University College who repeatedly interrogated, harassed, and undermined the authority of his academic supervisor, Dr. Reed, by sending a multitude of long, badgering emails for months on end.[852] In response, McReady's contract was not renewed, and within two months he had refused to comply with new departmental policy when teaching his fall semester courses, so he was terminated for insubordination.[853] He sued for, inter alia, infringement on his right to free speech under the First Amendment,

---

[847] *Id.* at *7-11.
[848] *Id.* at *18.
[849] *Id.* at *19.
[850] *Id.* at *22.
[851] *Jensen v. Western Carolina University*, 538 Fed.Appx. 359 (4th Cir. 2013).
[852] *McReady v. O'Malley*, 804 F.Supp.2d 427, 432–37 (D. Md. 2011).
[853] *Id.* at 435–37.

but none of his speech was in any way protected by the First Amendment.[854] All of McReady's speech was made as an employee and constituted personal workplace grievances.[855] McReady even argued that his supervisor's placement of a late-enrolled student into his course was a violation of his academic freedom, to which the court responded with a citation to *Urofsky*[856] that academic freedom inheres to the university not individual professors.[857]

The court noted that even if McReady's speech had addressed a matter of public concern, Supreme Court precedent states that an employee's speech that is sufficiently disruptive will likely be outweighed by "the employer's interests in maintaining order and efficiency."[858] The court concluded by explaining that

Even if UMUC's interest in disciplining Dr. McReady and preventing rank insubordination did not outweigh Dr. McReady's speech interests, the right to write pervasive, hostile emails to one's superiors challenging managerial decisions was not clearly established at the time Dr. McReady was terminated, and it is unlikely that such a right will ever be recognized. Accordingly, Defendants are protected by qualified immunity, and are therefore entitled to summary judgment on Dr. McReady's free speech claims.[859]

The court was blunt in its assessment of the case, writing, "Indeed, it is hard to fathom how any other decisions could have been made in the face of Dr. McReady's

---

[854] *Id.* at 438–39.
[855] *Id.* at 439.
[856] *Urofsky v. Gilmore*, 216 F. 3d 401 (4th Cir. 2000).
[857] *McReady v. O'Malley*, 804 F.Supp.2d at 439–40.
[858] *Id.* at 440.
[859] *Id.* at 441.

behavior without seriously interfering with the educational mission of the University of Maryland."[860]

4.4.5. McReady v. Montgomery Coummunity College

In this case, McReady, the same plaintiff from *McReady v. O'Malley*[861] above, had been working as an adjunct at Montgomery Community College in Maryland.[862] McReady was disciplined, suspended, and then his contract was not renewed because of his noncompliance with institutional email policy.[863] He continuously sent angry and disruptive emails to his supervisors, copying their supervisors and his peers on long tirades about the unfair treatment he received.[864] In some of these emails he even copied students.[865] McReady argued that the discipline he received was in retaliation for alerting the college's administrators to the "Dishonesty [*sic*] and Malfeasance [*sic*]" of his hiring dean after she refused to hire him at a higher pay rate retroactively and provide him with backpay.[866] The defendants made three arguments for dismissal of his First Amendment claims.[867] First, the defendants argued that McReady had not exhausted his contractual remedies, which the court said failed because constitutional protections do not require the exhaustion of contractual remedies.[868] Second, the defendants argued that McReady failed to state a claim and the court agreed.[869] The court stated that McReady was unable

---

[860] *Id.* at 447.
[861] *McReady v. O'Malley*, 804 F.Supp.2d 427.
[862] *McReady v. Montgomery Cmty. Coll.*, 2020 WL 5849481, at *1-2 (D. Md. Sep. 30, 2020).
[863] *Id.* at *4-5.
[864] *Id.* at *3-5.
[865] *Id.* at *4.
[866] *Id.* at *7.
[867] *Id.*
[868] *Id.*
[869] *Id.* at *8.

to show he participated in protected conduct.[870] Finally, the defendants argued they were entitled to qualified immunity and the court agreed, and granted their motion to dismiss on the basis of both the failure to state a claim, and qualified immunity.[871]

4.4.6. Mitchell v. Winston-Salem State University

In this case, Mitchell, a tenured associate professor at Winston-Salem State University, was terminated just prior to the start of the fall 2017 semester for unprofessional behavior, insubordination, and neglect of duty. Mitchell was told he could appeal the dismissal letter and until his appeals were exhausted he'd be placed on paid leave.[872] Mitchell did appeal the dismissal shortly thereafter (September 2017) and in January 2018 a faculty committee heard his appeal.[873] The committee unanimously found that there was insufficient evidence to support Mitchell's dismissal and recommended that the chancellor deny the request for his dismissal. [874] After nearly three weeks, the chancellor disagreed with the committee's conclusions and reconvened the faculty committee to "take evidence from the plaintiff;" Mitchell presented no further evidence, only stating he believed the chancellor to be violating university procedure by reconvening the committee.[875] In February, the faculty committee unanimously renewed its recommendation.[876] The chancellor once again disregarded their recommendation and dismissed Mitchell on March 7, 2018.[877] Mitchell then appealed that decision to the board

---

[870] *Id.* at *9-10.
[871] *Id.* at *10-11.
[872] *Mitchell v. Winston-Salem State Univ.*, 2020 WL 1516537, at *1-2 (M.D.N.C. Mar. 30, 2020).
[873] *Id.* at *2.
[874] *Id.*
[875] *Id.*
[876] *Id.*
[877] *Id.*

of trustees and submitted his objections to the record, but did not hear back.[878] On August 6 2018, nearly a year since his first letter of dismissal, the board of trustees upheld the dismissal.[879] Mitchell further appealed this decision to the University of North Carolina system board of governors, pursuant to the faculty handbook, but his pay was terminated after August 2018 without notice.[880] In January 2019 Mitchell filed suit claiming First Amendment retaliation against the institution in the county court, but it was swiftly removed to federal court.[881] On May 23, 2019, the board of governors upheld his discharge.[882] Mitchell once again appealed this decision on June 24, 2019, but in light of the pending federal case the county superior court granted the board of governors a stay "until [the federal] court's final disposition." [883]

The District Court for the Middle District of North Carolina dismissed the First Amendment claim against WSSU and the monetary relief against defendants in their official capacities, citing sovereign immunity.[884] The court then showed that Mitchell had not even begun to allude to any speech or expressive activity whatsoever, let alone protected activity that may have substantially motivated the defendants to dismiss him.[885] The court dismissed the First Amendment count for failure to state a claim.[886]

---

[878] *Id.*
[879] *Id.* at *3.
[880] *Id.*
[881] *Id.* at *4.
[882] *Id.* at *3.
[883] *Id.*
[884] *Id.* at *5.
[885] *Id.* at *9-10.
[886] *Id.* at *10.

4.4.7. Munn-Goins v. Board of Trustees of Bladen Community College

In this case, Munn-Goins, a full-time lecturer in computer science and retired US Army lieutenant colonel, was reprimanded and had her pay withheld for distributing public information at work.[887] Each year, according to a North Carolina statute which makes community college data publicly accessible, Munn-Goins had requested copies of the college's salary data.[888] She often circulated this information to her colleagues and it had never resulted in any disruption.[889] In 2006, one of the copies of salary data was scribbled on with phrases like "UNFAIR" and "INEQUITY IS AMAZING;" this version was then copied and the copies were placed in faculty mailboxes on campus.[890] According to Munn-Goins, this was not her doing, and she never found out who did it; nevertheless, she was reprimanded and accused of attempting "to inflame and incite members of the staff and to create a hostile workplace environment."[891] Munn-Goins's attorney wrote to the vice president of curriculum and instruction, explaining that disseminating the salary data was a constitutionally protected activity, requesting that Munn-Goins be paid her bonus which had been withheld after the salary data incident, and asking that the defendant remove the disciplinary letter from Munn-Goins's employee record.[892] Subsequently, in the first semester a new policy was in place, Munn-Goins was written up for her discretionary decisions not to drop students from her

---

[887] *Munn-Goins v. Board of Trustees of Bladen Community College*, 658 F. Supp. 2d 713, 717 (E.D.N.C. 2009).
[888] *Id.* at 718.
[889] *Id.*
[890] *Id.* at 719.
[891] *Id.*
[892] *Id.* at 720.

courses who had excuses for missing 20+% of class-time.[893] Later, Munn-Goins's educational leave was denied.[894] Once again, Munn-Goins's attorney wrote to the vice president to accuse her of retaliating against Munn-Goins for the attorney's letter and for the salary incident.[895] The attorney offered to come to a settlement agreement in return for which Munn-Goins would resign at the end of the calendar year.[896] Instead, shortly thereafter Munn-Goins was given a non-renewal notice with the reason listed as "mutual loss of confidence."[897]

In her complaint in federal court, Munn-Goins alleged that the defendants had retaliated against her for her First Amendment protected expression (requesting and distributing salary information).[898] The defendants moved for summary judgment.[899] The district court found that the "content" of distributing the salary information without commentary "did not promote any 'issue of social, political, or other interest to a community.'"[900] The court likewise found that the form and context of the expression were not supportive of a finding that the expression addressed a matter of public

---

[893] *Id.* at 720–21.
[894] *Id.* at 721.
[895] *Id.* at 722.
[896] *Id.*
[897] *Id.*
[898] *Id.* The court did not address whether the alleged retaliatory acts constituted adverse employment actions; these included "the May 2006 discipline letter, the February 2006 warning letter, the denial of the educational leave request, and the non-renewal of plaintiff's contract." *Id.* n. 4. When analyzing Munn-Goins's claims, the court did not address Munn-Goins's allegation that the college withheld a bonus she otherwise would have received. *Id.* at 719.
[899] *Munn-Goins v. Board of Trustees of Bladen Community College*, 658 F. Supp. 2d at 722.
[900] *Id.* at 726.

concern.[901] Munn-Goins appealed to the Fourth Circuit Court of Appeals, but the Circuit Court affirmed the district court's granting of the motion for summary judgment.[902]

4.4.8. Stronach v. Virginia State University

In this case, Stronach—a white male, alleged violations of Title VII race discrimination and of the First Amendment against administrators at the HBCU where he had worked for over 40 years.[903] Stronach had supported two other white colleagues in Title VII discrimination cases—one of which resulted in a jury verdict for the plaintiff of one million dollars; Stronach alleged this protected activity was the reason he was constructively discharged and given a greater teaching load.[904] The court found that Stronach's First Amendment claim failed because it lacked a causal link between the retaliatory/discriminatory animus and the adverse employment actions.[905] In addition, Stronach mischaracterized all four of the alleged adverse employment actions to a large enough to degree that the court felt the need to set the record straight in the opinion.[906]

A prior opinion in this case dealt specifically with an alleged First Amendment right to academic freedom.[907] Stronach had given a student a grade of D, but the student complained up the chain of command with allegedly falsified quiz results and ended up

---

[901] *Id.* at 726–27.
[902] *Munn-Goins v. Board of Trustees of Bladen Community College*, 2010 WL 3377333 (4th Cir. Aug. 26, 2010). Nevertheless, Munn-Goins was not finished with her work in Bladen County; she has since been twice elected as Bladen County commissioner for District 1. See, Bladen County, government, *Dr. Ophelia Munn-Goins*, BLADEN COUNTY, NC COMMISSIONER, DISTRICT 1, https://bladennc.govoffice3.com/index.asp?SEC=9E1E8C6A-BCB9-452F-8BBF-07B54C55C37D&DE=70DCEC23-86A8-44BD-9F81-C746A11378E7&Type=B_DIR (last visited Jul. 18, 2022).
[903] *Stronach v. Va. State Univ.*, 631 F. Supp. 2d 743, 746 (E.D. Va. 2008).
[904] *Id.* (The allegedly greater teaching load was still less than the standard load listed in the faculty handbook); 2008 WL 161304, at *2 (E.D. Va. Jan. 15, 2008).
[905] *Stronach v. Va. State Univ.*, 631 F. Supp. 2d at 753.
[906] *Id.* at 750–52.
[907] *Stronach*, 2008 WL 161304, at *2.

receiving an override grade of A—Stronach alleged this was retaliation for his support of his colleague's Title VII lawsuit.[908] The district court clarified the distinction between an institutional right of the university to academic freedom and an individual right of the professor to academic freedom.[909] The court held that *Sweezy*[910] recognized an institutional right, but there is no Supreme Court (or even Federal Circuit) precedent for the individual right.[911] The judge concluded that Stronach had failed to state a plausible claim for which the court could afford relief and therefore dismissed the claim.[912]

4.4.9. Weihua Huang v. Rector and Visitors of University of Virginia

In this case, Huang was a full-time researcher in the department of psychiatry who was promoted to research assistant professor at the University of Virginia to extend his visa in the U.S.[913] Huang's former mentor, Dr. Li, negotiated his mentee's offer letter so as to require Huang to continue the reporting relationship and demanded that Huang not develop his own independent line of research—despite the fact that this is the institution-wide expectation of research assistant professors. [914] The next year Huang refused to agree to Li's request to decrease Huang's salary.[915] Huang submitted his own NIH grant application listing himself as the principal investigator (PI) and Li as co-investigator even though Li had told him he was not ready for that responsibility and Li had resubmitted his own grant application listing the roles as reversed.[916] In writing his proposal, Huang used

---

[908] *Id.* at *1-2.
[909] *Id.* at *3.
[910] *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957).
[911] *Stronach*, 2008 WL 161304, at *3.
[912] *Id.* at *4.
[913] *Weihua Huang v. Rector and Visitors of Univ. of Va.*, 896 F.Supp.2d 524, 529 (W.D. Va. 2012).
[914] *Id.*
[915] *Id.* at 530.
[916] *Id.*

data collected under Li's supervision and described Dr. Li as a co-investigator and himself as sole-PI.[917] Li took issue and Huang apologized; while things between them were collegial enough, the next semester Li wrote to the department chair complaining about Huang's attitude of entitlement.[918]

In June of that summer, Huang's NIH grant was approved.[919] In August, Dr. Huang purchased an expensive laptop computer using a university purchasing card and funds from his grant. [920] Dr. Li informed Dr. Huang that he had failed to obtain permission for the purchase according to institutional policy and demanded that he cancel the order. [921] Recently, Huang had heard from another former mentee that Dr. Li had manipulated the grant funds for that person's grant as well, and it had created tension leading to the deterioration of their professional relationship.[922] Thus, Huang was untrusting of Li's advice and took the time to investigate university policy himself. [923] Within a week, Huang investigated the guidelines and found Li had been correct; Huang apologized for his ignorance of the policy and returned the laptop.[924] While reading up on university grant fund policies, however, Huang learned that as PI of his own NIH grant he should have been receiving monthly expense reports from the fiscal contact for grants in the department, but so far he had not received any for June, July or August.[925] Huang inquired into this, requesting the reports, on September first.[926] Huang did not receive

---

[917] *Id.*
[918] *Id.* at 530–31.
[919] *Id.* at 531.
[920] *Id.*
[921] *Id.*
[922] *Id.* at 533–34.
[923] *Id.* at 531.
[924] *Id.*
[925] *Id.*
[926] *Id.*

them until September 29th, and even then they had been delivered to Dr. Li first.[927] When Huang reviewed the reports, he found that the effort levels on the grant did not at all reflect what he had approved.[928] Apparently, Dr. Li had changed the effort levels without permission, in violation of institutional policy and possibly in violation of federal law.[929] Huang immediately reported his concerns about the misappropriation of funds to his department chair; he also filed a grievance with the faculty senate.[930] Despite Huang's instruction that all misappropriated monies be refunded to the grant and the department chair's assurance that it would be, the evidence showed that the money had not been fully refunded until two years later.[931]

Less than six weeks later, Huang was told his contract would not be renewed after the end of the academic year, and eight extreme demands were stipulated as conditions of his continued employment.[932] The next semester, Huang was issued a letter asserting that he had repeatedly failed to comply with the terms in the non-renewal letter, and that he could face termination.[933] Huang took this to the grievance committee soon thereafter, and they began investigating the next month.[934] Huang also reported the conflict with Dr. Li to the ombudsman; Huang attributed the threat of discipline to the fact he had reported Li's misappropriation of grant funds.[935] The senior associate dean wrote to Huang soon

---

[927] *Id.* at 533.
[928] *Id.*
[929] *Id.*
[930] *Id.*
[931] *Id.* n. 4.
[932] *Id.* at 534. The stipulations included that Huang would have to assign 100% of his effort to his own grant, yet he would have to provide updates to Li every two weeks on his work, and he would have to get advance permission to use any laboratory resources in Dr. Li's lab. *Id.* n. 5.
[933] *Weihua Huang*, 896 F.Supp.2d at 535.
[934] *Id.*
[935] *Id.*

thereafter to tell him "the school was also investigating his employment situation" and they placed him on administrative leave with pay (effective immediately).[936] In this letter she referenced two issues with Huang's behavior prior to the non-renewal: alleged representation of Li's data as his own and "the purchase of a computer without approval [which] resulted in multiple verbal and written requests by Professor Johnson and Dr. Li to return the computer."[937] In response, Huang wrote to the associate dean to once again raise the issue of Dr. Li's misuse/misappropriation of his grant funds.[938] The next month, Huang met with the associate dean to negotiate new conditions for his continued employment, but in the end declined the terms.[939] The dean then recommended to the provost that Huang's employment be terminated.[940] The provost requested the faculty senate peer review panel (FSPRP) to review the proposed termination of Dr. Huang. [941] Their report was issued two months later, finding that his termination was not justified and that the conditions of his continued employment in the November 2009 letter could be reasonably interpreted as retaliatory.[942] The grievance committee (FSGC) reviewed the FSPRP report and issued its own report a month later, in September 2010.[943] They found that Huang had been mistreated, but they believed he would not have been renewed either way.[944] They also noted that the committee chair had recommended Huang take the June 2010 offer from the senior associate dean to continue his

---

[936] *Id.*
[937] *Id.* at 536.
[938] *Id.*
[939] *Id.* at 537.
[940] *Id.*
[941] *Id.*
[942] *Id.*
[943] *Id.* at 538.
[944] *Id.* at 539.

employment at UVA, but Huang declined.[945] At this point, Huang still had not received a definitive finding from the institution about whether or not his mentor had misappropriated funds from his grant so he wrote to the president, the board secretary and others.[946] In January 2011, two months later, the university's audit department released an audit report finding "nothing of significant concern was identified."[947] Finally, Huang filed a complaint with the NIH alleging misallocation of federal grant monies.[948] Contract and grants director Mr. Craig at UVa was contacted by HHS and reported there were no abnormalities to be reported on the UVa end; the grant was closed out in May 2011, long after Huang was no longer employed at UVa.[949]

In analyzing the First Amendment free speech claim, the district court concluded that Huang spoke as an employee when he reported the potential misallocation of funds to his supervisor and department chair.[950] The court applied *Garcetti*, viewing the topic of the speech not closely-related enough to scholarship or teaching.[951] The court cited *Renken v. Gregory*, viewing the facts in that case as analogous to those presented here.[952] The court found that Huang's speech was not protected as it was made pursuant to his official duties, but even if it had been, the court argued the speech did not address a matter of public concern and therefore the court would have arrived at the same conclusion based on the second factor.[953] The court argued that calling what Huang

---

[945] *Id.*
[946] *Id.*
[947] *Id.*
[948] *Id.* at 539–40.
[949] *Id.* at 540.
[950] *Id.* at 543.
[951] *Id.* n. 12.
[952] *Id.* at 544. *Renken v. Gregory*, 541 F. 3d 769 (7th Cir. 2008). For discussion of *Renken* see *infra* Part 4.7.14.
[953] *Weihua Huang*, 896 F.Supp.2d at 547.

alleged Dr. Li did "'public corruption' over-exaggerates the severity of what Dr. Huang purports actually took place."[954] Accordingly, the court awarded summary judgment to the defendants based on qualified immunity.[955]

4.4.10. Conclusion

When it comes to faculty free speech cases within the Fourth Circuit, courts have routinely found the allegedly protected speech to be unprotected on-the-job speech.[956] In the remaining cases, the plaintiff failed to allege a plausible causal link between the speech and alleged retaliation,[957] and the court applied an academic exception to speech related to one's work but which was also a matter of public concern.[958] In both *Adams* and *Cravey*, however, their speech was originally and undoubtedly made as citizens rather than as employees, but their employers did not allegedly retaliate against them until the opportunity arose. It is less than clear, therefore, what kind of academic exception might be available in the Fourth Circuit to a professor who speaks originally as a professor or employee about a matter of public concern, rather than as a citizen.

4.5. Fifth Circuit

Of all the circuits, the Fifth Circuit has the greatest variation among the courts' opinions when it comes to the application of *Garcetti* to faculty. In *Van Heerden v. Bd. of Supervisors of La. State Univ. and Agric. And Mech. College*, the District Court for the

---

[954] *Id.* at 546.
[955] *Id.* at 547.
[956] *McReady v. O'Malley*, 804 F.Supp.2d 427 (D. Md. 2011); *McReady v. Montgomery Cmty. Coll.*, 2020 WL 5849481 (Sep. 30, 2020); *Mitchell v. Winston-Salem State Univ.*, 2020 WL 1516537 (Mar. 30, 2020); *Munn-Goins v. Board of Trustees of Bladen Community College*, 658 F. Supp. 2d 713 (2009); *Stronach v. Va. State Univ.*, 2008 WL 161304 (Jan. 15, 2008); *Weihua Huang*, 896 F.Supp.2d 524.
[957] *Jensen v. Western Carolina University*, 2012 WL 6728360 1 (W.D.N.C.).
[958] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550 (4th Cir. 2011); *Cravey v. Univ. of N.C. at Chapel Hill*, 2018 WL 4471732 1 (M.D.N.C.).

Middle District of Louisiana addressed the application of the academic exception to research-related speech; in short, the court found that published research addressing the cause of the post-Katrina flooding of New Orleans was protected speech under the First Amendment.[959]

Overall, the Fifth Circuit has limited the definition of an adverse employment action under §1983 to "discharges, demotions, refusals to hire, refusals to promote, and reprimands" and had not chosen to apply the *Burlington Northern*[960] (Title VII) standard for adverse actions to §1983 cases at least through 2014.[961] In the 2015 decision in *Oller v. Roussel*, the Fifth Circuit Court of Appeals continued to hold that undesirable teaching assignments, choice of textbook, and other teaching-related decisions were not adverse employment actions under the Fifth Circuit's jurisprudence.[962] Among the twenty-five cases in the Fifth Circuit, only three were decided in the plaintiffs' favor,[963] the rest were dismissed.[964]

4.5.1. Austen v. Weatherford College

The facts of this case are not detailed in the district court's memorandum and order, only in the appeals court's decision. In the district court's memorandum and order, the court granted the defendant's motion for summary judgment in its entirety. Regarding

---

[959] *Van Heerden v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll.*, 2011 WL 5008410 1 (M.D. La. 2011).
[960] *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).
[961] *Jackson v. Texas Southern University*, 997 F. Supp. 2d 613, 629 (S.D. Tex. 2014).
[962] *Oller v. Roussel*, 609 Fed. Appx. 770, 773–74 (5th Cir. 2015).
[963] *Van Heerden v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll.*, 2012 WL 1493834 (M.D. La. Apr. 27, 2012); *Smith v. College of the Mainland*, 63 F.Supp.3d 712 (S.D. Tex. 2014); *Wetherbe v. Texas Tech University System*, 699 Fed.Appx. 297 (5th Cir. 2017).
[964] Overall three out of twenty-five survived dismissal in the Fifth Circuit compared to zero out of four in the First Circuit, one out of fifteen in the Second Circuit, two out of thirteen in the Third Circuit (with two still pending) and two out of ten in the Fourth Circuit.

the First Amendment retaliation claim, the court found that the plaintiff had not spoken on a matter of public concern, stating that all of her allegedly protected speech concerned matters related to her personal employment circumstances, and thus constituted personal grievances and not matters of public concern.[965] The court did not cite *Garcetti* and did not pursue any further inquiries into the speech claim. Austen claimed that she had protection under the petition clause, but since the inquiry in the Fifth Circuit also requires the speech under the Petition Clause to touch on a matter of public concern, the same failing was dispositive.

The appeals court affirmed the district court's decision, and expanded on the free speech claim, stating "assuming arguendo that Austen's complaints about alleged sexual harassment and sex discrimination constituted speech on a matter of public concern, she offers no summary-judgment evidence to rebut the legitimate reasons for nonrenewal. She thus fails to provide sufficient evidence of a disputed issue as to whether the nonrenewal was motivated by her speech."[966] The defendant claimed that the institution did not renew Austen's contract "based on six incidents of unprofessional behavior that had occurred in the previous semester."[967] The court found that Austen had not alleged sufficient evidence to show that the college's legitimate non-discriminatory reason (unprofessional behavior) for her non-renewal was pretextual; thus the Fifth Circuit affirmed the district court's order granting the defendant's motion for summary judgment.[968]

---

[965] *Austen v. Weatherford College*, 2012 WL 3223664, *10 (N.D. Tex.).
[966] *Austen v. Weatherford College*, 564 Fed.Appx. 89, 93 (5th Cir. 2014).
[967] *Id.* at 92.
[968] *Id.* at 93.

4.5.2. Buchanan v. Alexander

Buchanan was a tenured associate professor of early childhood education at Louisiana State University (LSU).[969] There were multiple complaints levied against her both by a local school district superintendent with whom she had worked as well as by students in her classes.[970] She had spoken about sexual relationships in class.[971] Another student reported that Buchanan had made a recording of the student crying during a meeting.[972] She was also extremely profane when speaking.[973] A faculty committee found that while she had violated the university's sexual harassment policy she should be subjected to progressive discipline prior to revoking her tenure or termination.[974] The chancellor of the university overruled this decision and recommended her termination to the Board.[975] Buchanan claimed she was terminated in retaliation for speech protected by the First Amendment, and that the sexual harassment policy also violated the First Amendment.[976]

Buchanan's First Amendment retaliation claims were dismissed against three of the defendants on statute of limitations grounds (only one year in Louisiana).[977] The court noted that even the superintendent who had originally complained about Buchanan believed that Buchanan's profanity was instructional; Buchanan was trying to make that point to her students that children from different backgrounds will use different

---

[969] *Buchanan v. Alexander*, 284 F. Supp. 3d 792, 799 (M.D. La. 2018); 919 F.3d 847, 850 (5th Cir. 2019).
[970] *Buchanan v. Alexander*, 284 F. Supp. 3d at 799–800.
[971] *Id.* at 800.
[972] *Id.* at 800–801.
[973] *Id.* at 801.
[974] *Id.* at 805.
[975] *Id.*
[976] *Id.* at 807.
[977] *Id.* at 809–11.

vocabulary than that which students are more accustomed (e.g. using profane terms for genitals).[978] The court recognized "the academic freedom exception to *Garcetti*," but nevertheless stated that this case did not qualify as such.[979] The court stated that Buchanan did not provide evidence that her speech (profanity, discussions regarding her sex life or the sex lives of her students) in the classroom constituted matters of public concern and were not "part of her overall pedagogical strategy for teaching preschool and elementary education to students."[980]

Buchanan also challenged the constitutionality of the sexual harassment policies at LSU, but the defendants argued that she lacked standing because she had been fired and could not be reinstated.[981] The court found Buchanan had standing to challenge LSU's policies.[982] The court then reviewed both facial and as-applied challenges to the policy.[983] The court granted summary judgment in favor of the defendants on the facial challenge claim because Buchanan failed to show "that there exists no set of circumstances under which this policy would be valid."[984] Likewise, Buchanan failed to meet the burden with respect to the as-applied challenge because she was unable to show that her speech merited protection under the First Amendment; thus the policy was not unconstitutional as applied.[985]

---

[978] *Id.* at 800.
[979] *Id.* at 822.
[980] *Id.* at 817.
[981] *Id.* at 823.
[982] *Id.* at 827.
[983] *Id.* at 827–37.
[984] *Id.* at 826.
[985] *Id.*

One issue in the Fifth Circuit in this case hinges on whether individual defendants can be held liable for termination (one of the adverse employment actions in the case) if the board is the only and final decisionmaker empowered to terminate employees.[986] The court found that while there was the possibility that individual liability could attach; in fact, "the Court [found] that Plaintiff has sufficiently alleged that [Dean] Andrew and [Chancellor] Alexander caused her termination" when read in the light most favorable to Buchanan.[987] The claims against both Dean Andrew and Chancellor Alexander were dismissed on the grounds of qualified immunity in the matter, since this issue of liability for individual defendants under these circumstances was still unclear in the caselaw.[988] Buchanan appealed to the Fifth Circuit which affirmed the district court's ruling that Buchanan's speech was not protected by the First Amendment.[989]

4.5.3. Committe v. Gentry

In this case, Committe, an assistant professor in the school of business at Northwestern State University in Louisiana, was removed from his teaching duties and at the end of the semester his contract was terminated.[990] The reasons the defendant (the vice president of academic affairs) gave for his termination were that (1) he had chosen to use a self-published book for his accounting class that had not been approved by the other accounting faculty and (2) the defendant objected to his syllabi, specifically how he

---

[986] *Id.* at 811–14.
[987] *Id.* at 814.
[988] *Id.*
[989] *Buchanan v. Alexander*, 919 F.3d 847, 856 (5th Cir. 2019). The Fifth Circuit found that Dr. Buchanan had sued the wrong party on the facial challenge, so the district court's ruling on that claim was vacated and the claim was dismissed on this alternate ground. *Id.*
[990] *Committe v. Gentry*, No. 19-cv-00122, 2020 WL 3443022, at *2 (W.D. La. May 8, 2020).

would conduct his courses and measure student performance.[991] Committe argued that his suspension and termination violated his right to free speech and academic freedom.[992]

The court noted that the U.S. Supreme Court has not returned to the question of academic freedom left open in *Garcetti*, thus the law remains not clearly established, and therefore the defendants were entitled to qualified immunity.[993] The court cited Fifth Circuit precedent stating that denying textbook selection is not an adverse employment action.[994] The judge found that whatever argument Committe had tried to make had failed, and the defendant was entitled to qualified immunity on these counts.[995] The magistrate judge also warned Committe that any additional filings in line with his history of frivolous complaints[996] would be met with proper sanctions and that this was his final warning.[997] Committe objected to the magistrate's recommendations, prompting a

---

[991] *Id.*
[992] *Id.* at *1.
[993] *Id.* at *6.
[994] *Id.* at *7.
[995] *Id.*
[996] Bruce Committe has filed lawsuits against at least thirteen universities since 2015 including multiple lawsuits against some of them (e.g., Oregon State University). In addition to Northwestern State University in Louisiana, Committee has sued Oregon State University, Northern Michigan University, Cleveland State University, John Carroll University, Georgetown University, Florida State University, West Texas A&M University, SUNY – Oneonta, Miami University, University of Cincinnati, University of Nebraska, and University of Nevada. See, *Committe v. Oregon State University*, 683 Fed.Appx. 607 (9th Cir. 2017); No. 3:13-cv-01341-ST, 2015 WL 2170122 (May 8, 2015); *Committe v. Northern Michigan University*, No. 2:16-CV–81, 2016 WL 8738358 (Jun. 21, 2016); *Committe v. Zhu*, No. 1:17 CV 1534, 2017 WL 4512479 (Aug. 17, 2017); *Committe v. John Carroll University*, No. 1:18CV01372, 2019 WL 2295347 (May 30, 2019); *Committe v. Georgetown University*, No. 18-0018 (RBW), 2018 WL 4778927 (Oct. 3, 2018); *Committe v. Board of Trustees of the Florida State University*, No. 4:15cv228-MW/CAS, 2016 WL 4942015 (Sep. 15, 2016); *Committe v. Terry*, No. 2:17-CV-131, 2018 WL 4519319 (N.D. Tex. Aug. 31, 2018); *Committe v. Yen*, No. 6:17-cv-0784 (MAD/TWD), 2018 WL 2108193 (District Court May 7, 2018); 764 Fed.Appx. 68 (2d Cir. 2019); *Committe v. Miami University*, No. 1:16cv563, 2017 WL 680633 (Feb. 21, 2017); *Committe v. University of Cincinnati*, No. 1:15cv653, 2016 WL 4944500 (S.D. Ohio Sep. 16, 2016); *Committe v. University of Nebraska*, No. No. 8: 21CV257, 2022 WL 170621 (District Court Jan. 19, 2022); *Committe v. Pippin*, No. 3:17-cv-00446-MMD-WGC, 2017 U.S. Dist. LEXIS 167053 (D. Nev. Oct. 10, 2017).
[997] *Committe v. Gentry*, No. 19-cv-00122, 2020 WL 3443022, at *7.

response from the district court judge.[998] The district court first affirmed the findings on qualified immunity, then also went on to state that because Committe was speaking in his role as a state employee (self-published textbook and syllabus), the speech was not protected.[999] Likewise, the court cited *Urofsky*[1000] to underscore the fact that the courts recognize institutional academic freedom rather than professorial academic freedom.[1001]

4.5.4. Cunningham v. Board of Supervisors of Louisiana State University

In this case, Cunningham, a tenure-track assistant professor of environmental studies, argued that he was terminated because of his reporting of "plagiarism and discriminatory treatment of students.".[1002] Specifically, Cunningham believed that two graduate students accused of plagiarism were treated differently based on their ethnicity (Korean and Caucasian) and reported the preferential treatment of one student up the chain of command.[1003] According to Cunningham's affidavit, shortly after his contract had been renewed for three more years and he was nominated for early promotion and tenure, he was terminated.[1004] The dean who terminated both Cunningham's and his wife's contracts had been the one to change the Korean student's grade from an F to a B.[1005] After Cunningham had received his termination notice, the dean accused the

---

[998] *Id.* at *1.
[999] *Committe v. Gentry*, No. 1:19-CV-00122, 2020 WL 3442303, at *1 (W.D. La. Jun. 23, 2020).
[1000] *Urofsky v. Gilmore*, 216 F. 3d 401, 409 (4th Cir. 2000).
[1001] *Committe v. Gentry*, No. 1:19-CV-00122, 2020 WL 3442303, at *1.
[1002] *Cunningham v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 2008 WL at *5 (M.D. La. Sep. 17, 2008).
[1003] *Id.* at *5-6. The facts of the case hinged in part on the nationality of the Korean student, which is why the students' ethnicities are explicitly repeated in this summary. For a further discussion of the larger phenomenon of how the model minority myth about Asian students contributes to differential treatment when it comes to plagiarism and honor code infractions, see EUNKYONG LEE YOOK, CULTURE SHOCK FOR ASIANS IN U.S. ACADEMIA: BREAKING THE MODEL MINORITY MYTH 17, 50, 84 (Lexington Books Nov. 2013).
[1004] *Cunningham v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 2008 WL, n. 44.
[1005] *Id.* at *4-5.

plaintiff of "gender bias and racism;" an official reason for Cunningham's termination is not clear from the record.[1006] The district court judge found the defendants' argument compelling that Cunningham's speech was made pursuant to his official duties.[1007] The court concluded,

It is apparent from a review of these facts, which are taken from the plaintiff's own affidavit and deposition testimony, that all of the communications regarding the plagiarism and discrimination reported by the plaintiff occurred in the workplace and within the plaintiff's chain of command. It is equally apparent that the communications were either required by or part of the plaintiff's official duties as an instructor and assistant professor. The only reasonable inference that can be drawn from these undisputed facts is that all of the plaintiff's communications about the issues arising from the Korean graduate student's plagiarism were made in his role as a professor, faculty member and employee of the university.[1008]

In granting the defendants' motion for summary judgment, the court did not discuss non-retaliatory reasons for terminating Cunningham's contract (or his wife's contract). The court applied the *Garcetti* standard without addressing an academic exception.[1009]

4.5.5. DePree v. Saunders

In this case, DePree was a faculty member in the business school who published and updated a website complaining about his department and colleagues and sent a

---

[1006] *Id.* at *6.
[1007] *Id.*
[1008] *Id.*
[1009] *Id.* at *3.

complaint about his college to an oversight body for business degree programs.[1010] DePree was removed from teaching and service duties and required to work off campus to continue to pursue his research after his colleagues and supervisors complained that he had created a hostile work environment.[1011] Citing *Garcetti*, among other public employee free speech cases, the district court held that DePree failed to establish an adverse employment action, as removal from teaching is not necessarily adverse at a research university.[1012] Thus, the court stated the defendants were entitled to qualified immunity as there was no violation of a clearly established right.[1013]

On appeal, the Fifth Circuit assumed, arguendo, that the speech was protected, but affirmed the district court's ruling for qualified immunity, as well as the failure to prove DePree experienced an adverse employment action.[1014] The appeals court affirmed the district court's grant of summary judgment to the defendants on the retaliation claim against the individual defendants, but reversed and remanded the claims against the defendants in their official capacities requesting injunctive relief related to the defendants requirements that DePree undergo psychological evaluation.[1015] The case was finally settled by a joint motion of dismissal in June of 2010, nearly three years after the suit was first filed.[1016]

[1010] *DePree v. Saunders*, 588 F. 3d 282, 286 (5th Cir. 2009).
[1011] *Id.* at 285–86.
[1012] *DePree v. Saunders*, 2008 WL 4457796, at *6 (S.D. Miss. Sep. 30, 2008).
[1013] *Id.* at *7.
[1014] *DePree v. Saunders*, 588 F. 3d at 287.
[1015] *Id.* at 289.
[1016] Agreed Final Judgment of Dismissal, *DePree v. Saunders*, No. 2:07-cv-00185, Doc. 183 (S.D. Miss. Jun. 16, 2010), https://www.courtlistener.com/docket/4819112/depree-v-saunders/.

4.5.6. Faculty Rights Coalition v. Shahrokhi[1017]

In this unpublished decision, an adjunct at the University of Houston, Wolfgang P. H. De Mino,[1018] wanted access to his employee email account during months when he was not teaching (i.e., the summer). De Mino alleged that the policy restricting his access to email violated the First Amendment.[1019] De Mino stated that he was further retaliated against for his anti-administration rhetoric when his teaching load reduced from three to two. [1020] De Mino alleged First Amendment retaliation for his speech about governance involvement of adjuncts, adjunct unionization suppression (and Texas law outlawing public-sector unionization), and other complaints about the university.[1021] De Mino argued that the reduction of his pay and teaching load constituted an adverse employment action in retaliation for his protected speech.[1022] The court found that De Mino's First Amendment rights were not infringed, because he could not establish a causal link between his speech and his course-load reduction.[1023] The court did not cite *Garcetti*. For the First Amendment violation, the Fifth Circuit considered whether the email system constituted a public forum.[1024] The court found that the university's ability to conduct its business would be substantially derailed by removal of the email policies in question because they served a legitimate purpose in controlling the storage and filtering of email

---

[1017] *Faculty Rights Coal. v. Shahrokhi*, 204 F. App'x 416 (5th Cir. 2006).
[1018] *Id.* at 417.
[1019] *Id.* at 418.
[1020] *Id.*
[1021] *Id.*
[1022] *Id.* at 419.
[1023] *Id.*
[1024] *Id.* at 418–19.

data.[1025] The Fifth Circuit thus affirmed the lower court's grant of summary judgment in favor of the defendants.[1026]

4.5.7. Hays v. La Forge

Professor Hays was former chair of the languages department at Mississippi's Delta State University.[1027] Hays was not renewed as chair and returned to his position as professor; Hays was told that the reason for not renewing his chair position was "not for cause."[1028] Hays believed that his advocacy for "academic freedom and fairness, as well as for public access to the budget and transparency of University administration decisions, frequently put him at odds with University administration."[1029] In response to seven separate instances of allegedly-protected speech, Hays claimed that the president had retaliated against him beginning in 2010,[1030] even though the university president had not been employed at the university until 2013.[1031]

Analyzing the speech claim in light of the defendant's motion to dismiss, the court addressed whether the speech was made as a citizen on matters of public concern.[1032] Hays claimed there were seven instances of allegedly protected speech, and in each instance the court found that Hays spoke as an employee.[1033] The speech in question included letters and petitions to the former president which had been circulated among and signed by the faculty,[1034] a grievance against the provost for allegedly using

---

[1025] *Id.* at 419.
[1026] *Id.*
[1027] *Hays v. LaForge*, 113 F. Supp. 3d 883, 888 (N.D. Miss. 2015).
[1028] *Id.*
[1029] *Id.* at 889.
[1030] *Id.* at 899–904.
[1031] *Id.* at 905.
[1032] *Id.* at 899.
[1033] *Id.* at 899–904.
[1034] *Id.* at 899–900.

Hay's writing without attribution,[1035] an interview with the student newspaper pointing out issues with a university budget committee report,[1036] a reference to an alleged policy violation within Hays's annual division chair report,[1037] an appeal Hays organized when a faculty member in his division was denied a tenure-track contract,[1038] Hays's signature on a petition to defend the university curriculum,[1039] and his email to fellow faculty members advocating proactive defense of the current education program at the university.[1040] The court stated that even assuming some of this speech could have been made as a citizen on a matter of public concern, Hays's failure to show a causal link between the speech and his demotion from chair was dispositive.[1041] The court thus granted the defendant's motion to dismiss the case for failure to state a claim.[1042] The court did not cite any potential carveout under *Garcetti* for the teaching and scholarship of public university professors.

4.5.8. Jackson v. Texas Southern University

In this case, Jackson, an associate professor of pharmacy at Texas Southern University, sued alleging First Amendment retaliation, among other claims.[1043] Jackson attended a board of regents meeting to protest College of Pharmacy and Health Sciences policies that resulted in the dismissal of numerous pharmacy students (many nearing graduation).[1044] As examples of retaliatory actions she suffered, Jackson alleged she had

---

[1035] *Id.* at 900.
[1036] *Id.* at 900–901.
[1037] *Id.* at 901.
[1038] *Id.* at 902–3.
[1039] *Id.* at 903.
[1040] *Id.*
[1041] *Id.* at 901, 905–6.
[1042] *Id.* at 907.
[1043] *Jackson v. Texas Southern University*, 997 F. Supp. 2d 613, 634 (S.D. Tex. 2014).
[1044] *Id.* at 635.

been attacked both verbally and physically by her defendant colleagues, told to retire, given a heavier course load than her colleagues, and had her salary payments delayed upon her return from medical leave.[1045] The district court applied *Garcetti,* and found that at the motion to dismiss phase there was insufficient evidence to make a determination regarding whether Jackson's speech touched on a matter of public concern.[1046] Nevertheless, the court found that Jackson could not allege an adverse employment action that satisfied the Fifth Circuit's definition under §1983.[1047] The claim was dismissed for failure to allege she suffered an adverse employment action under the Fifth Circuit's standard.[1048]

4.5.9. Jingping Xu v. University of Texas M.D. Anderson

In this case, a genetics researcher's job was eliminated in August 2008 due to a lab closure after the primary investigator retired and the grant funding for the plaintiff, Xu's position ran out.[1049] Xu negotiated to continue receiving pay and working for the same genetics department through October 28, 2008, however.[1050] On October 8, the department chair told the department assistant (both co-defendants) to terminate Xu's employment in the system.[1051] The assistant did so, terminating Xu's email account, and ordering that she return her badge and keys. [1052] Xu recognized that this termination must have been a mistake as it was a breach of contract, so on October 21, 2008, the plaintiff

---

[1045] *Id.* at 634–36.
[1046] *Id.* at 649.
[1047] *Id.*
[1048] *Id.* at 650.
[1049] *Jingping Xu v. University of Texas Md Anderson*, 854 F. Supp. 2d 430, 433 (S.D. Tex. 2012).
[1050] *Id.*
[1051] *Id.*
[1052] *Id.*

delivered a grievance letter to the assistant, hoping the assistant would learn from the error.[1053] Instead, in response to the letter, the assistant called campus police who sent out a photo of Xu to the whole campus and said she had no official business being on campus.[1054] The adverse employment action in this case, thus, was being banned from campus and the assistant's refusal to reinstate Xu's employment through the end of her contract.[1055] This resulted in Xu being unable to complete the requirements of an NIH award.[1056] Xu continued working as an adjunct faculty member even after the genetics research contract had lapsed; nevertheless, the assistant continued to report Xu's presence on campus to UT police and the department chair insisted on continuing to bar Xu from campus as well as ensuring she never be hired in the genetics department again.[1057] Despite Xu's multiple requests to clear her name, UT failed to acknowledge or respond to her.[1058] The district court cited Fifth Circuit precedent which states, "speech cannot be made in furtherance of a personal employer-employee dispute if it is to relate to the public concern."[1059] The court decided the case in the defendants' favor after finding that the contents of the plaintiff's letter to the assistant did not address a matter of public concern.[1060] The court did not cite *Garcetti*; however, citing *Connick*, the district court did determine that the case was properly evaluated within the public employment context.[1061]

[1053] *Id.*
[1054] *Id.*
[1055] *Id.* at 433–34.
[1056] *Id.* at 433–34.
[1057] *Id.* at 433.
[1058] *Id.* at 433–34.
[1059] *Id.* at 437–38.
[1060] *Id.* at 437–39.
[1061] *Id.* at 439.

4.5.10. Kostic v. Texas A & M University at Commerce

In this case a full professor of chemistry at Texas A&M University at Commerce (TAMUC) sued for retaliation under Title VII and §1983 after he was dismissed for violating university policy, moral turpitude, and professional incompetence.[1062] The termination notice, signed by the university president, cited various serious infractions including sexual and gender harassment, publicly humiliating students and employees, and misuse of funds.[1063] The notice also referenced a petition signed by more than 400 students alleging that the plaintiff "fostered an atmosphere of hostility, discrimination, unfair grading practices, and sexual harassment."[1064] Nevertheless, Kostic claimed that he was terminated for speaking to news media about alleged corruption and hazardous practices within the chemistry department related to a laboratory fire as well as about "the alleged establishment of religion at TAMUC, including [a defendant's] alleged proselytization, religious discrimination […], religious influence in the TAMUC curriculum, and public religious ceremonies at TAMUC conducted by top TAMUC officials."[1065]

When analyzing the First Amendment retaliation claim under the standard for summary judgment, the court found that Kostic spoke as a citizen on a matter of public concern when he spoke to the media about the fire in the department and related health and safety concerns in the laboratories on campus.[1066] The court also believed his speech was made as a citizen on a matter of public concern when he discussed the establishment

---

[1062] *Kostic v. Texas A & M University at Commerce*, 11 F.Supp.3d 699, 731 (N.D. Tex. 2014).
[1063] *Id.*
[1064] *Id.*
[1065] *Id.* at 716.
[1066] *Id.* at 719.

of religion and proselytization at TAMUC at large and in the chemistry department in particular. [1067]

In applying the *Pickering* balancing test, the court looked to the manner of the speech and determined that the disruptiveness with which Kostic spoke out on these issues (he was "disrespectful, demeaning, rude, and insulting...engaged in vitriolic attacks on TAMUC's students, faculty, and staff, and his superiors" according to his colleagues and supervisors) leaned in the defendants' favor.[1068] But, the court concluded that while the university's interest in preventing disruption clearly outweighed Kostic's right to speak out on issues like nepotism or scholarships, Kostic's right to speak out about safety, proselytization, and exposing a cover-up outweighed TAMUC's interest in promoting workplace efficiency and this speech was protected under the First Amendment.[1069]

The court found insofar as the individuals participated in the termination of Kostic for the protected speech, they would not be entitled to qualified immunity, but they would be entitled to qualified immunity for any other alleged adverse employment actions.[1070] The court then analyzed whether Kostic's protected speech was a substantial or motivating factor in his termination.[1071] Kostic presented a prima facie case of retaliation, but he failed to respond to the adequate (and non-retaliatory) justifications for his termination offered by the defendants because he did not present evidence that these

---

[1067] *Id.*
[1068] *Id.* at 720.
[1069] *Id.* at 721.
[1070] *Id.* at 723.
[1071] *Id.* at 728.

reasons were pretextual.[1072] The defendants' legitimate reasons for terminating Kostic included:

> sending a letter to a pregnant student's physician requesting medical information, denying a student's request to drop a class and harassing her about her medical condition, publicly humiliating two students in front of their peers, humiliating four TAMUC employees or potential employees, purchasing chemicals with Higher Education Funds and shipping them to another university that had no current working relationship with TAMUC, and sexual harassment of two female students.[1073]

Instead, Kostic merely relied on the temporal proximity of the speech and his termination.[1074] The court therefore found for the defendants, granting their motion for summary judgment on all First Amendment retali ation counts.[1075] Kostic's Title VII retaliation claim survived the motion and was eventually decided in a jury trial.[1076]

4.5.11. LaRavia v. Cerise

LaRavia, the plaintiff, was the director of the Louisiana State University–Bogalusa residency clinic where he was employed on a year-to-year basis.[1077] After two years as program director, LaRavia was not reappointed to his position.[1078] He was given no reason for his non-renewal.[1079] The local community—including a state senator—

[1072] *Id.* at 731.
[1073] *Id.*
[1074] *Id.* at 732.
[1075] *Id.* at 734.
[1076] The jury found for the plaintiff and awarded him back and front-pay and attorney's fees amounting to nearly half a million dollars. *Kostic v. Texas A&M University-Commerce*, 2016 WL 407357 (N.D. Tex. Feb. 3, 2016).
[1077] *LaRavia v. Cerise*, 462 Fed.Appx. 459, 461 (5th Cir. 2012).
[1078] *Id.*
[1079] *Id.*

contacted LSU and urged the institution to issue a statement of its reasons for not reappointing LaRavia.[1080] Shortly thereafter, the VP for health affairs sent a statement to the local newspaper and read it out loud at a town meeting.[1081] The court summarizes:

The statement provided the following reasons for the non-reappointment: "[m]ultiple billing irregularities" under Dr. LaRavia's supervision, which were "being referred to appropriate state and federal authorities for review"; "breaches" or "abuses" of federal reimbursement rules under Dr. LaRavia's supervision; residents' "signing off" on case files in the names of staff physicians who were not present; Dr. LaRavia's refusal to cooperate with the hospital at which the clinic was based, including denying hospital administrators access to the clinic and refusing to produce the chart of a patient who had an adverse outcome; inadequate inpatient admissions due to Dr. LaRavia's failure to enter into affiliation agreements with local physicians; and, Dr. LaRavia's repeated insubordination.[1082]

The First Amendment claim was based on LaRavia's allegation that the email he received prior to the town meeting included instructions for him not to speak at the meeting along with the institution's media policy.[1083]

In the 2012 Fifth Circuit decision appealing the award of summary judgment to the defendants on all claims, the court (per curiam) affirmed the lower court's finding that LaRavia failed to allege a free speech claim.[1084] The district court, citing *Garcetti, Pickering,* and *Connick*, found that there was no evidence that LaRavia was threatened or

---

[1080] *Id.*
[1081] *Id.*
[1082] *Id.*
[1083] *Id.* at 463.
[1084] *Id.* at 464.

prohibited from speaking as a citizen on a matter of public concern, and thus granted the defendants' motion.[1085] Both courts stated that the LSU media policy in question did not cover citizen speech and that there was no evidence LaRavia had been instructed not to attend/speak at the meeting.[1086]

4.5.12. Nichols v. University of Southern Mississippi

Nichols was an adjunct professor for approximately eight years in the music school at the University of Southern Mississippi who spoke frankly with a student during a voice lesson about his beliefs regarding homosexuality in a way that made his gay student feel uncomfortable.[1087] The student reported the incident and was reassigned to a different studio because he felt it would be "extremely awkward" to continue working with Nichols.[1088] After finding that Nichols had violated the schools non-discrimination policy, Nichols was allowed to serve out the end of that semester but his contract was not renewed for the following semester.[1089] Nichols sued the school under USC 42 § 1983 for (among other things) violation of the First Amendment; the university moved for summary judgment.[1090]

In analyzing the case, the district court used a combination of Fifth Circuit precedent built on the *Pickering* line, along with *Garcetti*.[1091] The court stated that whether the speech was made pursuant to his official duties was somewhat muddy given

---

[1085] *LaRavia v. Cerise*, 2010 WL 11469112, at *5-6 (M.D. La. Dec. 14, 2010).
[1086] *Id.* at *6; 462 Fed.Appx. at 464.
[1087] *Nichols v. University of Southern Mississippi*, 669 F. Supp. 2d 684, 688–89 (S.D. Miss. 2009). The specific lies need not be repeated to be understood as harmful.
[1088] *Id.* at 690.
[1089] *Id.*
[1090] *Id.* at 691.
[1091] *Id.* at 698.

the content being far from Nichols's area of expertise, but the court determined that since it occurred in the classroom it should be seen as "classroom" speech.[1092] Thus, the court concluded that the speech was, in fact, made pursuant to official duties and therefore not protected by the First Amendment.[1093] The court continued with the balancing test, nonetheless, finding that the interest of the university to create environments free of harassment outweighed the free speech rights of the professor, despite the deference the court recognizes should be offered professors in their own classrooms.[1094] The court explained, "in considering Dr. Nichols's interest in speech, the court must consider the right of faculty members 'to engage in academic debates, pursuits, and inquiries and to discuss `ideas, narratives, concepts, imagery, [and] opinions — scientific, political, or aesthetic — [with] an audience whom the speaker seeks to inform, edify, or entertain.'"[1095] Nevertheless, the court concluded that Nichols failed to demonstrate a violation of a constitutionally protected right, and thus the defendants were entitled to qualified immunity.[1096]

4.5.13. Oller v. Roussel

Oller was a full professor of communications (in the communication disorders or CODI department) at the University of Louisiana at Lafayette (UL) for nearly twenty years.[1097] This case hinged on whether Oller's speech about creationism, intelligent designs, and the relationship between vaccines and autism resulted in an adverse

---

[1092] *Id.* at 699.
[1093] *Id.*
[1094] *Id.*
[1095] *Id.*
[1096] *Id.* at 699–700.
[1097] *Oller v. Roussel*, 609 Fed. Appx. 770, 772 (5th Cir. 2015).

employment action.[1098] What constitutes an adverse employment action is notably limited in the Fifth Circuit to "discharges, demotions, refusals to hire, refusals to promote, and reprimands."[1099] The Fifth Circuit specifically noted that, within the academic context, decisions related to "teaching assignments, pay increases, administrative matters, and departmental procedures" are not adverse actions in First Amendment claims.[1100] Oller argued that he had experienced five adverse employment actions including:

(1) Defendants refused to allow Oller to use his textbook as primary source material in classes he teaches;

(2) Defendants did not assign him to teach classes in the CODI department;

(3) Defendants gave the Hawthorne Professorship, an endowment available to professors at UL, to another professor;

(4) Defendants reclassified Oller from a Track IV professor to a Track III professor; and

(5) Defendants had not awarded him a merit pay raise since 2004 (seven years).[1101]

Oller's first assertion failed to constitute an adverse employment action because courses are to use the same text if they consist of multiple sections.[1102] The determination of texts is a departmental procedure rather than a constitutional deprivation, the court wrote.[1103]

[1098] *Id.* at 770. This is because the Title VII standards from *Burlington Northern* have not yet been applied to §1983 cases. See *Kostic v. Texas A & M University at Commerce*, 11 F.Supp.3d 699, n. 1 (N.D. Tex. 2014) citing Burlington Northern and noting that the Fifth Circuit has not yet addressed whether the broader Title VII standard applies to §1983 retaliation claims.
[1099] *Oller v. Roussel*, 609 Fed. Appx. at 772.
[1100] *Id.* at 773.
[1101] *Id.*
[1102] *Id.*
[1103] *Id.*

In addition, the department allowed him to use the text as secondary material for the course and talk about his views in class, so the department did not chill his speech.[1104] The court secondly found that not being assigned upper-level courses in his department was not an adverse employment action. Oller was unable to provide evidence that this action "fundamentally changed the nature of his job with UL [...] nor [that....] Defendants prohibited him from speaking on certain topics during his assigned classes."[1105] Oller's third allegation did not constitute an adverse employment action since he had been appointed to that endowed professorship for a three-year term and had to reapply for the honor every three years.[1106] The year that he reapplied most recently, other faculty also applied, and his department decided to award the honor to another faculty member in the department instead of him.[1107]

The court explained that Oller also failed to provide any evidence that his change in track designation (from track IV to III) in anyway affected "his pay, benefits, or other privileges of employment," and the evidence showed that Oller remained a tenured professor after his reclassification.[1108] Oller's final claim was that he had not received a merit raise in years because of lower merit evaluations, but the defendants claimed no one at UL had received a merit raise since 2008 due to the recession (seven years before the writing of the opinion) and Oller failed to rebut this.[1109] The Fifth Circuit Court of Appeals affirmed the district court's award of summary judgment to the defendants,

---

[1104] *Id.*
[1105] *Id.* at 773–74.
[1106] *Id.* at 774.
[1107] *Id.*
[1108] *Id.*
[1109] *Id.*

finding that his speech had not been restricted or censored and he had suffered no adverse employment actions to speak of.[1110]

4.5.14. Payne v. University of Southern Mississippi

In this case, an associate professor of criminal justice filed suit against his chair/associate dean, replacement chair, dean, and provost for violating his First Amendment right to free speech (among other claims).[1111] The speech for which Payne claimed he was retaliated against was religious in nature.[1112] One graduate student employed by a program for which he was the administrator complained (informally) that Payne would bring up his Christian faith and religiosity in conversation in a way that made her and others "very uncomfortable."[1113] At one point—during a trip to Scotland with this program and while the student employee was present—Payne said that anyone who is not a Christian is going to hell.[1114] Payne would also tell the employees of the program to pray about issues, which the student alleged was so that Payne would not have to deal with the issues himself.[1115] The defendants claimed that Payne's speech was made pursuant to his official duties as a professor.[1116] The court stated that Payne's brief failed to address this claim altogether.[1117] Since Payne did not address whether or not the speech at issue was made in his capacity as a professor, the court ruled that all of the evidence demonstrated that it was.[1118] The district court ruled that under *Garcetti*,

---

[1110] *Id.*
[1111] *Payne v University of Southern Mississippi*, 2014 WL 691563 1, *1 (S.D. Miss. 2014).
[1112] *Id.* at *3.
[1113] *Id.*
[1114] *Id.*
[1115] *Id.*
[1116] *Id.* at *4.
[1117] *Id.*
[1118] *Id.*

Payne's employee speech was not protected from employer discipline which included the university's denial of Payne's promotion and the non-renewal of his contract.[1119] Payne appealed and the Fifth Circuit affirmed the district court's rejection of the §1983 claims with a short paragraph.[1120] The courts eventually required Payne to pay the defendants attorneys' fees because his claims had been frivolous.[1121]

4.5.15. Richmond v. Coastal Bend College District

In this case, a group of women community college instructors and administrators who were all older than forty sued other administrators and board members for First Amendment retaliation. [1122] One plaintiff, Hermann, spoke to a college accreditation body about some unusual conduct she had been instructed to carry out (i.e., signing class rosters for classes she had never taught) and provided them with evidence of such. The plaintiff purported that this evidence led to the college being placed on probation by the accreditor. The Magistrate judge in 2009 dismissed Hermann's claim because she had failed to allege an adverse employment action.[1123] The court found that receiving second-hand threats of termination would not compel a reasonable employee to resign. In 2012, the Senior District Judge adopted in part the magistrate judge's memorandum and recommendations. In relevant part, the district court concluded that the speech Hermann made to the accreditation committee was "pursuant to her official duties" rather than

---

[1119] *Id.*
[1120] *Payne v. University of Southern Mississippi*, 643 Fed.Appx. 409, 412 (5th Cir. 2016).
[1121] *Payne v. University of Southern Mississippi*, 681 Fed.Appx. 384 (5th Cir. 2017). Payne filed a second appeal arguing that the district court's award of attorney's fees to the defendants for his frivolous claims was inappropriate. *Id.* at 384. The Circuit Court affirmed the trial court's ruling and ordered that Payne pay the defendants a total of over $20,000 in attorneys' fees. *Id.* at 387, 390. The defendants had requested over $100,000 in attorneys' fees. *Id.* at 387.
[1122] *Richmond v. Coastal Bend College District*, 883 F.Supp.2d 705, 708 (S.D. Tex. 2012).
[1123] *Richmond v. Coastal Bend College District*, 2009 WL 10694155 1 (S.D. Tex. 2009).

citizen speech, and therefore did not determine whether or not the plaintiff had actually experienced a constructive discharge.[1124]

4.5.16. Rushing v. Board of Supervisors of University of Louisiana System

In this case, a full professor of music had issues with his employer, Southeastern Louisiana University; after filing numerous grievances and a lawsuit in state court, the school restricted his access to the grievance process.[1125] He filed suit again in federal court alleging that his restricted access to the grievance procedures at the school constituted First Amendment retaliation.[1126] In 2008, the United States District Court for the Middle District of Louisiana found that the defendants had failed to establish that qualified immunity was warranted in this case because Rushing had alleged that his speech—prior lawsuits and recent grievances, which the court stated "implicate[d] issues relevant to the public's evaluation of the performance of a governmental agency"—dealt sufficiently with a matter of public concern.[1127]

In the 2011 ruling, the defendants' motions to dismiss were mostly unopposed.[1128] While Rushing opposed the dismissal of the First Amendment retaliation claim, the district court stated that even assuming (without finding) that Rushing suffered an adverse employment action, he failed to prove the other necessary elements. [1129] The court found that the claims were not made by a citizen on a matter of public concern, and fell far outside the scope of protected academic speech that the dissenters in *Garcetti*

[1124] *Richmond v. Coastal Bend College District*, 883 F.Supp.2d at 716.
[1125] *Rushing v. Board of Sup'rs of University of Louisiana System*, 2008 WL 4200292, *1 (M.D. La.); 2011 WL 6047097, at *1-3 (M.D. La. Dec. 5, 2011).
[1126] *Rushing*, 2011 WL 6047097, at *3.
[1127] *Rushing*, 2008 WL 4200292, *11.
[1128] *Rushing*, 2011 WL 6047097.
[1129] *Id.* at *3.

referenced.[1130] Likewise, the court found that the defendants were entitled to qualified immunity.[1131]

4.5.17. Simpson v. Alcorn State University

In this case, Simpson, a psychology professor at an HBCU in Mississippi, sued his employer for First Amendment retaliation after allegedly blowing the whistle on two employees who had forged his signature to authorize payment of $5,000 to one of his colleagues.[1132] For years afterward he alleged his colleagues created a hostile work environment by repeatedly exacerbating his medical condition, denying him the permanent position of department chair, moving him to a different office, denying him a key to said office, demanding he appear on campus (even though he was teaching online) and threatening termination.[1133] He filed an EEOC claim in July 2011 and also filed a grievance with the vice president of academic affairs (VPAA) around the same time regarding the choice of the new department chair (who rehired the payee of the unlawful $5,000).[1134] The VPAA refused to process the grievance, so Simpson reported this to the Mississippi Institutions of Higher Learning (IHL).[1135] The university president found out, and was "so angry with him [...] that he refused to meet with or discuss any issues with plaintiff."[1136] The university scheduled a hearing for December 13, 2011, because Simpson was the "subject of an allegation of sexual harassment by a male student."[1137]

[1130] *Id.* at *4.
[1131] *Id.* at *5.
[1132] *Simpson v. Alcorn State University*, 25 F.Supp.3d 711, 715 (S.D. Miss. 2014).
[1133] *Id.* at 716.
[1134] *Id.*
[1135] *Id.*
[1136] *Id.*
[1137] *Id.*

Simpson claimed the defendants leaked the information about the hearing to the news media so they could film him on campus that day.[1138] Simpson also alleged he was portrayed and stereotyped as a homosexual by the defendants.[1139] Despite the IHL ordering the president to investigate the subject of Simpson's grievance, he refused to allow such an investigation, leading Simpson to file a formal complaint with the federal government (under the American Recovery and Reinvestment Act of 2009) in December 2011.[1140]

Analyzing the free speech claim, the district court found that Simpson failed to state a First Amendment claim at any point.[1141] While his constructive discharge may well have constituted an adverse employment action, he did not allege who was responsible for this decision, or what protected speech supposedly prompted this decision.[1142] According to the court, Simpson failed to establish an adverse employment action that was tied directly to an individual defendant where protected speech was a substantial or motivating factor, thus the First Amendment claims were dismissed.[1143]

4.5.18. Smith v. College of the Mainland

In this case, Smith, a professor of government at the College of the Mainland in Galveston, TX sued his former college employer after he was terminated for alleged

---

[1138] *Id.*
[1139] A reminder to the reader that this case, once again, was in pre-*Obergefell* times, in Mississippi. In 2004 the Mississippi constitution was amended to define marriage as between a man and a woman by a public referendum with an 86% approval rating. Ballotpedia: Mississippi Marriage Definition, Amendment 1 (2004); The text of the amendment is still on the books, despite the Supreme Court ruling it unconstitutional in *Obergefell*. See, Miss. Const. art. XIV, § 263a.
[1140] *Simpson v. Alcorn State University*, 25 F.Supp.3d at 717.
[1141] *Id.* at 722.
[1142] *Id.*
[1143] *Id.*

insubordination and fostering a climate of fear among his colleagues.[1144] The court does not cite *Garcetti*, instead citing older Fifth Circuit cases when applying the *Connick-Pickering* standard; however, the court later cited *Lane v. Franks*, a post-*Garcetti* case.[1145] The defendants argued in their motion for summary judgment that the subject of the speech in question (Smith's prior lawsuits which were both settled after the court denied defendants' motions to dismiss) was not a "matter of public concern" when in both prior lawsuits the court had concluded that topic of the speech in those cases was as a matter of law a "matter of public concern."[1146] The court found that Smith's prior lawsuits were protected speech under the First Amendment.[1147] The court then ruled in Smith's favor on the balancing element, writing,

> The College contends that Smith's prior lawsuits chilled speech among the faculty because professors feared they would be sued next. That argument might be compelling if Smith's lawsuits had been frivolous. But the federal court denied summary judgment in one, granted a preliminary injunction in the other, and both cases settled. The filing of a bona fide First Amendment retaliation suit *should* chill future unconstitutional conduct.[1148]

The court noted that the defendants attempted to argue that the speech in question was a motivating factor, but only in the "manner" of his speech rather than the "content."[1149]

[1144] *Smith v. College of the Mainland*, 63 F.Supp.3d 712, 715 (S.D. Tex. 2014).
[1145] *Id.* at 715–16. In *Lane v. Franks* the Supreme Court held that a public employee's testimony in court was protected speech under the First Amendment even if the witness spoke about his employer or employment-related topics. *Lane v. Franks*, 573 U.S. 228 (2014).
[1146] *Smith*, 63 F.Supp.3d at 716.
[1147] *Id.*
[1148] *Id.* at 718 (emphasis added).
[1149] *Id.* at 719.

The court found this to be evidence that the speech was indeed a motivating factor in Smith's termination.[1150] Likewise, the college failed to provide adequate justification for terminating Smith between the end of his lawsuit in January and his dismissal in May; both the temporal link as well as the failure to justify were found to be evidence of causation.[1151] Thus, the court determined that, a reasonable jury could conclude Smith's more recent settled lawsuit was indeed a substantial or motivating factor in the adverse employment action and denied the defendants' motion for summary judgment.[1152] Furthermore, the court's response to the defendants' argument for qualified immunity was notable:

The Court's conclusion that Smith overcomes qualified immunity at the summary judgment stage is reinforced by the previous two lawsuits between Smith and the defendants. The decisions in those cases clearly established that the defendants could not take an even more adverse course of action—terminating Smith—for the even less controversial conduct of filing a meritorious lawsuit to protect his rights. [1153]

The parties settled the case within a few months of the denial of summary judgment.[1154]

4.5.19. Stotter v. University of Texas at San Antonio

In this case Stotter, a chemistry professor at UTSA, was eventually terminated for not cleaning his laboratory or office in the manner or by the date determined by the

---

[1150] *Id.*
[1151] *Id.* at 719–20.
[1152] *Id.* at 720.
[1153] *Id.* at 721.
[1154] Harvey Rice, *Fired Mainland Professor Settles Lawsuit*, HOUSTON CHRONICLE (Dec. 15, 2014), https://www.houstonchronicle.com/news/article/Fired-Mainland-professor-settles-lawsuit-5958998.php.

defendants.[1155] Amidst a multiple years-long back and forth between Stotter and the administration about Stotter's office and lab spaces beginning in December 1998, Stotter sent a memo regarding his pay with brief mention of prior administrative misuse of his employee benefits occurring in 1989-1991 and through 1993.[1156] During this period, Stotter repeatedly refused to clean his lab and office despite knowing that they presented numerous safety hazards.[1157] In January 2001, Stotter created such a disturbance while halting UTSA's clean up effort that the UTSA police escorted him—in handcuffs—to his car and requested he leave campus.[1158] In February 2001, more than 6 months after the memo was sent to administrators, Provost Bailey specifically referenced the memo in a one-on-one meeting with Stotter stating that administrators were under the impression that any issues regarding his medical leave and benefits had been "resolved back in 1992."[1159] After this meeting Bailey no longer worked directly with Stotter as he did not trust him to clean the spaces himself.[1160] Bailey sent a certified letter to Stotter to alert him to the office and lab closures for cleaning with three days' notice—the letter was not received until two days after the cleaning had taken place.[1161] In the course of the cleaning, UTSA discarded all of Stotter's personal property that had been stored in his lab; that same semester, UTSA terminated Stotter's employment.[1162]

[1155] *Stotter v. University of Texas at San Antonio*, 508 F.3d 812, 817 (5th Cir. 2007); 2010 369 Fed.Appx. 641, 642 (5th Cir.).
[1156] *Stotter*, 508 F.3d at 817–18.
[1157] *Id.* at 818.
[1158] *Id.*
[1159] *Id.* at 819.
[1160] *Id.* at 818–19.
[1161] *Id.* at 819.
[1162] *Id.*

Stotter leveraged the UTSA grievance procedure—a faculty panel held a four-day hearing and concluded that there was no (good) cause for termination based on the facts.[1163] The board of regents "accepted the findings of fact of the grievance panel, [but] rejected the conclusion that no good cause existed for termination" and approved Stotter's termination in February of 2002, one year after his personal property had been discarded.[1164] Stotter sued for First Amendment retaliation along with various other §1983 claims.[1165]

The district court granted summary judgment to the defendants finding that Stotter's memo had not addressed a matter of public concern.[1166] On appeal, the Fifth Circuit clarified the caselaw on mixed-speech cases; mixed speech means speech which implicates the speaker both as an employee and as a citizen in one communication.[1167] The Court of Appeals did not cite *Garcetti* and instead only referenced *Connick*, but agreed with the district court that, "Dr. Stotter was speaking as an aggrieved employee, about a classic employment issue: compensation."[1168] The court found that because the memo Stotter sent to administrators in August of 2000 mostly dealt with issues related to Stotter's personal employment, it represented an employee grievance rather than a matter

---

[1163] *Id.*
[1164] *Id.*
[1165] *Id.* at 812.
[1166] *Id.* at 824–25.
[1167] *Id.* at 825.
[1168] *Id.* at 827.

of public concern.[1169] The Fifth Circuit affirmed the district court's grant of summary judgment in favor of the defendants.[1170]

4.5.20. Udeigwe v. Texas Tech University

In this case, Udeigwe was a tenure-track assistant professor of plant and soil science at Texas Tech University (TTU).[1171] Udeigwe served three years, but when his contract was up for renewal the department head told him that the faculty members assigned to his pre-tenure review did not like him and he was informed that his contract would not be renewed. [1172] Udeigwe signed a one-year terminal contract to stay on for the following academic year.[1173] Udeigwe appealed his non-renewal, but "the Tenure Hearing Panel concluded that 'the process was generally consistent with prior third year reviews,' and affirmed Udeigwe's non-reappointment in late April 2016. TTU's Interim President approved the panel's decision roughly one week later."[1174] Udeigwe filed a racial discrimination charge with the EEOC after receiving this decision.[1175] Once he received a right to sue letter, Udeigwe sued under Title VII and §1983; the district court granted the defendants' motion to dismiss his Title VII claim, and treated his remaining claims (including his First Amendment claim) as abandoned after Udeigwe filed his third

---

[1169] *Id.* at 826–27.
[1170] *Id.* at 827. Stotter's due process claim went to a jury trial wherein the jury found "that Bailey had violated Stotter's right to notice, that Stotter had a property interest in various items in his lab, and that he was entitled to $175,000 for the loss of his research notebooks…" After the jury verdict, however, Bailey moved for a judgment as a matter of law under Rule 50(b) and the motion was granted by the district court. On appeal, the Fifth Circuit affirmed the trial court's finding, noting that the research notebooks in question fell under UTSA's intellectual property policy such that Stotter could not (under the UTSA policy) have a protectable property interest in them. *Stotter v. University of Texas at San Antonio*, 2010 369 Fed.Appx. 641, 642–43 (5th Cir.).
[1171] *Udeigwe v. Texas Tech University*, 733 Fed.Appx. 788, 790 (5th Cir. 2018).
[1172] *Id.*
[1173] *Id.*
[1174] *Id.*
[1175] *Id.*

amended complaint *pro se* and failed to follow the court's instructions.[1176] Udeigwe appealed the dismissal, but the Fifth Circuit found that he had failed to identify any speech that was a matter of public concern, let alone protected or which motivated Udeigwe's non-renewal.[1177] The appellate court affirmed the district court's decision.[1178]

4.5.21. Van Heerden v. Board of Supervisors of Louisiana State University

In this case, van Heerden was an untenured associate professor of research in civil engineering who co-founded the Louisiana State University Hurricane Center.[1179] Despite not having tenure,[1180] Van Heerden was an outspoken public critic of the U.S. Army Corps of Engineers' failures to maintain the levees around New Orleans leading up to Hurricane Katrina.[1181] He testified to his expert knowledge of the federal government's failings in this regard before the U.S. Congress and the Louisiana legislature despite LSU's requests that he not make public statements regarding the levee failures. [1182] The defendant administrators repeatedly warned van Heerden that continuing to speak out on these issues could jeopardize LSU's federal funding; in May 2006, van Heerden published a book about the levee's failures and exposing LSU's attempts to silence his opinions; in April 2009 van Heerden's contract was not renewed.[1183]

[1176] *Id.* at 791.
[1177] *Id.* at 793.
[1178] *Id.* at 795.
[1179] *Van Heerden v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll.*, 2011 WL 5008410 1, *1 (M.D. La. 2011).
[1180] Van Heerden had claimed *de facto* tenure and breach of contract. The court found that the university's policy disclaimers clearly stated that "*reappointment is made solely at the initiative of the university.*" *Id.* at *13. Summary judgment was granted in favor of the defendants on both counts. *Id.* at *2.
[1181] *Van Heerden v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll.*, 2011 WL 5008410, *1.
[1182] *Id.*
[1183] *Id.* at *1-2.

The defendants argued that van Heerden's speech was made pursuant to his official duties;[1184] however, the court found evidence that the defendants had changed van Heerden's job description to disavow themselves of his speech in question and especially of his involvement in "Team Louisiana" (the group that wrote the report criticizing and publicizing the failures of the Army Corps of Engineers).[1185] The court wrote that even if it were to apply *Garcetti* to the instant case, the facts presented did not indicate that van Heerden spoke pursuant to his official duties.[1186] The court took a stance that an academic exception to *Garcetti* could be appropriate in future cases, but did not apply to this case as the court found that van Heerden had spoken as a citizen.[1187] The claims against all but one defendant were dismissed based on the statute of limitations for §1983 claims; however, the last claim against the former interim dean of the engineering school (who was responsible for not renewing the plaintiff's contract) survived the motion for summary judgment.[1188] The case was settled just before the case was set to go to a jury trial for over $400,000.[1189]

4.5.22. Wetherbe v. Smith

The conflict between the plaintiff, Dr. Wetherbe, and the employer-defendant, Texas Tech University, began in 2012.[1190] This conflict formed the basis of this case with

---

[1184] *Id.* at *3.
[1185] *Id.* at *6.
[1186] *Id.*
[1187] *Id.*
[1188] *Id.* at *7.
[1189] *Van Heerden Deal Cost State $435,000 | News | Theadvocate.Com*, https://www.theadvocate.com/baton_rouge/news/article_4d788cc9-840e-5a5d-94ef-5df8a1ef06d5.html (last visited Mar. 10, 2021).
[1190] *Wetherbe v. Smith*, 2013 U.S. Dist. LEXIS 191270, *2-6 (N.D. Tex. 2013).

opinions issued in 2013 and 2014, as well as a second federal lawsuit with decisions from 2016 and 2017, and a state lawsuit with opinions issued in 2017 and 2018.[1191]

In the first case, Dr. Wetherbe— a full professor of Information Systems Management who declined his entitlement to tenure—alleged that the provost (Smith) of Texas Tech disagreed with Wetherbe's opinions about tenure for faculty members and retaliated against him by removing him from the candidate pools for a promotion to a named professorship and a job as dean.[1192] Citing *Garcetti*, the district court denied the motion to dismiss under 12(b)(6) and qualified immunity.[1193] The district court found that Wetherbe spoke as a citizen, because the court found that his beliefs were indicative of his citizen role and that his work duties did not demand that he speak on such matters.[1194] Nevertheless, the district court did not confront the defendant's contention that the "protected" speech was made during the interview (for the positions he was denied) and on his job application materials. The district court also found that tenure is a matter of university academic quality and public financing which are matters of public concern of interest beyond simply the relationship between public institutions and their employees.[1195] Since the defendants did not argue that their interests outweighed the plaintiff's rights or that the plaintiff had not alleged a causal link between the protected speech and the adverse employment actions, the court found that the claim would survive dismissal. The district court also inquired into the issue of qualified immunity raised by

---

[1191] *Wetherbe v. Smith*, 2013 U.S. Dist. LEXIS 191270; 593 Fed.Appx. 323 (5th Cir. 2014); 2016 WL 1273471 1 (N.D. Tex.); 699 Fed.Appx. 297 (5th Cir.); *Laverie v. Wetherbe*, 517 SW 3d (Tex. 2017); *Wetherbe v. Goebel*, 2018 WL 1177633 (Tex. Ct. App. Mar. 6, 2018).
[1192] *Wetherbe v. Smith*, 2013 U.S. Dist. LEXIS 191270, *3-5.
[1193] *Id.* at *21.
[1194] *Id.* at *11.
[1195] *Id.* at *12.

the defendants.[1196] The defendants argued that Wetherbe was not hired or awarded a named professorship based on his lack of tenure, whereas Wetherbe asserted that the reason was *also* because of his *beliefs about tenure*.[1197] The court stated that the issue of cause is a question for trial, and in light of case law which clearly established that retaliating against someone for their protected conduct/speech is a violation of one's constitutional rights, the motion to dismiss based on qualified immunity was denied.[1198] The defendants appealed.

The Fifth Circuit Court of Appeals in *Wetherbe v. Smith* first dismissed the claim that Wetherbe was retaliated against because the defendants showed that he was denied promotion based on his lack of tenure which is a status of his employment.[1199] The court explained,

Even if we accept that Wetherbe's decision not to have tenure is expressive conduct that contains some speech element, his tenure status is a condition of employment that is inextricably entwined with his role as an employee. He is no more protected from adverse action for his tenure status than a plaintiff would be for refusing to attend training or complete peer evaluations.[1200]

Additionally, the Fifth Circuit stated that a question in Wetherbe's interview for the deanship about his views on tenure was added because Smith knew *before* Wetherbe interviewed that Wetherbe was not tenured.[1201] The Circuit Court asserted that

---

[1196] *Id.* at *13-14.
[1197] *Id.* at *14.
[1198] *Id.* at *14-16.
[1199] *Wetherbe v. Smith*, 593 Fed.Appx. 323, 327 (5th Cir. 2014).
[1200] *Id.*
[1201] *Id.* at 325.

Wetherbe's complaint failed to give specific examples of protected activity without which there could be no causal link to the adverse employment action; rather, the court found that the speech in question was elicited in interviews and application materials which were clearly solicited by the government and was therefore employee speech.[1202] This government-elicited speech is that which is causally linked to the adverse employment actions in this case, the Circuit Court asserted. [1203] The Fifth Circuit explained that Wetherbe's speech regarding his views on tenure in his interview for the deanship (which was concurrent with his application for the named professorship) must not be protected, as the employer's screening process must be able to consider applicants' opinions on matters "central to the operation and mission of the institution."[1204] The Fifth Circuit reversed the district court's judgment and dismissed Wetherbe's First Amendment retaliation claim.[1205]

4.5.23. Wetherbe v. Texas Tech University System

In this case, Wetherbe—the same plaintiff in the preceding case—alleged First Amendment retaliation causally linked to his publication of various online articles about his opinions on tenure as well as his first lawsuit against his employer (2013-2015).[1206] Wetherbe alleged that since he had filed the first lawsuit, he had faced multiple adverse employment actions including a demotion to professor of practice for teaching-load

---

[1202] *Id.* at 328.
[1203] *Id.*
[1204] *Id.* at 329.
[1205] *Id.*
[1206] *Wetherbe v. Texas Tech University System*, 699 Fed.Appx. 297, 299 (5th Cir. 2017).

purposes, termination as associate dean, and removal from his endowed chair.[1207] In 2016, the district court ruled that Wetherbe did not necessarily speak as a citizen and that there was insufficient evidence to show that the defendants knew about the speech at the time of the adverse employment actions.[1208] Likewise, the court ruled that Wetherbe's speech was not on a matter of public concern.[1209]

Wetherbe appealed to the Fifth Circuit, and in 2017 the Fifth Circuit reversed in part and affirmed in part the district court's decision.[1210] The Fifth Circuit criticized the district court's understanding of tenure as being solely a feature of government employment as "fundamentally flawed."[1211] The Circuit Court found that the articles addressing Wetherbe's arguments and beliefs about tenure were, in fact, a matter of public concern and not simply personal grievances with his own experiences of tenure.[1212] Likewise, the court found that the context and form of the speech indicated that it was a matter of public concern, due to the fact that his thoughts and arguments were published in a variety of media outlets and seemed to be contributing to "an ongoing public conversation about tenure."[1213] The defendants argued that Wetherbe made this speech "in the course of performing his job" but the Fifth Circuit did not find

---

[1207] Order Denying Second Amended Rule 12(C) Motion for Judgment at 6–8, *Wetherbe v. Nail, et al.*, No. 5:15-CV-119-Y, Doc. 111 (N.D. Tex. 2019), https://www.courtlistener.com/recap/gov.uscourts.txnd.259081/gov.uscourts.txnd.259081.111.0.pdf; *Wetherbe v. Texas Tech University System*, 2016 WL 1273471 1, *1-2 (N.D. Tex.).
[1208] *Wetherbe*, 2016 WL 1273471, *7.
[1209] *Id.*
[1210] *Wetherbe*, 699 Fed.Appx. at 297.
[1211] *Id.* n. 1.
[1212] Footnote 7 of the district court's denial of defendants' motion for judgment in 2019 addressed the argument raised by the defendants that because the court erred in assessing the topic of speech as not a matter of public concern that in fact the caselaw was not clearly established and thus the actions were reasonable. The district court notes, however, that the caselaw referenced by the Circuit Court was decided "well before the year of [the defendant] Nail's alleged actions." Order Denying Second Amended Rule 12(C) Motion for Judgment at 13, *Wetherbe v. Nail, et al.*, No. 5:15-CV-119-Y, Doc. 111.
[1213] *Wetherbe*, 699 Fed.Appx. at 301.

"reason to infer from the complaint that writing articles on tenure or speaking to the press are part of Wetherbe's job duties."[1214] Additionally, the Fifth Circuit held that when the media approached Wetherbe for comment, that was a factor that "weighs in favor of finding that speech constituted a matter of public concern."[1215] The court did not directly address whether the speech was made as an employee or citizen, but subsumed it under the question of whether it was a matter of public concern: the court cited *Lane*, but not *Garcetti*.[1216] Within the Fifth Circuit, this case established that public debates about tenure in higher education touch on a matter of public concern. [1217]

In 2019 the district court issued a decision on defendants' motion for judgment on the pleadings.[1218] The court determined that Wetherbe had stated a claim and established four individual adverse employment actions for which he may be entitled to relief.[1219] Likewise, the court found that in Wetherbe's third amended complaint he sufficiently alleged that the defendant "knew about—and that his actions were motivated by—Wetherbe's published articles against tenure."[1220]

4.5.24. Whiting v. University of Southern Mississippi

In this case, Whiting, an assistant professor of education, was denied tenure and promotion and told her contract would not be renewed at the end of the academic year

---

[1214] *Id.*
[1215] *Id.*
[1216] *Id.* at 300.
[1217] *Id.*
[1218] Order Denying Second Amended Rule 12(C) Motion for Judgment, *Wetherbe v. Nail, et al.*, No. 5:15-CV-119-Y, Doc. 111 (N.D. Tex. 2019), https://www.courtlistener.com/recap/gov.uscourts.txnd.259081/gov.uscourts.txnd.259081.111.0.pdf. Under the Federal Rules of Civil Procedure, Rule 12(C) motion for judgment on the pleadings asks the trial court to adjudicate the claims once the pleadings are closed but not so late as to delay a trial.
[1219] *Id.* at 6–8.
[1220] *Id.* at 10.

(2002-2003), despite excellent annual evaluations.[1221] Whiting alleged that administrators had retaliated against her for ruling against her department chair "while sitting on a panel reviewing student grievances against administrative actions."[1222] Allegedly, Whiting had spoken out against the actions of her department chair, Dr. Thames, who also was the daughter of the university president.[1223] Subsequently, Whiting alleged, the department chair tried to sabotage Whiting's tenure and promotion chances by raising concerns about several articles, giving her flawed advice not to include certain materials in her dossier, and by intimating that Whiting had committed academic fraud.[1224]

Whiting filed suit in state court, but the federal claims were removed to the federal district court.[1225] The district court granted summary judgment to the defendants on Whiting's First Amendment claim and Whiting appealed to the Fifth Circuit; the Court of Appeals affirmed the district court's ruling.[1226] The district court focused its retaliation analysis on whether there was a retaliatory motive that could be attributed to the president, as final decision-maker of the tenure and promotion decision and sole decider of the non-renewal.[1227] The court stated that Whiting's only evidence of the retaliatory motive was "her beliefs" that President Thames would be biased towards her dossier based on his relationship with his daughter (Whiting's department chair) and her hostility towards Whiting, evidenced by her attempts to "poison" her dossier.[1228]

[1221] *Whiting v. University of Southern Mississippi*, 451 F.3d 339, 340 (5th Cir. 2006).
[1222] *Id.* at 350.
[1223] *Id.* at 340–43.
[1224] *Id.* at 341–43.
[1225] *Id.* at 343.
[1226] *Id.* at 343, 351.
[1227] *Id.* at 350–51. The defendants only argued that Whiting failed to allege a causal link, so the *Garcetti* question was not addressed.
[1228] *Id.*

4.5.25. Wilkerson v. University of North Texas

In this case, Wilkerson, a full-time non-tenure-track lecturer on a five-year contract, was not renewed allegedly because of his "poor judgment."[1229] The alleged poor judgment was brought to the attention of the dean and department chair when a graduate student with whom Wilkerson had had a very brief consensual relationship[1230] months prior filed a Title IX complaint against him after he became graduate program director.[1231] According to Wilkerson, he met this woman prior to her enrollment in the program, he kissed her twice in a bar, and went to a concert with her and another friend where the three shared a hotel room and nothing romantic occurred.[1232] The complaint was investigated and Wilkerson was found not to have violated the university policy, but shortly thereafter his contract was not renewed.[1233] Wilkerson alleged, *inter alia*, violations of his First Amendment right of association and claimed First Amendment retaliation for his choice not to respond to a survey about his department chair's continued service in that role.[1234]

While Wilkerson's freedom of association claim survived the motion to dismiss,[1235] his First Amendment Retaliation claim was dismissed with prejudice.[1236] The district court stated that Wilkerson failed to argue that in abstaining from responding to the survey (about whether his department chair should stay in her position) he spoke as a

---

[1229] *Wilkerson v. University of North Texas*, 223 F.Supp.3d 592, 600 (E.D. Tex. 2016).
[1230] According to the plaintiff, he met her, kissed her twice in a bar, and went to a concert with her and another friend where the three shared a hotel room and nothing romantic occurred. *Id.* at 598.
[1231] *Id.* at 599.
[1232] *Id.*
[1233] *Id.*
[1234] *Id.* at 599–600.
[1235] *Id.* at 604.
[1236] *Id.* at 607.

citizen and he also failed to show this topic was a matter of public concern.[1237] The district court dismissed for failure to state a claim.[1238]

4.5.26. Conclusion

Despite the twenty-five Fifth Circuit faculty speech cases summarized above, the Fifth Circuit has managed to avoid deciding whether to recognize an academic exception to *Garcetti*, and whether to adopt a more expansive definition of adverse employment action. While the District Court for the Middle District of Louisiana adopted the academic exception for van Heerden's scholarship, the other district courts in the Fifth Circuit have not taken such definitive steps.[1239] The limited definition of adverse employment action used by the Fifth Circuit has concerningly also been applied to state constitutional claims of violation of free speech in Texas state courts, as exemplified in *Texas A&M University v. Starks*.[1240]

4.6. Sixth Circuit

In contrast to the Fifth Circuit, the Sixth Circuit has defined an adverse employment action as an adverse action "that would chill a person of ordinary firmness from engaging in protected conduct."[1241] Other important distinctions in the Sixth Circuit jurisprudence are threefold. First, since 2013 it has recognized that academic-senate no-confidence votes (e.g., in the president and provost) are protected under the First

---

[1237] *Id.*
[1238] *Id.*
[1239] *Van Heerden v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll.*, 2011 WL 5008410 1 (M.D. La. 2011).
[1240] *Texas A & M University v. Starks*, 500 S.W.3d 560, 573–74, n. 2 (Tex. Ct. App. 2016) (stating that "neither party has argued that the elements of a free-speech retaliation claim under the Texas Constitution differ from the elements of a federal First Amendment retaliation claim. We will therefore use federal constitutional precedent in analyzing Starks's claim.").
[1241] *Crawford v. Columbus State Community College*, 196 F. Supp. 3d 766, 778 (S.D. Ohio 2016).

Amendment.[1242] Second, the Sixth Circuit recently adopted the academic exception to *Garcetti* in *Meriwether,*[1243] a religiously motivated case in which a professor refused to use a transgender student's preferred pronouns and which is likely to have far-reaching ramifications.[1244] Finally, cases related to whistleblowing (speech made outside of the chain of command) have not been easy to win for plaintiffs, but a recently decided case, *Khatri,* has only made it more challenging for faculty reporting malfeasance or other dangerous behaviors to establish protection under the First Amendment.[1245] In the most recent decision in *Khatri,* the Sixth Circuit stated explicitly that "when an employee 'raises complaints or concerns up the chain of command at his workplace about his job duties' even if he bypasses his immediate supervisors, he still speaks as a public employee."[1246] The Sixth Circuit applied this definition of "chain of command" to Khatri's reporting of misuse of harmful substances to campus police or human resources, two entirely different units from Khatri's food animal health research program. In contrast, the Encyclopedia of Educational Leadership and Administration describes "chain of command" as a hierarchical structure of progressive authority from supervisor to supervisor.[1247] The Sixth Circuit's definition of "chain of command" therefore contradicts the common understanding of the phrase within education.

[1242] *Benison v. Ross*, 983 F. Supp. 2d 891, 900 (District Court 2013); 765 F. 3d 649, 658 (6th Cir. 2014).
[1243] *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).
[1244] Indeed, a very similar case was filed in the Tenth Circuit in late-August 2022. Amended/Corrected Complaint, *Bugg v. Benson*, No. 4:22-cv-00062, Doc. 6 (D. Utah Aug. 30, 2022), https://www.courtlistener.com/docket/64934277/bugg-v-benson/.
[1245] *Khatri v. Ohio State Univ.*, No. 21-3193, 2022 WL 620147, at *3 (6th Cir. Jan. 25, 2022).
[1246] *Id.*
[1247] Fenwick W. English, *Chain of Command, in* ENCYCLOPEDIA OF EDUCATIONAL LEADERSHIP AND ADMINISTRATION 111 (SAGE Publications, Inc. Jul. 2022). Similarly, the definition of "chain of command" in the SAGE Glossary of the Social and Behavioral Sciences reads, "a top-down organizational

4.6.1. Benison v. Ross

In this case, two plaintiffs, a husband (a student) and wife (a full professor) at Central Michigan University, alleged that their institution and various individual administrators retaliated against them in violation of the First Amendment. The speech in question was the husband's introduction of a no-confidence measure in the university president to the Academic Senate which was subsequently approved by the body in December 2011. In Spring 2012, the professor was on sabbatical, applying for other jobs and applying for a promotional salary increase at CMU. She had been aware that she needed to return to CMU after her sabbatical for at least 12 months or else CMU could demand she repay her salary for her sabbatical semester. Her department, dean, and provost all failed to recommend her for a promotional salary increase, so she decided to take an offer from West Virginia University. CMU then demanded that she repay her sabbatical salary as well as her husband's tuition remission. When she refused, the university sued her in state court.

Importantly, the district court found that there is sufficient precedent (in the Second and Tenth Circuits) to provide that the "motion for a no confidence vote" was constitutionally protected.[1248] After finding Mr. Benison's speech was protected, it examined the adverse employment actions alleged: There were three.

1. Professor Benison was denied a promotional salary increase

---

approach popular in bureaucratic and, especially, military organizations, in which the hierarchy of task authority passes down an organizational structure, with each person being directly accountable to the person or position directly above him or her. The organization operates on the basis of superior and subordinate relationships, and authority is based on position in the organizational structure." Larry Sullivan, *Chain of Command (Education)*, *in* THE SAGE GLOSSARY OF THE SOCIAL AND BEHAVIORAL SCIENCES 69 (SAGE Publications, Inc. Jul. 2022).

[1248] *Benison v. Ross*, 983 F. Supp. 2d at 900.

2. CMU sued her to recover her sabbatical salary in state court

3. constructive discharge from job at CMU

The court broke down the promotional increase into three separate acts:

1. The departmental vote

2. The delays in reviewing her application

3. Breaches of faculty association agreement

For the departmental vote there was a clear non-retaliatory reason for the decision—Dr. Benison's lack of service to her department. The court found the claim did not survive summary judgment. When it came to the delays in reviewing her application, despite clear emails between the provost and HR stating he would purposely delay in case she might resign, the court found that the dean's delays were de minimis and the provost's delays were moot since "Dr. Benison had already decided to leave CMU by the time Shapiro delayed reviewing her salary application."[1249] Lastly, the court found the alleged breach of the faculty association agreement was de minimis because the provost never rendered a decision on her promotion application. The second alleged adverse employment action did not meet the court's definition because the four examples of professors who were not pursued in court to repay their sabbatical had significantly different situations and could not be found as "similarly situated" to the plaintiff. Finally, the court found that Dr. Benison's claim that she was constructively discharged failed to survive summary judgment. The court did not find evidence of intolerable working conditions deliberately created by her employer. [1250]

[1249] *Id.* at 903.
[1250] *Id.* at 909.

The Sixth Circuit Court of Appeals affirmed the district court's decision except for the adverse employment action of the lawsuit brought by CMU as represented by President Ross in his official capacity, which was remanded to the district court for further proceedings. They found that there was an issue of material fact for the jury related to whether or not the university's prior refusal to pursue other faculty for reimbursement of their sabbatical pay was evidence of a causal link in this case.[1251] Upon request for *en banc* review, one judge wrote to contextualize the denial of the panel rehearing. The judge explained that the official capacity claim had been defended with sovereign immunity and the plaintiffs acknowledged they were not seeking damages for the surviving claim (as it is not available against defendants in their official capacities).[1252] Specifically, the plaintiffs sought prospective relief in the form of an injunction prohibiting the enforcement of the state court's settlement agreement requiring their reimbursement of more than $50,000.[1253]

4.6.2. Crawford v. Columbus State Community College

In this case, a physics and engineering adjunct filed two First Amendment retaliation claims against his employer, Columbus State Community College. The first claim concerned speech related to his attempt to secure a tenure-track job, while the second claim concerned his behavior of posting anti-abortion pamphlets and flyers on

---

[1251] *Benison v. Ross*, 765 F. 3d 649, 663 (6th Cir. 2014).
[1252] *Benison v. Ross*, 771 F. 3d 331 (6th Cir. 2014).
[1253] The district court judge denied the defendants' motion for summary judgment again. *Benison v. Ross*, 2015 WL 13688201 (E.D. Mich. Mar. 31, 2015). The case was eventually settled after a bench trial before a verdict was delivered. Stipulated Order of Dismissal, *Benison v. Ross*, No. 1:12-cv-15226, Doc. 66 (Aug. 6, 2015).

public bulletin boards on campus.[1254] The court cited *Garcetti* when conducting the balancing test.[1255]

The clearly protected speech at issue was the plaintiff's posting of religiously motivated anti-abortion literature on public bulletin boards on campus. The dean had begun monitoring these postings in 2012 (around when Crawford was asked to develop a course) and in Spring 2012 he told Crawford to stop all postings on campus. Crawford then went to human resources where he was told that the bulletin boards were public for anyone to post on.

The speech in question for the second claim (denial of the tenure track job based on protected speech) was not even the plaintiff's speech, but instead a letter written by a student recommending that the plaintiff be hired as a tenure-track professor. The student sent a letter, a copy of the plaintiff's resume, and a petition signed by 42 students to the President of the college to request that the professor be promoted because of his exemplary teaching and tutoring. The president, dean, and chair were aware of the letter, and the dean subsequently met with the plaintiff and accused him of orchestrating the letter and petition with the students. The plaintiff denied any involvement. Six months after the letter and petition, the college posted a tenure-track job in "Engineering-Physics emphasis." Crawford far surpassed the qualifications listed in the posting.[1256] In the cover letter of his application, Crawford referenced the highly laudatory letter and petition written and signed by the college's students supporting his promotion to assistant professor at the college just six months prior. Still, a far younger and allegedly less

---

[1254] Crawford also filed a third claim of age discrimination.
[1255] *Crawford v. Columbus State Community College*, 196 F. Supp. 3d 766, 773 (S.D. Ohio 2016).
[1256] *Id.* at 771.

qualified applicant was hired two days after he was interviewed on campus, with Crawford being eliminated from the running even before first round interviews. Crawford claimed the deans and president manipulated scoring and left him out of the running because of the letter/petition incident and his anti-abortion views. Later, during winter 2015 the new tenure-track professor was out of the country and a different adjunct was assigned to his teaching duties (not Crawford).

The district court found that the plaintiff had failed to provide evidence that he spoke as a citizen on a matter of public concern when he referenced the student letter in his application. Indeed, the court stated that even if some of the content of the letter may have addressed issues of public concern when viewed in the light most favorable to the plaintiff, the plaintiff spoke as an employee pursuant to his official duties when he applied for the tenure-track position.[1257] The first claim of First Amendment retaliation was thus dismissed. Nevertheless, the court refused to dismiss the second claim of First Amendment retaliation as there was evidence that the dean had acted to suppress continued protected speech about abortion issues. Not only did the dean attempt to stop the plaintiff from posting anti-abortion pamphlets on campus bulletin boards, the dean had written an email to the senior vice president for academic affairs stating, "if a full-time position were 'ever to materialize, Thomas Crawford may not be suitable for the position' because he ''places anti-abortion literature and objects around campus."[1258] In

---

[1257] *Id.* at 775.

[1258] *Id.* at 778. The court continues, "Dean Schneider followed up by noting that the administration would 'continue to monitor Dr. Crawford's extra-curricular activities,' and the complaint alleges that 'Defendants Schneider and Hailu did monitor [Crawford's] activities of posting materials in public spaces on campus.' Just six months later, that full-time position did 'materialize, but Crawford was passed over for it" (citations omitted). *Id.* This email is easily among the most blatant examples of evidence of viewpoint discrimination and retaliatory animus in all of the (more than 250) court opinions reviewed for this study.

late April 2018 a jury trial was held, and final settlement was entered the next month, though the details of the settlement have not been made publicly available.

4.6.3. Frieder v. Morehead State University

In this case, Frieder, an assistant professor of art history was not awarded tenure after five years and his contract was terminated after a final semester of teaching. Frieder argued that the denial of tenure violated his First Amendment rights to free speech and academic freedom. The court was not persuaded. The classroom speech the professor claimed was protected was using "the bird" in class, simulating a sex act, and claiming that if any student was offended by the images in class they must be "a middle-aged woman who isn't getting any."[1259] The court found that not only was there no evidence of his speech being restricted by his conversations with his department chair about this questionably unprofessional speech, there was likewise no evidence that this speech had anything to do with his denial of tenure/termination. Indeed, the court found ample evidence that Frieder had simply failed to take his superiors' concerns about his dossier to heart prior to going up for tenure. The district court granted the defendants' motion for summary judgment. The plaintiff appealed the decision and the Sixth Circuit affirmed, specifically citing that there was no causal link between Frieder's allegedly protected speech and his tenure denial.[1260]

4.6.4. Higbee v. Eastern Michigan University

In this case, Higbee, a full professor of American history who taught African-American history courses was suspended without pay and denied access to the university

---

[1259] *Frieder v. Morehead State University*, 2012 WL 6187786 1, *5 (E.D. Ky. 2013).
[1260] *Frieder v. Morehead State University*, 770 F.3d 428, 430–31 (6th Cir. 2014).

campus or email for one semester for his alleged reference to the n-word in a post he made in a public Facebook group.[1261] The post denounced the actions of EMU administrators after a series of racially charged messages were graffitied on university buildings resulting in student protests[1262]. Higbee's post alleged that the EMU administrators were at least somewhat responsible for continued institutional racism at the University.[1263] His reference to the n-word was in the abbreviation "HN in C" which he noted to explain away the representational diversity of the university administrators who allegedly still bowed to white male authorities on issues of race.[1264] Higbee stated "HN in C" meant "Head Negro in Charge" which he alleged is a phrase with an academic meaning that is not derogatory, whereas the administration read "N" as the n-word.[1265] The university was granted their motion to dismiss the state law claims in a June 2019 ruling,[1266] and in the July 1, 2019 ruling sought to dismiss his First Amendment Retaliation claims. In a July 1, 2019 ruling, the judge found that Higbee alleged plausible claims under §1983 and denied the defendants' motion to dismiss.[1267]

The court's analysis of the §1983 claims began by stating how to establish a *prima facie* case of First Amendment retaliation. The court noted that the defendants only argued that Higbee's speech was not constitutionally protected.[1268] The court looked to

---

[1261] *Higbee v. Eastern Michigan University*, 399 F. Supp. 3d 694, 697 (Dist. Court 2019).
[1262] *Id.*
[1263] *Id.*
[1264] *Id.* at 698.
[1265] *Id.* at 697.
[1266] *Higbee v. Eastern Michigan University*, 2019 WL 2502733 1, *5 (United States District Court, E.D. Michigan, Southern Division.).
[1267] *Higbee v. Eastern Michigan University*, 399 F. Supp. 3d at 708.
[1268] *Id.* at 700.

Garcetti, *Connick*, and *Pickering* to determine as a matter of law whether or not Higbee's speech was protected.[1269]

First the court decided that Higbee plausibly spoke on a matter of public concern.[1270] The court acknowledged that the Supreme Court has found protesting racial discrimination is inherently a matter of public concern, so the court found the post to be on a matter of public concern.[1271] The defendants argued, that "HN in C" is commonly understood to be a slur, and it was used by Higbee to insult administrators. But the court rebuts that the broader point was not to insult individual administrators but to point to the "university's reaction to a newsworthy incident."[1272] The court also noted that even if the phrase were meant as an insult, at least some portion of the speech addressed a matter of public concern, and that met the necessary threshold.[1273] The defendants also argued that the topic of the post was related to an employment dispute, asserting employer incompetence, etc.[1274] But the same case that defendants rely on for this argument, the court points out, differentiated speech about forms of discrimination from simply employment disputes.[1275] The court concluded that Higbee's speech was in fact a matter of public concern.[1276]

Second, the court determined that Higbee spoke as a private citizen. While there were not many factual allegations, the court determined that there was no reason to

---

[1269] *Id.*
[1270] *Id.* at 702.
[1271] *Id.* at 701–2.
[1272] *Id.* at 702.
[1273] *Id.*
[1274] *Id.*
[1275] *Id.*
[1276] *Id.*

believe that "using a public forum to comment on the university's response to recent racial incidents [would be] within a history professor's official duties."[1277]

Finally, the court found (for the purposes of the motion to dismiss) that Higbee's speech interest outweighed the University's interest in efficiency. The court found that since Higbee spoke as a private citizen on a matter of public concern his "speech interest is substantial."[1278] The defendants argued that the post in question "was likely to cause disruption" including: (1) interfering with the performance of his duties as a professor given the racial tension following the graffiti incident; (2) creating disharmony between his co-workers and administrators; (3) endangering prospective enrollment of African American students.[1279] In other words, the defendants argued that there was an issue of collegiality and perhaps a potential slightly detrimental effect on enrollment of African-American students in the future. The court noted that there was no evidence of actual disruption, so the court had to assess whether the prediction of disruptiveness was reasonable.[1280] The only disruption noted in the facts before the court at this stage was the narrative of the student protests roughly a year prior to the post in question. The defendants provided no evidence based upon which the court could find the defendants reasonably predicted disruptions to the University's work, especially since the protests weren't even shown to have disrupted the work of the University.[1281] The court continued, noting that disharmony among coworkers and recruiting students were unsubstantiated concerns based on the facts before the court. The court cited *Smith v. College of the*

[1277] *Id.*
[1278] *Id.* at 703.
[1279] *Id.*
[1280] *Id.*
[1281] *Id.*

Mainland[1282] noting that academic workplaces are settings in which dissent is expected, so the court found the defendants would need to show how the "post would cause an *unacceptable* level of disharmony."[1283] The court also noted that the meaning of the phrase was up for debate, thus casting doubt on its intended or unintended potential effects.[1284]

The court determined that for the purposes of the motion to dismiss, Higbee's First Amendment right was clearly established.[1285] The court cited Sixth Circuit precedent stating that "an official should be charged with knowledge of the law only if there is a previously decided case with 'clearly analogous facts.'"[1286] The court provided a Sixth Circuit exception when the "balance of cognizable interests weighs so starkly in the plaintiff's favor."[1287] Thus the court denied qualified immunity. Not only that, the court went on to state that *Pickering* itself was clearly analogous to this case (pre-discovery), and also addressed defendants' counter argument that profanity in the post distinguished it from *Pickering* by pointing to Sixth Circuit precedent (*Dambrot v. Central Michigan University*, 1995) noting that "a university professor's speech is not *per se* punishable just because it incorporates racially derogatory remarks."[1288] In the conclusion, the court pointed out that the difficulty in performing a *Pickering* balancing test prior to discovery is a well-recognized issue in the Sixth Circuit.[1289] Following this order, the defendants

---

[1282] *Smith v. College of the Mainland*, 63 F.Supp.3d 712 (S.D. Tex. 2014). See *supra* Section 4.5.18.
[1283] *Higbee v. Eastern Michigan University*, 399 F. Supp. 3d at 704.
[1284] *Id.*
[1285] *Id.*
[1286] *Id.* at 704–5, (citations omitted).
[1287] *Id.* at 705, (citations omitted).
[1288] *Id.* at 706 citing Dambrot v. Central Michigan University, 55 F. 3d 1177 (Court of Appeals, 6th Circuit 1995).
[1289] *Higbee v. Eastern Michigan University*, 399 F. Supp. 3d at 706.

appealed to the Sixth Circuit, but before the appeals court could rule on the case, the parties filed a joint motion to dismiss.

4.6.5. Kaplan v. University of Louisville

In this case, Kaplan, a full professor of Ophthalmology and chair of the department of Ophthalmology and Visual Sciences was insubordinate and committed multiple sanctionable acts without approval of his supervisors.[1290] When the dean and executive vice president confronted Kaplan about this, he was notified that the university would investigate these allegations through a "special chair review" and an independent investigation by the audit department.[1291] Kaplan was subsequently placed on paid leave and was warned that any findings could result in his termination as a chair and/or faculty member.[1292] After multiple investigations, the administrators eventually issued a termination letter detailing six reasons for the revocation of Kaplan's tenure and his immediate dismissal.[1293] Kaplan grieved and the faculty grievance panel held a two-day hearing over the course of November and December 2019.[1294] The hearing panel found four of the six grounds for dismissal were demonstrated by clear and convincing evidence, but they did not determine whether termination was warranted given that not all the grounds in the termination letter were found to be committed by Kaplan.[1295] Two months later, the president of the university determined that there was still adequate cause

---

[1290] *Kaplan v. University of Louisville*, 2020 WL 4275042, at *1-2 (W.D. Ky. Jul. 24, 2020).
[1291] *Id.* at *2.
[1292] *Id.*
[1293] *Id.* at *3.
[1294] *Id.*
[1295] *Id.*

for termination and Kaplan's revocation and termination was official as of April 23, 2020.[1296]

Kaplan argued that the university violated his right to academic freedom under the First Amendment by denying him his ability to do his job (e.g., continue his research and work on multiple grant-funded research projects, allowing him to use university medical facilities to treat/see his patients, etc.).[1297] The court did not find this convincing and pointed to Kaplan's lack of precedent or authority to establish a right to academic freedom that could have possibly constituted a liberty interest under substantive due process.[1298] The court wrote, "Dr. Kaplan's claim would have this Court recognize a novel First Amendment right to access highly specialized and specific academic resources that might speculatively enable him to produce speech in the future. This claim is devoid of any support from precedent, let alone the First Amendment itself, and is without merit."[1299] The court did not cite *Garcetti*, but did cite *Keyishian*,[1300] *Ewing*,[1301] and other classic cases that dealt with academic freedom.[1302]

4.6.6. Kerr v. Hurd

In this case, Kerr, an assistant professor of obstetrics and gynecology was fired from his faculty position at Wright State University by the chair of the department for his classroom speech related to the overuse of Caesarean sections and the proper use of

---

[1296] *Id.*
[1297] *Id.* at *9.
[1298] *Id.*
[1299] *Id.*
[1300] *Keyishian v. Board of Regents of Univ. of State of NY*, 385 U.S. 589 (1967).
[1301] *Ewing v. Board of Regents of University of Michigan*, 552 F. Supp. 881 (Dist. Court 1982).
[1302] *Kaplan*, 2020 WL 4275042, at *9.

forceps during birth.[1303] Kerr sued his department chair (also his clinical supervisor) and the clinic/corporation run by the university that provided doctors' services to the hospital (UMSA).[1304] The court showed that the Ohio savings statute—allowing plaintiffs one year to re-file after voluntarily dismissing their claims—applied to Kerr's §1983 claims such that the statute of limitations did not bar his First Amendment claim against UMSA.[1305] It then addressed UMSA's contention that they were not state agents and did not act under color of state law when they dismissed Kerr from his role as a clinician (which was a default dismissal based on his dismissal by Wright State University).[1306] The district court found that there were still genuine issues of material fact related to whether UMSA was acting under color of state law, so the court denied them judgment as a matter of law on the issue.[1307]

The court determined that Kerr's speech was a matter of public concern; the court was persuaded that such speech was a matter of public concern in part because there were newspaper and radio stories about the same topic (C-sections and the use of forceps) while the judge was writing the decision.[1308] Defendant Dr. Hurd (Kerr's supervisor who terminated him) argued that "this question of the choice between vaginal deliveries with the use of forceps and Caesarian sections 'does not concern the community or public at large.'"[1309] The court specifically noted that in communicating Dr. Kerr's opinions on this issue to his students, he was furthering the debate among practitioners who would need to

---

[1303] *Kerr v. Hurd*, 694 F. Supp. 2d 817, 828 (District Court 2010).
[1304] *Id.* at 835.
[1305] *Id.* at 836.
[1306] *Id.* at 837–40.
[1307] *Id.* at 840.
[1308] *Id.* at 842–43.
[1309] *Id.* at 841.

make these decisions in the future, thus playing an important role in the clinical discourse.[1310]

The court also determined that Kerr had spoken as a citizen when speaking with his students about methods of delivery by means of the academic exception to *Garcetti*.[1311] The court likewise found that there was clear evidence that Kerr had suffered an adverse employment action (termination).[1312] The question that remained was whether the action was taken in retaliation for Kerr's protected speech.[1313] The court cited a clearly documented conflict between the parties extending through the entire time they worked together regarding Kerr's beliefs on this issue.[1314] The court stated that whether or not this was the reason Kerr was fired was a question for a jury.[1315] Finally, the court found that the defendant was not entitled to qualified immunity citing Sixth Circuit precedent.[1316] The case was appealed to the Sixth Circuit but later the appeal was withdrawn and the case appeared to have been settled out of court.

[1310] *Id.*
[1311] *Id.* at 843–44. The District Court for the Southern District of Ohio followed the Sixth Circuit's *Evans-Marshall* precedent, a post-*Garcetti* that provides an academic exception for classroom speech. *Evans-Marshall v. Board of Educ. of Tipp City*, 428 F. 3d 223 (6th Cir. 2005).
[1312] *Kerr v. Hurd*, 694 F. Supp. 2d at 844.
[1313] *Id.*
[1314] *Id.*
[1315] *Id.*
[1316] *Id.* at 846.

4.6.7. Khatri v. Ohio State University[1317]

In *Khatri v. Ohio State University*, decided by the U.S. District Court for the Northern District of Ohio[1318] and affirmed by the Sixth Circuit,[1319] a research scientist[1320] sued his former university employer, his principal investigator, his former supervisors, and other colleagues claiming that his First Amendment rights were violated when he was fired because of his whistleblowing activity.[1321] In this case, Khatri worked in a lab with dangerous infectious substances (strictly regulated under federal law) and found that lab personnel had not been properly trained on how to work with these pathogens. Fearing the very real possibility of a "major disaster that may have resulted in loss of human lives and livestock," the plaintiff attempted to report the misuse and mishandling of the substances to a federal agency but did not know how.[1322] He contacted local law enforcement who told him to contact the campus police; so he did.[1323] He also reported the issues in the lab to the campus biosafety manager and the director of the agricultural research center in which his program was housed.[1324] He reported additional issues with the hostile work environment, harassment, and abuse he endured to the campus human resources director.[1325] Over the course of years, these reports were dismissed or ignored.

[1317] The researcher has published a paper dealing with this case. See, Nora Devlin, *Vulnerable Integrity: Two Whistleblower Cases in Public Universities*, 46 J.C. & U.L. 360 (2021). After this article was published, the plaintiff, Khatri, contacted the researcher directly to obtain a copy of the article. The researcher has exchanged emails with this plaintiff, but that is the extent of their interactions.
[1318] *Khatri v. Ohio State Univ.*, 2021 WL 534904 (N.D. Ohio Feb. 12, 2021).
[1319] *Khatri v. Ohio State Univ.*, No. 21-3193, 2022 WL 620147 (6th Cir. Jan. 25, 2022).
[1320] A research scientist is a non–tenure-track faculty member who is assigned solely to research duties. They have no teaching or service expectations; therefore, they do not normally participate in shared governance.
[1321] *Khatri*, 2021 WL 534904; 2020 WL 5340233; 2020 WL 533040 (N.D. Ohio Feb. 3, 2020).
[1322] *Khatri*, 2021 WL 534904, at *1; 2020 WL 5340233, *9.
[1323] *Khatri*, 2020 WL 5340233, *10.
[1324] *Khatri*, 2021 WL 534904, at *1-2.
[1325] *Khatri*, 2020 WL 5340233, *10.

After filing a complaint against the acting head of the program, Khatri was placed on an employee improvement plan which eventually led to his termination.[1326]

The federal district court for the Northern District of Ohio adopted the magistrate judge's report and recommendations granting defendants' motion to dismiss in early 2020.[1327] Khatri represented himself and filed his objections to the magistrate's opinion one day after the deadline and after the district court judge had officially adopted the recommendations and closed the case.[1328] The district court's opinion from 2021, nevertheless, addressed Khatri's objections to the 2020 ruling and once again dismissed all federal claims with prejudice.[1329] The court acknowledged that Khatri "was valued for bringing in [over $1 million in] grant money, which his department heads sought to retain" and which they allegedly continued to use for their own purposes without his approval.[1330] The court did not address whether or not Khatri's whistleblowing activity was a motivating factor in his termination, as the court found that none of Khatri's complaints constituted protected speech under the First Amendment.[1331] The court stated that Khatri's complaints were not protected because they were internal communications—meaning speech made to other units within the same university employer—made pursuant to his job duties.[1332] Citing *Garcetti*, the court maintained that Khatri's speech was made as an employee rather than a citizen.[1333] In affirming the

---

[1326] *Khatri v. Ohio State Univ.*, 2021 WL 534904, at *2.
[1327] *Khatri v. Ohio State Univ.*, 2020 WL 533040 (N.D. Ohio Feb. 3, 2020).
[1328] *Khatri*, 2021 WL 534904, at *3.
[1329] *Id.* at *4-13.
[1330] *Khatri*, 2020 WL 5340233, *15.
[1331] *Khatri*, 2021 WL 534904, at *9.
[1332] *Id.* at *8. Even though it is arguable that HR directors, biosafety officers, and campus police are not within the chain of command of a research scientist.
[1333] *Id.*

district court's ruling, the Sixth Circuit stated explicitly that "when an employee 'raises complaints or concerns up the chain of command at his workplace about his job duties' even if he bypasses his immediate supervisors, he still speaks as a public employee." [1334]

4.6.8. Li v. Jiang

In this case, an Assistant Professor of Sociology at Youngstown State University filed suit against her department chair and university for First Amendment retaliation. The defendant—department chair (Jiang)—and the plaintiff (Li) are both Chinese women. Less than 2 weeks after Li received a unanimous departmental endorsement for tenure, the defendant sent a racist/politically-motivated tirade against Japanese people to Li and requested that she forward the email to others in the Chinese Community. Li refused. Within one week, Defendant Jiang sent three pages of allegations about Li to the dean recommending her tenure application be rejected. She was notified in April of that year that she could continue on a one-year non-tenure-track contract before she would be dismissed. In response to the defendants' motion for judgment on the pleadings, the court dismissed §1983 claims against YSU and the department chair in her official capacity. The court ruled that defendant Jiang in her individual capacity was not entitled to qualified immunity because Li showed that it was a clearly established violation of the First Amendment to dismiss public employees based on their political beliefs. The court also found that Li's complaint was plausible under the *Twombly/Iqbal* standard.[1335]

[1334] *Khatri v. Ohio State Univ.*, No. 21-3193, 2022 WL 620147, at *3 (6th Cir. Jan. 25, 2022).
[1335] *Min Li v. Qi Jiang*, 38 F. Supp. 3d 870, 882 (N.D. Ohio 2014). The *Twombly-Iqbal* standard refers to two Supreme Court cases (*Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* respectively) which changed federal civil procedure. Under this standard, all civil actions require a plaintiff to state a claim to relief that is plausible based on only the factual pleadings that "allow the court to draw the reasonable

In the 2016 memorandum opinion, the court adjudicated the defendants' motion for summary judgment on the §1983 claim and the Title VII claim. In contrast to the pre-discovery opinion in 2014, this opinion includes substantially more factual background. The court ruled that even though Li had shown a *prima facie* case of retaliation, the evidence clearly indicated that the defendants would have taken the same action absent the speech.[1336] This appears to be a clear issue of departmental politics, leading to feelings of betrayal for both parties. Like *Kahan v. Slippery Rock University* in the Third Circuit, this was a case of a tenure-track professor who kept teaching at another school rather than investing in the school where they were a full-time assistant professor.[1337] The court demonstrated that despite having two full years of course releases to conduct research, Li had not published a single article or even presented at a national conference.[1338] Likewise, the court noted that not only had Li *not* quit teaching at her former employer (Ferris State University in Michigan), she had taken on additional teaching hours while she had course releases at YSU.[1339]

Li appealed and the Sixth Circuit affirmed the 2016 district court ruling.[1340] Specifically, the appellate court noted Li's successful prima facie case, but nevertheless agreed that "the uncontested evidence still showed that [the defendant] and her superiors

---

inference that the defendant is liable for the misconduct alleged," rather than "mere conclusory statements." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940 (2009). For a more thorough explanation of the standard and how these cases changed civil procedure, see Anthony Gambol, *The Twombly/Iqbal Plausibility Pleading Standard And Affirmative Defenses: Gooses and Ganders Ten Years Later*, 41 PACE L. REV. 193, 194–98 (2020).

[1336] *Li v. Jiang*, 164 F. Supp. 3d 1012, 1023 (N.D. Ohio 2016).

[1337] See *supra* Section 4.3.7.

[1338] *Li v. Jiang*, 164 F. Supp. 3d at 1017.

[1339] *Id.* at 1015.

[1340] *Min Li v. Qi Jiang*, 673 Fed.Appx. 470 (6th Cir. 2016).

would have made the same decision they did anyway."[1341] The court concluded that the preponderance of the evidence demonstrated an adequate justification, insofar as the legitimate concerns "came well before the alleged eruption over Jiang's email, [...] had considerable evidence backing them, and [...] outlined a compelling case for denying Li tenure."[1342] Notably, in the conclusion, the Sixth Circuit pointed out that Li had only two publications, both from research conducted prior to her arrival at YSU, and she was a fourth author on both of them.[1343]

4.6.9. Lifter v. Cleveland State University

In this case, a full professor (Gelman) and his wife (Lifter, an associate dean)[1344] at Cleveland State University claimed First Amendment retaliation for Gelman's efforts to unionize the law school faculty.[1345] Gelman, along with 9 other founding union members, received a merit raise of $666 for FY14 while many non-union faculty members received either $3,000 or $5,000 raises for the same year.[1346] The dean claimed he had at no point deliberately ordered that any faculty member be given a $666 raise.[1347] Gelman also claimed that the semester following the unionization approval, he was not reappointed to the various committees he had served on previously.[1348] In July 2014, plaintiff Lifter—the associate dean—was laid off by the dean who cited financial

---

[1341] *Id.* at 473–74.
[1342] *Id.* at 475.
[1343] *Id.* at 476.
[1344] Lifter is listed second and as Gelman's wife solely because Gelman is the faculty plaintiff in the case and that is the focus of this dissertation; Lifter is surely her own person who has accomplished great things in her own right and not simply Gelman's wife.
[1345] *Lifter v. Cleveland State University*, 202 F. Supp. 3d (N.D. Ohio 2016); 707 Fed.Appx. 355 (6th Cir. 2017).
[1346] *Lifter*, 202 F. Supp. 3d at 782.
[1347] 202 F. Supp. 3d 779, 782 (Dist. Court).
[1348] *Lifter*, 202 F. Supp. 3d at 781.

exigency and budgetary issues.[1349] In January 2015, faculty were offered an early retirement incentive and Gelman accepted the incentive buyout, as his wife had already been dismissed.[1350]

Both plaintiffs filed grievances with the state employment board, but the charges were dismissed.[1351] The defendants claimed that the matter at hand was collaterally estopped because the charges had been filed with and subsequently dismissed by the state employment board already.[1352]The court did not agree, finding that because the state employment board's decision was not appealable, these claims were not estopped.[1353]

The district court then turned to each of the two counts of First Amendment retaliation.[1354] First, addressing Gelman's claim of retaliation, the court determined that his claim only included the alleged adverse employment action of a lower merit raise.[1355] To substantiate this claim, Gelman asserted that he should have been awarded at least a $3,000 merit raise.[1356] However, the court found that Gelman had provided the dean with a faculty self-report that did not support his claims.[1357] Likewise, the court found the faculty members originally said to receive $727 each had their amounts reduced to $666 after the budget had been cut by $3,067 overall.[1358] Thus the court stated there was no

---

[1349] *Id.* at 783.
[1350] *Id.* at 784.
[1351] *Id.*
[1352] *Id.* at 785–86.
[1353] *Id.* at 787.
[1354] *Id.*
[1355] *Id.* at 788.
[1356] *Id.*
[1357] *Id.*
[1358] *Id.* at 789.

issue of fact as to whether Gelman's protected activity was a motivating factor in his raise amount.[1359]

In the 2017 appeal, Sixth Circuit Judge Boggs, writing for the appellate panel, affirmed the district court's ruling on Professor Gelman's retaliation claim.[1360] The court found that Gelman failed to show that his protected activities were a substantial or motivating factor in the adverse employment actions he experienced.[1361] The court determined that when Dean Boise denied Gelman three faculty committee appointments, no reasonable juror could find anti-union animus was a substantial or motivating factor.[1362] The evidence demonstrated that Boise had appointed other pro-union faculty members to those committees and had appointed Gelman to a hiring committee and then hired the individual the committee had recommended.[1363] The court did not, however, address the fact that the filings *also* indicated that Gelman himself had been singled out as the primary instigator of the unionization efforts when Dean Boise said "shame on you Sheldon Gelman" and publicly accused him of being out to get Boise personally during a school-wide faculty meeting.[1364] Boise's actions were viewed as so inappropriate that multiple faculty members emailed Boise to follow up after the meeting and scold him for being so unprofessional.[1365]

[1359] *Id.*
[1360] *Lifter v. Cleveland State University*, 707 Fed.Appx. 355 (6th Cir. 2017).
[1361] *Id.* at 362.
[1362] *Id.* at 363.
[1363] *Id.*
[1364] 202 F. Supp. 3d 779, 781 (Dist. Court); *Lifter*, 707 Fed.Appx. at 357.
[1365] 202 F. Supp. 3d at 781; *Lifter*, 707 Fed.Appx. at 357.

The Sixth Circuit found that there was no material issue of fact as to how Boise reached the $666 figure.[1366] The court also stated that despite the plaintiff's belief that the performance metric used to evaluate faculty scholarship was flawed, the metric was evenly applied to all faculty and therefore was not retaliatory.[1367] Likewise, the appeals court noted that the allegedly retaliatory raise amount was applied to pro-union and anti-union faculty alike, which undermined the plaintiff's allegation that it was retaliatory.[1368] The Sixth Circuit found that defendants were entitled to summary judgment for all claims.[1369]

4.6.10. Meriwether v. Trustees of Shawnee State University

In this case, Meriwether, a full professor sued the board of trustees in their individual and official capacities along with the provost (and VPAA), the dean, the chair of the English/humanities department, the Title IX coordinator, and two deputy Title IX coordinators, for the adoption and implementation of policies which Meriwether believed required him to speak contrary to his deeply held religious beliefs regarding gender identity.[1370] Meriwether, a professor of philosophy, had been subject to a formal warning after a Title IX investigation found that Meriwether had violated the university's non-discrimination policy by creating a hostile environment for one of his students.[1371] Meriwether claimed the warning he received constituted First Amendment retaliation and

---

[1366] *Lifter*, 707 Fed.Appx. at 363.
[1367] *Id.* at 364.
[1368] *Id.* at 363.
[1369] *Id.* at 366. Plaintiff Lifter's claims were dismissed for lack of jurisdiction because she did not have third-party standing to raise a retaliation claim based on her husband's First Amendment rights. *Id.* at 365-366.
[1370] *Meriwether v. Trustees of Shawnee State University*, No. 1:18-cv-00753, 2019 WL 4333598, at *1 (S.D. Ohio Sep. 5, 2019).
[1371] *Id.* at *5.

that the university policy violated his right free speech and free exercise of his religion.[1372]

Meriwether taught his political philosophy course by calling on students by their last names and a gendered title (miss/mr./mrs./etc) or "sir" or "ma'am" to respond to questions during class.[1373] In January 2018, Meriwether was approached by a student who asked that he please refer to her as a woman as she was a transgender female.[1374] Two days later, Meriwether met with his dean who asked him to please refer to all students by last names only and eliminate any and all gendered references while addressing students.[1375] They came to a verbal agreement that he would continue using gendered titles for other students, but not for the particular transgender student.[1376] Despite the fact that the student continued to complain that this solution was not satisfactory, Meriwether refused to stop using gendered titles.[1377] He stated that he would only refer to students by their gender identities if he could include in his syllabus that he was doing so only under compulsion which required him to set aside his personal and religious beliefs.[1378] The dean told him such a statement in his syllabus would violate the non-discrimination policy, so he said he would not change his behaviors.[1379] Soon thereafter, the student filed an informal complaint and the dean issued a formal notice to plaintiff that he was expected to treat "all students the same, irrespective of their gender identity."[1380] Three

---

[1372] *Id.* at *7.
[1373] *Id.* at *4.
[1374] *Id.*
[1375] *Id.*
[1376] *Id.*
[1377] *Id.* at *4-5.
[1378] *Id.* at *4.
[1379] *Id.*
[1380] *Id.* at *5.

days later, the dean launched a formal investigation as per the collective-bargaining agreement.[1381] The Title IX office determined Meriwether had violated the policy and the dean and provost approved a written warning that was included in his file stating that his actions and continued refusal to change his behaviors had violated the policy.[1382] It also stated that further violations of the policy would result in escalated disciplinary consequence.[1383]

With respect to Meriwether's First Amendment free speech claim, the defendants argued that Meriwether's speech was not protected under *Garcetti* as a matter of law, and even if it had been, the government interest would outweigh Meriwether's interest in his rights under the *Pickering* balancing test.[1384] Meriwether responded by contending that his speech was related to teaching and invoked the academic exception under *Garcetti*.[1385] The plaintiff further claimed that the formal written warning and threat of future corrective actions would chill the speech of a person of ordinary firmness, and indeed has chilled his own speech, causing him to avoid discussions of gender identity in class or with students.[1386]

Meriwether argued that there was an academic exception for faculty speech related to teaching and scholarship under *Garcetti,* but the district court stated that the Supreme Court did *not* carve out an exception to its holding because it declined to decide that matter at the time of *Garcetti.*[1387] The court instead noted that being bound to the

---

[1381] *Id.*
[1382] *Id.* at *6.
[1383] *Id.*
[1384] *Id.* at *7.
[1385] *Id.*
[1386] *Id.* at *8.
[1387] *Id.* at *10.

Sixth Circuit and the Supreme Court, neither courts had ruled that there was in fact or in law an academic exception to *Garcetti*.[1388] The court thus applied the *Garcetti* analysis to the instant case and found that Meriwether had spoken pursuant to his official duties.[1389] Thus, the court found that Meriwether had failed to state a claim as a matter of law, but continued to analyze the case according to the rest of the *Connick-Pickering* test assuming, arguendo, that Meriwether had not spoken pursuant to his official duties.[1390] The court went on to determine that Meriwether's use of titles and gendered pronouns "did not implicate the broader social concerns surrounding" issues related to gender identity and thus his speech was not on a matter of public concern.[1391] Importantly, the district court noted that Meriwether's speech could not "reasonably be construed as conveying *plaintiff's broader beliefs and views* about gender identity" because Meriwether did not provide the students with proper context or explain his views such that they could understand any intent rooted in his beliefs.[1392] Citing another case in the Sixth Circuit, the court stated that public universities are entitled to impose sanctions and discipline employee-speakers whose speech is not protected and which contradicts the educational or academic mission of the institution.[1393]

After determining that Meriwether had not alleged a retaliation claim, the court analyzed the compelled speech, content/viewpoint discrimination, and unconstitutional conditions claims.[1394] The court found that the compelled speech claim failed because

---

[1388] *Id.* at *11.
[1389] *Id.* at *12.
[1390] *Id.* at *13.
[1391] *Id.* at *14.
[1392] *Id.* at *15.
[1393] *Id.* at *11.
[1394] *Id.* at *16-25.

Meriwether failed to allege that any of the defendants compelled him to speak.[1395] The court repeatedly notes that when speech "is part of an employee's official duties, the employer may insist that the employee deliver any lawful message."[1396] To further explain, the court writes

> Plaintiff does not claim that defendants mandated that he use any particular terms of speech to refer to Doe. To the contrary, plaintiff acknowledges that defendants gave him the option to stop using gender-based titles during class, but plaintiff rejected that option. For the reasons discussed supra, plaintiff's use of male titles and pronouns to address Doe did not in and of itself express a belief or an idea and was not "protected" speech. By the same token, defendants' requirement that plaintiff address Doe and the other students in plaintiff's class in a consistent manner, whether by their first or last names only, did not force plaintiff to express a belief on "gender identity" that he did not personally hold or endorse. Defendants did not violate plaintiff's free speech rights under the First Amendment by compelling him to "mouth support" for a view plaintiff found objectionable. Plaintiff's claim for compelled speech should be dismissed.[1397]

In other words, the court found that defendants offered very reasonable compromises on language in the classroom that would only have required Plaintiff to refer to students by a uniform rule (e.g. by just last name rather than by a gendered title) that would have adhered to the non-discrimination policy. Nevertheless, the plaintiff refused to acquiesce.

[1395] *Id.* at *16.
[1396] *Id.* at *17.
[1397] *Id.*, (citations omitted).

Meriwether appealed the decision to the Sixth Circuit and a three-judge panel issued an opinion in the case in March 2021.[1398]

4.6.10.1. **Meriwether v. Hartop (Sixth Circuit 2021)**

In the March 2021 Sixth Circuit opinion, Judge Thapar wrote for the three-judge panel stating definitively that the Sixth Circuit joins the Fourth, Fifth, and Ninth circuits in recognizing an academic exception for teaching and scholarly speech made pursuant to a professor's official duties.[1399] The appellate court found that Meriwether had made a prima facie case of First Amendment retaliation.[1400] The court pointed to the university's position that Meriwether ought not include his position on gender identity in his syllabus as an example of the university restricting speech in the name of decency.[1401]

The court also stated that if the university is allowed to dictate what gender pronouns professors use to refer to students it "could likewise prohibit professors from addressing university students by their preferred gender pronouns—no matter the professors' own views. […] Without sufficient justification, the state cannot wield its authority to categorically silence dissenting viewpoints."[1402] The court continues "thus, the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[1403] The court provides no caselaw to support such an assertion.[1404] The court goes

---

[1398] *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). This decision was issued after the cut-off for inclusion in this dissertation, however, as it is an important opinion in the Sixth Circuit, and because the prior decisions fell within the criteria, I have chosen to include it.
[1399] *Id.* at 505.
[1400] *Id.* at 503, 512.
[1401] *Id.* at 506.
[1402] *Id.* at 506–7.
[1403] *Id.* at 507.
[1404] The implication that the university did not justify their policy requiring professors to use students' preferred pronouns was clearly unsupported by the evidence and filings cited in the district court's opinion.

on to list three supposedly "critical" interests at stake in a college classroom which are not based on caselaw (despite the citing of *Lane v. Franks* and *Sweezy*)[1405] nor are they based on any scholarship.[1406] They include:

(1) the students' interest in receiving informed opinion,

(2) the professor's right to disseminate his own opinion, and

(3) the public's interest in exposing our future leaders to different viewpoints.[1407]

The court then stated that while some administrative tasks would not be protected by the First Amendment (e.g., calling roll at the beginning of class as required by the university) this case dealt with academic speech, since it communicates a message, and Meriwether disagrees with that message.[1408] In applying the matter of public concern test from *Connick*, the court found that the topic of his speech was the broader debate as evidenced in his refusal to use a pronoun not traditionally associated with one's sex designated at birth.[1409] The district court's dismissal was vacated and the case was remanded for further proceedings.[1410] The case was settled in April 2022 for $400,000.[1411]

[1405] *Lane v. Franks*, 573 U.S. 228 (2014); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).
[1406] *Meriwether v. Hartop*, 992 F.3d at 507.
[1407] *Id.*
[1408] *Id.*
[1409] *Id.* at 509. The Sixth Circuit did not reference the district court's ruling wherein the magistrate judge (and district court in adopting the report and recommendations) explained that simply calling everyone else by their title except for the one trans person in the class did not reach a matter of public concern since there was no justification, or room for debate.
[1410] *Id.* at 518.
[1411] Megan Henry, *Shawnee State to Pay Professor $400,000 in Settlement over Student's Preferred Pronouns*, THE COLUMBUS DISPATCH (Apr. 19, 2022), https://www.dispatch.com/story/news/2022/04/19/shawnee-state-pay-professor-400-000-settle-pronoun-lawsuit/7358716001/.

4.6.11. Miller v. Michigan State University

In this case, Miller, a clinical professor[1412] of psychiatry and addiction medicine, claimed he had been retaliated against for his speech about the paltry course offerings related to addiction in the medical school curriculum.[1413] The university and individual defendants instead argued that his contract was not renewed because he failed to perform his job duties, including taking the summer off to study for the bar exam.[1414]

In analyzing the First Amendment retaliation claim, the court stated that Miller had failed to provide any evidence of his speech.[1415] In a footnote, the court added that even if the plaintiff had provided evidence of speech, the court doubted that under *Garcetti* such speech would have been protected speech as it was likely made pursuant to his official duties (e.g., in faculty meetings).[1416] The court similarly asserted that Miller failed to submit evidence of a causal link between the non-renewal and any allegedly protected speech.[1417] Thus the court awarded summary judgment to the defendants in this case.[1418]

4.6.12. Morreim v. University of Tennessee

In this case, a professor of bioethics with a legal and medical background spent 24 years teaching mainly courses within the pediatrics department of the Tennessee Health Science Center (Medical School) and publishing in scholarly journals in the fields of

---

[1412] The clinical professor was a full-time, non-tenure-track faculty member at the rank of full professor. He did not have tenure and was on a three-year renewable contract.
[1413] *Miller v. Michigan State University*, 2009 WL1885030, *6 (W.D. Mich. 2009).
[1414] *Id.* at *2.
[1415] *Id.* at *7.
[1416] *Id.* note 6.
[1417] *Id.*
[1418] *Id.* at *8.

medical law and bioethics.[1419] In 2009 the Human Values and Ethics department was dissolved and the plaintiff and two other tenured faculty colleagues were transferred into the department of internal medicine under the chairship of Defendant Dr. Guy Reed.[1420] Defendant Reed proceeded to make demands of Morreim that violated the faculty handbook and thus her contract: for instance, Reed told Morreim that she needed to pay at least 25% of her own salary through external grants or consulting, despite the contractual provision that 100% of her base salary was to be paid by the university.[1421] Even after Morreim's numerous attempts to call attention to Reed's noncompliance with her contract, higher-level administration continued to rubber stamp Reed's retaliatory decisions and statements.

After two consecutive years of "unsatisfactory" evaluations from Reed, the faculty handbook mandated a cumulative performance review conducted by a committee of faculty colleagues.[1422] The dean intervened in the composition of the committee and vetoed the only other professor in the college of medicine with a J.D. (and thus the only person qualified to properly evaluate her legal scholarship).[1423] Nevertheless, the committee unanimously found and reported to the dean that Morreim had met expectations for her rank in every respect.[1424] Morreim was never notified of this finding, however, and was only made aware when she inspected her own personnel files in the dean's office seven months later.[1425] That same day, she also discovered that the dean had

---

[1419] *Morreim v. University of Tennessee*, 2013 U.S. Dist. LEXIS 149436 1, *2-3 (W.D. Tenn.).
[1420] *Id.* at *5.
[1421] *Id.* at *6.
[1422] *Id.* at *12.
[1423] *Id.* at *13.
[1424] *Id.* at *13-14.
[1425] *Id.* at *14.

directed the vice chancellor for academic affairs to initiate revocation of Morreim's tenure.[1426] The committee had adhered to the directives within the faculty handbook, but the dean criticized them for doing so instead of accomplishing his directive to them to uphold the authority of the chair of the internal medicine department.[1427]

In addition to requesting money damages from defendants in their individual capacities, Morreim also requested prospective injunctive relief "to enjoin Defendants to retract her two negative evaluations, to cease efforts to revoke her tenure, to reassign her to another supervisor besides Dr. Reed, and to develop a mutually agreeable process for evaluating Plaintiff's teaching and scholarship."[1428]

In evaluating her First Amendment retaliation claim, the court first dismissed any claims based on the potential future revocation of her tenure as not ripe.[1429] The court cited *Garcetti* in applying the *Pickering* balancing test.[1430] Then the court addressed the claim that the poor evaluations and initiation of tenure review proceedings constitute adverse employment actions and found that "assuming without deciding that these acts constitute adverse actions, Morreim has alleged no facts to show that her adverse actions were motivated in any way by her complaints to administration."[1431] The court asserted that Morreim failed to "point to specific nonconclusory allegations reasonably linking her speech to employer discipline."[1432] The court went on to determine that the internal

---

[1426] *Id.*
[1427] *Id.* at *15.
[1428] *Id.* at *24.
[1429] *Id.* at *36-37.
[1430] *Id.* at *61.
[1431] *Id.* at *63.
[1432] *Id.* at *63-64.

complaints about her employment conditions fail to raise a "public concern"[1433] and thus Morreim failed to state a valid First Amendment retaliation claim.[1434]

4.6.13. Nuovo v. The Ohio State University

In this case, an Italian-American physician and professor of obstetrics raised concerns with his supervisors about misdiagnoses of malignant HPV in female patients at extremely high rates (greater than 40%) in OSU's pathology labs.[1435] Nuovo had his lab privileges taken away multiple times for raising this issue, and eventually was fired from his clinical position.[1436] Over the course of more than three years, Dr. Nuovo repeatedly attempted to alert university administrators to the misdiagnoses, including sending letters to the board of trustees, university president, and the Joint Commission on Accreditation, among others.[1437] In April 2009, Nuovo filed this lawsuit against OSU and various administrators claiming First Amendment retaliation and national origin discrimination (by his supervisor)[1438] because he had been barred from accessing laboratories for trying to call attention to the HPV misdiagnoses.[1439] In May 2009, scientific misconduct charges were filed against Nuovo including a reopening of previously dismissed charges against him from two years prior.[1440]

The District Court for the Southern District of Ohio cited *Garcetti*, stating that Nuovo had no First Amendment right to free speech in issuing condemnations of the

---

[1433] *Id.* at *65.
[1434] *Id.* at *65-67.
[1435] *Nuovo v. The Ohio State University*, 726 F. Supp. 2d 829, 834 (S.D. Ohio 2010).
[1436] *Id.* at 834–35.
[1437] *Id.* at 835.
[1438] The Title VII claim against Nuovo's supervisor was not dismissed as Nuovo provided evidence of multiple instances of discriminatory animus exhibited by his supervisor towards him for being Italian. *Id.* at 846.
[1439] *Id.* at 836.
[1440] *Id.* at 835–36.

administrators' unethical conduct, as he was speaking as an employee/physician and not a private citizen.[1441] Nuovo contended that he spoke as a physician out of professional obligation to provide competent care to patients.[1442] The court nevertheless refused to distinguish between speech made by contractual versus professional obligation and did not acknowledge a difference between Nuovo's internal speech to OSU human resources or his supervisors and his letter to the Joint Commission on Accreditation.[1443] Nuovo's First Amendment claim against OSU was thus dismissed with prejudice for failure to state a claim.[1444] The court also agreed with the defendants' claims that Nuovo had failed to assert any actions by certain individual defendants that infringed upon Nuovo's First Amendment rights.[1445] The district court proceeded to dismiss Nuovo's First Amendment claim against his supervisor as well.[1446]

4.6.14. Ryan v. Blackwell

In this case Ryan was a full professor of journalism at the University of Kentucky who was audited by the university's auditor.[1447] The auditor reported that Ryan had made over $6,000 from the usage of his textbook in the classes he taught.[1448] Ryan denied the allegations, but the provost (Blackwell) began termination and tenure revocation proceedings.[1449] Ryan alleged that Provost Blackwell subsequently made a statement to the press accusing Ryan of stealing from students.[1450] Soon thereafter other defendants

---

[1441] *Id.* at 843.
[1442] *Id.*
[1443] *Id.*
[1444] *Id.* at 844.
[1445] *Id.* at 843–44.
[1446] *Id.* at 847.
[1447] *Ryan v. Blackwell*, 2019 WL 6119212, at *1 (D. Ky. Nov. 18, 2019).
[1448] *Id.*
[1449] *Id.* at *2.
[1450] *Id.* at *1.

allegedly took actions to constructively discharge Ryan in violation of his First Amendment rights to free speech.[1451] Ryan asserted that his allegedly protected conduct included the assertion of his due process rights and his public statements.[1452]

Professor Ryan claimed to have suffered three adverse employment actions in violation of his fundamental rights—the initiation of termination/tenure removal proceedings, the statement by Provost Blackwell to the media, and the efforts to coerce Ryan to resign.[1453] The court first addressed the initiation of the tenure-removal proceedings. Ryan alleged that his dean tried to coerce him to resign in light of the auditor's report, and when Ryan refused the provost initiated the tenure-removal procedure.[1454] The court did not find this to be an adverse employment action, because the court found that it was the precise due process Professor Ryan had himself asserted he was entitled to when he refused to resign.[1455]

The court next analyzed Ryan's claim that defendant Blackwell's statement constituted retaliation. Ryan claimed this statement was made to retaliate against him for not resigning.[1456] Rather than directly addressing this question, the court considered whether Ryan's refusal to resign "constituted an assertion of his due process rights under the Fourteenth Amendment."[1457] The court asserted that the "Plaintiff clearly viewed the termination proceedings as an unwanted procedure thrust upon him by Defendants."[1458]

[1451] *Id.*
[1452] *Id.* at *4.
[1453] *Id.* at *2.
[1454] *Id.*
[1455] *Id.*
[1456] *Id.* at *3.
[1457] *Id.*
[1458] *Id.*

The court concluded the review of whether Blackwell's statement constituted an adverse employment action in retaliation for Ryan's refusal to resign or invocation of his due process rights by stating,

Due process is the salve that the Fourteenth Amendment provides to protect citizens from certain injurious State conduct. Plaintiff did not ask for relief but received it anyway, and claims that the prescription was poison even after it mitigated his ailment. He has failed to allege that he asserted his due process rights, and because of the complaint's logical enigmas, the Court cannot draw this inference in his favor; as a result, he has failed to assert a claim that Defendant Blackwell's statement was unconstitutional retaliation.[1459]

The court then analyzed whether Ryan's public statements and assertion of his due process rights had addressed a matter of public concern. Despite Ryan's reliance on press coverage of his public humiliation and the faculty resistance to the administration's tactics/actions, the court found that the alleged speech was not of public concern; the court felt the Ryan's complaint lacked "sufficient, relevant, factual content" and did not clarify "what [Ryan] actually said."[1460] The court thus granted the defendants' motion to dismiss the First Amendment claims.

Ryan then appealed to the Sixth Circuit.[1461] On appeal, the Sixth Circuit acknowledged that the district court erred when it did not recognize Ryan's refusal to resign as an assertion of his due process rights.[1462] The appeals court then analyzed

---

[1459] *Id.*
[1460] *Id.* at *5.
[1461] *Ryan v. Blackwell*, 979 F.3d 519 (6th Cir. 2020).
[1462] *Id.* at 525.

whether the provost's statement constituted an adverse employment action.[1463] The court noted that while the publicizing of facts to damage Ryan's reputation could be an adverse action, it "hardly seems enough to chill an ordinary person from refusing to resign a tenured professorship."[1464] Likewise, the court noted that the Ryan does not even allege that his speech was chilled.[1465]

The court then analyzed the retaliation alleged by Ryan, "when (1) the University continued its audit, (2) Blackwell did not retract his press statement, and (3) Ryan was removed from teaching a course in the spring semester."[1466] The court found that Ryan failed to state a retaliation claim because he could not show that his speech dealt with a matter of public concern.[1467] Like the district court, the appeals court pointed to the personal nature of his speech and how it represented more of a workplace grievance than a matter of public concern.[1468] The Sixth Circuit found that because "Ryan has not shown that the actions taken against him would chill a person of ordinary firmness, nor has he sufficiently demonstrated that his speech constituted a matter of public concern" he had failed to meet the standard required to overcome qualified immunity, thus on this basis as well, his claim was dismissed.[1469]

[1463] *Id.*
[1464] *Id.*
[1465] *Id.*
[1466] *Id.* at 525–26.
[1467] *Id.* at 527.
[1468] *Id.*
[1469] *Id.* at 528.

4.6.15. Savage v. Gee

In this case, Savage, a librarian, had offered book suggestions to a campus-wide committee he was serving on as a potential book for the first-year class to read.[1470] One of the books he mentioned included a chapter decrying homosexuality.[1471] An openly gay faculty member on the committee took offense.[1472] After two committee members went back and forth escalating the email exchange with Savage, they involved the rest of the faculty by copying the entire faculty listserv.[1473] There were sexual harassment allegations made against the plaintiff, who in turn made complaints about the harassment he had received over the book suggestion.[1474] Savage also contacted legal advocacy groups the Foundation for Individual Rights and Expression (FIRE) and the Alliance Defense Fund (now the Alliance Defending Freedom, or ADF)[1475] which resulted in additional harassment of gay faculty on campus who were involved in the debacle.[1476] The librarian sued the university in state court, but when he saw how the university counsel treated him he resigned thinking he'd never feel supported by the institution again (even though his supervisors had always supported him).[1477] He later sued in federal court claiming his resignation constituted constructive discharge.[1478]

[1470] *Savage v. Gee*, 716 F. Supp. 2d 709, 710–11 (S.D. Ohio 2010).
[1471] *Id.* at 711.
[1472] *Id.* at 712.
[1473] *Id.* at 712.
[1474] *Id.* at 713–14.
[1475] FIRE specifically focuses on free speech cases and historically only represented plaintiffs within the education context; in 2022 FIRE changed the E in its name from Education to Expression "to reflect its broader effort to protect and promote [values of free speech and free thought] off campus, as well." *Mission*, FIRE, https://www.thefire.org/about-us/mission/ (last visited Aug. 1, 2022). In contrast, ADF describes itself as the "world's largest legal organization committed to protecting religious freedom, free speech, the sanctity of life, parental rights, and God's design for marriage and family." *Who We Are*, ALLIANCE DEFENDING FREEDOM, https://adflegal.org/about-us/who-we-are (last visited Aug. 1, 2022).
[1476] *Savage v. Gee*, 716 F. Supp. 2d at 713.
[1477] *Id.* at 714.
[1478] *Id.*

The district court concluded that *Garcetti*'s interpretation and application was appropriate in this case.[1479] The court found that the speech in question (the emails about book suggestions) was properly of public concern, considering the subjects of the books and the subsequent distribution to the entire faculty on campus and their continued involvement in the controversy. [1480] The district court, considered whether his speech was made as a citizen or an employee; the judge concluded that his service on the committee was not strictly required, but that it was still pursuant to his official duties.[1481] The court stated that unless some exception to *Garcetti* were to apply, Savage's speech was not protected under the First Amendment.[1482] The court examined the possibility of an academic exception under *Garcetti* but found that such an exception was only imagined by the Supreme Court as encompassing at most teaching and scholarship; the court thus concluded that without deciding whether such an academic exception exists, Plaintiff's speech would not qualify as concerning scholarship or teaching. [1483] The district court also determined that Savage was not constructively discharged since he was unable to show that his employer took any action to force him out of his job.[1484] Finally, the court stated that Savage lacked standing on any challenges to OSU's harassment and discrimination policy because he no longer worked at OSU, he could not file for damages on the same claims he raised in state court under Ohio statute, and he was not disciplined under the OSU policy.[1485]

[1479] *Id.* at 716–18.
[1480] *Id.* at 716.
[1481] *Id.* at 717.
[1482] *Id.*
[1483] *Id.* at 718.
[1484] *Id.* at 719.
[1485] *Id.* at 720–21.

Savage appealed the district court's granting of summary judgment to the Sixth Circuit.[1486] The Sixth Circuit affirmed the district court's decision, also finding that even assuming an exception to *Garcetti* for scholarship and teaching exists, it would not apply to the facts of Savage's case.[1487] Nevertheless, the *Garcetti* application was not dispositive as the plaintiff could not present sufficient evidence of an adverse employment action. [1488]

4.6.16. Setayesh v. Tennessee

Setayesh was a tenured full professor of chemistry at Nashville State Community College (NSCC) who sued the state of Tennessee, the Tennessee Board of Regents, NSCC, and the Chancellor and Interim President of NSCC. While serving as vice president of institutional effectiveness she spoke out about various inefficiencies—for instance, numerous inconsistencies and errors in the college course schedule, misallocation of funds, federal policy violations, etc.[1489] When a new administration moved in, she was demoted and her salary was cut significantly both of which violated multiple policies and Dr. Setayesh's contract.[1490]

The defendants filed a motion to dismiss which required the court to view the facts in the light most favorable to Setayesh.[1491] Citing *Lane v. Franks*, the court found that her speech had touched on various topics of public concern that were not made pursuant to her official duties and the concern for which fell outside of her official

---

[1486] *Savage v. Gee*, 665 F. 3d 732 (6th Cir. 2011).
[1487] *Id.* at 739.
[1488] *Id.*
[1489] *Setayesh v. Tennessee*, 2018 U.S. Dist. LEXIS 114502, *4 (M.D. Tenn.).
[1490] *Id.* at *8-9.
[1491] *Id.* at *21.

responsibilities.[1492] The court denied the defendants' motion for dismissal, and her free speech claim survived.[1493] A year later, the court awarded defendants' motion for summary judgment because Setayesh had filed a claim with the Tennessee Claims Commission which automatically waived any other claims based on the same acts or omissions of the same state officers/employees.[1494] The district court found that the complaints were based on the same acts/omissions, and Setayesh's federal claims were dismissed with prejudice.[1495]

4.6.17. Smock v. Board of Regents of University of Michigan

In this case, Smock, a full professor of sociology, questioned the integrity of one graduate student's research output.[1496] Allegedly in retaliation, three students reported her for sexual harassment and misconduct related to her interactions with graduate students.[1497] The institution conducted an investigation into the allegations and determined that Smock's conduct was not sufficiently severe or pervasive enough to have created a hostile environment.[1498] Nevertheless, the executive committee of the school and the dean were troubled by the allegations in the report and disciplined her for three years by denying her sabbatical leave, freezing her sabbatical accrual and salary at current levels, barring her from chairing dissertation committees and limiting her interactions with graduate students to only professional settings.[1499] She filed a grievance

---

[1492] *Id.* at *21.
[1493] *Id.*
[1494] *Setayesh v. Tydings*, 2019 WL 1460882, at *3 (M.D. Tenn. Apr. 2, 2019).
[1495] *Id.* at *5.
[1496] *Smock v. Board of Regents of University of Mich.*, 353 F. Supp. 3d 651, 654 (E.D. Mich. 2018).
[1497] *Id.*
[1498] *Id.*
[1499] *Id.* at 654–55.

and after a hearing, the grievance committee upheld the sanctions, as did the provost.[1500] During the grievance hearing, however, the university proffered new allegations that Smock had not been notified of prior to the hearing.[1501] Smock sued for procedural due process violations and challenged the constitutionality of the civility policy that she had been accused of violating, as well as claiming First Amendment retaliation.[1502]

Her challenges to the policies for overbreadth and vagueness were dismissed because the court "decline[d] to interfere with the University's balancing of professorial freedom with its expectations of professionalism."[1503] The court found that Smock failed to show that the policy was unconstitutionally vague, since the policy requires a broad contextual evaluation of how speech creates climates (not just causes one-time offense) and because the policy mandates that there be multiple peer evaluators who apply the policy.[1504] The court found that the instant case's policy-related unconstitutionality lay with the due process violations rather than a First Amendment violation, so the First Amendment challenge to the policy was dismissed.[1505]

Finally, the court found that the retaliation claim hinged on a question of academic freedom. Relying on Sixth Circuit precedent, the district court stated that the test is "the extent to which the [faculty member's] speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives."[1506] The court found that Smock had not pled facts to support that her speech transcended personal

---

[1500] *Id.* at 655.
[1501] *Id.*
[1502] *Id.* at 654.
[1503] *Id.* at 660.
[1504] *Id.*
[1505] *Id.*
[1506] *Id.* at 661.

interest; the court characterized her speech as dealing with "personal sexuality" and found that it did not touch on a matter of public concern.[1507]

4.6.18. Stolle v. Kent State University

In this case, Stolle was a non-tenure-track instructor in the Finance Department at Kent State University.[1508] He was hired in Fall 2006.[1509] In his fourth year as an instructor, in January 2011, Stolle wrote a three-page letter to the Speaker of the Ohio House of Representatives on KSU department of finance letterhead.[1510] The letter proposed eliminating tenure as a cost-saving measure for public universities.[1511] The Speaker contacted KSU's lobbyist who in turn contacted upper administration at KSU alerting them to the letter which was sent in violation of KSU policy.[1512] The lobbyist requested that proper action be taken to notify Stolle of this policy, so the dean contacted Stolle's chair and the associate dean for faculty and told them to meet with Stolle.[1513] The meeting took place one day after the lobbyist's email to administrators.[1514] In the meeting, Stolle was told that his letter had violated university policy because it was on KSU letterhead and could be understood as representing the views of the institution.[1515] Stolle "laughed the whole thing off" and argued that his freedom of speech and academic rights

---

[1507] *Id.* The due process claims were eventually settled out of court in 2020 amidst additional sexual harassment allegations against the provost defendant. Steve Marowski, *UM Settles Professor's Lawsuit over Due Process in Harassment Case - Mlive.Com*, MICHIGAN LIVE (Jan. 29, 2020), https://www.mlive.com/news/ann-arbor/2020/01/um-settles-professors-lawsuit-over-due-process-in-harassment-case.html.
[1508] *Stolle v. Kent State University*, 610 Fed. Appx. 476, 477 (6th Cir. 2015).
[1509] *Id.* at 478.
[1510] *Id.*
[1511] *Id.* at 478.
[1512] *Id.*
[1513] *Id.*
[1514] *Id.* at 479.
[1515] *Id.* at 479.

empowered him to refuse their "cease and desist" request.[1516] Shortly thereafter Stolle published two op-eds in local papers about eliminating tenure at state universities.[1517] He was subsequently renewed for an additional year of teaching, but midway through that contract his department chair determined that he and one other non-tenure-track faculty member should not be renewed at the end of the year due to budget constraints.[1518]

Stolle filed suit claiming that both the associate dean and his department chair had retaliated against him in violation of his First Amendment right to free speech.[1519] Stolle alleged that the meeting he had with the associate dean for faculty and the department chair constituted an adverse employment action, as did his contract nonrenewal.[1520] The court found the meeting was insufficient to support a First Amendment retaliation claim; thus the court awarded the defendants summary judgment on the claims which relied on the meeting as an adverse employment action.[1521] The claim against the department chair went to trial to determine if the op-eds were the but-for cause for Stolle's nonrenewal and the jury found for the defendant.[1522] Stolle subsequently appealed, arguing that the court had abused its discretion when it refused to grant his motion for a continuance after the district court had overruled and partially reversed its own finding of fact during the jury trial.[1523] The Sixth Circuit found no real injury had occurred and the court had not abused its discretion, thus affirming the district court's decision.[1524]

[1516] *Id.*
[1517] *Id.* at 479–80.
[1518] *Id.* at 480.
[1519] *Id.* at 481.
[1520] *Id.*
[1521] *Id.*
[1522] *Id.* at 482.
[1523] *Id.*
[1524] *Id.* at 477–78.

4.6.19. Webb v. Kentucky State University

In this case, Webb, an assistant professor of nursing, was denied tenure despite her department's unanimous favorable vote because the university tenure committee found her application lacking in service and scholarship.[1525] The provost and president recommended against tenure.[1526] Webb was given an additional one-year terminal contract.[1527] She tried to negotiate a contract for an additional (second) year with the support of her department chair, and meanwhile hired an attorney to help her pursue an appeal of the tenure denial.[1528] Webb's attorney sent a letter to Webb's department chair to notify her that Webb had retained an attorney to appeal the tenure denial.[1529] Webb claimed that in retaliation for her attorney's letter, she was denied her contract renewal for an additional year as a non-tenure-track faculty member.[1530] The district court awarded summary judgment to the defendants and Webb appealed.[1531]

The Sixth Circuit asserted that while Webb showed she had engaged in protected conduct (hiring an attorney), she could not show she suffered an adverse employment action in retaliation for her attorney's letter.[1532] Her tenure-track contract had expired more than two weeks prior to the date on the attorney's letter, and she had not been offered or signed a written contract for the following year.[1533] Furthermore, the court

---

[1525] *Webb v. Kentucky State University*, 2012 WL 858639, at 517 (6th Cir. Mar. 14, 2012).
[1526] *Id.*
[1527] *Id.*
[1528] *Id.*
[1529] *Id.*
[1530] *Id.* at 517–18.
[1531] *Id.* at 516.
[1532] *Id.* at 523.
[1533] *Id.*

alleged, such an action would not deter a person of reasonable firmness from hiring an attorney in the future.[1534]

4.6.20. Yohn v. Coleman

In this case, Yohn, a tenured associate professor of dentistry at the University of Michigan, sent more than 25 emails to the dental school faculty and published three articles in the *University Record*[1535] complaining about how minority dental students lowered the standards and rigor of the dentistry program.[1536] Plaintiff alleged he was denied an equity increase to his salary in retaliation for his protected speech.[1537] He filed a grievance and the faculty committee found that while his speech was protected, he had not experienced retaliation, as the actions taken by his supervisors had no malicious intent—they had valid reasons not to give him the salary increase (he had fewer service and scholarship contributions than other faculty who received larger raises).[1538] Likewise, the grievance review board found that when Yohn's supervisor offered to read through his draft emails before he sent them to the entire faculty, that was to try to prevent disruptions or dissension among the faculty.[1539]

In assessing the claim, the court only cited *Connick*, not *Garcetti*.[1540] The court found that while Yohn had spoken on a matter of public concern, his interest in the speech did not outweigh the state's interest in promoting the efficiency of the public

---

[1534] *Id.*
[1535] The University Record describes itself as "is the official source for faculty-staff news at the University of Michigan. The University Record, in print and online, is part of the U-M **Office of the Vice President for Communications**." *About the University Record | The University Record*, https://record.umich.edu/about/ (last visited Mar. 18, 2022).
[1536] *Yohn v. Coleman*, 639 F. Supp. 2d 776, 780 (E.D. Mich. 2009).
[1537] *Id.* at 782.
[1538] *Id.* at 781.
[1539] *Id.* at 782.
[1540] *Id.* at 785.

services.[1541] Additionally, the court found that since no constitutional rights were violated even when viewing the facts in the light most favorable to Yohn, the defendants were entitled to qualified immunity.[1542] The court thus granted the defendants' motion for summary judgment.[1543]

4.6.21. Conclusion

In conclusion, the Sixth Circuit has decided most claims in the defendants' favor, as seen in the previously discussed First through Fifth Circuits. The academic exception to *Garcetti* was recently applied in the Sixth Circuit in *Meriwether.*[1544] In the Sixth Circuit, the definition for adverse employment action under §1983 asks only that the action be adverse enough to "chill a person of ordinary firmness from engaging in protected conduct."[1545] Finally, the Sixth Circuit has applied the term "chain of command" to intramural or internal speech made to institutional officers outside of the employee's department, school, or unit.[1546]

4.7. Seventh Circuit

The Seventh Circuit has ruled on a limited number of cases of faculty speech since 2006, but there is a good deal of overlap on the three-judge panels assigned to the cases. One might hope this could lead to coherent law, though it is not immediately clear that is the case for the Seventh Circuit.

[1541] *Id.* at 786.
[1542] *Id.* at 789.
[1543] *Id.*
[1544] *Meriwether v. Hartop,* 992 F.3d 492 (6th Cir. 2021).
[1545] *Crawford v. Columbus State Community College,* 196 F. Supp. 3d 766, 778 (S.D. Ohio 2016).
[1546] *Id.*

In *Moore v. Watson*, the District Court for the Northern District of Illinois held that "Because they are recognized participants within the designated public forum established by the Illinois General Assembly, the First Amendment protects collegiate media advisers against retaliation for the protected speech of the students."[1547] This explicit protection for faculty advisors of student newspapers is distinctive in that it offers protection against retaliation for the speech made by the students/advisees under the advisor's supervision, not just speech explicitly made by the advisor.

4.7.1. Abcarian v. McDonald

In this case, Abcarian, a professor of surgery, sued the Chief Medical Officer, Director of Safety and Risk Management, and an assortment of other faculty and employees at the University of Illinois Medical Center at Chicago.[1548] Abcarian alleged violations of his constitutional rights to free speech, equal protection, and procedural due process in retaliation for his speech addressing issues related to operating room procedure and surgeons' abuse of prescription drugs.[1549] The adverse employment action he alleged was the administrators' malicious settlement of a malpractice lawsuit against him (and the medical center) for the death of one of his former patients, as well as the reporting of said settlement to national and state professional agencies without notifying Abcarian. Both of these adverse employment actions took place, allegedly, without Abcarian's knowledge, and he was only alerted to these facts after he received letters from the agencies to which his name had been reported.[1550] Upon receiving word, he hired an

---

[1547] *Moore v. Watson*, 838 F.Supp.2d 735, 757 (N.D. Ill. 2012).
[1548] *Abcarian v. McDonald*, 2009 WL 596575 (N.D. Ill. Mar. 9, 2009); 617 F. 3d 931 (7th Cir. 2010).
[1549] *Abcarian v. McDonald*, 617 F. 3d at 935.
[1550] *Id.* at 934.

attorney and learned that he had also been named in a malpractice lawsuit in the state of Illinois which had been dismissed without his ever knowing of its existence.[1551] The district court dismissed the free speech claim for failure to state a claim, citing *Garcetti* and noting that all of Abcarian's allegedly protected speech addressed issues related to and were made in the context of his official duties.[1552] Abcarian appealed.

The Seventh Circuit affirmed and clarified that "whenever employees speak pursuant to their official duties, they speak as employees and not as citizens," by which the court meant that speech made by employees speaking with coworkers is as unprotected as speech made to supervisors.[1553] The Court of Appeals determined that Abcarian's speech was made in his capacity as Head of the Department of Surgery and thus as an employee.[1554] The court wrote, "this alleged speech was within the scope of Abcarian's responsibilities as an employee."[1555] In a footnote, the Seventh Circuit addressed the argument that Abcarian's speech could be related to teaching or scholarship stating, "Abcarian's speech involved administrative policies that were much more prosaic than would be covered by principles of academic freedom."[1556] The court did not mention or address the concept of shared governance.

4.7.2. Beverly v. Watson

This case was brought by plaintiffs Phillip Beverly and Robert Bionaz who were both faculty at Chicago State University and who co-founded and contributed to a blog

---

[1551] *Id.* at 934–35; 2009 WL 596575, at *1.
[1552] *Abcarian*, 2009 WL 596575, at *6.
[1553] *Abcarian v. McDonald*, 617 F. 3d at 936.
[1554] *Id.* at 937.
[1555] *Id.*
[1556] *Id.* at 938 footnote 5.

called “CSU Faculty Voice” which exposed “perceived mismanagement at the university.”[1557] After publishing a November 2013 article about the president’s girlfriend, who allegedly falsified her employment application to the University, the President (Watson), General Counsel, and Associate General Counsel took action to silence Beverly’s and Bionaz’s speech on the blog.[1558] The defendants sent cease and desist letters threatening legal action, crafted and implemented new policies against “cyberbullying” under which the plaintiffs were investigated, and otherwise intimidated the plaintiffs and their colleagues in order to chill expressive activity critical of the administration.[1559] In fact, the plaintiffs had evidence that Watson on several occasions even tried to convince the Interim Vice President of Enrollment and Student Affairs to claim that plaintiff Beverly had sexually harassed her.[1560] When she told Watson she had not felt threatened or harassed by her conversation with Beverly, “Watson asserted that [she] had been harassed and that [she] ‘did not realize it.’”[1561]

In 2017, after two years of litigation, the federal district court for the Northern District of Illinois decided that the defendants' motion for summary judgment should be granted in part and denied in part.[1562] The plaintiffs had brought three claims; the first was a facial challenge to the computer use policy—the defendants' motion for summary judgment on this claim was denied because they failed to show conclusively that the policy was not unconstitutionally vague or overbroad.[1563] The second was a facial

---

[1557] *Beverly v. Watson*, 2017 WL 4339795, at *1 (N.D. Ill. Sep. 29, 2017).
[1558] *Id.* at *2.
[1559] *Id.*
[1560] *Id.*
[1561] *Id.*
[1562] *Beverly*, 2017 WL 4339795.
[1563] *Id.* at *9.

challenge to the cyber bullying policy—the defendants' motion for summary judgment on this claim was granted,[1564] and the third was for First Amendment retaliation—the defendants' motion for summary judgment on this claim was denied since the plaintiffs supplied sufficient evidence to support their claim of retaliation.[1565]

Importantly, in analyzing the First Amendment claim, the district court noted that the defendants' claim that the cease-and-desist letter was only "to protect the University's intellectual property rights" was without merit, since "it is undisputed that CSU had no protected rights in its marks at the time the letter was sent."[1566] Similarly, the court pointed out that defendants' claim that they were protected by qualified immunity was without merit.[1567] The defendants argued that the violation of plaintiffs' first amendment rights was not clearly established, but the court explained that the right at issue was the right to free expression without retaliation, not whether the expression took place "online or elsewhere."[1568]

4.7.3. Burton v. Board of Regents of University of Wisconsin System

In this case, Burton—an associate professor of criminal justice (CJ)—had her tenure revoked and was fired for her unprofessional and disruptive conduct over the course of multiple years.[1569] She had previously also brought multiple federal and state lawsuits against the University of Wisconsin–Platteville.[1570] The issues began after

---

[1564] *Id.* at *11.
[1565] *Id.* at *3.
[1566] *Id.* at *12.
[1567] *Id.*
[1568] *Id.*
[1569] *Burton v. Board of Regents of University of Wisconsin System*, 2020 WL 5304493, at *1 (W.D. Wis. Sep. 4, 2020).
[1570] *Id.*

Burton helped a student report sexual harassment perpetrated by a fellow CJ faculty member.[1571] Burton believed she was repeatedly retaliated against for this activity.[1572] Burton filed a lawsuit two years after the original harassment reporting, alleging violations of Titles VII and IX, but two years later that suit was dismissed for failure to state a claim.[1573] The lawsuit(s) apparently did nothing to reconcile Burton to her institution or colleagues, and the animosity continued unabated for months until she filed her second federal lawsuit based on First Amendment retaliation.[1574]

The speech in question consisted of communications made by Burton to her superiors, Wisconsin state officials, or online and to the media about her workplace grievances.[1575] By the time her superiors had initiated dismissal proceedings, Burton had already posted audio recordings of departmental and university meetings—in which the participants discussed personnel evaluations of junior faculty members—to the website her husband had maintained for numerous years in order to detail every possible wrong she had endured.[1576] The dismissal proceedings were approved and a faculty committee voted to revoke her tenure and terminate her contract; the state court affirmed after she grieved the decision.[1577]

In analyzing the First Amendment claim, the district court first determined that the claim was precluded because Burton presented a First Amendment and academic freedom argument to the state court when she appealed the decision of the Board of

---

[1571] *Id.* at *2.
[1572] *Id.*
[1573] *Id.* at *1.
[1574] *Id.* at *2-8.
[1575] *Id.* at *14-15.
[1576] *Id.* at *6.
[1577] *Id.* at *7-8.

Regents to terminate her and revoke her tenure.[1578] Nevertheless, the district court addressed the merits of the claim as well, finding that Burton had failed to advance any evidence of a causal link between three potential instances of protected speech and the revocation of her tenure and termination.[1579] Instead, the court found that the summary judgment record clearly indicated that the university had fired Burton because she had been a disruptive, vituperative, and unprofessional colleague who "made it impossible for [the university] to provide a safe, harmonious work environment for the faculty and staff in the criminal justice department."[1580] Citing *Garcetti,* the court found that the numerous unkind and uncooperative emails and her persistent refusals to treat her colleagues with good faith were made pursuant to her official duties and thus valid causes for the discipline Burton received.[1581]

4.7.4. Capeheart v. Northeastern Illinois University

In this case, Capeheart, an associate professor of justice studies, sued the university and the named defendant, vice president of student affairs and campus police Melvin Terrell, in his individual capacity (seeking damages for defamation) along with the president and provost in their official capacities.[1582] In suing the president and provost, Capeheart sought an injunction to be appointed department chair and to enjoin the defendants from future retaliation.[1583] The professor claimed she had been retaliated

---

[1578] *Id.* at *13.
[1579] *Id.* at *14-15.
[1580] *Id.* at *16.
[1581] *Id.* at *15-16.
[1582] *Capeheart v. Northeastern Illinois University*, 2010 WL 894052 (N.D. Ill. Mar. 9, 2010); *sub nom. Capeheart v. Hahs*, 2011 WL 657848 (N.D. Ill. Feb. 14, 2011); *sub nom. Capeheart v. Terrell*, 695 F. 3d 681, 682 (7th Cir. 2012).
[1583] *Capeheart v. Hahs*, 2011 WL 657848, at *2; *Capeheart v. Terrell*, 695 F. 3d at 684.

against for her protesting with her students in the student socialism club (for which she was faculty advisor), advocating for her students and speaking out against their mistreatment and unjust arrest by the campus police during a student affairs committee meeting, and for her invited remarks at an Illinois Latino Caucus meeting.[1584]

In the 2011 decision on the defendants' motion for summary judgment, the district court cited *Garcetti* and analyzed the causal link between the speech and the alleged retaliatory action of denying her the position of department chair and denying her a faculty award.[1585] The court found that Capeheart's speech before the Illinois Latino Caucus was protected, but that the time period between the denials of the promotion and award was too long (over one year) to establish a causal link.[1586] Furthermore, the court found that Capeheart was unable to provide evidence that her speech was the "but-for" cause for the retaliation she alleged.[1587] In Capeheart's response to the defendants' motion for summary judgment, she withdrew her demand to be appointed department chair, leaving only the demand for the injunction against the defendants in their official capacities to prevent them from future retaliation.[1588]

The district court's decision was appealed and subsequently overturned in the 2012 decision.[1589] The Seventh Circuit found that because Capeheart had withdrawn her demand to be appointed department chair, she had only managed to bring claims against the defendants in their official capacities seeking a permanent injunction.[1590] Thus, the

---

[1584] *Capeheart v. Hahs*, 2011 WL 657848, at *4.
[1585] *Id.* at *5.
[1586] *Id.*
[1587] *Id.*
[1588] *Capeheart v. Terrell*, 695 F. 3d at 684.
[1589] *Capeheart v. Terrell*, 695 F. 3d 681.
[1590] *Id.* at 684.

court found that her claims should be dismissed on ripeness grounds; Capeheart was unable to show that she was in imminent danger of suffering any injury by the defendants, especially since her defamation claims against Terrell could still succeed in state court.[1591] The court wrote, "we think that her claim is too speculative, the prospect of similar harms too remote, to allow us to [award her an injunction]."[1592] Capeheart's state law claims were settled in 2014.[1593]

4.7.5. Grant v. Trustees of Indiana University

In this case, Grant, an associate professor at Indiana University, was fired for allegedly falsifying his credentials and employment documents over the two decades during which he worked at the university.[1594] After a dean investigated student complaints about Grant and found that he had been evasive and when compelled had provided false information about his qualifications, the dean recommended sanctions.[1595] Grant filed a racial discrimination claim against the dean (Grant is African American) but it was never pursued.[1596] The student complainants also brought their complaints to the local newspaper (*South Bend Tribune*), which filed two public records requests on Grant's training and education.[1597] The vice chancellor for academic affairs began compiling the documents to respond to these record requests and also identified multiple

---

[1591] *Id.* at 684–85.
[1592] *Id.* at 685.
[1593] Susan Kruth, Northeastern Illinois Professor Settles with University in Years-Long Retaliation Case, FIRE (Feb. 13, 2014), https://www.thefire.org/northeastern-illinois-professor-settles-with-university-in-years-long-retaliation-case/; Colleen Flaherty, Northeastern Illinois Settles with Professor in Defamation Suit, Inside Higher Ed (Jan. 28, 2014), https://www.insidehighered.com/quicktakes/2014/01/28/northeastern-illinois-settles-professor-defamation-suit.
[1594] *Grant v. Trustees of Indiana University*, 2016 WL 1222344 1, *1 (S.D. Ind.).
[1595] *Id.*
[1596] *Id.*
[1597] *Id.* at *2.

concerning discrepancies which she sent up the chain of command.[1598] The Faculty Misconduct Review Committee reviewed these documents at the vice chancellor's behest, but they declined to have a formal hearing. They felt that the search committee should have been responsible for vetting Grant's background, and that credential falsification ought not be the basis for removal of his tenure and dismissal.[1599] The chancellor met with Grant to clarify and request any new documentation to refute the findings against him, but he denied the charges, claiming that the dean and vice chancellor (also African American) had retaliated against him.[1600] The chancellor was still concerned about these findings, so she hired an outside consulting firm to investigate and verify Grant's credentials.[1601] The findings were damning: it was clear that nearly everything in his original application had been falsified or was fraudulent, including his recommendation letters, master's degree, enrollment in a doctoral program, clerkships, teaching experience, and every listed fellowship.[1602] Over the years he had even changed his undergraduate minor on his CV.[1603]

These concerning facts led the chancellor to recommend to the university president that the professor be dismissed for gross misconduct (in violation of the IU Handbook, Code of Academic Ethics, etc.) for which there was now ample evidence.[1604] Grant filed a grievance with the faculty board of review prior to the effective date of termination, but eventually withdrew from the review process prior to its scheduling a

---

[1598] *Id.*
[1599] *Id.*
[1600] *Id.*
[1601] *Id.* at *3.
[1602] *Id.* at *3-5.
[1603] *Id.* at *5.
[1604] *Id.*

hearing.[1605] Grant's termination was not submitted to the IUSB Senate Promotion, Tenure, and Reappointment Committee.[1606]

The court granted the defendants' motion for summary judgment on all of Grant's remaining claims.[1607] The speech claim was dismissed because Grant failed to allege any facts or evidence whatsoever that could plausibly support a causal link between a retaliatory animus and his termination by the chancellor/president.[1608] The court did not cite *Garcetti*, nor was there any consideration of whether his discrimination complaints constituted protected speech. Grant appealed to the Seventh Circuit and the appeals court affirmed the district court's finding that "the evidence does not permit a reasonable fact-finder to conclude that [the defedants'] proffered reason for terminating Grant was pretextual."[1609]

4.7.6. Hatcher v. Board of Trustees of Southern Illinois University

In this case, Hatcher, a female assistant professor of political science (pre-tenure) was the highest ranking female faculty member in the political science department.[1610] Because of her senior status, female students came to her to report their continued sexual harassment by male faculty members in the department.[1611] Hatcher sought counsel with the dean to inform her of the situation and the ongoing issues of harassment in the department, which Hatcher believed continued to violate university policy.[1612] Two

---

[1605] *Id.* at *6.
[1606] *Id.*
[1607] *Id.* at *15.
[1608] *Id.* at *9-10.
[1609] *Grant v. The Trustees of Indiana University*, 870 F.3d 562, 571 (7th Cir. 2017).
[1610] *Hatcher v. Cheng*, 63 F. Supp. 3d 893, 896 (S.D. Ill. 2014); *Hatcher v. Board of Trustees of Southern Illinois University*, 829 F. 3d 531 (7th Cir. 2016).
[1611] *Hatcher v. Cheng*, 63 F. Supp. 3d at 896.
[1612] *Id.*

weeks after this discussion, the dean recommended that Hatcher be denied tenure, while recommending tenure to a male colleague in her department who was allegedly less qualified than Hatcher.[1613] Hatcher sued under Title VII, the First Amendment, and the due process clause of the Fourteenth Amendment.[1614]

The district court found that Hatcher spoke as an employee when raising issues about the sexual harassment policy and reporting the students' complaints of sexual harassment.[1615] The court cited Seventh Circuit precedent affirming *Garcetti* in similar cases, like *Abcarian v. McDonald*.[1616] Likewise, the court found that defendants were entitled to qualified immunity since Plaintiff's expressions were not clearly protected speech.[1617] Hatcher's Title VII discrimination claim survived the motion to dismiss, but her Title VII retaliation claim was dismissed.[1618]

On appeal, the Seventh Circuit affirmed the district court's ruling that the First Amendment retaliation claim was properly dismissed because Hatcher's speech was made as an employee when she reported the sexual harassment of graduate students in her department.[1619] The court of appeals explained that they "have repeatedly held that an employee's speech about misconduct affecting an area within her responsibility is considered pursuant to her employment even when she is not strictly required to make it."[1620] The court therefore found that *Garcetti* barred Plaintiff's retaliation claim.[1621]

[1613] *Id.*
[1614] *Id.* at 897.
[1615] *Id.* at 902.
[1616] *Id.* at 901; *Abcarian v. McDonald*, 617 F. 3d 931, 937 (7th Cir. 2010).
[1617] *Hatcher v. Cheng*, 63 F. Supp. 3d at 902.
[1618] *Id.* at 898–99.
[1619] *Hatcher v. Board of Trustees of Southern Illinois University*, 829 F. 3d 531, 540 (7th Cir. 2016).
[1620] *Id.* at 539.
[1621] *Id.* at 540.

Nevertheless, on appeal the Seventh Circuit did reverse the dismissal of her Title VII retaliation claim for filing an EEOC charge.[1622] The Circuit Court remanded this claim back to the district court for further proceedings in July 2016; the parties settled in June of 2018.[1623]

4.7.7. Isabell v. Trustees of Indiana University

In this case, Isabell, an adjunct professor of nursing at Indiana University (IU) applied for a full-time Clinical Assistant Professor position in the nursing department where she was already teaching, but the search committee offered the position to someone whom the plaintiff claimed was less qualified.[1624] Shortly after Isabell had been hired as an adjunct at IU, she had published a blog post avowing that she was formerly pro-choice and now held pro-life views on abortion, and in the post she discussed how she taught nursing students about controversial topics like abortion.[1625] She was interviewed for the non-tenure-track full-time position, and during her interview, the chair of the search committee asked her (and no other candidates during their interviews) about how Isabell would teach controversial topics in the clinical setting.[1626] A less qualified candidate was subsequently hired (a candidate without a doctorate, while Dr. Isabell does have a doctorate).[1627]

[1622] *Id.* at 538.
[1623] *Id.*; *Hatcher v. Board of Trustees of Southern Illinois University*, No. 3:13-cv-00407-SMY-SCW (S.D. Ill.), https://www.courtlistener.com/docket/5227638/hatcher-v-cheng/.
[1624] *Isabell v. Trustees of Indiana University*, 432 F.Supp.3d 786, 789–92 (N.D. Ind. 2020).
[1625] *Id.* at 789.
[1626] *Id.* at 790.
[1627] *Id.* at 792.

Isabell filed a First Amendment retaliation lawsuit against the chair of the search committee.[1628] The defendant moved for summary judgment, but the court found that the clear similarities between the title of Isabell's article and the question asked her by the defendant were sufficient to create a causal link.[1629] Likewise, a triable issue of material fact existed as to when the defendant learned about Isabell's article (either prior to, during, or after the interview wherein the defendant asked Isabell the aberrant question).[1630] Likewise, because the defendant abandoned accepted hiring practices (a fact only the defendant disputed, despite every other witness testifying as such), the court found circumstantial evidence of a retaliatory motive.[1631] The court detailed a great deal of evidence against the defendant, going through the committee members' testimonies and noting the most concerning aspects of each.[1632] Eventually the court concluded that many triable issues of material fact persisted, including a plausible finding that any reasonable grounds for the decisions made by the defendant could be pretextual, thus the court denied the defendant's motion for summary judgment on the §1983 claim.[1633]

4.7.8. Manning v. Jones[1634]

In this case, Manning sued Carolyn Jones, the dean of the University of Iowa school of law for viewpoint discrimination in violation of the First Amendment after she was not hired for a full-time faculty role, and subsequently for an adjunct role.[1635]

[1628] *Id.* at 789.
[1629] *Id.* at 797.
[1630] *Id.*
[1631] *Id.*
[1632] *Id.* at 801–4.
[1633] *Id.* at 804.
[1634] The plaintiff in this case originally went by Wagner but her name had changed to Manning by the time the case was closed, so she will be referred to as Manning throughout for consistency and clarity.
[1635] *Wagner v. Jones*, 664 F.3d 259, 267 (8th Cir. 2011).

Manning was interviewed for the full-time instructor of legal writing position.[1636] During and after the hiring process, concerns about Manning's activism with conservative Republican groups, which were included on her CV, were discussed by the dean and associate dean over email.[1637] After Manning was denied the full-time position, she applied for and was not hired for adjunct positions within the same program.[1638]

The District Court for the Southern District of Iowa granted summary judgment to the defendant dean Jones, citing qualified immunity.[1639] On appeal, the Eighth Circuit reversed and remanded the case pursuant to their opinion. [1640] It was undisputed that plaintiff's political views/associations were protected activity and that she was not hired for any of the multiple positions for which she applied. [1641] The Eighth Circuit held that when the facts were viewed in the light most favorable to Manning, she had made a prima facie case of viewpoint discrimination.[1642] The court then turned to the defendant's *Mt. Healthy* defense.[1643] The court noted that the plaintiff can discredit the proffered reason for the adverse action either circumstantially or directly, showing that discrimination was more likely than not a motivating factor.[1644] Manning's evidence included that there were two positions available, that her performance was rated higher than the candidate who was offered the position, and yet the faculty decided not to recommend her for the second position.[1645] Likewise, the hiring committee recommended

---

[1636] *Id.* at 264.
[1637] *Id.* at 267.
[1638] *Id.*
[1639] *Wagner v. Jones*, 2010 WL 11534328, *4 (S.D. Iowa 2010).
[1640] *Wagner*, 664 F.3d 259.
[1641] *Id.* at 270.
[1642] *Id.* at 271.
[1643] *Id.*
[1644] *Id.* at 272.
[1645] *Id.* at 270–71.

her for the multiple part-time positions for which she applied, but she was never even offered an interview, even though the faculty had never before rejected a candidate recommended by the committee.[1646] The Circuit court determined that a genuine issue of material fact persists, "namely whether Dean Jones would have made the same hiring decision in the absence of Wagner's political affiliations and beliefs."[1647] The case went before two juries: the first jury could not come to a unanimous decision, and the Eighth Circuit reversed and remanded the case for a new jury trial.[1648] The second jury found that Manning failed to establish that Jones discriminated against her on the basis of her politics.[1649] Manning appealed that ruling to the Eighth Circuit a third time, but the appeals court upheld the jury verdict.[1650]

4.7.9. Meade v. Moraine Valley Community College

Meade was an adjunct who served as the president of the adjunct union at her community college.[1651] In her capacity as union president, she sent a letter to a potential grantor to say she did not support her college's application because of its poor record of supporting adjuncts.[1652] Two days later she was fired and told that it was because of her letter.[1653] She sued the college for violating her First and Fourteenth Amendment rights.[1654] She was also told after some weeks that any visits to campus that she made would be considered criminal trespass.[1655] Originally, the district court granted

---

[1646] *Id.* at 272–73.
[1647] *Id.* at 273.
[1648] *Wagner v. Jones*, 758 F.3d 1030, 1031 (8th Cir. 2014).
[1649] *Manning v. Jones*, 875 F.3d 408, 410 (8th Cir. 2017).
[1650] *Id.* at 409.
[1651] *Meade v. Moraine Valley Community College*, 770 F. 3d 680, 682 (7th Cir. 2014).
[1652] *Id.*
[1653] *Id.*
[1654] *Id.*
[1655] *Id.*

defendants' motion to dismiss because it found Meade's letter did not address a matter of public concern.[1656] On appeal, the Seventh Circuit reversed and remanded the First Amendment claim for trial.[1657] The Circuit Court cited *Garcetti*, but only addressed whether the letter's content was a matter of public concern since the defendants had conceded that there was no employer-imposed duty to write her letter.[1658] The circuit court stated that not only did the letter discuss matters of public concern, but the letter addressed "almost no content personal to Meade."[1659] The Seventh Circuit cited multiple newspaper articles criticizing colleges' reliance on adjunct faculty and their poor working conditions as evidence supporting the plaintiff's assertion that the letter did address a matter of public concern.[1660] The appeals court then remanded the case for further proceedings consistent with their opinion.[1661]

In an unpublished opinion from October 17, 2016,[1662] the district court vacated its March 2016 ruling denying Meade's motion for summary judgment,[1663] and granted Meade's motion for reconsideration. A settlement hearing was conducted, and the defendant paid Meade a settlement of $125,000.[1664]

[1656] *Id.*
[1657] *Id.* at 688.
[1658] *Id.* at 684.
[1659] *Id.*
[1660] *Id.* at 684–85.
[1661] *Id.* at 688.
[1662] Order, *Meade v. Moraine Valley Community College*, No. 1:13-cv-07950, RECAP Doc No. 102 (N.D. Ill.).
[1663] *Meade v. Moraine Valley Community College*, 168 F. Supp. 3d 1094 (N.D. Ill. 2016).
[1664] See PACER docket: https://www.courtlistener.com/docket/4261602/meade-v-moraine-valley-community-college/

4.7.10. Meer v. Graham

In this case, Meer, a clinical assistant professor and director of the residency program in dental surgery at University of Illinois at Chicago, was investigated for misconduct based on complaints from residents about the leadership in the department.[1665] The majority of the investigation focused on the department head, not Meer, but Meer argues he was suspended (with pay) and investigated without due process and therefore filed the instant lawsuit.[1666] Meer concluded that the acting department head then chose not to renew his contract for the following academic year because he had filed a lawsuit.[1667] The defendants asserted that he was not renewed because the department needed a fresh start, and he had failed to confront or address the allegations against him.[1668]

The 2007 district court decision denied defendants' motion for dismissal when it came to the First Amendment retaliation claim.[1669] The defendants had argued that the instant lawsuit did not constitute a matter of public concern, but the court rejected this argument.[1670] The court stated that a state-run university failing to abide by its own employment policies could very well be a matter of public concern.[1671]

In the 2009 decision on the parties' cross-motions for summary judgment, the district court granted summary judgment to the defendants on all counts.[1672] Meer's First

---

[1665] *Meer v. Graham*, 524 F. Supp. 2d 1044, 1048–49 (N.D. Ill. 2007).
[1666] *Id.* at 1048; 611 F.Supp.2d 815, 826 (N.D. Ill. 2009).
[1667] *Meer v. Graham*, 524 F. Supp. 2d at 1053; 611 F.Supp.2d at 826.
[1668] *Meer v. Graham*, 611 F.Supp.2d at 831.
[1669] *Meer v. Graham*, 524 F. Supp. 2d at 1054.
[1670] *Id.* at 1053.
[1671] *Id.*
[1672] *Meer v. Graham*, 611 F.Supp.2d at 832.

Amendment retaliation claim failed because he failed to adduce any evidence of a causal link between his lawsuit (protected speech) and the non-renewal of his contract.[1673] The court also found that his pretext argument failed since there was evidence of adequate justification based on the residents' complaints about Meer's passivity during the dean's investigation into the former department head.[1674] The court did not cite *Garcetti*, only *Connick* and *Pickering*.[1675]

4.7.11. Moore v. Watson

In this case, Moore, the plaintiff, served as the faculty advisor for the Chicago State University student newspaper (*Tempo*).[1676] Moore's contract was not renewed, and he was suspended with pay to the end of his contract after a series of controversial articles were published in the student newspaper under his advisement.[1677] Moore was recruited and hired originally as a lecturer and faculty advisor to the student paper, but after just a semester he was transferred to a position within the public relations department. [1678] Within a year Moore began reporting to defendant Arnold, the Executive Director of University Relations.[1679] In their motion for summary judgment, the defendants contended that Moore was terminated for his unsatisfactory job performance in drafting press releases, but Moore provided "sufficient evidence to allow the finder of fact to reasonable [sic] determine that this explanation is pretextual."[1680] The court

---

[1673] *Id.* at 830–31.
[1674] *Id.* at 831.
[1675] *Meer v. Graham*, 524 F. Supp. 2d at 1053.
[1676] *Moore v. Watson*, 738 F.Supp.2d 817, 820 (N.D. Ill. 2010).
[1677] *Id.*
[1678] *Id.*
[1679] *Id.* at 822.
[1680] *Id.* at 831.

reviewed various fact issues that remained and needed to be resolved by a finder of fact.[1681]

The case went to a bench trial in April 2011.[1682] In the 2012 decision in the bench trial, the court explained that Moore had pled his case adequately to establish a case of First Amendment retaliation, showing that the articles published in the student newspaper he advised were a substantial or motivating factor in his supervisor's decision to terminate his employment.[1683] The university tried to defend the termination by arguing that Moore was fired for two press releases that his supervisor found unsatisfactory, but the court found evidence that such a claim was pretextual.[1684] First, Arnold testified that the problems with Moore's press releases dealt with form rather than substance, and the court found that a form issue was unconvincing in light of how frustrated she seemed to have felt about the newspaper content.[1685] Likewise, the court found that Arnold's defense was suspect because she did not even meet with Moore to discuss his performance issue on these press releases; rather, she did meet with Moore to express her anger and concern about the content of the student paper which she felt was "unconscionable."[1686] Finally, the judge noted "because they are recognized participants within the designated public forum established by the Illinois General Assembly, the First Amendment protects collegiate media advisers against retaliation for the protected speech of the students.

[1681] *Id.* at 832. For whatever reason, the plaintiff failed to sue the defendants in their individual capacities and thus was not entitled to damages. It is unclear why. *Id.* at 834.
[1682] *Moore v. Watson*, 838 F.Supp.2d 735, 739 (N.D. Ill. 2012).
[1683] *Id.* at 759.
[1684] *Id.*
[1685] *Id.* at 758–59.
[1686] *Id.* at 759.

Notably, Defendants have never challenged Moore's standing in this case."[1687] The court ordered that Moore be reinstated to his previous or similar position and that any negative materials related to his dismissal be expunged from his employment records.[1688]

4.7.12. Mullin v. Gettinger

In this case, Mullin, an art professor at Western Illinois University, claimed First Amendment retaliation against several administrators.[1689] After Mullin sent a letter to the art department chair and university president about a matter of public concern, her benefits were miscalculated.[1690] In her letter, Mullin complained about her colleague's actions and the failure of her department chair to address multiple allegations of professorial misconduct in front of undergraduates (with alcohol present); the letter was sent in November 1997.[1691] Mullin was not informed of issues with her sick day accrual until May 1999.[1692] The Seventh Circuit found that she had failed to establish a causal link between the protected speech and her adverse employment action.[1693] The adverse employment action, she claimed, was that the administrators in the provost's office refused to "correct" her sick day accrual count, which she alleged should have been sufficient for her full retirement benefits in 1999, but the university insisted she had to wait until 2002 to meet the requirements.[1694] The case went to trial and a jury returned a verdict for the defendants, which Mullin appealed to the Seventh Circuit.[1695] The Seventh

---

[1687] *Id.* at 757.
[1688] *Id.* at 763.
[1689] *Mullin v. Gettinger*, 450 F.3d 280, 281 (7th Cir. 2006).
[1690] *Id.* at 282–84.
[1691] *Id.* at 282.
[1692] *Id.* at 285.
[1693] *Id.* at 284.
[1694] *Id.* at 283–84.
[1695] *Id.* at 284.

Circuit affirmed the judgment because Mullin "failed to prove the necessary causal link between her protected speech and the administrators' actions."[1696] The Circuit Court felt that the prolonged time between her 1997 letter and her benefits miscalculation in 1999 was not sufficient to show that her speech was a substantial or motivating factor.[1697] Mullin tried to argue that May 1999 was the first opportunity the defendants had to retaliate against her, but the court found no evidence of a retaliatory motive.[1698] This case did not cite *Garcetti.*

4.7.13. Piggee v. Carl Sandberg College

In this case, Piggee, an adjunct instructor in a cosmetology program at Carl Sandburg College (a community college), sued the institution for not renewing her contract after she had been reprimanded for what the college called "sexual harassment" of a student under the school's sexual harassment policy.[1699] Piggee alleged the policy violated her First Amendment right to freedom of expression.[1700] Piggee had professed her Christian faith repeatedly in her classroom (as evidenced by the majority of her teaching evaluations).[1701] After identifying one of her students as gay, she slipped into his smock pocket (during class) two religious pamphlets exemplifying harmful views on homosexuality and inviting him to discuss them with her.[1702] The student was offended by the behavior and the content of the pamphlets, so he alerted the administration and

---

[1696] *Id.* at 281.
[1697] *Id.* at 285.
[1698] *Id.* at 285–86.
[1699] *Piggee v. Carl Sandburg College*, 464 F. 3d 667, 668 (7th Cir. 2006).
[1700] *Id.*
[1701] *Id.* at 672.
[1702] *Id.* at 668, 671.

reported Piggee's behavior.[1703] Piggee subsequently confronted the student and brought him into a room alone where she accused him of attempting to get her fired.[1704] After this incident he once again told the administration and they reprimanded her for being inappropriate and harassing her student.[1705] Her contract was not renewed for the following semester.[1706]

The Court of Appeals for the Seventh Circuit reviewed the district court's decision to grant summary judgment for the defendants.[1707] The Seventh Circuit affirmed *Garcetti* in its emphasis on the right of the institution to control the speech made by its employees pursuant to their official duties.[1708] Still, the Seventh Circuit held that academic freedom is of great importance and must be considered in cases regarding classroom or scholarly speech which it acknowledged is also made pursuant to official duties.[1709] The Seventh Circuit thus boiled the case down to whether or not the college "had the right to insist that Piggee refrain from engaging in that particular [proselytizing] speech while serving an instructor of cosmetology."[1710] While the Seventh Circuit recognized that the sexual harassment policy may not have been the perfect policy under which to discipline Piggee, the impact of Piggee's behavior was a harassing effect, thus the court found that the college's behavior was within constitutional limits.[1711]

[1703] *Id.* at 669.
[1704] *Id.*
[1705] *Id.*
[1706] *Id.*
[1707] *Id.* at 668.
[1708] *Id.* at 670.
[1709] *Id.* at 671.
[1710] *Id.*
[1711] *Id.* at 674.

4.7.14. Poulard v. Trustees of Indiana University

In this case, Poulard, a humanities professor at Indiana University, was investigated after his department chair found evidence of sexual harassment and other inappropriate behaviors in the student evaluations for one of his courses.[1712] The equal employment office at the university completed an investigation and wrote a detailed report finding evidence of homophobic, racist, sexist, Islamophobic and sexually demeaning speech as well as reports of Poulard's unwanted touching and kissing his female students' hands and cheeks.[1713] The Vice Chancellor for Academic Affairs (VCAA) reviewed the report and determined that Plaintiff had violated both the Sexual Misconduct Policy and the Code of Academic Ethics.[1714] The VCAA exercised appropriate discipline including a one semester suspension without pay, a written warning in his employee file, and assignment to a mandatory sexual misconduct training.[1715]

The district court for the Northern District of Indiana stated that the evidence showed a clear causal link between the speech attributed to Poulard in the report and the adverse employment action (suspension).[1716] Poulard, nevertheless, denied most of the speech attributed to him in the investigative report.[1717] The court stated, that in order to prevail on a First Amendment claim, it did not matter if he never made the speech attributed to him, it matters whether the speech for which he was disciplined was in fact

---

[1712] *Id.* at *1.
[1713] *Poulard v. Trustees of Indiana University*, 2018 WL 4680010 1, *1 (N.D. Ind.).
[1714] *Id.* at *2.
[1715] *Id.*
[1716] *Id.* at *9-10.
[1717] *Id.* at *10.

protected.[1718] The judge first determined that at least some of the speech was on a matter of public concern; however, after conducting the *Pickering* balancing test, the judge ruled that the university's interests in an inclusive learning environment outweighed Poulard's interests in making his controversial statements that were not immediately germane to the course.[1719] The court acknowledged faculty's academic freedom to discuss controversial issues, but distinguished the comments in the instant case from instruction germane to the course, by noting how Poulard's statements seem to sound "much more like harassing statements" than a professor discussing hot-button issues.[1720] The district court cited *Connick* and *Pickering* as well as *Piggee v. Carl Sandberg College*, but did not cite *Garcetti*.[1721]

4.7.15. Renken v. Gregory

Renken was a professor of engineering at the University of Wisconsin–Milwaukee who sued the dean of the engineering school and other administrators for violating his First Amendment right to free speech.[1722] Renken claimed his grant was returned to the National Science Foundation (NSF) after he complained about the way the university handled grant funds.[1723] Renken refused to agree to the University's terms under which the university's matching funds could be spent, arguing that his dean had misinterpreted the federal regulations governing the NSF grant.[1724] After over five months and various attempts at compromise had proved ineffective, university

---

[1718] *Id.*
[1719] *Id.* at *10-11.
[1720] *Id.* at *11.
[1721] *Id.* at *10.
[1722] *Renken v. Gregory*, 541 F. 3d 769, 770 (7th Cir. 2008).
[1723] *Id.* at 773.
[1724] *Id.* at 771.

administrators chose to return the grant funds.[1725] Renken filed suit against the administrators and the university for docking his pay in response to his allegedly protected speech.[1726] The district court granted summary judgment in favor of the defendants and the Seventh Circuit affirmed.[1727]

Citing *Garcetti*, the Seventh Circuit affirmed the District Court's analysis of the facts and concluded that Renken had spoken pursuant to his official duties when he complained about the administration of his grant funds.[1728] The appeals court held that "the proper administration of an educational grant fell within the scope of Renken's teaching duties at the University, so much so that he would receive a reduction in his teaching load for serving as a [Principal Investigator] for the project."[1729] The appeals court found that because Renken spoke as an employee, his speech was not protected under the First Amendment.[1730] While the District Court had also held that Renken's speech was not on a matter of public concern, the Seventh Circuit determined that the *Garcetti* question was dispositive and therefore the question of public concern need not be addressed.[1731]

4.7.16. Rose v. Haney

In this case, the plaintiff, Barry Rose, was an adjunct in the paralegal program at College of Lake County (CLC) beginning in January 2007.[1732] Rose had expressed

---

[1725] *Id.* at 773.
[1726] *Id.*
[1727] *Id.* at 770.
[1728] *Id.* at 774.
[1729] *Id.*
[1730] *Id.* at 775.
[1731] *Id.*
[1732] *Rose v. Haney*, 2017 WL 1833188 1, *2 (N.D. Ill. 2017).

concerns on multiple occasions about the lack of transparency in the Paralegal Advisory Board, the process of evaluating teachers, and other concerns related to CLC failing to prioritize students' best interests.[1733] CLC subsequently terminated him, and the plaintiff sued for First Amendment retaliation.[1734] Finding that the official duties of an adjunct only include the teaching of students (rather than how the CLC carries out its educational mission or how the Paralegal Advisory Board conducts its meetings), the district court denied defendants' motion to dismiss.[1735] The district court thus cited *Garcetti* and found that Rose's speech was not made pursuant to his official duties and therefore he spoke as a citizen.[1736] Likewise, Rose made clear in his communications that his primary concern was to keep the best interests of the students at heart, and the court found this was a legitimate matter of public concern, citing *Meade*.[1737] The case was settled in August 2017, but the terms of the settlement are not publicly available.

4.7.17. Salaita v. Kennedy

This case began in October 2013 when Steven Salaita accepted an offer for an associate professor position at the University of Illinois Urbana-Champaign (UIUC) for the 2014-2015 academic year.[1738] Sometime in early-to-mid 2014, Salaita took to his personal twitter account to tweet about a recent clash between Israelis and Palestinians.[1739] His tweets caused a stir, garnering media attention, and the media looked

---

[1733] *Id.* at 4.
[1734] *Id.* at *1.
[1735] *Id.* at *12.
[1736] *Id.* at 5.
[1737] *Id.* at *6. See *Meade v. Moraine Valley Community College*, 770 F. 3d 680, 685 (7th Cir. 2014).
[1738] *Salaita v. Kennedy*, 118 F.Supp.3d 1068, 1074 (N.D. Ill. 2015).
[1739] *Id.* at 1075.

to UIUC for a response.[1740] The university's immediate response was to affirm Salaita's free speech (and acknowledge him as an employee), however this prompted multiple high-level donors to contact the chancellor and demand that Salaita's contract be rescinded.[1741] In August 2014, the same month Salaita's contract was set to begin, he received a letter from the chancellor alerting him that his appointment would not be recommended to the board of trustees.[1742] The following month, the UIUC board of trustees voted to approve every new faculty appointment except Salaita's in a single vote, and then voted separately to deny Salaita's appointment.[1743] Salaita sued the university for promissory estoppel and First Amendment retaliation, and the donors for tortious interference in contractual relations.[1744] The defendants' motion to dismiss his First Amendment claim was denied.[1745]

The defendants argued that Salaita was not fired because of his protected speech, but even if he were, they averred that their interest in preventing disruption to the learning environment outweighed Salaita's interests.[1746] The judge stated that there was not sufficient discovery to apply the balancing test at the motion to dismiss stage, but even so "Dr. Salaita[has] alleged facts that plausibly demonstrate he was fired because of […] tweets implicat[ing[every 'central concern' of the First Amendment."[1747] The court also found that the contract had been binding, so Salaita's promissory estoppel and

---

[1740] *Id.*
[1741] *Id.*
[1742] *Id.*
[1743] *Id.*
[1744] *Id.* at 1075–76.
[1745] *Id.* at 1084.
[1746] *Id.* at 1081.
[1747] *Id.* at 1083.

breach of contract claims also survived the defendants' motion to dismiss.[1748] In November 2015, the parties settled; Salaita was paid $875,000—$275,000 of which went to attorneys' fees.[1749]

4.7.18. Sun v. Board of Trustees of University of Illinois

Sun, an assistant professor of engineering at University of Illinois, was denied tenure and sued the university for violating his First Amendment rights.[1750] Sun had served on a committee that selected the winner of the yearly teaching award within his department the year after Sun had won the award.[1751] The department chair had told Sun while he was serving on the committee that the chair should also be considered for the award.[1752] When Sun informed the chair that the committee had chosen someone else, the chair became angry and changed his demeanor towards Sun.[1753] The chair then proceeded to change departmental policy such that only Sun would no longer be compensated for teaching online.[1754] That same semester Sun compiled his dossier for his tenure evaluation that fall.[1755] There was clear animosity on the part of the chair who opposed Sun receiving tenure and attempted to influence as many other tenured faculty as he could to vote against Sun's promotion.[1756] The process took a full year and a half longer than it should have, because each time the vote went against recommending tenure, Sun

---

[1748] *Id.* at 1080–81.
[1749] Jodi S. Cohen, *University of Illinois OKs $875,000 Settlement to End Steven Salaita Dispute*, CHI. TRIB. (Nov. 12, 2015), https://www.chicagotribune.com/news/breaking/ct-steven-salaita-settlement-met-20151112-story.html.
[1750] *Sun v. Board of Trustees of University of Il*, 429 F. Supp. 2d 1002, 1006–7 (C.D. Ill. 2006).
[1751] *Id.* at 1007.
[1752] *Id.*
[1753] *Id.*
[1754] *Id.*
[1755] *Id.* at 1007–8.
[1756] *Id.* at 1010–11.

would appeal the denial and another investigation would need to be conducted.[1757] Eventually all parties except for the Faculty Advisory Committee and Sun had been convinced that there were reasonable considerations made, but that he was still not deserving of tenure and promotion at the University of Illinois based on the contents of his dossier.[1758]

The defendants moved for summary judgment, the district court granted the motion and Sun appealed.[1759] The district court found Sun's speech was protected, citing *Connick* rather than *Garcetti*, but the Circuit court declined to answer that question.[1760] Instead, the Seventh Circuit found the district court's holding to be dispositive that Sun failed to show that the speech motivated his denial of tenure and that defendants would have denied his tenure anyway.[1761] The court concluded that the intervening independent decisions after the department's first possibly corrupt vote indicated that the decision was far enough removed from the department chair's corruption to "break any causal chain between any retaliatory conduct and the ultimate decision not to promote Sun."[1762]

4.7.19. Tanner v. Board of Trustees

In this case, Tanner, a non-tenure-track lecturer in the Intensive English Program (IEP) at University of Illinois-Springfield filed complaints and reports with multiple administrators about ongoing "discrimination against Middle Eastern/Arab Muslim students" by her supervisor's supervisor and two of the teaching faculty within the

---

[1757] *Id.* at 1011–20.
[1758] *Id.* at 1020.
[1759] *Sun v. Board of Trustees of University of IL*, 473 F.3d 799, 801 (7th Cir. 2007).
[1760] *Id.* at 816; *Sun v. Board of Trustees of University of Il*, 429 F. Supp. 2d at 1029.
[1761] *Sun v. Board of Trustees of University of Il*, 429 F. Supp. 2d at 1028–29; *Sun*, 473 F.3d at 816.
[1762] *Sun*, 473 F.3d at 816.

IEP.[1763] The allegations were hardly addressed.[1764] Instead, the teaching faculty filed complaints about Tanner which were investigated and resulted in findings of ethics violations. Tanner was put on leave, banned from campus, and barred from contacting any of her former colleagues.[1765] After the ethics office confirmed they had found evidence of ethics violations, Tanner was allowed only to work from home and reassigned to work for the business school through the end of her seven-month contract.[1766] Tanner had been made to sign a shorter contract without a raise as had been promised her; she was given only one day to sign the contract or else she would lose her benefits.[1767]

Tanner filed numerous complaints in federal court including a First Amendment retaliation claim.[1768] Citing *Garcetti*, the court found that Tanner failed to allege her speech was made as a private citizen, and in fact, had established that her speech was made within her role as an employee.[1769] The judge stated that Tanner had "made some of the complaints […] through the chain of command in her department and within other official University channels" and these complaints were made pursuant to her responsibilities as an employee.[1770] The court thus granted the defendants' motion to

---

[1763] *Tanner v. Board of Trustees of the University of Illinois*, 2018 U.S. Dist. LEXIS 35126 1, *7 (C.D. Ill.).
[1764] *Id.* at *9-10.
[1765] *Id.* at *12-13.
[1766] *Id.* at *12.
[1767] *Id.*
[1768] *Id.* at *2, *29.
[1769] *Id.* at *32.
[1770] *Id.*

dismiss the First Amendment retaliation claim (without prejudice) with leave to amend her complaint.[1771]

4.7.20. Wozniak v. Adesida

Wozniak, a tenured professor of engineering at University of Illinois Urbana-Champaign, posted private student information to his public website and then claimed retaliation after he was terminated for misconduct.[1772] Wozniak was offended that the student in question did not select him for a teaching award for engineering professors awarded by the student honor societies.[1773] The students in charge of the selection process sent out a survey to collect votes.[1774] Wozniak had received the most votes, but because he had received the award only two years prior, the students and an administrator involved in the selection process chose to give the award to the professor with the second-most votes.[1775] Plaintiff interrogated one of the students in his office until she began crying and told him to speak with the administrator.[1776] When he did, she told him that the department chair knew about the decision not to give the award to Wozniak.[1777] Wozniak then wrote up a document—which he posted to his website, circulated to faculty and staff via email, and linked to in his email signature— alleging there was some sort of conspiracy to deny him the award.[1778] While he did not name the student, he gave enough

---

[1771] *Id.* at *33. Tanner's Third Amended Complaint indicated that she reserves the right to refile the claim after discovery, see Third Amended Complaint, *Tanner v. Board of Trustees of the University of Illinois*, No. 3:17-cv-03039-EIL, RECAP https://storage.courtlistener.com/recap/gov.uscourts.ilcd.68674/gov.uscourts.ilcd.68674.42.0.pdf (C.D. Ill. Mar. 16, 2018).
[1772] *Wozniak v. Adesida*, 932 F.3d 1008, 1009 (7th Cir. 2019).
[1773] *Wozniak v. Adesida*, 368 F.Supp.3d 1217, 1225 (C.D. Ill. 2018).
[1774] *Id.*
[1775] *Id.*
[1776] *Id.*
[1777] *Id.*
[1778] *Id.*

information to identify her.[1779] Wozniak even filed a lawsuit against the students in order to be able to interrogate them about the process further.[1780]

The dean of the college of engineering asked Wozniak to leave the students alone and outlined the professional expectations he held for Wozniak.[1781] The university counsel also told Wozniak to leave the students out of it, but in Spring of 2010 Wozniak gave a video-recorded interview which was eventually posted to Youtube and gave enough detailed information about one of the students (including that she cried in his office) to make her easily identifiable.[1782] Thereafter, the dean reassigned Wozniak's teaching and advising duties and ordered an investigation.[1783] After the Committee on Academic Freedom and Tenure conducted a full investigation they found that while he had not done anything to warrant dismissal, he had done many egregious things.[1784] The CAFT recommended that if he were to post any more identifiable student information to his website he should be dismissed.[1785] He proceeded to post the entire unredacted CAFT report and exhibits to his website, which included the names and personal details of multiple students, including the student who cried, in direct violation of the CAFT's recommendations.[1786] The vice provost told him to remove them, but he did not do so immediately.[1787] After a great deal of due process,[1788] the UIUC board of trustees voted to

---

[1779] *Id.*
[1780] *Id.* at 1226.
[1781] *Id.*
[1782] *Id.*
[1783] *Id.*
[1784] *Id.* at 1227–28.
[1785] *Id.* at 1228.
[1786] *Id.*
[1787] *Id.*
[1788] *Id.* at 1228–31.

revoke Wozniak's tenure and immediately terminate his employment.[1789] The board of trustees found Wozniak's conduct unprofessional and contradictory to the university's educational mission.[1790] Wozniak then sued the university and numerous defendants for violating his First Amendment right to free speech.[1791]

In their motion for summary judgment, the defendants argued that Wozniak did not speak on a matter of public concern, that the university's interest in meeting its educational mission outweighed Wozniak's interest in free speech, that Wozniak's speech was not a substantial or motivating factor in his termination, that his speech was not subject to prior restraint, and that the defendants were entitled to qualified immunity.[1792] In analyzing the free speech claim, the district court agreed that personally identifiable student information was not a matter of public concern and the vast majority of the content of the speech dealt primarily with personal grievances related to Wozniak not receiving the teaching award.[1793] The district court undertook an exhaustive analysis of the *Connick* question (i.e., was the speech about a matter of public concern?) and concludes it was not and therefore his speech was not protected.[1794] The district court granted summary judgment in favor of the defendants and Wozniak appealed.[1795]

[1789] *Id.* at 1231.
[1790] *Id.* at 1235.
[1791] *Id.* at 1232.
[1792] *Id.*
[1793] *Id.* at 1235. The judge's tone is chiding as well, "Instead of understanding the award for what it was ($500 and a plaque) and moving on, Plaintiff embarked upon a quixotic 'investigation' into why he did not get the award. He interrogated a student to the point of tears in his University office. Some might even characterize Plaintiff's speech as paranoid, narcissistic, and petty." *Id.*
[1794] *Id.* at 1233–38. There was no question as to whether Wozniak's speech was made a citizen, so the *Garcetti* question was not relevant.
[1795] *Wozniak v. Adesida*, 932 F.3d 1008, 1008 (7th Cir. 2019).

On appeal, the Seventh Circuit affirmed both the district court's ruling in favor of the defendants and echoed the district court opinion's chiding of Wozniak and his incredibly unprofessional behavior.[1796] The circuit court noted that Wozniak conceded that he committed the tort of abuse of process against the students and stated, "a university that permits professors to degrade students and commit torts against them cannot fulfill its educational functions."[1797]

4.7.21. Conclusion

The Seventh Circuit's *Salaita* case is likely the most well-known case among academics in the sample of cases due to the public outcry and media coverage of Salaita's controversial tweets. However, the Seventh Circuit's ruling in *Piggee* was the first application of *Garcetti* to a faculty free speech case by a Circuit Court, thus *Piggee* is likely among the most influential cases from the sample. In *Piggee,* the Seventh Circuit found that a college is entitled to discipline speech made pursuant to an employee's official duties—particularly when that speech violates institutional policy—as when Piggee gave her gay student pamphlets stating that he would go to hell for being gay.[1798] Likewise, in *Renken* the Seventh Circuit found that a faculty member's official duties include obtaining and administering grant funds such that when speaking about the administration of grant funds with university administrators, Renken's speech was made as an employee and thus not protected under *Garcetti*.[1799] In contrast, in *Moore v.*

[1796] For instance, the Seventh Circuit wrote, "By humiliating students as a matter of self-gratification and persisting in defiance of the Dean's instructions, Wozniak left himself open to discipline consistent with the Constitution." *Id.* at 1010.
[1797] *Id.*
[1798] *Piggee v. Carl Sandburg College*, 464 F. 3d 667 (7th Cir. 2006).
[1799] *Renken v. Gregory*, 541 F. 3d 769 (7th Cir. 2008).

Watson, the District Court for the Northern District of Illinois stated that a faculty advisor to a student newspaper could rightly claim First Amendment protection for speech published in the student paper.[1800] The Seventh Circuit has not yet recognized an academic exception to *Garcetti*.

4.8. Eighth Circuit

The Eighth Circuit cases are the least likely to cite other cases within their own circuit that have to do with other faculty members. In the Eighth Circuit between 2006 and 2020 there were twelve cases (nineteen decisions)—among these cases, only two cited other cases included in this dissertation and neither cited any other cases in the dissertation from within the Eighth Circuit). The Eighth Circuit has not yet decided whether to recognize an academic exception to *Garcetti*.[1801] Therefore, the Eighth Circuit precedent remains unclear. Because potential for an academic exception referenced in *Garcetti* is not clearly established, it is unlikely that the next faculty speech case to be tried before the Eight Circuit will result in a decision other than the matter of qualified immunity for the defendants. That said, the appeals court has heard six[1802] faculty speech cases since *Garcetti*, just, in the court's view, none of them have dealt with teaching or scholarship.[1803]

[1800] *Moore v. Watson*, 738 F.Supp.2d 817, 759 (N.D. Ill. 2010).
[1801] *Lyons v. Vaught*, 875 F.3d 1168, 1176 (8th Cir. 2017).
[1802] A sixth case was decided in 2021, but it falls outside the range of dates included within this dissertation. See, *Onyiah v. St. Cloud State University*, 5 F.4th 926 (8th Cir. 2021). The Eighth Circuit did not address the question of an academic exception in *Onyiah* either.
[1803] The five decisions include, *Lyons v. Vaught*, 875 F.3d 1168; *Palade v. Board of Trustees University of Arkansas System*, 830 Fed.Appx. 171 (8th Cir. 2020); *Keating v. University of South Dakota*, 569 Fed.Appx. 469 (8th Cir. 2014); *Satcher v. Univ. of Arkansas at Pine Bluff Bd. of Trs.*, 558 F.3d 731 (8th Cir. 2009); *Wagner v. Jones*, 758 F.3d 1030 (8th Cir. 2014).

4.8.1. Keating v. University of South Dakota

Keating was an assistant professor of physics at University of South Dakota.[1804] The only other full-time physics professor was Keller—the program director and Keating's immediate supervisor.[1805] Their working relationship became highly strained over time; Keating filed a grievance against Keller with the department head, and Keller accused Keating of sexual harassment.[1806] Keating sent an email to his department head asserting he could not trust or work with Keller or the department head because they both had so mistreated him in the recent past.[1807] In the email, Keating called Keller "a lying backstabbing sneak."[1808] The content of this email was found to be in violation of the civility clause in Keating's employment contract.[1809] Keating was soon alerted that his contract would not be renewed for the following academic year, so he sued the university for violating his First Amendment rights.[1810]

On the motion for summary judgment, the district court noted that the official complaints did not specify that the defendants were being sued in both their individual and official capacities, and all signs pointed solely to official capacity claims, thus the court found the defendants were entitled to Eleventh Amendment immunity on the §1983 claims.[1811] The district court stated that even if Keating had sued the defendants in their individual capacities, the speech did not address a matter of public concern, but rather

---

[1804] *Keating v. Univ. S.D.*, 569 Fed.Appx. at 470.
[1805] *Id.*
[1806] *Id.*
[1807] *Id.*
[1808] *Id.*; see 980 F. Supp. 2d 1137, 1140–41 (D.S.D. 2013) for full text of the email.
[1809] *Keating v. Univ. S.D.*, 980 F. Supp. 2d at 1141.
[1810] *Keating v. Univ. S.D.*, 569 Fed.Appx. at 470–71.
[1811] *Keating v. Univ. S.D.*, 980 F. Supp. 2d at 1143.

was a personal grievance, and therefore the defendants were entitled to qualified immunity.[1812] Nevertheless, the district court ruled that the policy under which plaintiff was disciplined was unconstitutionally vague since the terms "civil" or "civilly" or "uncivil" were not defined within the policy.[1813]

On appeal, however, the Eighth Circuit reversed the district court's ruling and held that the use of the term "civility" in the employment policy is contextualized by other directives that preclude a finding of unconstitutional vagueness.[1814] The appeals court ruled that it was reasonable of the employer to expect that the plaintiff recognize "that his email ran afoul of [the policy's] requirements."[1815]

4.8.2. Krejci v. Board of Trustees of Nebraska State Colleges Acting As Chadron State College

Krejci worked as a tenure-track assistant professor at Chadron State College in Nebraska.[1816] Krejci was required to complete her Ph.D. by the end of December 2006 so that she could go up for tenure in January 2007.[1817] In her 2003, evaluation Krejci had told her reviewer that she had submitted a first draft of a dissertation proposal.[1818] Not only did she not complete her dissertation by the end of 2006, Krejci did not even have an approved proposal by then—three years after she had insinuated that she had submitted a complete first draft of a proposal.[1819] In July 2006, Krejci requested a medical extension

---

[1812] *Id.* at 1144.
[1813] *Id.* at 1147.
[1814] *Keating v. Univ. S.D.*, 569 Fed.Appx. at 471.
[1815] *Id.* at 472.
[1816] *Krejci v. Board of Trustees*, 2010 WL 1815407 1, *1 (D. Neb.).
[1817] *Id.* at *2.
[1818] *Id.* at *3.
[1819] *Id.*

through Spring 2007 for the completion of her dissertation, so the Vice President of Academic Affairs contacted her dissertation advisor to confirm this timeline was realistic.[1820] Krejci's advisor stated that Krejci was taking an unusually long time and that she had not yet even defended a dissertation proposal.[1821] Krejci's extension request was denied and she was told she would receive a terminal contract for the 2007-2008 academic year.[1822] Krejci was told she was terminated because her request was made after she already knew she would not be able to complete her doctorate by the deadline since she had still not defended a proposal.[1823] Krejci filed an administrative charge against Chadron State with the Nebraska Equal Opportunity Commission (NEOC) in June 2007 alleging sex and disability discrimination.[1824] She subsequently applied for multiple open faculty positions at Chadron State in various biology-related fields, despite pursuing her PhD in Educational Administration.[1825] She was not hired for any of these positions, nor was she interviewed. She then filed a federal lawsuit alleging, inter alia, that Chadron State had retaliated against her for her NEOC complaint by denying her the three faculty positions for which she was never qualified.[1826] The court awarded summary judgment for the defendants, not even being persuaded that Krejci had pled any cause of action relating to the First Amendment.[1827]

[1820] *Id.*
[1821] *Id.*
[1822] *Id.* at *4.
[1823] *Id.*
[1824] *Id.*
[1825] *Id.* at *5.
[1826] *Id.* at *6-7.
[1827] *Id.* at *7.

4.8.3. Lyons v. Vaught

In this case, the plaintiff, Lyons, alleged his adjunct contract was not renewed because of his disagreements with the administration about the unfair preferential treatment of athletes at the school.[1828] Lyons had given a student athlete an F and the student complained to the dean.[1829] A faculty committee reviewed the complaint and determined that the student should be allowed to write another term paper, which he did, and it was graded by a faculty panel (not by Lyons). The student was assigned a new grade for that paper and for the course (a passing grade of D+).[1830] Lyons complained to the chancellor and dean about the preferential treatment for student athletes, but never heard anything after he met with them expressing his concerns.[1831] He was not given notice before his contract was subsequently not renewed.[1832] Lyons sued the university, and various administrators for First Amendment retaliation.[1833]

The district court judge twice denied defendants' motions to dismiss the complaint based on qualified immunity because she believed the case law in the Eighth Circuit clearly indicated that an adverse employment action in retaliation for speech on a matter of public concern made outside of one's official duties is a violation of the First Amendment.[1834] The Eighth Circuit court of appeals disagreed and twice reversed and remanded the case to be dismissed under qualified immunity.[1835] The Eighth Circuit

---

[1828] *Lyons v. Vaught*, 875 F.3d 1168, 1170 (8th Cir. 2017); 781 F. 3d 958, 961 (8th Cir. 2015).
[1829] *Lyons v. Vaught*, 875 F.3d at 1170.
[1830] *Id.*
[1831] *Id.*
[1832] *Lyons v. Vaught*, 781 F. 3d at 960.
[1833] *Lyons v. Vaught*, 875 F.3d at 1170.
[1834] *Lyons v. Vaught*, 2015 WL 10936765, at *4 (W.D. Mo. Dec. 14, 2015).
[1835] *Lyons v. Vaught*, 781 F. 3d at 963; 875 F.3d at 1176.

corrected the district court, stating that *Garcetti* changed the interpretation of the law after 2006 and the Eighth Circuit's line of cases should be understood in light of the new law established under *Garcetti*.[1836] The appeals court explained that under *Garcetti,* speech stemming from plaintiff's grading duties, including the process of grade appeals, is unprotected by the First Amendment.[1837] The court did not find that an academic exception to *Garcetti* for speech related to scholarship or teaching would apply in this case.[1838]

4.8.4. Magee v. Trustees of the Hamline University

In this case, Magee, a law professor at Hamline University, wrote an op-ed criticizing a court's handling of a local high-profile criminal case involving the death of a police officer.[1839] A police officer responded to the op-ed and in his letter he questioned the plaintiff's "fitness to teach" stating "I hope Professor Magee confines her race baiting and cop-hating to her newspaper submissions and keeps it out of the classroom."[1840] The law school shortly thereafter installed a new dean, who allegedly began working with police offers to get Magee fired.[1841] The Hamline University is a private institution, and thus not a state actor; however, Magee alleged that email communications between defendants (the officer and the dean) demonstrated that they conspired to violate her First Amendment rights.[1842] Magee was eventually charged for misdemeanor tax law

---

[1836] *Lyons v. Vaught*, 875 F.3d at 1173–74.
[1837] *Id.*
[1838] *Id.* n. 4.
[1839] *Magee v. Trustees of the Hamline University Minn.*, 957 F.Supp.2d 1047, 1053 (D. Minn. 2013).
[1840] *Id.*
[1841] *Id.*
[1842] *Id.* at 1077–78. Magee also brought a claim against the dean for intentional interference with contract, but for reasons unknown to the author of this dissertation did not sue the officer for the same. *Id.* at 1054

violations and in response Hamline suspended her.[1843] Once she was convicted, Hamline initiated termination proceedings and subsequently fired Magee; she swiftly brought suit against the university, the officer, and the dean alleging, inter alia, First Amendment retaliation.[1844]

The court found that the local police union was not a state actor.[1845] The court stated that even if the defendant officer had acted in his official capacity as president of the police union when he organized other police officers to inundate the university president's office with calls and emails demanding the university fire the plaintiff, the court found that Magee had not produced evidence that he had acted under color of state law.[1846] Likewise, the court determined that since there was no evidence of a "meeting of the minds" between the union and the police department there was no evidence anyone had acted as state actors.[1847] Since the police defendant(s) was not acting under color of state law, the claims against the university defendants also failed.[1848] The defendants' motions to dismiss were granted.[1849]

4.8.5. Onyiah v. St. Cloud State University

In this case, a full professor of statistics and Black man born in Nigeria brought a First Amendment retaliation suit against St. Cloud University, his dean, and his department chair, among others.[1850] Onyiah's (undisputed) protected speech was his

---

[1843] *Id.* at 10.
[1844] *Id.* at 1053.
[1845] *Id.* at 1056–58.
[1846] *Id.* at 1056.
[1847] *Id.* at 1064.
[1848] *Id.* at 1059.
[1849] *Id.* at 1065.
[1850] *Onyiah v. St Cloud State University and Board of Trustees*, 2017 WL 9249434 1, *1 (D. Minn.).

earlier wage discrimination lawsuit which was decided by the Eighth Circuit in 2012.[1851] Onyiah alleged that over the next four years, in retaliation for his prior lawsuit, his department chair and dean repeatedly harmed him by denying him a salary adjustment, rescheduling his courses, denying him the opportunity to utilize learning assistants in his courses, adjusting his teaching load to reduce his overload pay, cancelling his courses, adjusting course caps to his detriment, and more.[1852] In 2017 the defendants moved to dismiss Onyiah's claims, but this motion was denied as to Onyiah's First Amendment retaliation claims.[1853] In 2019, the district court stated that Onyiah's First Amendment retaliation claim had been changed from a §1983 claim to a §1981 claim, and found that the defendants were entitled to summary judgment because Onyiah failed to establish a causal link between his protected speech and the adverse employment actions, and he was unable to show that the defendants' non-retaliatory reasons were pretextual.[1854] Onyiah died in 2020 but he had already appealed the 2019 decision to the Eighth Circuit; the case was taken over by his widow.[1855] In 2021, the Eighth Circuit affirmed the district court's ruling, finding that the district court properly ruled that Onyiah could not establish causation as a matter of law.[1856]

4.8.6. Palade v. Board of Trustees of the University of Arkansas

In this case, Palade along with other tenured faculty members at the University of Arkansas sued their employer for violating their First Amendment rights. The board of

---

[1851] *Id.*
[1852] *Id.* at *2-4.
[1853] *Id.* at *23-24.
[1854] *Onyiah v. Peiyi Zhao*, 2019 WL 4221347, *3 (D. Minn.).
[1855] *Onyiah v. St. Cloud State University*, 5 F.4th 926, n. 1 (8th Cir. 2021).
[1856] *Id.* at 930. The three judge panel disagreed about the issues related to filing the suit under §1983 or §1981, but all three judges agreed that the causal element was dispositive. *Id.* at 931-933.

trustees revised a policy, without faculty input, that changed the definition of "cause" in cases of faculty discipline or termination.[1857] The district court found that because the policy had not yet been enforced against any of the plaintiffs by the time the case went to trial, the plaintiffs' claims were not ripe and there was no real and immediate injury in fact.[1858] The district court granted the defendants' motion to dismiss and the Eighth Circuit affirmed the dismissal on appeal.[1859]

4.8.7. Payne v. University of Arkansas Fort Smith

In this case, Payne, a tenured faculty member at Westark College was demoted and eventually fired after her institution merged with the University of Arkansas and became the Fort Smith satellite campus of the school.[1860] Payne, an associate professor, had spoken out against a recent institutional policy, then was subsequently demoted, not just to an untenured assistant professor position, but to a Non-Tenure-Track instructor position, which Payne alleged was retaliatory.[1861] Payne filed an EEOC charge alleging wage discrimination, hostile work environment, that her rank demotion had been motivated by sex discrimination, and retaliation.[1862] While the EEOC did not find evidence of a hostile work environment or any discrimination, they did find evidence indicating that the university had retaliated against Payne for filing her EEOC charge.[1863] Six months later, Payne filed this lawsuit.[1864] At the same time, Payne applied for a

---

[1857] *Palade v. Bd. of Trs. of the Univ. of Ark._*, 2020 U.S. Dist. LEXIS 126640, *7 (E.D. Ark. 2020).
[1858] *Id.* at *9.
[1859] *Palade v. Board of Trustees University of Arkansas System*, 830 Fed.Appx. 171, 171 (8th Cir. 2020).
[1860] *Payne v. University of Arkansas Ft Smith ex rel Bd of Trustees of University of Arkansas*, 2006 WL 2091859, *1-2 (W.D. Ark. 2006).
[1861] *Id.* at *3.
[1862] *Id.* at *2.
[1863] *Id.*
[1864] *Id.*

promotion to tenure-track assistant professor, but in the process she was accused of plagiarizing her job materials.[1865] An ad-hoc committee investigated the allegations and found that she had not adequately cited sources and had misunderstood "common knowledge" according to scholarly standards.[1866] The committee recommended a one-semester suspension, but the same chancellor who had originally been involved in demoting Payne decided to terminate her instead.[1867] One of the members of the ad-hoc committee came forward to advocate for Payne's suspension rather than dismissal, but the chancellor terminated Payne by the start of the next semester.[1868]

Payne's complaint alleged that she experienced First Amendment retaliation when she was demoted to instructor for her speech criticizing a university policy.[1869] The court found that the speech in question did not address a matter of public concern and therefore was not protected.[1870] The court agreed with Payne that her EEOC charge and her lawsuit constituted protected speech, but because they were filed after her demotion, they could not serve as the basis of her retaliation claim.[1871] Her First Amendment claim was dismissed, but her Title VII and Equal Pay Act claims survived the motion for summary judgment.[1872]

[1865] *Id.*
[1866] *Id.*
[1867] *Id.*
[1868] *Id.*
[1869] *Id.* at *3.
[1870] *Id.* at *4.
[1871] *Id.* Why Payne failed to allege that her subsequent termination constituted retaliation for the EEOC charge and lawsuit is as baffling as it is unclear from the record.
[1872] *Id.* at *5. After a five-day trial the jury found for the plaintiff on the Title VII retaliation claim and recommended damages around $150,000. The judge also ordered that Payne be reinstated to her position of instructor and that the report detailing the finding of Payne's plagiarism be removed from the university website. Judgment, *Payne v. the University of Arkansas*, No. 2:04-cv-02189-RTD, Doc. 76 (W.D. Ark. 2006), https://storage.courtlistener.com/recap/gov.uscourts.arwd.5802/gov.uscourts.arwd.5802.76.0.pdf.

4.8.8. Satcher v. University of Arkansas at Pine Bluff Board of Trustees

In this case, a tenured professor of history sued his university in 1999 for removing him as department chair but the lawsuit was settled during discovery.[1873] Following the first lawsuit, Satcher remained suspicious of the institution, especially the department chair (both Black men), whom Satcher believed tried to make him look bad to administrators.[1874] When Satcher refused to turn in multiple reports and documents, university administrators asked Satcher to meet with them to discuss issues with his professionalism (including his allegedly insubordinate complaints about his supervisor), but Satcher refused to attend.[1875] Satcher repeatedly videotaped student registration, his classes and classes taught by other professors, because he believed that his department chair was out to get him.[1876] Satcher's behavior resulted in university security removing him from the areas where he had been videotaping multiple times.[1877] In response, the chancellor requested Satcher's presence at a meeting to discuss the future of his employment.[1878] Satcher failed to attend this meeting so the process for dismissal went ahead without his participation.[1879] Rather than asserting his right to a hearing granted to him as a tenured faculty member under institutional policy, Satcher filed the instant lawsuit alleging he was fired because of his first lawsuit.[1880]

[1873] *Satcher v. Univ. of Arkansas at Pine Bluff Bd. of Trs.*, 558 F.3d 731, 732–33 (8th Cir. 2009).
[1874] *Id.* at 733.
[1875] *Id.*
[1876] *Id.*
[1877] *Id.*
[1878] *Id.*
[1879] *Id.* at 733–34.
[1880] *Id.* at 734.

The court noted that the defendants raised an eleventh amendment immunity defense which Satcher did not contest in his opposition brief, and failed to do so when it came to the retaliation claims as well.[1881] Still, the court held that Satcher's First Amendment claim failed on the merits.[1882] The court noted that Satcher could not show a causal connection between his allegedly protected speech (his prior lawsuit) and his termination.[1883] Neither the appellate nor the district courts cited *Garcetti*.[1884] Likewise, the court found that the defendants had shown a legitimate non-discriminatory reason for his termination: namely, that he had been insubordinate, refused to meet with his superiors to address their complaints, and was generally unprofessional.[1885]

4.8.9. Tarasenko v. University of Arkansas

In this case, an associate professor of biology was accused of making discriminatory and threatening remarks towards one of her graduate students/advisees, within earshot of multiple witnesses, and was consequently terminated.[1886] Tarasenko gave the student an incomplete after her dissertation proposal was not approved by her committee and filed an academic integrity report notifying the university that the student "had committed academic fraud."[1887] After the report was filed, the chair of the department solicited statements from student witnesses alleging misconduct by Tarasenko, including the incidents of threats and discrimination.[1888] Tarasenko alleged

---

[1881] *Id.* at 734–35.
[1882] *Id.* at 735.
[1883] *Id.*
[1884] *Satcher*, 558 F.3d 731; 2008 WL 906692 (E.D. Ark.).
[1885] *Satcher*, 558 F.3d at 735–36.
[1886] *Tarasenko v. University of Arkansas*, 63 F.Supp.3d 910, 912–13 (E.D. Ark. 2014).
[1887] *Id.* at 913.
[1888] *Id.*

she was subsequently investigated in a manner contrary to university policy by a human resources officer (who inappropriately attempted, but failed, to adhere to the *staff* handbook procedures rather than the *faculty* handbook procedures throughout her investigation).[1889] After the HR officer completed a report finding that the allegations against Tarasenko were substantiated by her investigation, the dean of Tarasenko's school recommended that the chancellor terminate Tarasenko and suspend her immediately.[1890] This recommendation was ultimately approved by the president.[1891] Tarasenko appealed the termination to a formal faculty committee review (which took a year) and in the end by a 4-1 vote the faculty committee determined that the administration had failed to uphold institutional policies and had wrongly terminated plaintiff.[1892] The president rejected the committee's findings and permanently dismissed Tarasenko.[1893] Tarasenko appealed to the board of trustees but they also rejected her appeal.[1894] She promptly filed with the EEOC and received a right to sue letter.[1895]

Tarasenko alleged, inter alia, that the defendants had violated her First Amendment rights when they fired her after she spoke out about academic fraud by her grad student, "academic violations" related to educational quality, academic grading, grade appeals, and academic integrity.[1896] The district court did not explicitly cite *Garcetti* in its First Amendment analysis, but it cited Eighth Circuit precedent that states

---

[1889] *Id.* at 914–15.
[1890] *Id.* at 915.
[1891] *Id.*
[1892] *Id.*
[1893] *Id.*
[1894] *Id.* at 916.
[1895] *Id.*
[1896] *Id.* at 920.

"unless the employee is speaking as a concerned citizen [...] the speech does not fall under the protection of the First Amendment."[1897] The district court found that Tarasenko had spoken in her capacity as an employee and therefore her speech was not protected.[1898] The district court gave Tarasenko leave to amend her complaint after granting the defendants' motion to dismiss, but Tarasenko's amended complaint did not correct the original complaint's deficiencies so the district court dismissed all federal claims with prejudice.[1899] Tarasenko appealed this final decision, but the Eighth Circuit affirmed.[1900]

4.8.10. Taylor v. St. Louis Community College

In this case, an adjunct math professor and union representative sued the vice-chair of the board of trustees, St. Louis Community College (his employer), and a campus police officer after being arrested for speaking out against a discriminatory application of a no-clapping rule during a (regular) board of trustees meeting.[1901] The plaintiff claimed that the defendants violated the First Amendment when

1) they applied the no-clapping rule to content that challenged the board but not to other board-approved speech, and

2) they arrested Plaintiff for speaking up during a break between speakers to raise a point of order.[1902]

[1897] *Id.*
[1898] *Id.* at 920–21.
[1899] *Tarasenko v. University of Arkansas*, 2014 WL 7335026 1 (W.D. Ark. 2014).
[1900] *Tarasenko v. University of Arkansas*, 616 Fed.Appx. 214 (8th Cir. 2015).
[1901] *Taylor v. St. Louis Community College*, 2018 WL 5078360, at *1 (E.D. Mo. Oct. 18, 2018).
[1902] *Id.* The day after the arrest, the college released a public statement in which it described Taylor's behavior the night before. The same day, Taylor was served a no trespass order and notified that Taylor's employment was suspended and he was recommended for termination due to his speech at the meeting. *Id.* at *2.

The district court found that Taylor adequately pleaded his first claim but found that the second claim should be dismissed since the speech was appropriately restricted within the limited public forum.[1903]

In the decision on the defendants' motion for summary judgment, the district court determined that the defendants were entitled to qualified immunity since caselaw rejecting on First Amendment grounds a ban on no-clapping rules during meetings of this type (limited public fora) had not been clearly established in the relevant caselaw.[1904] The district court also noted that the defendant had announced at the beginning of the meeting that "disruptive clapping" like at the last board meeting would "not be tolerated" at this meeting.[1905] The court determined that it was clear in context that the portion of the meeting this clapping rule applied to was only the public comment section, but even given that dispute of material fact, the court found that the defendants were entitled to qualified immunity.[1906]

4.8.11. Uradnik v. Inter-Faculty Association, St. Cloud State University, et al.

This case concerned Uradnik, a full professor of political science at Minnesota's St. Cloud State University, who sued her university employer, the board of trustees, and the faculty union claiming that a collective-bargaining unit that served as exclusive representative for all faculty violated her right to free speech and free association.[1907] The

---

[1903] *Id.* at *3-4.
[1904] *Taylor v. St. Louis Community College*, 2020 WL 1065651, at *4 (E.D. Mo. Mar. 5, 2020).
[1905] *Id.* at *3.
[1906] *Id.* at *3-4.
[1907] *Uradnik v. Inter Faculty Association*, 2019 WL 6608784, at *1 (D. Minn. Dec. 5, 2019). This case was filed shortly after the decision in *Janus* was released; see *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018).

free speech claim was foreclosed by precedent[1908] (Uradnik had recognized that the Eighth Circuit and the Supreme Court had already ruled that the state statute in question had been found to survive exacting scrutiny) and the court stated there was no genuine dispute of material fact.[1909] The court found that defendants were entitled to judgment as a matter of law on the compulsory speech claim.[1910]

4.8.12. Conclusion

Of the dozen faculty speech cases decided in the Eighth Circuit courts between 2006 and 2020, half have been appealed to and heard by the Eighth Circuit Court of Appeals.[1911] Despite a fifty percent appeal rate, the Eighth Circuit still has not decided whether an academic exception to *Garcetti* ought to be applied to faculty speech related to teaching or scholarship. In the 2017 decision in *Lyons v. Vaught* the Eighth Circuit held that Lyons' speech (addressing issues related to the expectations of faculty to grade student athletes more leniently than other students) was not speech related to scholarship or teaching.[1912] The court did not address the break in logic that follows—if adjuncts like Lyons are solely contracted for teaching, and grading is part of an adjunct's official duties, how could grading-related speech not be related to teaching? The Eighth Circuit cited *Gorum v. Sessoms*[1913] which also dealt with grade inflation for student athletes, but unlike Lyons, Gorum had been the one changing the grades for the athletes. For the

---

[1908] The district court cited precedent in *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984); *Bierman v. Dayton*, 900 F. 3d 570 (8th Cir. 2018).
[1909] *Uradnik*, 2019 WL 6608784, at *2.
[1910] *Id.*
[1911] *Lyons v. Vaught*, 875 F.3d 1168 (8th Cir. 2017); *Onyiah v. St. Cloud State University*, 5 F.4th 926 (8th Cir. 2021) *Palade v. Board of Trustees University of Arkansas System*, 830 Fed.Appx. 171 (8th Cir. 2020); *Keating v. University of South Dakota*, 569 Fed.Appx. 469 (8th Cir. 2014); *Satcher v. Univ. of Arkansas at Pine Bluff Bd. of Trs.*, 558 F.3d 731 (8th Cir. 2009); *Wagner v. Jones*, 758 F.3d 1030 (8th Cir. 2014).
[1912] *Lyons v. Vaught*, 875 F.3d, n. 4.
[1913] *Id.* citing *Gorum v. Sessoms*, 561 F. 3d 179, 186 (3d Cir. 2009).

Eighth Circuit to rule on an academic exception to *Garcetti*, the case will likely need to have indisputable evidence of either classroom or scholarship speech that was clearly causally linked to a defendant's retaliatory animus. Until such a case comes before the Eighth Circuit, plaintiffs can expect to have their claims dismissed under qualified immunity.

4.9. Ninth Circuit

Ninth Circuit precedent for faculty speech cases is generally based on the case of *Demers v. Austin* (discussed in detail in Section 4.9.5 below).[1914] Since *Demers*, the Ninth Circuit has adopted an academic exception to *Garcetti* that treats faculty speech related to teaching or scholarship as though it were speech made by a citizen on a matter of public concern.[1915] In other words, the speech is fast-tracked to the balancing test portion of the *Pickering* standard.[1916]

Because the Ninth Circuit spans such an enormous geographical and culturally diverse area, the district courts can have wildly different perspectives, especially prior to the Ninth Circuit's ruling in *Demers.* Where the Northern District of California found Sheldon's employee speech to be potentially protected under an academic exception to *Garcetti*,[1917] the District Court of Idaho found that emails written by faculty and sent to all university faculty—even those regarding matters of public concern which dealt directly with the university's educational mission—can be regulated by the

---

[1914] *Demers v. Austin*, 729 F. 3d 1011 (9th Cir. 2013).
[1915] *Id.* at 1025.
[1916] See, *Abdulhadi v. Wong*, 2022 WL 842588, at *8 (N.D. Cal. Mar. 4, 2022).
[1917] *Sheldon v. Dhillon*, 2009 WL4282086 1, *4 (N.D. Cal. 2009).

administration on the basis of viewpoint.[1918] As is clear from the jurisprudence in the Ninth Circuit thus far, judicial deference to academic institutions varies from case to case and district to district.

4.9.1. Abdulhadi v. Wong (San Francisco State University)

In this case, Abdulhadi, an associate professor of Arab/Islamic diaspora studies claimed she was retaliated against for advocating for Palestinians by the president and provost at San Francisco State University (SFSU).[1919] Abdulhadi alleged that her reimbursement financials were repeatedly investigated, and that her contract was breached numerous times,(e.g. when the President told the dean to act as though her contract did not state that she entitled to hire two additional assistant professors for the program she founded, or when her travel support was decreased by 13%).[1920] Over the course of nearly a decade, Abdulhadi alleged that she was additionally subject to a hostile work environment because of the way she was treated by third parties, her department chair, and the defendant administrators.[1921] Abdulhadi sued three defendants in their official and individual capacities, Wong (president of SFSU), Rosser (former provost), and Summit (current provost); the official capacity suit against the President survived the motion to dismiss, but the official capacity claims against the other two defendants were dismissed. [1922]

[1918] *Idaho State University Faculty Association v. Idaho State University*, 857 F. Supp. 2d 1055, 1063 (D. Idaho 2012).
[1919] *Abdulhadi v. Wong*, N.D. Cal. Civil, 2019 2019 WL 3859008 1, *2 (Aug. 16, 2019).
[1920] *Id.* at *3-5.
[1921] *Id.* at *4-7.
[1922] *Id.* at *12.

When it came to the individual capacity claims, the defendants agreed that Abdulhadi engaged in constitutionally protected activity *and* that the adverse employment actions taken by her employer would chill the speech of a person of ordinary firmness.[1923] The only aspect of Abdulhadi's claims that the defendants contested was the existence of a nexus between Abdulhadi's speech and the adverse employment actions.[1924] The court analyzed the claims against each defendant individually.

Abdulhadi's individual capacity claim against President Wong alleged retaliation based on the temporal proximity between an outside pressure groups' complaints about Abdulhadi's planned research trip and Wong's instruction to scrutinize plaintiff's travel (only two months later).[1925] Among other reasons, the court also cited the reason offered for cancelling Abdulhadi's pre-approved trip to Palestine due to a U.S. State Department travel warning, noting that this warning was issued after the cancellation of the trip by the university.[1926] Therefore, the claim against President Wong in his individual capacity survived the motion to dismiss.[1927]

The district court analyzed the claim against the interim provost; the judge found that the delayed travel authorization (due to an amendment to the memorandum of understanding brought to the administrators' attention by a right-wing think-tank) was supported by sufficient evidence to allege a causal link.[1928] While this aspect of the claim survived the motion to dismiss, the other claims related to denial of funding for

---

[1923] *Id.* at *9.
[1924] *Id.* at *11.
[1925] *Id.* at *10.
[1926] *Id.*
[1927] *Id.*
[1928] *Id.* at *11.

Abdulhadi's program and the requirement that she remove a post on a Facebook page under penalty of termination were not sufficiently supported and therefore were dismissed.[1929]

When it came to the Facebook post, the defendants argued that plaintiff's post was "re-posted" to the department Facebook page and a student group's Facebook pages, thus it implicated the First Amendment right of SFSU.[1930] The original request from the Provost asked only that Abdulhadi remove the post from the department Facebook page.[1931]

The allegations against Provost Sue Rosser failed to show a causal link between the speech and the adverse actions she took against Abdulhadi.[1932] The claims against Rosser in her individual and official capacities were dismissed.[1933] In March 2022, the court granted defendants' motion for summary judgment on all claims, finding the remaining defendants were entitled to qualified immunity.[1934]

4.9.2. Alozie v. Arizona Board of Regents

In this case, Dr. Alozie, a full professor of sociology at Arizona State University (ASU), applied for a newly created dean position.[1935] When the interim dean had announced the position, Alozie was under the impression that the interim dean had

---

[1929] *Id.* at *11-12.
[1930] *Id.*
[1931] *Id.* at *12.
[1932] *Id.*
[1933] *Id.*
[1934] *Abdulhadi v. Wong*, 2022 WL 842588, at *10 (N.D. Cal. Mar. 4, 2022). According to the district court, Abdulhadi failed to include evidence of the allegedly protected speech for which she claimed she had suffered retaliation. *Id.* at *7. Thus, the court was unable to determine whether the speech dealt with a matter of public concern, or was made as a citizen, employee, or in her capacity as a teacher/scholar. *Id.* at *8. Finally, the court was unable to determine whether there was a causal link without evidence of the speech in question. *Id.* at *9.
[1935] *Alozie v. Arizona Board of Regents*, 2017 WL 11537899, at *1 (D. Ariz. Sep. 21, 2017).

strongly implied that his interim position would be made permanent.[1936] Alozie, along with three other candidates who met the qualifications, was interviewed by a committee of fifteen people.[1937] In his interview, Alozie brought an "opening statement," five pages in length, touting his qualifications and describing his interest in the position which he distributed to the committee.[1938] At the beginning of this statement, he wrote that he was led to believe that the search for a dean was just the university "going through the motions," as the provost intended to appoint the interim dean to a permanent post.[1939] Subsequently, after the committee members had read Alozie's statement and discussed it in a search committee meeting, Alozie was not chosen for a second-round interview.[1940] The chair of the search committee subsequently called and spoke with the provost about the concerns that Alozie had expressed in his statement; she conveyed that Alozie had alleged "that the committee was biased."[1941]

The First Amendment claim was brought originally against all defendants (president, provost, interim dean, deputy provost, and chair of the search committee), but the claim was dismissed against all defendants except for the chair of the search committee.[1942] Then in the January 2020 ruling on the motion for summary judgment, the district court determined that the defendant search chair was entitled to qualified

---

[1936] *Alozie v. Arizona Bd. of Regents*, 431 F. Supp. 3d 1100, 1106 (D. Ariz. 2020).
[1937] *Id.*
[1938] *Id.* at 1107.
[1939] *Id.* at 1108.
[1940] *Id.*
[1941] *Id.* at 1109. In fact, this seemed to be a misunderstanding, as Alozie believed it was a foregone conclusion that the provost himself would appoint the interim dean as dean permanently regardless of what the search committee recommended. In the end, this did seem to be the case, as the provost appointed the white interim dean despite the committee chair's recommendation that they relaunch the search and conduct an external search for dean. *Id.*
[1942] *Id.* at 1105.

immunity and granted her motion for summary judgment on the First Amendment claim.[1943] The district court reasoned that because certain statements within the letter represented knowledge gained by Alozie's (secondary) role "as a diversity leader," the entirety of his statement was made "pursuant to official duties," and specifically the statement about the "revolving door of minority scholars."[1944] The court found that Ninth Circuit precedent failed to clearly establish whether Alozie's statement constituted "free speech" under *Demers*.[1945] Because Alozie's statement was not clearly citizen speech either, the court determined that the defendant had not violated a "clearly established" constitutional right and was therefore entitled to qualified immunity.[1946] The district court thus dismissed the speech claim.[1947] Alozie's Title VII claim continued to a jury trial—the jury found ASU had retaliated against him and was awarded $119,000 for the harm he suffered.[1948]

4.9.3. Calmelet v. Board of Trustees of the California State University

In this case, Calmelet was an associate professor of mathematics at Cal State Chico.[1949] Calmelet, a Black woman, was denied a promotion to full professor after she, as evaluation-committee chair, had filed a minority report on a tenure-track faculty

---

[1943] *Id.* at 1120.
[1944] *Id.* at 1118. The problems with this legal treatment of Alozie's role as a diversity leader as "pursuant to official duties" are numerous, especially the fact that the extension of this reasoning leads to the conclusion that all "diverse" leaders have additional (uncompensated) "official" duties to speak to their "diverse" experiences and those of other minoritized employees for which they can be retaliated against, that their privileged/majority counterparts are not expected to perform. The author of this dissertation does not dispute the ruling that the speech was not protected under the First Amendment (it was submitted for the committee's consideration in the search process, after all), only this precedent that the speech made in one's capacity as a "diversity leader" is made pursuant to one's official duties.
[1945] *Id.* at 1119.
[1946] *Id.*
[1947] *Id.* at 1120.
[1948] *Alozie v. Ariz. Bd. of Regents*, 562 F. Supp. 3d 203, 221 (D. Ariz. Nov. 29, 2021).
[1949] *Calmelet v. Board of Trustees of California State University*, No. 2:19-cv-02537-MCE-DMC, 2020 WL 5291925, at *1 (E.D. Cal. Sep. 4, 2020).

member's yearly evaluation.[1950] Calmelet had disagreed with the rest of the committee's assessment of the faculty member, so she wrote and included a minority report as was her prerogative as a member (and as chair) of the evaluation committee.[1951] The dean accused Calmelet of including inaccurate information and breaching confidentiality in her report and disciplined her by removing her from service on the committee immediately following the incident.[1952] He also sent his demand that Calmelet remove most of the comments in her minority report via email and copied her department chair, the entire departmental personnel committee, the college personnel committee chair and his assistant.[1953] Despite Calmelet disproving the confidentiality claim, the dean added two more allegations, claiming Calmelet was inconsistent and had caused process errors.[1954] Later that year, she was denied promotion to full professor by the dean, the departmental and college personnel committees (who had been copied on the dean's email), and the president.[1955] The reasons cited for her promotion denial were listed as her sudden departure from the evaluation committee and her failure to clearly demonstrate quality service to the institution.[1956]

In analyzing the first amendment claim, the District Court for the Eastern District of California found that Calmelet failed to show that her speech addressed a matter of public concern and thus the claim was dismissed with prejudice.[1957] The court found that

---

[1950] *Id.*
[1951] *Id.*
[1952] *Id.* at *1-2.
[1953] *Id.* at *1.
[1954] *Id.* at *2.
[1955] *Id.*
[1956] *Id.*
[1957] *Id.* at *4.

Calmelet's report was intended for a small non-public audience and that eventually "led to a workplace power struggle" between her and the dean, both of which support that "the context does not fall within the purview of a public concern."[1958] Calmelet was given 20 days to file a second amended complaint, however, she never did. Her Title VII claims are still pending.[1959]

4.9.4. Committe v. Miller Nash Graham & Dunn LLP

In this case, Bruce Committe[1960] filed a §1983 free speech claim against a private law firm that had represented Oregon State University in three preceding lawsuits brought by Comitte against the university.[1961] Committe alleged that the defendants conspired with Oregon State to deny him a job as an accounting professor at the university.[1962] The District Court of Oregon dismissed Committe's complaint, finding that the defendants "merely represented their client in the traditional adversarial role" and the defendants were a private law firm so they were not considered a state actor.[1963]

4.9.5. D'Andrea v. University of Hawaii

In this case, D'Andrea was a formerly tenured professor of counseling education at the University of Hawaii, who was suspended and subsequently terminated for his behaviors, which his colleagues alleged contributed to a hostile work environment.[1964] He

---

[1958] *Id.*
[1959] Stipulation and Order (continuing pretrial scheduling) at 1, *Calmelet v. Board of Trustees of the California State University*, No. 2:19-cv-02537-MCE-DMC, Doc. 60 (E.D. Cal. May 17, 2022), https://www.courtlistener.com/docket/18415159/calmelet-v-board-of-trustees-of-the-csu/.
[1960] The litigious Bruce Committe is the same plaintiff as in *Committe v. Gentry*—see *supra* section 4.5.3. for a list of his other lawsuits.
[1961] Committe v. Miller Nash Graham & Dunn, LLP, 2020 WL 410189, at *1 (D. Or. Jan. 23, 2020); See also Committee v. Oregon State University 2015 WL 2170122 (May 8, 2015); 2016 WL 4374945 (D. Or. Aug. 11, 2016); 683 Fed.Appx. 607 (9th Cir. 2017); 2018 WL 4623159 (D. Or. Sep. 26, 2018).
[1962] *Committe*, 2020 WL 410189, at *1.
[1963] *Id.* at *3.
[1964] *D'andrea v. University of Hawaii*, 686 F. Supp. 2d 1079, 1081–82 (D. Haw. 2010).

filed a lawsuit alleging violation of his free speech when he was told that he could not contact students or colleagues while he was suspended.[1965] Four months later, D'Andrea signed a settlement agreement with the university releasing them from all present and future claims.[1966] He was subsequently fired, and he grieved the termination.[1967] D'Andrea then filed a second lawsuit nearly two years after the settlement, while his grievance was still ongoing.[1968] The defendants moved for summary judgment arguing that D'Andrea's claims were barred by the settlement agreement.[1969] The court agreed and granted summary judgment for the defendants.[1970] D'Andrea appealed and the Ninth Circuit affirmed.[1971]

4.9.6. Demers v. Austin

In this Ninth Circuit case, Demers, an associate professor of journalism at Washington State University, shared his own proposed plan for structural changes to his own school and its departments by publishing and circulating a pamphlet.[1972] He also wrote a book about life in the academy that was at times critical and detailed some events at Washington State University.[1973] Demers alleged that administrators retaliated against him for his book and pamphlet by "spying on his classes, preventing him from serving on certain committees, preventing him from teaching basic Communications courses, instigating two internal audits, sending him an official disciplinary warning, and

---

[1965] *Id.* at 1084.
[1966] *Id.* at 1081, 1085.
[1967] *Id.* at 1083–84.
[1968] *Id.* at 1085–86.
[1969] *Id.* at 1086–87.
[1970] *Id.* at 1091–92.
[1971] *D'Andrea v. Hawaii*, 2011 WL 4842542 (9th Cir. Oct. 13, 2011).
[1972] *Demers v. Austin*, 746 F. 3d 402, 406 (9th Cir. 2014).
[1973] *Id.* at 408.

excluding him from heading the journalism sequence at the Murrow School."[1974] The district court had "held that [Demers' pamphlets were] written and distributed in the performance of Demers's official duties as a faculty member of WSU, and were therefore not protected under the First Amendment. The district court held, alternatively, with respect to the [pamphlet], that it did not address a matter of public concern."[1975] Demers appealed the district court's award of summary judgment to the defendants.[1976]

On appeal, the Ninth Circuit held that there is an academic exception to *Garcetti* for teaching and scholarship-related speech and that academic speech is governed by *Pickering.*[1977] The appeals court stated the defendants were entitled to qualified immunity since the post-*Garcetti* question was not clearly established, but allowed the injunctive relief claim to move forward.[1978] The court also clarified that there was insufficient evidence in the record to show a causal link between Plaintiff's book draft and the retaliation he alleged.[1979]

Importantly, in holding that Demers' speech was made pursuant to his official duties under *Garcetti* and that the speech was related to scholarship or teaching, the court essentially held that an academic exception to *Garcetti* can apply to speech within one's area of expertise, even when dealing with something as broad as the curriculum of the school in which one teaches.[1980] This is important because it sets the precedent that experts speaking in their areas of expertise can be protected by the First Amendment even

---

[1974] *Id.*
[1975] *Id.* at 409.
[1976] *Id.*
[1977] *Id.* at 406.
[1978] *Id.* at 417–18.
[1979] *Id.* at 414.
[1980] *Id.*

when that speech is made in a shared governance capacity. The Ninth Circuit goes on to state that "protected academic writing is not confined to scholarship. Much academic writing is, of course, scholarship. But academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring. Depending on its scope and character, such writing may well address matters of public concern under *Pickering*."[1981] The court found that Demers' pamphlet addressed a matter of public concern under *Pickering*.[1982] Demers' request for injunctive relief was remanded to the district court so that the remaining questions could be addressed (i.e., substantial or motivating factor, adequate justification, balancing of interests).[1983] The case was subsequently settled.[1984]

4.9.7. Dyer v. Southwest Oregon Community College

In this case, Dyer, a full-time tenure-track criminal justice professor, was fired after she represented students (who were not in her classes) in court who had been charged with "minors in possession."[1985] Prior to representing the students, Dyer spoke with her supervisor and a human resources manager about representing students in court; the HR manager told her not to represent students in her current classes, but that it was acceptable to represent students not in her courses if she did so pro bono, on her own

---

[1981] *Id.* at 416. The court clarifies that some structural or shared governance speech may not address matters of public concern, but Demers' plan did not fall under this category. *Id.*
[1982] *Id.*
[1983] *Id.* at 417.
[1984] Demers allegedly was given over $100,000 in settlement funds, but the Duke Campus Speech database reports he had spent nearly triple that amount in legal fees during the course of the lawsuit. *Demers v. Austin – Campus Speech*, https://campus-speech.law.duke.edu/campus-speech-incidents/demers-v-austin/.
[1985] *Dyer v. Southwest Oregon Community College*, 2018 WL 3431930, at *6 (D. Or. Jul. 16, 2018).

time, and without utilizing college resources.[1986] Her superiors were alerted to her involvement after the district attorney, an adjunct instructor in Dyer's department, reached out to express his and the police captain's concerns that Dyer's involvement could pose a conflict for the criminal justice program for which Dyer was responsible.[1987] The district attorney recused himself from the case to avoid a potential conflict of interest since Dyer was his supervisor in his capacity as an adjunct.[1988] Dyer represented six students who were not in her classes (the two students who were in her classes represented themselves) and all eight students' charges were dismissed in light of Fourth Amendment violations.[1989] While Dyer was cross-examining a police officer the officer asked Dyer if she was calling his integrity into question and she responded "I am questioning how you handled the case, yes."[1990] Subsequently, the president of the college held a meeting with the police chief and police captain "regarding [Dyer's] behavior in the courtroom at trial."[1991] Later, Dyer attended a chief's meeting with police chiefs, the ADA who prosecuted the students, the DA, and her supervisor.[1992] The DA ran the meeting, and then announced to everyone that they needed to discuss Dyer's behavior.[1993] He proceeded to "lambaste" her for fifteen to thirty minutes in front of her supervisor and ended by uninviting Dyer to future chief's meetings.[1994] Two days later,

---

[1986] *Id.* at *3. Her supervisor was present at this meeting, and while her supervisor alleged that she had previously told Dyer she should not represent any student enrolled at the college, she did not contradict the later instructions of the HR manager. *Id.*
[1987] *Id.* at *4.
[1988] *Id.*
[1989] *Id.* at *5.
[1990] *Id.* at *4.
[1991] *Id.* at *5.
[1992] *Id.*
[1993] *Id.*
[1994] *Id.*

the college notified her that they would be investigating whether or not to dismiss her from her position.[1995] The notice stated that she had violated college directives, and conducted herself unprofessionally in violation of the code of conduct.[1996] They gave Dyer four days' notice before a scheduled pre-termination hearing at which she would be able to present any information she wanted them to consider.[1997] At the pre-termination hearing, none of the witnesses against her nor anyone in her chain of command were in attendance so she was not able to confront or present information to them.[1998] Dyer was given a termination letter the same day; the two reasons for her termination given in the letter were that she was insubordinate by meeting with the students she represented while the students who were in her class (whom she refused to represent due to potential conflicts of interest) were in the same public park and that she used employment time and resources when she called the district attorney from her SWOCC office to help one of her students find out their arraignment date.[1999]

Analyzing the First Amendment claim, in light of the defendants' motion for summary judgment, the district court concluded that Dyer spoke as a citizen on a matter of public concern when she represented students pro bono in a lawsuit in which the court found dispositive evidence of police violating the students' Fourth Amendment rights.[2000] The defendants freely conceded that Dyer was terminated for her contested speech and association, but argued that their interests in the relationship between local law

---

[1995] *Id.*
[1996] *Id.*
[1997] *Id.* at *6.
[1998] *Id.*
[1999] *Id.*
[2000] *Id.* at *10-11.

enforcement and their criminal justice program outweighed plaintiff's constitutional rights as a private citizen.[2001] The court was not persuaded by this argument and found that the college did not have a legitimate administrative interest that outweighed Dyer's First Amendment rights.[2002] The court determined that defendants' but-for cause for termination was Dyer's protected speech and thus they were not entitled to summary judgment on the First Amendment retaliation claim.[2003]

Dyer subsequently moved for partial summary judgment on her First Amendment retaliation claim.[2004] Since this motion required the court to take the facts in the light most favorable to the non-moving party (the defendants), various new allegations of fact provided by the defendants that were not present in the previous decision were detailed in the second decision.[2005] Importantly, the court noted that defendants alleged that Dyer repeatedly commented on DA Frasier's religion—DA Fraiser was also an adjunct who reported to Dyer—over the course of the same semester.[2006] The defendants also alleged that Dyer had told people that she felt DA Fraiser "had a vendetta" against her and wanted her job.[2007]

The court found that Dyer had met her burden in the first three questions of the balancing test.[2008] Dyer argued that the speech in question was the but-for cause of her termination and that the administrative interests alleged did not constitute adequate

---

[2001] *Id.* at *11.
[2002] *Id.* at *15.
[2003] *Id.*
[2004] *Dyer v. Southwest Oregon Community College, et al.*, 2020 WL 7409053, at *1 (District Court Dec. 17, 2020).
[2005] *Id.*
[2006] *Id.*
[2007] *Id.*
[2008] *Id.* at *3. The conclusions were that Dyer spoke on a matter of public concern, as private citizen, and that her speech was a substantial or motivating factor in her termination. *Id.*

justification.[2009] The court found that there were genuine issues of material fact in the current record that precluded granting summary judgment to Dyer.[2010] Specifically, the court found that a fact finder could find that the defendants adequately justified their termination of Dyer by showing that they would have fired Dyer anyway based on the evidence that Dyer allegedly had a hostile relationship with the DA and behaved unprofessionally towards him on multiple occasions.[2011] The court found that taking the facts in the light most favorable to defendants, the court could not grant the motion for summary judgment.[2012]

4.9.8. Fuse v. Arizona Board of Regents

In this case, Fuse, a full-time non-tenure-track lecturer in the English department at Arizona State University alleged his contract was not renewed in violation of the First Amendment.[2013] Fuse argued his contract was not renewed due to his outspokenness about the department chair's allegedly discriminatory treatment of another faculty member and racial discrimination.[2014] The defendant department chair proffered evidence of Fuse's unprofessional behavior including his insubordination.[2015] The court found that Fuse failed to allege any evidence beyond timing that could causally link his non-renewal to his speech.[2016] Regardless, the speech referenced by defendants as reason for nonrenewal was not protected (not on a matter of public concern, but instead dealt with

---

[2009] *Id.*
[2010] *Id.* at *6.
[2011] *Id.* at *5-6.
[2012] *Id.* at *6. A joint motion to dismiss was filed and ordered in December 2021.
[2013] *Fuse v. Arizona Bd of Regents*, 2009 WL 2707237 1, *1 (D. Ariz.).
[2014] *Id.* at *1-3.
[2015] *Id.* at *1, *3.
[2016] *Id.* at *3-4.

personal grievances), so the court granted the defendants' motion for summary judgment.[2017]

4.9.9. Grigorescu v. Board of Trustees of the San Mateo Community College

In this case, Grigorescu, an adjunct physics professor, actively opposed a college construction project that attempted to replace an open-space garden with a parking lot.[2018] The activism resulted in a lawsuit (the garden lawsuit) that went to the California Supreme Court and was decided for the plaintiffs (including Grigorescu).[2019] Grigorescu played a very active role in that lawsuit, which was well-known to the former and new vice chancellors of human resources (VCHR). The new VCHR—Whitlock—also happened to be lead counsel for the college in the garden lawsuit.[2020] Within weeks of the new VCHR starting in his new role, defendant Whitlock had subjected Grigorescu to multiple adverse employment actions, culminating in Whitlock issuing Grigorescu a suspension and termination letter.[2021] The court found strong evidence of retaliation in the rationales Whitlock had offered to Grigorescu.[2022]

Grigorescu filed a complaint, alleging First Amendment retaliation under §1983 and the defendants moved to dismiss Grigorescu's complaints after she filed her first amended complaint.[2023] In ruling on the first motion to dismiss, the district court found that Grigorescu's claim that she had been retaliated against nearly four years after her

---

[2017] *Id.* at *5.
[2018] *Grigorescu v. Board of Trustees of San Mateo County Community College District*, 2019 WL 7050143, at *1 (N.D. Cal. Dec. 23, 2019).
§[2019] *Id.*
[2020] *Id.* at *1-2.
[2021] *Id.* at *2-3, *7.
[2022] *Id.* at *6-*8.
[2023] *Grigorescu v. Board of Trustees of San Mateo County Community College District*, 2019 WL 1790472 1, *1 (N.D. Cal.).

allegedly protected speech was insufficient to allege a causal link and dismissed the §1983 claims with leave to amend.[2024] After Grigorescu filed her second amended complaint, the defendants moved to dismiss once again, and the court once again dismissed her claims without prejudice with leave to amend so that she could include more facts related to the temporal proximity between the VCHR's ascension to the new role and the adverse employment actions Grigorescu suffered.[2025] The court did not officially state that Grigorescu's activity was protected, though it did refer to her involvement in the environmental lawsuit as "protected activity."[2026]

Grigorescu's Third Amended Complaint included allegations that the defendant Whitlock (new VCHR and former lead counsel in the prior lawsuit) began retaliating against her within weeks of assuming his VCHR position.[2027] The new allegations from the Third Amended Complaint sufficiently alleged that Grigorescu's role in the lawsuit was a substantial and motivating factor in defendant Whitlock's treatment of her.[2028] In analyzing the years elapsed between the protected activity and the adverse employment actions, the court wrote

Although the alleged retaliation occurs years after Mr. Whitlock's involvement in the lawsuit, he was not in a position to retaliate against Ms. Grigorescu since he did not work for the District. In assessing the time proximity at issue, a fair argument can be made that the time should be measured from the point at which Mr. Whitlock obtained

---

[2024] *Id.* at *9-10.
[2025] *Grigorescu v. Board of Trustees of San Mateo County Community College District*, 2019 WL 4082898, at *8 (N.D. Cal. Aug. 29, 2019).
[2026] *Id.*
[2027] *Grigorescu v. Board of Trustees of San Mateo County Community College District*, 2019 WL 7050143, at *6.
[2028] *Id.* at *7.

the authority to adversely affect Ms. Grigorescu's employment—here within weeks of Mr. Whitlock actually taking over the VCHR position.[2029]

This indicates that a court can measure time as starting at the point at which the defendant was given the authority to adversely affect the plaintiff. Defendant Whitlock's motion to dismiss the speech claim in the third amended complaint was denied in December 2019.[2030]

4.9.10. Grosz v. Lassen Community College District

In this case, two faculty plaintiffs (Chavez and Bishop) along with a number of other female employees of a community college district sued the college, the district, and the college president/district superintendent for violating their freedom of speech and association after they filed complaints (including with the EEOC) against the district.[2031] This case developed out of the female staff/faculty's concerns for their physical safety on a campus with what they believed were very few safety measures in place to protect them.[2032] The court found that the plaintiffs' complaints failed to allege sufficient facts to meet the pleading standard and dismissed all of the claims in the third amended complaint with prejudice.[2033] The plaintiffs appealed to the Ninth Circuit.[2034] The three-judge panel affirmed the district court's conclusions, except for the reversal of a select few claims including the two faculty plaintiffs' free speech claims. The district court

---

[2029] *Id.*
[2030] *Id.* at *9. The case is set for a jury trial in 2023. Order, *Grigorescu v. Board of Trustees of San Mateo County Community College District*, No. 3:18-cv-05932, Doc. 90 (N.D. Cal. 2022), https://www.courtlistener.com/docket/13554867/grigorescu-v-board-of-trustees-of-the-san-mateo-county-community-college/.
[2031] *Grosz v. Lassen Community College Dist.*, 572 F. Supp. 2d 1199, 1204 (E.D. Cal. 2008).
[2032] *Id.* at 1205–6.
[2033] *Id.* at 1212.
[2034] *Grosz v. Lassen Community College*, 360 Fed.Appx. 795 (9th Cir. 2009).

stated that the plaintiffs had not provided sufficient dates in the third amended complaint;[2035] however, the Ninth Circuit found that the temporal proximity between the protected speech of Chavez and Bishop and the adverse employment action they experienced was sufficient to allege that the protected activity was a substantial or motivating factor.[2036] The circuit court also rebuked the district court for finding that the individual defendant was immune to suit because of a California state statute (which cannot immunize a state actor against §1983 claims).[2037] The plaintiffs filed a proposed fourth amended complaint after the Ninth Circuit reversed and remanded the faculty §1983 claims, but the case was settled before trial.[2038]

4.9.11. Hodge v. Antelope Valley Community College District

In this case, Hodge, an emergency medical technician (EMT) instructor, sued his college employer for First Amendment retaliation after he received a negative evaluation and was ordered to do additional work related to cultural diversity and sensitivity.[2039] Hodge's teaching was observed by the dean of health sciences as part of a formal performance evaluation.[2040] During the course of the lesson, Hodge described various cultural practices as "weird," misrepresented some cultural practices, and said students may encounter "witch stuff" in the field.[2041] The dean's observation report said his tone,

---

[2035] *Grosz v. Lassen Community College Dist.*, 572 F. Supp. 2d at 1212.
[2036] *Grosz v. Lassen Community College*, 360 Fed.Appx. at 798.
[2037] *Id.* See *Grosz v. Lassen Community College Dist.*, 572 F. Supp. 2d 1199, 1209 (E.D. Cal. 2008) (citing California Government Code §820.2 which states that public officials are entitled to immunity for discretionary acts).
[2038] Docket, *Grosz v. Lassen Community College District*, No. 2:07-cv-00697 (District Court), https://www.courtlistener.com/docket/5765109/grosz-v-lassen-community-college-district/.
[2039] *Hodge v. Antelope Valley Community College District*, 2014 WL 12776507, at *1-3 (C.D. Cal. Feb. 14, 2014).
[2040] *Id.* at *2.
[2041] *Id.*

gestures, and language had been "inappropriate and disrespectful to the cultural beliefs of patients."[2042] These same critiques were echoed in a Tenured Faculty Evaluation Report (TFER) in which Hodge was found to need improvement when it came to "sensitivity to diversity."[2043] The TFER further specified how to ameliorate this rating of "needs improvement," which included writing a ten-page report addressing the application of federal laws and college policy related to discrimination in his classes, as well as writing a one-hour lesson plan on cultural diversity for his EMT 101 course.[2044] Hodge submitted a 27-page paper on the topic requested as well as a 14-page lesson plan to defendant Turner, the vice president for academic affairs (VPAA).[2045] The VPAA accepted the paper but told Hodge that he was not allowed to present the lesson plan because "it failed to adequately address cultural diversity and contained various epithets that might subject the District to a lawsuit for discrimination or harassment. Defendant Turner further informed Plaintiff that he would be subjected to 'disciplinary action' if he went ahead and delivered the Lesson Plan."[2046] Plaintiff sued for injunctive relief so that he could present the lesson plan, arguing that "he deems it relevant to what EMTs can expect to encounter in the field."[2047] Hodge claimed his in-class "real-world illustrations often include the same offensive language as is sometimes used by patients, family members, and bystanders at a given incident."[2048]

[2042] *Id.*
[2043] *Id.*
[2044] *Id.*
[2045] *Id.* at *2-3.
[2046] *Id.* at *3.
[2047] *Id.*
[2048] *Id.* at *1.

In ruling on the cross-motions for summary judgment, the court cited *Demers* noting that teaching related speech is entitled to the academic exception to *Garcetti* in the Ninth Circuit.[2049] The court found that both the lecture observed by the dean and the proposed lesson plan addressed matters of public concern.[2050] Likewise, the court agreed with Hodges that his interest in speaking outweighed the defendants' interest in regulating his speech.[2051] The defendants argued that they had a legitimate pedagogical concern regarding diversity pursuant to the California education code, that they had interest in preventing disruption caused by the lesson plan, that the lesson plan involved cultural diversity which is not part of the curriculum, and that students in Hodge's class were a "captive audience."[2052] The court did not find these points persuasive.

The court then determined that whether Hodges experienced an adverse employment action should be left up to the finder of fact because while there is not clearly established precedent that the retaliation he experienced constituted an adverse employment action, a finder of fact may well see them as such (e.g., being asked to create and turn in a new essay and a new lesson is an increase in workload for no additional pay).[2053] The court abstained from serving as a finder of fact in this opinion noting that the parties did not adequately devote much attention to the questions of fact in the briefs. Both parties agreed that the defendants were entitled to qualified immunity even if Hodge were to prevail on the First Amendment Retaliation claim, so the result could only be

---

[2049] *Id.* at *4.
[2050] *Id.* at *6-8.
[2051] *Id.* at *10.
[2052] *Id.*
[2053] *Id.* at *14.

injunctive relief without damages.[2054] Hodge also tried to claim a violation of his academic freedom under the First Amendment, but the judge fed his counsel some humble pie writing,

The Court is not aware of any authority allowing Plaintiff to raise an "academic freedom" claim separate and apart from his retaliation claim, and Plaintiff cites no additional authority to enlighten the court. In fact, while the Ninth Circuit has not addressed the question head-on, all other authority suggests that a plaintiff cannot bring a stand-alone claim for "academic freedom" under § 1983.[2055]

The case was settled before trial with the college paying half of Hodge's legal fees.[2056]

4.9.12. Hong v. Grant

In this case, Hong, an engineering professor at University of California–Irvine, argued he was denied a merit pay increase because during faculty and faculty committee meetings he was critical of his colleagues and his school and departments' administrative practices.[2057] In granting the defendants' motion for summary judgment, the district court found that Hong spoke as an employee and that his speech failed to address a matter of public concern.[2058] The court stated that Hong spoke pursuant to his official duties as a participant in shared governance and the peer review process.[2059]

[2054] *Id.*
[2055] *Id.* at *15.
[2056] FIRE April 14 & 2014, *EMT Instructor Deemed Insufficiently 'Sensitive to Diversity' Vindicated; Settlement Reached*, FIRE (Apr. 14, 2014), https://www.thefire.org/emt-instructor-deemed-insufficiently-sensitive-to-diversity-vindicated-settlement-reached/.
[2057] *Hong v. Grant*, 516 F. Supp. 2d 1158, 1160–61 (C.D. Cal. 2007).
[2058] *Id.* at 1167–69.
[2059] *Id.* at 1167–68.

The district court explained that the issues that Hong raised in his statements did not implicate matters of public concern like "malfeasance, corruption or fraud" in any way;[2060] however, the court also stated that two of the issues that Hong addressed in his speech were a colleague's failure to disclose how she acquired a $200,000 research grant (which was subsequently matched by her institution), and another colleague's improper inclusion of two conference papers as "refereed publications."[2061]

Hong appealed, and in light of the recency of the *Garcetti* ruling, in 2010 the Ninth Circuit affirmed the district court's decision on qualified immunity grounds but declined to proceed to the merits of his First Amendment argument.[2062] Four years later, the Ninth Circuit recognized an academic exception to *Garcetti* in *Demers v. Austin*.[2063]

4.9.13. Hussein v. Dugan, Hussein v. Nevada System of Higher Education

This case has an unusually long and complicated procedural history resulting in multiple consolidated appeals to the Ninth Circuit.[2064] Hussein was an associate professor of animal science at the University of Nevada, Reno.[2065] He attended an August 2005 Faculty Senate meeting and was accused of being disruptive and blocked from further public addresses during Faculty Senate meetings.[2066] In October 2005 leading up to another senate meeting he sent an email to all the members of the faculty senate, the

---

[2060] *Id.* at 1169.
[2061] *Id.* at 1162–63. If Hong's allegations were found to be true, both of these acts could be understood as fraud within an academic context.
[2062] *Hong v. Grant*, 2010 WL 4561419, at 238 (9th Cir. Nov. 12, 2010).
[2063] *Demers v. Austin*, 746 F. 3d 402 (9th Cir. 2014).
[2064] Hussein filed two cases against the Nevada System of Higher Education which were consolidated on June 22, 2005. See *Hussein v. Nevada System of Higher Education*, 2008 WL 11450864 (D. Nev. Jun. 27, 2008); 2011 WL 5592831 (9th Cir. Nov. 17, 2011). He then filed another lawsuit against individual defendants (chair of the faculty senate and the university general counsel) on June 30, 2005.See *Hussein v. Dugan*, 2008 WL11450829 1 (D. Nev.); 454 Fed.Appx. 541 (9th Cir. 2011).
[2065] *Hussein v. Dugan*, 2008 WL11450829, *2.
[2066] *Id.*

provost, and the president of the university to make his concerns known about two issues.[2067] First, he complained that the Faculty Senate members had not been given complete/accurate information about the President's approval of a surveillance camera installed outside the door of Hussein's lab.[2068] Second, Hussein believed changes to the faculty grievance procedure would make it harder for faculty to dispute/reverse "unfair performance evaluations." [2069] Specifically, Hussein believed that the change to the faculty grievance process would/did negatively impact his own grievances based on "unfair" performance reviews citing his mistreatment of graduate students.[2070] Hussein alleged that defendants had violated his First Amendment rights by not allowing him to speak at the Faculty Senate meeting in October 2005.[2071] The district court granted summary judgment to both defendants on the First Amendment claims.[2072]

In the 2011 Ninth Circuit decision, the appeals court affirmed the district court's conclusion that Hussein's First Amendment claims were collaterally estopped due to the ruling on his other suit in June 2008.[2073] Likewise, the court found that not allowing Hussein to speak during a faculty senate meeting was not a violation of his First

---

[2067] *Id.*
[2068] *Id.* It is perhaps worth reminding the reader that the issues in these cases began as early as spring 2002, the same academic year as September 11, 2001 when hostilities against people with names like Hussein were extremely common in the U.S. The placement of a surveillance camera outside of Professor Hussein's lab very well could have communicated to Hussein that Islamophobia had increased on campus. That said, mistreating graduate students is not justified because one feels he has been discriminated against.
[2069] *Id.*
[2070] *Id.* For more detail on Hussein's alleged mistreatment of graduate students, see *Hussein v. Nevada System of Higher Education*, 2008 WL 11450864, at *2 (D. Nev. Jun. 27, 2008).
[2071] *Hussein v. Dugan*, 2008 WL11450829, *3.
[2072] *Id.* at *13.
[2073] *Hussein v. Dugan*, 454 Fed.Appx. 541, 542–43 (9th Cir. 2011).

Amendment rights because "faculty members have no constitutional 'right to be heard by public bodies making decisions of policy.'"[2074]

In Hussein's other suit against the Nevada System of Higher Education, another judge for the federal district of Nevada granted the defendants' motions for summary judgment on Hussein's First Amendment claims.[2075] In this suit, Hussein claimed that he received negative performance evaluations under the pretext that he had created a hostile work environment for his graduate students when in fact he believed it was due to his attempts at whistleblowing related to animal mistreatment.[2076] In addition to defendants' entitlement to qualified immunity,[2077] the court found that Hussein's speech about the alleged mistreatment of animals was made in his role as an employee and therefore not protected,[2078] and that he failed to show his speech was a substantial or motivating factor in the conduct of the defendants.[2079] The district court noted that even if some causal link could be inferred, the defendants' "interest in managing [] personnel and other affairs weighs against Hussein."[2080] The Ninth Circuit affirmed numerous consolidated appeals in this case as well and reprimanded Hussein for his "frivolous and harassing litigation tactics."[2081]

[2074] *Id.* at 543.
[2075] *Hussein*, 2008 WL 11450864, at *13.
[2076] *Id.* at *2.
[2077] *Id.* at *8.
[2078] *Id.* at *6.
[2079] *Id.*
[2080] *Id.* at *7.
[2081] *Hussein v. Nevada System of Higher Educ.*, 2011 WL 5592831, at 661 (9th Cir. Nov. 17, 2011).

4.9.14. Idaho State University Faculty Association for the Preservation of the First Amendment vs. Idaho State University

In this case, members of Idaho State University's provisional faculty senate wanted to use a University list-serv email address (an email list) to distribute a draft of a revised faculty constitution to the entire ISU faculty.[2082] The vice president of academic affairs (VPAA) said the faculty could not use the list-serv to organize a poll regarding the draft of the constitution at the time they requested and she provided the plaintiffs with reasons why the list-serv should not be used for such purposes.[2083] The faculty formed an association that sued the university requesting injunctive relief for violations of their First Amendment rights.[2084]

In their request for injunctive relief, the plaintiffs requested that the court use a forum analysis[2085] while the defendants urged the court use *Pickering*.[2086] The court used *Pickering*, explaining that the Ninth Circuit has determined that forum analysis is improper when the government acts "as sovereign *and employer*."[2087] Citing *Garcetti*, the court recognized that both plaintiffs and defendants agreed that the faculty only wanted to use this list-serv to communicate as public employees in their official capacities.[2088]

[2082] *Idaho State University Faculty Association v. Idaho State University*, 857 F. Supp. 2d 1055, 1058 (D. Idaho 2012).
[2083] *Id.* at 1058–59.
[2084] *Id.* at 1058.
[2085] In First Amendment jurisprudence, a "public forum" is used to describe any forum in which speech can be made freely without undue restriction from the government; within a public forum, appropriate government restrictions are limited to the time, place, and manner of the speech and cannot be content-based. In asking the court to conduct a forum-analysis, the plaintiffs were hoping to establish the email list-serv as a public forum by showing prior restrictions had been implemented only as to time, place, and manner, and that discriminating based on viewpoint constituted a violation of the faculty's First Amendment rights. For a deeper discussion of the history of the public forum and cogent critiques of the use of the forum analysis in constitutional law, see Post, *supra* note 31.
[2086] *Id.* at 1061.
[2087] *Id.* at 1062 emphasis in original.
[2088] *Id.* at 1064–65.

Notably, the court failed to determine whether the speech addressed a matter of public concern: in the Ninth Circuit, that question is usually asked before the citizen/employee question added in *Garcetti*.[2089] Based on this analysis the district court denied the plaintiffs' motion for injunctive relief.[2090] The next month, based on the joint stipulation of facts, the district court ruled that the plaintiffs failed to show a violation of the First Amendment, and dismissed the case.[2091]

The school argued, and the court agreed, that even though it was clear that the email messages sent through the listserv were written by individuals, the university administration still moderated the messages and therefore they could be reasonably understood to have been "approved" by the administration.[2092] The court did not reach the balancing test because the court stopped the analysis after determining that the speech was all (to be) made in their roles as public employees and not as citizens.[2093]

4.9.15. Lopez v. Fresno City College

Lopez was a tenured faculty member in health sciences at Fresno City College.[2094] Students who were not enrolled in Lopez's classes complained about some statements about human sexuality and Christian perspectives on genetics that Lopez had made during class; following an investigation, Lopez received a written disciplinary reprimand for these in-class statements.[2095] Lopez was told specifically not to include any further

---

[2089] *Id.* at 1062, 1065.
[2090] *Id.* at 1067.
[2091] *Idaho State University Faculty Association v. Idaho State University*, 2012 WL 1313304 1, *7 (D. Idaho).
[2092] *Id.* at 1063.
[2093] *Id.* at 1065.
[2094] *Lopez v. Fresno City College*, 2012 U.S. Dist. LEXIS 32846 1, *1 (E.D. Cal.).
[2095] *Id.* at *1, *6-8.

religious readings or materials in his health science courses or further insinuate that gays and lesbians are abnormal and in need of psychological counseling.[2096] Lopez sued the college, the president and the vice president of student services, alleging violations of due process and free speech under §1983.[2097] The defendants moved to dismiss for failure to state a claim.[2098]

The District Court for the Eastern District of California determined it was inappropriate to require a teacher in Lopez's position "to show he spoke as a private citizen and not a public employee" and therefore did not ask the *Garcetti* question.[2099] The court cited *Sheldon v. Dhillon* as a similar case in which another California district court had applied an academic exception to *Garcetti*.[2100] Finding that the religious and social issues discussed in Lopez's lectures were matters of public concern and were clearly causally linked to the reprimand he received, the court determined that Lopez had stated a plausible claim for First Amendment retaliation and viewpoint discrimination.[2101] The court also denied the defendants' motion to dismiss based on qualified immunity. The court found the defendants were entitled to sovereign immunity because the original complaint failed to state claims against defendants in their individual capacities, but the court granted plaintiff the opportunity to amend the claims to specify "the particular

---

[2096] *Id.* at *13.
[2097] *Id.* at *2.
[2098] *Id.*
[2099] *Id.* at *24.
[2100] *Id.* n. 4.
[2101] *Id.* at *24-28.

conduct Plaintiff contends was performed in [Defendants'] individual capacities."[2102] The parties settled just prior to a jury trial.[2103]

4.9.16. Maa v. Ostroff

Dr. Maa was a medical doctor and at the time of the speech in question, he was an assistant professor of surgery at University of California San Francisco.[2104] Maa blew the whistle on an improper determination of a cause of death of a patient.[2105] Maa said he would testify in a wrongful death suit, which the hospital chose to settle out of court.[2106] Maa continued to petition the hospital administrators to correct the cause of death with the state medical board.[2107] He subsequently applied for tenure, and after denying his promotion, the administrators told him his tenure-track contract would not be renewed.[2108] Under the threat of removal, Maa's supervisors told him that the only way he could continue his employment at the UCSF medical center would be by accepting an adjunct position (a 46% pay cut) which was only salaried for 1 year before he had to raise his own salary in grant money.[2109] The court's inquiry into his free speech claims established first that it was a matter of public concern then asked whether the speech was made pursuant to his official duties.[2110] Maa was given leave to amend his complaint to address the issue of official duties. Maa alleged that at least one defendant said he'd been

---

[2102] *Id.* at *36.
[2103] Stipulation of Dismissal, *Lopez v. Fresno City College*, No. 1:11-cv-01468, Doc. 44 (E.D. Cal. 2013), https://www.courtlistener.com/docket/5896900/lopez-v-fresno-city-college/.
[2104] *Maa v. Ostroff*, 2013 WL 1703377 1, at *1 (N.D. Cal. Apr. 19, 2013) (No. 1703377).
[2105] *Id.* at *3.
[2106] *Id.* at 22.
[2107] *Id.*
[2108] *Id.* at 6–7.
[2109] *Id.* at 6–7.
[2110] *Id.* at 22 (citing the Ninth Circuit's five-step test for First Amendment Retaliation).

demoted to adjunct because of his reaction to the Jane Doe death case.[2111] Maa's case was eventually settled for $300,000.[2112]

4.9.17. Pace v. Portland Community College

In this case, Pace, a former economics instructor, claimed among other things that his rebuttal of a student complaint about the difficulty of his class was protected speech.[2113] The court determined none of the speech he alleged was a matter of public concern and dismissed the claim with prejudice.[2114] The court did not reach the *Garcetti* question.[2115] The defendants provided evidence that Pace was terminated for refusing to participate in a fitness for duty examination, not because of his speech.[2116] Because Pace was filing pro se, the court had given the plaintiff a great deal of time to respond to defendants' motion to dismiss but he never did, so the court found dismissal with prejudice was appropriate.[2117]

4.9.18. Pavel v. University of Oregon

In this case, Pavel, a full professor of Native American descent in the College of Education at the University of Oregon was dismissed for violating the university's sexual harassment policy.[2118] There were two complaints against him in the course of three

---

[2111] *Id.* at *6.
[2112] Motion for Settlement Enforcement, *Maa v. Ostroff*, No. 3:12-cv-00200-JCS, Doc. 130 (N.D. Cal. 7/23/15), https://www.courtlistener.com/recap/gov.uscourts.cand.250209/gov.uscourts.cand.250209.130.3_1.pdf.
[2113] *Pace v. Portland Community College*, 2020 WL 7090130, at *3 (D. Or. Oct. 5, 2020).
[2114] *Id.*
[2115] *Id.*
[2116] *Id.* at *2.
[2117] *Id.* at *1, *5.
[2118] *Pavel v. University of Oregon*, No. 6:16-cv-00819-AA, 2018 WL 1352150, at *1 (D. Or. Mar. 13, 2018).

years, both asserting that while they were alone with Pavel off campus, he had turned young women towards a reflective surface, touched them in non-platonic ways, and made them feel very uncomfortable.[2119] The incident that resulted in his termination involved a first-semester first-year student who had known plaintiff personally prior to her enrollment at the university.[2120] While at an off-campus event, Pavel allegedly touched and kissed this student in an unwanted manner while he was intoxicated.[2121] When she tried to get away he followed her onto an elevator and proceeded to grab her underwear through her dress.[2122] She reported this to her father, who contacted another Native American faculty member at the school, who assisted the student in formally filing a complaint against Pavel.[2123] The subsequent investigation resulted in his immediate suspension and, at the conclusion of the investigation, his termination in early 2015.[2124] Pavel attempted to grieve his dismissal but his union opted out of the university's offer of arbitration.[2125] Pavel subsequently sued the university alleging his termination was retaliation for his outspokenness against the firing of another Native American faculty member years earlier.[2126]

In 2018, the defendants were awarded summary judgment on the First Amendment retaliation claims which revolved around speech made in 2012 and 2014.[2127] The 2012 speech was related to the firing of another Native American professor (Ball) at

---

[2119] *Id.* at *1-2.
[2120] *Id.* at *1.
[2121] *Id.*
[2122] *Id.*
[2123] *Id.*
[2124] *Id.* at *2.
[2125] *Id.* at *3.
[2126] *Id.*
[2127] *Id.* at *8.

the university that year.[2128] In 2014 Pavel interacted with the Assistant to the President and Assistant Vice President (Younker—whose job was created in part to replace Professor Ball); Pavel expressed to them his belief that Professor Ball should not have been fired and that the university had a duty to remedy that situation with an apology and a ceremony.[2129] Apparently, Younker and Pavel's interactions were not cordial, especially when Younker asserted the sexual harassment allegations against Pavel were widely known.[2130] The court stated that there was insufficient evidence for a reasonable jury to find his speech in 2014 was a motivating factor in his termination.[2131] Since the defendants offered an adequate justification in the form of the investigation into Pavel's violation of the sexual harassment policy, the temporal proximity of three months was insufficient circumstantial evidence.[2132] The court found insufficient evidence that there was any causal link between Pavel's speech and the adverse employment action(s).[2133] Worthy of note, the district court specifically recognized that institutional memory can be long and individuals may not forget about protected speech made even ten years back.[2134] Pavel appealed the district court's granting of summary judgment to the defendants.[2135]

The Ninth Circuit Court of Appeals affirmed the district court's granting of summary judgment on all claims.[2136] On the First Amendment claim, the Ninth Circuit agreed that Pavel had failed to provide any evidence that protected statements were a

---

[2128] *Id.*
[2129] *Id.* at *9.
[2130] *Id.*
[2131] *Id.*
[2132] *Id.* at *9-10.
[2133] *Id.* at *10.
[2134] *Id.* at *8.
[2135] *Pavel v. University of Oregon*, 774 Fed.Appx. 1022 (9th Cir. 2019).
[2136] *Id.* at 1022–23.

"substantial or motivating factor" in his termination.[2137] The court also ruled that the defendants would have been entitled to summary judgment even if the plaintiff had provided evidence that would allow a reasonable juror to infer causation, because the defendants demonstrated they would have terminated the plaintiff even absent his speech.[2138]

4.9.19. Rodriguez v. Maricopa County Community College District

In this case, the plaintiffs were a group of Hispanic-identifying faculty who brought suit against their college for failing to properly respond to a white faculty member who sent out multiple emails to the college community that the plaintiffs felt were racially/ethnically targeting and harassing them.[2139] While there was not a claim of infringement of the plaintiffs' First Amendment rights, the central questions in addressing the plaintiffs' Equal Protection and Title VII claims were whether the defendants were entitled to academic deference and/or whether the alleged harassment was protected speech under the First Amendment.[2140] Because the Ninth Circuit addresses these important questions in this case, it is often cited in other cases.[2141] The Ninth Circuit found that the speech made by the faculty member on a matter of public concern and directed to the college community was not worthy of judicial intervention.[2142] The Ninth Circuit went further, stating, "we therefore doubt that a college professor's expression on

---

[2137] *Id.* at 1026.
[2138] *Id.*
[2139] *Rodriguez v. Maricopa Cty. Community College Dist.*, 605 F. 3d 703, 705 (9th Cir. 2010). The author chooses not to reproduce the content espoused by the professor because she believes it is white supremacist propaganda; such unconscionable ideas have no place in a dissertation, even one on free speech.
[2140] *Id.*
[2141] See, for instance, *Idaho State University Faculty Association v. Idaho State University*, 857 F. Supp. 2d 1055, 1063 (D. Idaho 2012).
[2142] *Rodriguez v. Maricopa Cty. Community College Dist.*, 605 F. 3d at 710.

a matter of public concern, directed to the college community, could ever constitute unlawful harassment and justify the judicial intervention that plaintiffs seek."[2143] The plaintiffs argued that the college could have applied its harassment policy to the emails in question, but the Ninth Circuit stated that "even in a nonpublic forum, state actors may not suppress speech because of its point of view[,] and that is exactly what application of the harassment policy to [the professor's] emails and website would have done."[2144] The court did not cite *Garcetti* in this case.

4.9.20. Sadid v. Idaho State University

Sadid was a tenured professor of engineering at Idaho State University who repeatedly and publicly critiqued the performances of both the university president (Vailas) and the dean of engineering (Jacobsen).[2145] In 2008, Sadid filed a lawsuit in Idaho state court against a colleague and the university for First Amendment retaliation after Sadid had published a guest column in a regional newspaper repudiating the university's plan to merge the colleges of engineering and technology.[2146] In the state suit, Sadid claimed the university had failed to perform his yearly evaluations for six years and refused to appoint him as chair.[2147] While the state lawsuit was ongoing, Sadid continued to publish columns in the local newspaper criticizing the administration, especially Jacobsen and Vailas.[2148]

[2143] *Id.* (citations omitted).
[2144] *Id.*
[2145] *Sadid v. Vailas*, 936 F. Supp. 2d 1207, 1213–14 (D. Idaho 2013).
[2146] *Id.* at 1214.
[2147] *Id.*
[2148] *Id.*

In April 2009, Sadid attended a faculty meeting presided over by Dean Jacobsen.[2149] Sadid repeatedly criticized the administration's disregard for faculty input and pointed the finger at Jacobsen for "creating friction among faculty." [2150] Following this meeting, Dean Jacobsen issued Sadid a notice that he was considering Sadid's dismissal citing his "aggressive, angry, and hostile outbursts."[2151] Dean Jacobsen also cited the fears of female staff members who feared Sadid would be violent towards them, despite their admissions that he had never threatened them with violence.[2152] In August 2009, President Vailas alerted Sadid that he would be placed on administrative leave pending Vailas's decision as to whether Sadid would be terminated per Jacobsen's recommendation.[2153] President Vailas would withhold his decision until the grievance committee could hear Sadid's case, pursuant to university policy.[2154] After several weeks of proceedings, the grievance committee concluded that Sadid should be reinstated, but Vailas rejected the committee's recommendation and fired him anyway. [2155] Sadid brought suit against the university, Vailas, and Jacobsen alleging that firing him for his speech during the faculty meeting violated his First Amendment rights.[2156]

[2149] *Id.*
[2150] *Id.*
[2151] *Id.*
[2152] *Id.* at 1215–16. Once again, it is worth pointing out that Sadid began alleging retaliatory treatment starting in 2001 the same year as the September 11th attacks. Like the plaintiff in *Hussein* above, Sadid's name, ethnicity, and national origin (and assumed religion) may have played a role in some of the backlash from administrators to what may have been seen from someone with a different background as simply "crabby" behavior. The district court even attributes extreme violence to Sadid's speech by employing a war analogy; the court writes, "[Sadid's] critique of the faculty evaluation process during the faculty meeting was nothing more than another verbal grenade lobbed from a common arsenal." *Id.* at 1219. That said, Sadid's suit did not allege discrimination.
[2153] *Id.* at 1215.
[2154] *Id.*
[2155] *Id.* at 1216.
[2156] *Id.* at 1217.

The defendants argued in their motion for summary judgment three theories for why the claims should be dismissed.[2157] The first was under the doctrine of res judicata, they claimed Sadid had already gotten a ruling in state court on a First Amendment claim.[2158] That argument failed, the district court determined, because the claim had only ripened after his first amended complaint had been submitted to the state court (in early 2009, prior to the April speech and the October dismissal).[2159] The court found that the ripeness exception under Idaho law allows Plaintiff to bring the claim in federal court even though he was relying on many of the same facts, because the adverse employment actions Sadid claimed were retaliatory had not yet been litigated in a court of law.[2160]

The second argument the defendants made in support of their motion for summary judgment was that Sadid's claims were time barred, but the court found this was just not true, since Sadid was terminated in October 2009, all parties agreed the statute of limitations for §1983 claims in Idaho is 2 years, and he brought the instant suit in March 2011 (well within two years).[2161]

Finally, the court spent a number of paragraphs addressing the question of an academic exception under *Garcetti*.[2162] The court pointed out that the court in *Garcetti* left open an exception for professors, but that Sadid did not challenge defendants' "argument that his speech during the faculty meeting was made during the course of his employment, except to say that his speech falls into this 'academic freedom'

[2157] *Id.* at 1217–23.
[2158] *Id.* at 1217–18.
[2159] *Id.* at 1219–21.
[2160] *Id.* at 1223.
[2161] *Id.*
[2162] *Id.* at 1224–26.

exception."[2163] The defendants argued that they were entitled to qualified immunity on all claims and the court agreed.[2164] Specifically, the defendants argued that Sadid failed to show that his right to free speech was clearly established when it came to speaking as an employee about the university administration; the court ruled that it was objectively reasonable for Vailas and Jacobsen to view Sadid's speech as unprotected because it addressed personal grievances.[2165] This case predated *Demers v. Austin,* so the Ninth Circuit had not yet decided how the academic exception to *Garcetti* would be applied within their jurisdiction.

4.9.21. Scannell v. Pitt

Scannell was an adjunct at a community college who taught a communications course that consisted of editing and writing the school newspaper for credit.[2166] In the middle of her second semester teaching this course, Scannell was told that all courses scheduled for the next semester with enrollments below fifteen students would be cancelled. [2167] In response to this decision, Scannell wrote an editorial that was critical of the policy in the school newspaper which she also cross-published in a quarterly magazine for the local professional society for journalists.[2168] Scannell's editorial claimed that the class she taught had never had more than fifteen students enrolled and that if more students did not register the newspaper might be cancelled as well.[2169] The professional journalism publication requested contact information for the president and

---

[2163] *Id.* at 1224.
[2164] *Id.* at 1226.
[2165] *Id.*
[2166] *Scannell v. Pitt*, 2010 WL 2196580, at *1 (S.D. Cal. May 28, 2010).
[2167] *Id.*
[2168] *Id.*
[2169] *Id.*

vice president for academic affairs to that readers could contact them with comments or concerns regarding the possible cancellation of classes. [2170] Scannell obliged and informed her dean that she had done so. [2171] Scannell was reprimanded for her speech and told that her course would be cancelled if she did not find fifteen students to enroll.[2172] Scannell had fifteen students enroll, but subsequently learned that other courses with fewer than fifteen students were not cancelled despite the administrators' threats towards her.[2173] During that same semester, the dean reprimanded Scannell again for a student editorial in the newspaper, to which Scannell responded by educating the dean on the protections for student newspapers under the First Amendment and California law.[2174] Scannell's contract was not renewed at the end of the semester, allegedly in retaliation for her speech in the student newspaper, which she alleged violated the First Amendment and California law.[2175]

Scannell sought punitive damages as well as injunctive relief (reinstatement).[2176] The defendants filed a motion for judgment on the pleadings.[2177] The defendants argued that Scannell's speech was not protected because in the editorial her main motivation was airing personal grievances out of fear she would lose her teaching contract, thus it was not touching on a matter of public concern.[2178] Scannell argued that her editorial clearly touched on matters of public concern and that there was no evidence that her speech

---

[2170] *Id.*
[2171] *Id.*
[2172] *Id.* at *2.
[2173] *Id.*
[2174] *Id.*
[2175] *Id.* at *3.
[2176] *Id.*
[2177] *Id.* at *1.
[2178] *Id.* at *4.

interfered with school operations in any way.[2179] Likewise, Scannell argued that the balancing test could not be applied prior to discovery as the question of disruption is a question of fact rather than of law.[2180]

The district court for the Southern District of California found that the speech was clearly related to matters of public concern (e.g. funding and quality of education at the school). [2181] The court agreed that the *Pickering* balancing test was not appropriate at this stage because there was no factual record of any workplace disruption; likewise, the court stated the defendants had not shown any evidence of "actual injury to its *legitimate* interests." [2182] The defendants argued they were entitled to qualified immunity because a balancing test is required and therefore public officials cannot be expected to predict the outcome of such balancing or engage in it themselves.[2183] The court did not agree; the court found that the right to be free of institutional retaliation by government officials based on that individual's constitutionally protected speech was clearly established by at least 1997 in the Ninth Circuit.[2184] Moreover, the court pointed to very clear similarities in Scannell's editorial and the speech at issue in *Pickering*, thus finding that the law had been clearly established even in 1968.[2185] Thus the court denied the defendants' motion for judgment on the pleadings.[2186] The court did not reference *Garcetti*.

[2179] *Id.* at *5.
[2180] *Id.*
[2181] *Id.*
[2182] *Id.*
[2183] *Id.* at *6.
[2184] *Id.*
[2185] *Id.*
[2186] *Id.* at *7.

4.9.22. Sengupta v. University of Alaska, Fairbanks

In this case, Sengupta, a former tenured professor at the University of Alaska, Fairbanks, applied for a job at the same university where he had worked and been fired for cause years earlier.[2187] The university screened out his application (since he had been previously fired for cause) and he sued alleging First Amendment retaliation, among other allegations.[2188] His attempt to relitigate his firing in 1995 was dismissed under res judicata because he had already sued and lost on that claim in state court.[2189] The district court found that he failed to raise a triable issue as to whether the university's explanation for not hiring him was pretext for an unlawful motive, and the Ninth Circuit affirmed the district court's ruling.[2190] The Ninth Circuit did not reference *Garcetti*, likely because Sengupta was no longer an employee.

4.9.23. Sheldon v. Dhillon

As an adjunct at San Jose Community College, Sheldon taught a course on heredity.[2191] During class she discussed a biological basis for homosexuality. [2192] Sheldon's version of events was: she responded to a student question after a quiz, discussing the complexity of the issue of sexuality and genetics; cited a German researcher; and said the class would learn more later in the course. [2193] A student subsequently complained about Sheldon's response to the student question and

---

[2187] *Sengupta v. University of Alaska Fairbanks*, 336 Fed.Appx. 751, 753 (9th Cir. 2009). The same plaintiff also brought a state suit with similar allegations, see *Sengupta v. University of Alaska*, 139 P.3d 572 (Alaska 2006).
[2188] *Sengupta*, 336 Fed.Appx. 751, 752.
[2189] *Id.* at 752–53.
[2190] *Id.* at 753.
[2191] *Sheldon v. Dhillon*, 2009 WL4282086 1, *1 (N.D. Cal. 2009).
[2192] *Id.*
[2193] *Id.*

characterized her statements very differently than Sheldon's version did.[2194] After an internal investigation was conducted, the Vice-Chancellor of Human Resources wrote a letter to Sheldon informing her that her offer to teach in the spring was withdrawn, she had been removed from the adjunct seniority rehire preference list, and that her employment was terminated effective that date (subject to Board approval).[2195] Thereafter, the adverse action was approved by the board.[2196] The court refused to dismiss Sheldon's First Amendment claims because it found there was reason to believe classroom speech—within the parameters of approved curriculum and academic norms—could be protected, even post-*Garcetti*.[2197] The case was settled in Spring 2010 for $100,000.

4.9.24. Conclusion

The Ninth Circuit adopted the academic exception to *Garcetti* in 2013 in *Demers v. Austin*.[2198] Despite the arguably generous application of the academic exception in *Demers,* most cases in the Ninth Circuit have continued to result in dismissals for faculty plaintiffs. Since 2013, the only plaintiff to fully benefit from the precedent set in Demers has been the plaintiff in *Hodge v. Antelope Valley Community College District.*[2199] While the plaintiffs' claims in *Dyer* and *Grigorescu* also survived dismissal, the speech in those cases was clearly made by citizens rather than in the plaintiffs' capacities as faculty

---

[2194] *Id.* at *1-2.
[2195] *Id.* at *2.
[2196] *Id.*
[2197] *Id.* at *4.
[2198] *Demers v. Austin*, 729 F. 3d 1011, 1025 (9th Cir. 2013) withdrawn and replaced by 746 F. 3d 402 (9th Cir. 2014).
[2199] *Hodge v. Antelope Valley Community College District*, 2014 WL 12776507 (C.D. Cal. Feb. 14, 2014).

members.[2200] Nevertheless, seven of the twenty-one plaintiffs (33.3%) prevailed in the Ninth Circuit—a higher rate of success than the database average of 29.3% (76 out of 259).

4.10. Tenth Circuit

In the Tenth Circuit, an academic exception specifically for classroom speech was cited by the Federal District Court for the District of Kansas in *Heublein v. Wefald*.[2201] Under this test, the court wrote "the key inquiry is whether the actions taken by the college were reasonably related to a legitimate pedagogical interest it has."[2202] In contrast, out-of-classroom speech is analyzed using the *Garcetti-Connick-Pickering* test.[2203] The Tenth Circuit also explained in *Singh v. Cordle* that even if the speech in question addresses matters of public concern, if the plaintiff is primarily motivated by personal grievance, the defendant(s) may be entitled to qualified immunity under Tenth Circuit precedent.[2204]

4.10.1. Duckett v. The State of Oklahoma ex rel. The Board of Regents of the University of Oklahoma et al.

In this case, Duckett, who identifies as Black, was a tenured Music Professor at Cameron University.[2205] He received a "severe sanction" because of his continual complaints about racism and discriminatory hiring practices at the university at large and in the music

---

[2200] *Dyer v. Southwest Oregon Community College*, 2018 WL 3431930, at *10-11 (D. Or. Jul. 16, 2018); *Grigorescu v. Board of Trustees of San Mateo County Community College District*, 2019 WL 7050143, at *5 (N.D. Cal. Dec. 23, 2019).
[2201] *Heublein v. Wefald*, 784 F.Supp.2d 1186, 1198 (D. Kan. 2011).
[2202] *Id.*
[2203] *Id.* at 1197.
[2204] *Singh v. Cordle*, 936 F. 3d 1022, 1036 (10th Cir. 2019).
[2205] *Duckett v. Oklahoma ex rel. Bd. of Regents of University of Oklahoma*, 986 F.Supp.2d 1249, 1253 (W.D. Okla. 2013).

department particularly.[2206] The sanction consisted of "stripping [Duckett] of his regular duties for the Fall 2012 semester and prohibiting him from physically coming to University's campus."[2207] The sanction was allegedly based on an administrative finding that Duckett had "created a hostile work environment in the Department of Music through his continued insistence that race must be in the forefront of all discussions."[2208] According to his complaint, Duckett's comments about discrimination and racism at Cameron University generally did not implicate specific persons but were overall critiques about matters of public concern.[2209] The court applied *Garcetti* and *Connick*, determining that Duckett's comments were not made pursuant to his duties as a music professor, and that his comments addressed matters of public concern and not merely a personal grievance.[2210] The district court judge denied the defendants' motion to dismiss the First Amendment claim; the case was eventually settled out of court.[2211]

4.10.2. Hale v. Emporia State University[2212]

In this case, Hale (an African American man) was hired as an assistant professor at Emporia State University (ESU).[2213] At the same time, Hale's wife was hired as the marketing assistant to the dean of the school where Hale worked.[2214] After four months at

---

[2206] *Id.*
[2207] *Id.*
[2208] *Id.* at 1256.
[2209] *Id.*
[2210] *Id.*
[2211] *Id.* at 1259.
[2212] This is one of two cases in this dissertation in which the author has had some form of contact with any of the named parties. The plaintiff in this case contacted the author directly to thank her for her article on Title VII and Equal Pay Act cases published in 2018 as he had also represented his wife (pro se) in her Title VII case against ESU. The contact was made through ResearchGate or academia.edu and happened prior to the author's advancement to candidacy; the author responded once, but both messages have since disappeared from the website.
[2213] *Hale v. Emporia State University*, 266 F.Supp.3d 1261, 1266 (D. Kan. 2017).
[2214] *Id.*

ESU, Hale complained to the dean about the conduct of the school's office manager who had allegedly committed an act of racial discrimination directed at Hale's wife, in addition to several other instances of perceived discrimination.[2215] The dean responded by denying Hale's allegations and asking if Hale's wife was menopausal.[2216] Hale requested that the dean move his wife's office to another floor of the building, which she did.[2217] Nevertheless, the move seemed to heighten tensions, as afterwards the dean because to speak negatively about Hale and his wife to other ESU faculty, staff and administrators.[2218] Towards the end of the second semester the Hales were employed at ESU, a graduate assistant who reported to Hale's wife "arrived at work to find that someone had unlocked her office, tampered with its contents and wrote [the n-word] on a notepad on her desk."[2219] Hale believed "that the racial slur was directed at him and his wife because 'of their boldness, which is uncommon at ESU.'"[2220] Hale and his wife reported the slur incident to the dean and requested that she conduct an investigation.[2221] He also informed his department chair a few days later, and asked why nothing had been done about it.[2222] More than a month after the incident, the dean had still done nothing, so the chair agreed to talk to the dean and Human Resources.[2223]

After two months, Hale and his wife reported the slur incident to the provost and the director of HR at ESU as well as to the ESU police department.[2224] Allegedly, the

---

[2215] *Id.*
[2216] *Id.*
[2217] *Id.*
[2218] *Id.*
[2219] *Id.*
[2220] *Id.*
[2221] *Id.*
[2222] *Id.*
[2223] *Id.* at 1266–67.
[2224] *Id.* at 1267.

ESU police refused to investigate.[2225] Finally, Hale wrote a letter to ESU's interim president asking her to investigate the incident and alleging that he and his wife were victims of retaliation.[2226] Hale was contacted shortly thereafter by an HR employee who was assembling a report for the president.[2227] Hale and his wife each met with the HR employee separately, discussing their concerns about the slur incident as well as the earlier incidents of discrimination by the office manager that they had reported to the dean.[2228] Hale and his wife later learned that the HR employee was a family friend of the office manager, and they asked that he recuse himself from the investigation but he refused, and the president also refused to remove him.[2229] Hale alleged that after he had reported the slur incident to the provost, his dean began to treat him and his wife differently.[2230] When the Hales spoke with the dean,

> [The dean] expressed disappointment that the Hales had reported the [slur] incident to the provost and the ESU Police Department. [She also] said that the Hales' performance had been stellar leading up to their complaints, but that she felt blindsided by their allegations that she and [the office manager] had engaged in misconduct. [She] told [Hale] that she had hoped he would have overlooked the [slur] incident because he could have served as a model for professional behavior by an African-American. [She] also expressed frustration that the Hales wanted

---

[2225] *Id.*
[2226] *Id.*
[2227] *Id.*
[2228] *Id.*
[2229] *Id.*
[2230] *Id.*

> something done about the incident. She told [Hale] that he should accept the incident because "this is Kansas."[2231]

Hale's wife subsequently was told her contract would not be renewed, despite verbal promises to the contrary.[2232] Hale's wife decided to quit two weeks before the end of her contract, and did so by writing an open letter to the dean about her feelings.[2233] Hale stated that the letter started a controversy and the Associated Press covered the story.[2234] Hale accused the named defendants in the lawsuit of reporting to the media that ESU "had conducted a fair, logical, and thorough investigation of the racial slur incident and that no crime had occurred."[2235] At the beginning of the third semester of Hale's employment he and his lawyer met with the president.[2236] She told him that no hate crime had occurred, asked Hale "to sign a document stating that he would seek counseling and refrain from discussing his concerns about discrimination" and "introduced the subject of [Hale's] termination."[2237] Hale's attorney advised him not to sign anything, and told the president that signing such a document "would have a chilling effect [on] employees who report hate crimes."[2238] Following this meeting, the administrators developed a "cooling off period" for Hale for the full academic year following the racial slur incident, during which he was not allowed to discuss racial discrimination and nor was he permitted to access his office.[2239] Because Hale could not access his office, he was unable to create a

---

[2231] *Id.*
[2232] *Id.* at 1267–68.
[2233] *Id.* at 1268.
[2234] *Id.*
[2235] *Id.*
[2236] *Id.*
[2237] *Id.*
[2238] *Id.*
[2239] *Id.*

portfolio of his research and service contributions, which administrators then cited as a reason for his termination.[2240] Hale sued alleging violations of his First Amendment rights and retaliation for his complaints of racial discrimination.[2241]

In 2017, the district court for the district of Kansas found for Hale and denied the defendants' motion for judgment on the pleadings.[2242] The court stated that Hale's speech addressed a matter of public concern, and the court cited *Connick*, stating that racial discrimination is inherently a matter of public concern.[2243] The court stated that Hale's speech addressed personal grievances as well as matters of public concern.[2244] The court found that the defendants were not entitled to qualified immunity because Hale's right to speak out against racial discrimination and report hate crimes were clearly established under *Connick*.[2245]

In 2019, the district court judge denied the defendants' motion for summary judgment.[2246] The court denied the motion because the defendants failed to file a record of uncontroverted facts, even when Hale (*pro se*) alerted them to this failure in his own opposition to their motion.[2247] In 2019 the case went to trial and the jury found for the defendants; Hale was ordered to pay attorneys' fees for the defendants. In Hale's claim against the provost, the jury found that his termination/non-renewal was an adverse employment action, but they did not find by a preponderance of evidence that his

---

[2240] *Id.*
[2241] *Id.*
[2242] *Id.* at 1265.
[2243] *Id.* at 1272–73.
[2244] *Id.* at 1273.
[2245] *Id.* at 1274.
[2246] *Hale v. Vietti*, 2019 WL 1255247, at *1 (D. Kan. Mar. 19, 2019).
[2247] *Id.* at *3-4.

complaints about racial slurs were a substantial or motivating factor in his termination.[2248] The judge dismissed all other defendants as a matter of law.[2249]

4.10.3. Heublein v. Wefald

In this case, Heublein was a tenured math professor at Kansas State University.[2250] One of Heublein's students complained to her advisor that Heublein had treated her differently from his male students, made jokes about women, and made sarcastic remarks.[2251] One of the defendants charged with reviewing the complaint was a part-time faculty member (Nancy Mosier).[2252] She found no sexual harassment, however, she resigned from the investigation citing fear of violence from the plaintiff.[2253] The investigation resulted in a report which was sent to multiple administrators, then the dean decided to require Heublein to work with his department chair to develop a corrective action plan (CAP) and follow the plan for five years.[2254] Heublein was not given access to the report, and did not feel CAPs were recognized under university policy, so he filed an administrative appeal to the provost.[2255] The provost affirmed the Dean's requests, but asked that the term "investigation" be stricken from the Dean's letter because it did not accurately reflect the efforts taken.[2256] After exhausting the grievance process, Heublein filed a suit against KSU and various administrators alleging First Amendment retaliation

---

[2248] See Jury Verdict, *Hale v. Emporia State University*, No. 16-cv-4182-DDC (D. Kan. 7/15/19) (No. 16-cv-4182-DDC), https://storage.courtlistener.com/recap/gov.uscourts.ksd.114742/gov.uscourts.ksd.114742.133.0.pdf.
[2249] *Id.*
[2250] *Heublein v. Wefald*, 784 F.Supp.2d 1186, 1190 (D. Kan. 2011).
[2251] *Id.*
[2252] *Id.*
[2253] *Id.*
[2254] *Id.* at 1191.
[2255] *Id.*
[2256] *Id.*

and infringement of his right to academic freedom; the defendants filed a motion to dismiss.[2257]

The federal district court of Kansas found that Heublein's speech inside the classroom was a motivating factor in the defendants' decisions, but pursuant to Tenth Circuit precedent, that fell within the university's legitimate pedagogical interest ("in the professionalism or conduct exhibited by professors").[2258] For classroom speech, the court essentially skipped to the balancing test.[2259] Likewise, Heublein's speech outside the classroom to students or colleagues and during his administrative appeals did not touch on a matter of public concern, as the court found they were addressing personal workplace grievances.[2260] The court cited *Garcetti* but skipped to the matter of public concern question from *Connick* without addressing whether the speech was made pursuant to Heublein's official duties.[2261] Heublein's attempt at raising an academic freedom claim failed as well.[2262] Heublein argued that the sanctions imposed on him would "straight jacket" his teaching style, but the court found no support for this claim, instead finding that the sanctions are "intended to improve plaintiff's behavior toward others."[2263]

4.10.4. Joritz v. University of Kansas

In this case Joritz, an assistant professor of animation at the University of Kansas, was not renewed after a series of anomalous occurrences during her pre-tenure

---

[2257] *Id.* at 1192.
[2258] *Id.* at 1198.
[2259] *Id.* at 1197.
[2260] *Id.* at 1198.
[2261] *Id.*
[2262] *Id.* at 1199.
[2263] *Id.*

evaluations.[2264] Administrators repeatedly interfered with her pre-tenure reviews in ways that violated or undermined institutional policy.[2265] For instance, allegedly discriminatory student evaluations (one called her a Nazi sympathizer because she has a German surname and is well known as a German filmmaker) were included in Joritz's dossier despite her request that they be removed because they were defamatory.[2266] Joritz claimed her complaints about the contract-breaching activity constituted protected speech and were a substantial or motivating retaliatory factor in her non-renewal.[2267]

The district court ruled on defendants' motion to dismiss finding that the defendants were protected by qualified immunity when it came to restricting Joritz's communications with faculty members on the progress towards tenure review (PTTR) committee.[2268] Nevertheless, the court found that Joritz had adequately pled a claim for retaliation related to her speech about the administrators' policy violations involved in her tenure procedure.[2269] The administrators brought an interlocutory appeal on the denial of qualified immunity on the First Amendment retaliation claim.[2270]

The Tenth Circuit Court of Appeals disagreed with the district court, finding that Joritz's speech did not address a matter of public concern and therefore was not protected under the First Amendment.[2271] The Tenth Circuit cites its opinion in *Singh v. Cordle* explaining that when it comes to the *Connick* question (whether the speech addressed a

---

[2264] *Joritz v. Gray-Little*, 822 Fed.Appx. 731, 733–36 (10th Cir. 2020).
[2265] *Id.*
[2266] *Id.* at 733.
[2267] *Id.* at 737–38.
[2268] *Id.* at 737.
[2269] *Id.* at 738.
[2270] *Id.* at 737.
[2271] *Id.* at 738.

matter of public concern), the question becomes what the primary purpose or motive was when the employee spoke.[2272] The court explained, "speech is not a matter of public concern if the plaintiff's *principal* motive is to serve her own personal interests rather than to expose some kind of governmental wrongdoing."[2273] The court distinguished Joritz's complaints from other complaints about discrimination by noting that her complaints "focused entirely on the conditions of her own employment and the impact the allegedly discriminatory student evaluations would have on her own prospects for tenure."[2274] The court recognized that Joritz's complaints "suggested ways to address the issue of student discrimination against faculty in the future," but still held that the context was demonstrative that her motive was primarily personal.[2275] The Tenth Circuit concluded that Joritz's speech did not involve matters of public concern, was thus not protected under the First Amendment, and that therefore the defendants were entitled to qualified immunity.[2276]

4.10.5. Klaassen v. Atkinson

In this case, Klaassen, a medical professor, criticized the University of Kansas Medical Center (KUMC) for misconduct (including misuse of grant funds and financial mismanagement) and alleged that he was subsequently the victim of retaliation.[2277] His complaints about misuse of grant funds allegedly resulted in the associate vice chancellor and the vice chancellor for research putting him on administrative leave for a month and

---

[2272] *Id.* at 740.
[2273] *Id.* at 741. Emphasis in original.
[2274] *Id.* at 738–39.
[2275] *Id.* at 741.
[2276] *Id.* at 741–42.
[2277] *Klaassen v. Atkinson*, 348 F.Supp.3d 1106, 1116 (D. Kan. 2018).

a half (with pay) for his belligerent behavior and mishandling of grant funds.[2278] They also allegedly requested to remove Klaassen from two of his NIH grants, took out money from his remaining grant accounts without his permission, and assigned him to a different department and research laboratory away from his colleagues in his department.[2279]

Klaassen was investigated by the Vice Chancellor for Academic Affairs; a report was compiled which allegedly included evidence of Klaassen's "unprofessional behavior."[2280] This report was presented to a faculty committee and they recommended that KUMC publicly censure Klaassen for his behavior and that he issue a general apology. [2281] That same year, Klaassen complained to the interim dean that KUMC had misappropriated $200,000 of his NIH grant funds.[2282] After a full semester, the interim dean met with Klaassen about his complaint and, as a solution to the misappropriation issue, the dean allegedly recommended "using money from new grants to cover deficits in old existing grants, which [Klaassen] said was unethical conduct."[2283] A week after their meeting, the dean placed Klaassen on administrative leave; while on leave, KUMC contacted the NIH to remove Klaassen as principal investigator on one of his grants.[2284] After six months of administrative leave with pay, KUMC held a hearing charging Klaassen "with professional misconduct and request[ing] his termination."[2285] The faculty committee recommended that KUMC reinstate Klaassen immediately and only warn

---

[2278] *Klaassen v. University of Kansas School of Medicine*, 84 F.Supp.3d 1228, 1236 (D. Kan. 2015).
[2279] *Id.*
[2280] *Id.*
[2281] *Id.* at 1237.
[2282] *Id.* The summary judgment record later showed that Dr. Klaassen's own expenditures had been exceeding available funds by $52,000 per month. *Klaassen*, 348 F.Supp.3d at 1135.
[2283] *Klaassen*, 84 F.Supp.3d at 1237.
[2284] *Id.*
[2285] *Id.*

him.[2286] The executive vice chancellor of the university of Kansas rejected the committee's recommendation instead terminating Klaassen.[2287]

In addressing Klaassen's First Amendment retaliation claim, the district court divided the allegedly protected speech into two broad topics: "(1) criticism of KUMC's governance and financial situation; and (2) criticism about mismanagement and misappropriation of grant money."[2288] The court then discussed how *Garcetti* affected the law and created a possibility for an academic freedom exception that has been adopted in some circuits (Fourth, Ninth) and not in others (Seventh, Tenth).[2289] Because of the uncertainty of the law, the court determined that the defendants were entitled to qualified immunity. The court found that Klaassen's speech was made pursuant to official duties and therefore was not protected under the First Amendment.[2290]

In particular, the court cited the Seventh Circuit case, *Renken v. Gregory*, as a similar case in which a faculty member's duties included obtaining grant funding and internal speech related to grant monies was found to be pursuant to official duties and therefore not protected.[2291] However, because Klaassen amended his complaint to include speech made to news media and presentations outside of the university after the defendants moved for judgment on the pleadings, the court denied the defendants' motion until they could address the amended pleadings.[2292]

[2286] *Id.*
[2287] *Id.*
[2288] *Id.* at 1250.
[2289] *Id.* at 1251.
[2290] *Id.* at 1253.
[2291] *Id.* at 1252–53.
[2292] *Id.* at 1254.

Three years after the first decision in this case, the district court ruled on the defendants' motions for summary judgment in an eighty-seven page opinion that could be its own novella.[2293] The evidence showed that Klaassen made multiple threats to his colleagues,[2294] he repeatedly slandered his colleagues and administrators, he called meetings with large audiences solely to give presentations about the misconduct of administrators,[2295] he lashed out at other faculty and at times pounded the table.[2296] Despite the dozens of pages of new evidence before the court, the timeline was not substantially altered; the difference was mainly in the abundant evidence of Klaassen's increasingly threatening and irrational behavior.[2297]

When it came to the summary judgment motion on the First Amendment claim, the court explained that it would use the *Garcetti-Pickering* test to determine whether Klaassen's rights were violated.[2298] The court noted four instances of speech that Klaassen argued had prompted the defendants' retaliation:

1) When Klaassen accused the dean of financial mismanagement at a vendor's presentation to faculty;

2) when Klaassen prepared a PowerPoint criticizing the absence of shared governance and alleged financial mismanagement (which he gave to the dean);

3) when Klaassen communicated with the newspaper about alleged mismanagement;

[2293] *Klaassen v. Atkinson*, 348 F.Supp.3d 1106 (D. Kan. 2018).
[2294] *Id.* at 1124.
[2295] *Id.*
[2296] *Id.* at 1118–31.
[2297] *Id.*
[2298] *Id.* at 1166.

4) and when Klaassen presented a PowerPoint criticizing the dean's decision to remove him as chair of his department.[2299]

The defendants argued that there were no triable issues of fact under the *Garcetti-Pickering* test, and the court agreed.[2300] The court stated there were three reasons it granted summary judgment.[2301]

1. Klaassen's speech was made "as part of his official duties"[2302] according to Tenth Circuit precedent which states that "if the speech 'reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties."[2303]
2. Klaassen's complaints were "merely grievances of a personal nature and did not involve matters of public concern."[2304]
3. The employer's interest outweighs Klaassen's free speech interest.[2305]

Additionally, the court ruled that defendants were entitled to qualified immunity.[2306] Klaassen appealed this decision but dismissed the case while the appeal was still pending.

[2299] *Id.* at 1167–71.
[2300] *Id.* at 1166.
[2301] *Id.*
[2302] *Id.*
[2303] *Id.* at 1170.
[2304] *Id.* at 1172.
[2305] *Id.* at 1174. The court writes, "The summary judgment facts establish that Dr. Klaassen's speech *in fact* was disruptive. Other faculty complained his comments were inappropriate and unprofessional, and some faculty members even walked out of one meeting in response to his speech. The employer's interest here is strong. *Id.* at 1176.
[2306] *Id.* at 1178.

4.10.6. Madden v. Regional University System of Oklahoma

In this case, Madden, an assistant professor in the department of criminal justice and legal studies, was not renewed after colleagues complained about their interactions with him.[2307] The week before the nonrenewal of his contract, Madden had received a good evaluation and his department chair had recommended he be retained for another year.[2308] There were two instances of allegedly protected speech.[2309] The first was an email between Madden and a few other professors about whether the appointment of the dean's wife to a department within the dean's college would require a presidential and board of trustees sanctioned exception to the state nepotism statute/ethics laws,[2310] Madden stated in this email that he believed that the dean would need an exception and cited other potential policy violations that the dean could incur if he did not follow proper procedure.[2311] The second topic had to do with the U.S. presidential election of 2012, and the differing political affiliations of faculty within the department.[2312] Madden had multiple heated and contentious discussions with a Republican colleague who argued with Madden about whether people were calling the colleague a racist.[2313]

The court cited *Garcetti, Lane,* and *Pickering.*[2314] The court stated that the first topic did not constitute a matter of public concern that was clearly established.[2315] The court cited a case from the Tenth Circuit in which a professor was denied tenure for

---

[2307] *Madden v. Regional University System, of Oklahoma*, 73 F. Supp. 3d 1341, 1343–44 (W.D. Okla. 2014).
[2308] *Id.* at 1344.
[2309] *Id.*
[2310] *Id.* at 1345.
[2311] *Id.*
[2312] *Id.*
[2313] *Id.*
[2314] *Id.* at 1346.
[2315] *Id.* at 1347.

advocating for a no-confidence vote as to some members of the board of regents.[2316] The court extrapolated that Madden's speech "did not criticize any particular person or process, or suggest misconduct on anyone's part" but rather "responded only to a hypothetical question as to how the faculty handbook should be interpreted. It did not address any particular action of the university, but addressed a potential situation that had not yet arisen."[2317] The court did not acknowledge that as a professor in the legal studies department, Madden's academic expertise may have extended to the knowledge and interpretation of policies and statutes. Importantly in this case, the court viewed the hypothetical as further removing the content of the exchange from the realm of public concern rather than pushing it closer to the realm of scholarship and research that might merit an academic exception to *Garcetti*. The court stated that regardless of whether or not the speech touched on a matter of public concern, Madden failed to provide evidence that his right was clearly established and thus the defendants were entitled to qualified immunity.[2318] Likewise, the court found that Madden's discussions with his Republican colleague did not implicate matters of public concern.[2319] The court justifies this finding, writing,

> The episode at [a colleague's] house apparently involved a spirited discussion of [the colleague]'s motivation for the views he held, but that is plainly not a matter of public concern. Plaintiff's involvement in "outing" [this colleague] as a Republican may have been of interest to others in the department, but also does

---

[2316] *Id.*
[2317] *Id.*
[2318] *Id.*
[2319] *Id.* at 1347–48.

> not qualify as a matter of public concern. Plaintiff attempts to cast the circumstances as involving defendants retaliating against him for simply talking about the presidential election, but there is nothing in the parties' submissions to plausibly support such a claim. The only mention of plaintiff's speech is in [the chair's] memo to the personnel file, which provides no detail as to what was said nor does it otherwise support an inference that he was non-renewed because of his interest in the presidential election or because of the content of his opinions. In the context of a qualified immunity analysis, the burden is on plaintiff to make a sufficient showing to at least put a potential constitutional violation in issue and avoid the qualified immunity defense. Plaintiff has not done so as to his [colleague]-related comments.[2320]

The court thus ended the analysis and granted the defendants' motion for summary judgement on the basis of qualified immunity.[2321]

4.10.7. McGettigan v. Di Mare

In this case, McGettigan, a full Professor of sociology at Colorado State University–Pueblo disseminated—to the entire student body—a series of emails criticizing the chancellor's decision to fire 50 people at the Pueblo campus.[2322] In McGettigan's final email, he compared the chancellor's decision to terminate employees

---

[2320] *Id.* This portion of the opinion is quite confusing, as it does not really address whether the speech touches on a matter of public concern at all. It would not be unusual for Madden to have little evidence of a causal link between his speech and the adverse employment action, so his argument likely would have broken down at that stage anyway and the defendants still could have succeeded on their motion. It is unfortunate that this case is precedential, then, because this opinion is (needlessly) confusing even for someone who has read hundreds of these cases.
[2321] *Id.* at 1348.
[2322] *McGettigan v. Di Mare*, 173 F. Supp. 3d 1114, 1118 (D. Colo. 2016).

with the historic massacre of striking coal miners by militia and company guards in Ludlow, Colorado one hundred years prior.[2323] McGettigan's email explicitly referred to the chancellor as a hitman.[2324] President Di Mare read the violent metaphor as potentially inciting violence and responded by immediately removing McGettigan's technology privileges (including email) and two weeks later rescinding approval of his sabbatical scheduled for the next semester.[2325] McGettigan filed his complaint alleging violations of his First Amendment rights.[2326]

Defendant Di Mare filed a motion to dismiss, asserting she was entitled to qualified immunity because under the *Garcetti/Pickering* test McGettigan's complaint failed as a matter of law.[2327] Di Mare argued that McGettigan's complaint failed (only) at the third prong, that the government's interest outweighed McGettigan's right to speak freely.[2328] The court explained that the defendant must establish that the decision "was based on legitimate reasons grounded in the efficient conduct of public business" before the court proceeds to balancing the interests of the two parties.[2329] The court clarified that the problem with conducting the balancing test at the motion to dismiss stage is that it is a fact-intensive inquiry which is not properly conducted prior to discovery.[2330] The court noted that because the defendant failed to demonstrate the necessity of the actions she took, the court had to deny her motion to dismiss.[2331] The court did, however, grant the

---

[2323] *Id.* at 1119.
[2324] *Id.*
[2325] *Id.* at 1119–20.
[2326] *Id.* at 1120.
[2327] *Id.* at 1120–22.
[2328] *Id.* at 1123.
[2329] *Id.*
[2330] *Id.* at 1125.
[2331] *Id.* at 1124–25.

defendant's motion to dismiss McGettigan's defamation claim because the statement was not on its face unmistakably injurious.[2332] The case was settled prior to trial after more than three years. [2333]

4.10.8. Moore v. University of Kansas

Moore was an assistant (research) scientist and director of the Microscopy Analysis and Imaging Laboratory at the University of Kansas when he was suspended without pay and subsequently terminated for "'disruptive' and 'unprofessional' behavior."[2334] Moore alleged he had repeatedly attempted to bring his concerns regarding laboratory and research waste, mismanagement, and misconduct to his superiors to no avail.[2335] Moore grew frustrated with his superiors and conveyed his concerns to the FBI, a funder of medical research, and a newspaper.[2336] Moore brought suit against the university alleging that he was fired in retaliation for speaking as a citizen on a matter of public concern.[2337]

On the defendants' motion to dismiss, the court analyzed the defendants' argument that Moore spoke pursuant to his official duties when reporting misconduct and mismanagement.[2338] The defendants argued that there was a university-wide policy for reporting fraud and mismanagement and it effectively required all employees to report known or suspected misconduct.[2339] The court, however, cited *Klaassen*,[2340] noting that

---

[2332] *Id.* at 1127.
[2333] See docket Docket, *McGettigan v. DiMare,* No. 1:15-cv-00097 (D. Colo.), https://www.courtlistener.com/docket/4196503/mcgettigan-v-dimare/.
[2334] *Moore v. University of Kansas*, 118 F.Supp.3d 1242, 1248 (D. Kan. 2015).
[2335] *Id.* at 1249.
[2336] *Id.*
[2337] *Id.* at 1258.
[2338] *Id.* at 1258–60.
[2339] *Id.* at 1258–59.
[2340] *Klaassen v. Atkinson*, 348 F.Supp.3d 1106, 1252 (D. Kan. 2018).

the defendants failed to distinguish the context or content of the various instances of speech in question, and likewise they failed to "point to the duties and responsibilities with the plaintiff's position, as formally described or actually performed, under which such speech would fall."[2341] The court aptly noted that the defendants' argument that a universal policy is equivalent to an official duty "would dispense with evaluating job duties and performance" any time a relevant general policy existed.[2342] The district court ruled that the arguments and facts were insufficient for the court to apply *Garcetti* and thus denied the defendants' motion to dismiss.[2343]

4.10.9. Peterson v. Williams

Peterson, a tenured Music Professor at Dixie State University in Utah,[2344] complained publicly about the firing (for cause) of his colleague in the school of arts in 2014.[2345] Four years after the firing of his colleague (2018), the provost issued a notice of termination that suspended him until the dismissal was finalized.[2346] The provost's justification for the termination was "Mr. Peterson had violated the university's rules and regulations and engaged in professional misconduct because he, among other things, had disclosed confidential information, made improper representations on behalf of DSU, and 'slandered'[his colleague's department chair] and DSU's president."[2347] Peterson requested a faculty review board hearing in response to his dismissal.[2348] The faculty

---

[2341] *Moore v. University of Kansas*, 118 F.Supp.3d at 1260.
[2342] *Id.*
[2343] *Id.* at 1260–61.
[2344] If the author had been asked prior to reading this case to guess what state Dixie State University is in, Utah would not have been in her top thirty guesses. She would have sooner guessed Oregon.
[2345] *Peterson v. Williams*, 2020 WL 1876225, at *1 (D. Utah Apr. 15, 2020).
[2346] *Id.*
[2347] *Id.*
[2348] *Id.*

review board found that DSU failed to satisfy the burden of proof (preponderance of information) for its accusations against Peterson.[2349] The review board recommended a warning not to make "inappropriate comments" about the institution or its administration and that he be reinstated as a tenured professor.[2350] The final termination decision normally would be made by the president, but because Peterson had been critical of the president, the president referred the decision to the associate commissioner for academic and student affairs for the state system of higher education. She had agreed that there was not sufficient evidence to support termination and recommended that a ten-day suspension without pay should suffice for discipline and that he be reinstated as a tenured music professor.[2351] She also decided that the institution should issue Plaintiff a "final chance" letter with expectations for continued employment.[2352] The DSU general counsel wrote a "Last Chance Agreement" (LCA) that essentially stripped him of tenure and participation in shared governance, and said that he could be summarily terminated for any violation of the terms in the LCA.[2353] Peterson refused to sign the agreement, believing it to be beyond the scope of what the associate commissioner decided; at the end of the summer he learned that his employment had been terminated and was subsequently unable to find suitable work.[2354]

Citing *Garcetti*, the court found that the speech was made pursuant to official duties because, as a tenured faculty member, Peterson was expected to participate in

---

[2349] *Id.*
[2350] *Id.*
[2351] *Id.*
[2352] *Id.*
[2353] *Id.* at *2.
[2354] *Id.*

service on faculty/tenure review, disciplinary, and employment search committees.[2355] Thus the court stated that because the speech addressed discipline of a fellow faculty member and the performance of a department chair, it was within the scope of Peterson's duties.[2356] Furthermore, the court found that Peterson's speech did not constitute a matter of public concern and instead addressed his personal issues.[2357] Peterson also argued that the Last Chance Agreement was an unlawful prior restraint on his First Amendment rights.[2358] The court dismissed this claim stating that because Peterson did not provide sufficient evidence that the speech was curtailed by the LCA insofar as his complaint failed "to identify what actions were taken and by which Defendants to support a plausible claim of civil conspiracy."[2359] Thus both of Peterson's §1983 claims were dismissed.[2360]

4.10.10. Rodriguez v. Serna

In this case, Rodriguez was an adjunct who identified and researched public records indicating that over $300,000 in unbid contracts were awarded to two campus employees, Brandi and Ryan Cordova.[2361] Brandi Cordova served as public records custodian and was therefore aware of Rodriguez's investigation into the malfeasance.[2362] Rodriguez was assaulted and feared battery when exiting the public records room one time.[2363] Rodriguez alleged that her sustained efforts to shed light upon financial

---

[2355] *Id.* at *3.
[2356] *Id.*
[2357] *Id.* at *4.
[2358] *Id.*
[2359] *Id.*
[2360] *Id.*
[2361] *Rodriguez v. Serna*, 2019 WL 2340958, *9 (D.N.M. 2019).
[2362] *Id.* at *11.
[2363] *Id.*

mismanagement at her college provoked retaliation by the administration resulting in adverse employment actions.[2364] In May 2014—despite a signed contract—Rodriguez was told her contract was not binding and the defendants refused to honor it.[2365] Rodriguez created and maintained a public website in early 2015 explaining and providing evidence of the allegations against the Cordovas.[2366] The site was taken down by administrators because of alleged (false) copyright infringement.[2367] Rodriguez's contract was not renewed, she was banned from campus, and banned from teaching at the college.[2368] The court found a clear connection between her protected speech and the adverse employment actions of multiple administrators and thus denied these defendants' motions to dismiss the First Amendment claims.[2369] Furthermore, the court ruled that assault (or threat thereof) and banning from campus were sufficient to chill any reasonable person's speech.[2370]

4.10.11. Singh v. Cordle

In this case, Singh was employed at Emporia State University in Kansas for five years as an assistant professor on a series of one-year probationary appointments.[2371] Singh was given a terminal contract after he had been employed for five of the six years of probation.[2372] Singh claimed his contract was not renewed because he was discriminated against and as retaliation for his speech about the discrimination he had

---

[2364] *Rodriguez v. Serna*, 2019 WL 2340958.
[2365] *Id.* at *4.
[2366] *Id.* at *5, *9, *11.
[2367] *Id.* at *11.
[2368] *Id.* at *6.
[2369] *Id.* at *7-9.
[2370] *Id.* at 8. A settlement was reached in late 2019 for $115,000.
[2371] *Singh v. Shonrock*, No. 15-cv-9369-JWL, 2017 WL 4552139, at *1 (D. Kan. Oct. 12, 2017).
[2372] *Id.*

alleged.[2373] Singh's evidence of discrimination was based mainly on his strained relationship with Dr. Alexander, dean of the School of Library and Information Management.[2374] Evidence showed that Alexander made multiple anti-Asian remarks and spoke disrespectfully and harshly with Singh.[2375] The court wrote, "ultimately defendant Alexander began complaining to other faculty members that plaintiff was not collegial and she advised other faculty members not to socialize or become too friendly with him."[2376] The court explained that Singh was repeatedly told by the faculty promotion committee in his annual evaluations that he was not collegial enough and that he failed to warm up to his colleagues in the way they wanted.[2377] In response to each evaluation he would submit a rebuttal noting that he was being unfairly held to a higher standard than his colleagues.[2378] In the end, his rebuttals, compiled into a "pre-grievance binder," were what the provost found to be evidence of his lack of collegiality and failure to acclimate to the department.[2379]

In analyzing Singh's free speech claim, the district court granted summary judgment to the defendants except when it came to Provost Cordle in his individual capacity.[2380] Singh claimed that defendant Cordle retaliated against him by not renewing his contract because of the contents of his pre-grievance binder, which he argued was protected speech.[2381] Defendant Cordle argued that the binder was not protected speech

---

[2373] *Id.*
[2374] *Id.* at *2. This is the same dean from *Hale v. Emporia State.*
[2375] *Id.*
[2376] *Id.*
[2377] *Id.* at *3-4.
[2378] *Id.*
[2379] *Id.* at *5.
[2380] *Id.* at *15.
[2381] *Id.* at *14.

nor was it a motivating factor in his decision.[2382] First, Cordle argued that Singh's speech was made pursuant to his official duties and therefore not protected. The court was not persuaded by this argument because Singh had no supervisory authority that conferred on him a duty to report his concerns about discriminatory bias.[2383] Second, Cordle argued Singh's binder did not address matters of public concern but was instead related to matters of solely personal significance to Singh.[2384] The district court rejected this reasoning as well, stating that because some of the issues raised were clearly public concerns, even acknowledged to be so by the defendant himself and his witness, there was protected speech within the binder.[2385]

The court found that there was sufficient evidence to compel a jury to find Cordle was motivated at least in part by the protected speech when he issued a non-renewal of Singh's contract.[2386]

In terms of qualified immunity, the district court wrote that "Cordle does not contend that clearly established precedent would not have put defendant Cordle on notice that plaintiff's allegations of racial bias within [the school], a department at a public university, were protected by the First Amendment."[2387] The district court thus denied Cordle's motion for summary judgment; he subsequently appealed to the Tenth Circuit.

The Tenth Circuit reversed the denial of summary judgment for the First Amendment claim against Cordle.[2388] The court clarified that "the relevant legal question

---

[2382] *Id.*
[2383] *Id.*
[2384] *Id.*
[2385] *Id.*
[2386] *Id.* at *15.
[2387] *Id.*
[2388] *Singh v. Cordle*, 936 F. 3d 1022, 1044 (10th Cir. 2019).

[is] whether the employee's *primary* purpose was to raise a matter of public concern" or address personal grievances.[2389] The Tenth Circuit stated that Cordle was entitled to qualified immunity because a reasonable administrator could have assumed that Singh's primary motive when compiling the binder was personal rather than to raise awareness about an issue of public concern.[2390]

4.10.12. Conclusion

Six of the eleven cases in the Tenth Circuit have been adjudicated by the District Court for the District of Kansas, including the adoption of an academic exception in *Heublein* as detailed above.[2391] The other five faculty speech cases in the Tenth Circuit have been brought against Oklahoma,[2392] Colorado,[2393] Utah,[2394] and New Mexico institutions.[2395] Only two of the eleven cases were appealed to the Tenth Circuit—both of which originated in Kansas.[2396] In both of these cases, the Tenth Circuit held that when determining whether an employee's speech addresses a matter of public concern, the question to be asked is whether the speaker's primary motive was in service of the public or the speaker's own personal concern.[2397] The Tenth Circuit quoted its own opinion

---

[2389] *Id.* at 1035.
[2390] *Id.* at 1036.
[2391] *Hale v. Emporia State University*, 266 F.Supp.3d 1261 (D. Kan. 2017) *Heublein v. Wefald*, 784 F.Supp.2d 1186 (D. Kan. 2011); *Joritz v. University of Kansas*, No. 17-4002-SAC-JPO, 2019 WL 1515251 (D. Kan. Apr. 8, 2019); *Klaassen v. University of Kansas School of Medicine*, 2016 WL 7117183 (D. Kan. Dec. 7, 2016); *Moore v. University of Kansas*, 118 F.Supp.3d 1242 (D. Kan. 2015); *Singh v. Shonrock*, No. 15-cv-9369-JWL, 2017 WL 4552139 (D. Kan. Oct. 12, 2017).
[2392] *Madden v. Regional University System, of Oklahoma*, 73 F. Supp. 3d 1341 (W.D. Okla. 2014); *Duckett v. Oklahoma ex rel. Bd. of Regents of University of Oklahoma*, 986 F.Supp.2d 1249 (W.D. Okla. 2013).
[2393] *McGettigan v. Di Mare*, 173 F. Supp. 3d 1114 (D. Colo. 2016).
[2394] *Peterson v. Williams*, 2020 WL 1876225 (D. Utah Apr. 15, 2020).
[2395] *Rodriguez v. Serna*, 2019 WL 2340958 (D.N.M. 2019).
[2396] *Joritz v. Gray-Little*, 822 Fed.Appx. 731 (10th Cir. 2020); *Singh v. Cordle*, 936 F. 3d 1022 (10th Cir. 2019).
[2397] *Joritz v. Gray-Little*, 822 Fed.Appx. 731, 739–40 (10th Cir. 2020); *Singh v. Cordle*, 936 F. 3d 1022, 1030 (10th Cir. 2019).

Singh in its opinion in *Joritz* to reiterate that, "it is not enough … that the public interest was part of the employee's motivation."[2398] Thus, despite the potential for an academic exception for classroom speech, if a faculty member's primary motive is believed to be personal, any discipline for such speech will likely be protected by qualified immunity under current Tenth Circuit precedent.

4.11. Eleventh Circuit

The Eleventh Circuit has only ruled on a select few faculty speech cases since 2006. Importantly, in 2022, the District Court for the Northern District of Florida granted an injunction against the University of Florida for banning professors from acting as expert witnesses in cases against the state.[2399] This was not the first time, however, that Florida politicos attempted to prohibit public faculty members' behaviors. In *Faculty Senate*, a state representative expressly credited an FIU faculty member's ties to Cuba as the catalyst for his state law banning travel to terrorist states.[2400] Likewise, recently in Georgia, alterations to the state higher education system policies have resulted in public outcry and an AAUP censure of the policy changes for threatening academic freedom.[2401] The increasing number of censorship policies banning the teaching of Critical Race Theory in public institutions is similarly indicative of the belief that state legislatures

---

[2398] *Joritz v. Gray-Little*, 822 Fed.Appx. 731, 740 (10th Cir. 2020) citing *Singh v. Cordle*, 936 F. 3d 1022, 1035 (10th Cir. 2019)

[2399] *Austin v. University of Florida Board of Trustees*, No. 1:21cv184-MW/GRJ, 2022 WL 195612 (N.D. Fla. Jan. 21, 2022). The university has since appealed this decision to the Eleventh Circuit. As this case does not meet the criteria for inclusion in the database its summary is not included in the text. Nevertheless, the author recommends the decision to interested readers as an outstanding example of judicial treatment of the First Amendment and academic freedom for faculty.

[2400] *Faculty S. of Fla. Int'l Univ. v. Roberts*, 574 F.Supp.2d 1331, 1336 (S.D. Fla. 2008).

[2401] Colleen Flaherty, *University System of Georgia Censured Over Tenure Changes*, INSIDE HIGHER ED (Mar. 7, 2022), https://www.insidehighered.com/quicktakes/2022/03/07/university-system-georgia-censured-over-tenure-changes.

have no federally imposed limitations when it comes to policing higher education and its faculty.[2402] Thus, the Eleventh Circuit, despite its few cases, has been the site of disproportionate activity related to the states' roles in controlling faculty speech.[2403]

4.11.1. Faculty Senate of Florida International University v. Roberts

In this case, the state of Florida passed a law banning the disbursement of funds by state universities for any travel to/from a country on a list of "terrorist" countries regardless of the proposed reason or purpose.[2404] This list of countries included Cuba, among others.[2405] This meant that faculty whose research was located mainly in Cuba were not allowed to access funding they had received from non-state sources to travel to do their research.[2406] The faculty senate of Florida International University challenged the law under various provisions of the United States Constitution, including the First Amendment.[2407] The district court was not persuaded by the First Amendment argument, because the purpose of the bill was not to restrict expressive activity, only travel activity.[2408] While the district court felt the bill was poorly drafted, it did not find the legislation to be overbroad; however, the court did not address the First Amendment argument that the state legislature had essentially mandated where faculty may conduct

---

[2402] Wyatt Mystkow, *Legislation to Limit Critical Race Theory at Colleges Has Reached Fever Pitch*, THE CHRONICLE OF HIGHER EDUCATION (Jun. 8, 2022), https://www.chronicle.com/article/legislation-to-limit-critical-race-theory-at-colleges-has-reached-fever-pitch; Colleen Flaherty, *'An Affront to Open Discourse,'* INSIDE HIGHER ED (Jun. 9, 2022), https://www.insidehighered.com/news/2022/06/09/aacu-and-pen-america-oppose-divisive-concepts-bans; Sylvia Goodman, *Researchers Did a Deep Dive Into Efforts to Restrict Critical Race Theory. Here's What They Found.*, THE CHRONICLE OF HIGHER EDUCATION (Aug. 3, 2022), https://www.chronicle.com/article/researchers-did-a-deep-dive-into-efforts-to-restrict-critical-race-theory-heres-what-they-found.
[2403] *Austin*, No. 1:21cv184-MW/GRJ, 2022 WL 195612, n. 41.
[2404] *Roberts*, 574 F.Supp.2d at 1335.
[2405] *Id.* at 1336.
[2406] *Id.* at 1339–43.
[2407] *Id.* at 1335.
[2408] *Id.* at 1359.

their research, thus violating a university's First Amendment right to institutional academic freedom.[2409] The court failed to address this important argument, even though the sponsor of the act explicitly stated that the arrest of a former FIU professor charged with being a Cuban government agent had originally inspired the bill.[2410] The district court found the statute unconstitutional only insofar as it placed limitations on non-state funds related to travel, as well as non-state funds (i.e. grants) that are administered by state institutions, thus limiting the foreign affairs power of the U.S. President.[2411] The defendants appealed. The Eleventh Circuit reversed and vacated the district court's injunction, finding that Florida's limitations on federal or private funds was not violative of the federal foreign affairs power.[2412] The statute is still on the books to this day.[2413]

4.11.2. Johnson v. District Bd. of Trustees of Broward Community College

In this case, an adjunct professor of religion claimed his free speech was violated and he was discriminated against for his religious beliefs when his department chair assigned someone else a full-time teaching load instead of him, and his employment was terminated.[2414] Shortly before his termination, Johnson filed a complaint with the EEOC about the teaching load denial.[2415] The federal district court for the Southern District of Florida found that Johnson's First Amendment claim failed because Johnson could not show a causal link between his protected speech and the adverse employment action.[2416]

[2409] *Id.* at 1354–55.
[2410] *Id.* at 1336.
[2411] *Id.* at 1354.
[2412] *Faculty Senate of Florida Intern. Univ. v. Winn*, 616 F. 3d 1206, 1212 (Court of Appeals, 11th Circuit 2010).
[2413] Fla. Stat. §§ 112.061(3)(e), 1011.81(3).
[2414] *Johnson v. Dist. Bd. of Trs. of Broward Cmty. Coll. Fla.*, 2007 WL 9701014 1, *1-4 (S.D. Fla.).
[2415] *Id.* at *4.
[2416] *Id.* at *9.

According to the court, temporal proximity was insufficient evidence of causation.[2417] The court stated that "where causation is missing, the remaining elements of the plaintiff's claim need not be considered" and thus awarded summary judgment to the defendants.[2418]

4.11.3. Jolibois v. Florida International University Board of Trustees

Jolibois was a tenured engineering professor of Haitian national origin/African heritage at Florida International University (FIU).[2419] Jolibois filed suit against FIU alleging he had been terminated in violation of his civil rights.[2420] Jolibois alleged that he was fired for his protected speech about FIU failing to send aid to Haiti after the 2010 earthquake and then refusing his sabbatical requests to travel to Haiti for research after the earthquake.[2421] The defendants, the department chair and engineering dean, alleged they had denied Jolibois' sabbatical request because he had a series of yearly performance evaluations that found him below expectations in teaching, research, and service.[2422] The chair and dean stated that Jolibois was suspended without pay and later terminated for not turning in a performance improvement plan after his unsatisfactory seven-year-post-tenure evaluation required it (per the Collective Bargaining Agreement).[2423] After failing to turn in his performance improvement plan until eleven

---

[2417] *Id.*
[2418] *Id.* Summary judgment was denied on Johnson's discrimination claims. *Id.*
[2419] *Jolibois v. Fla. Int'l Univ. Bd. of Trs.*, 92 F.Supp.3d 1239, 1242 (S.D. Fla. 2015).
[2420] *Id.*
[2421] *Id.*
[2422] *Id.* at 1244–45.
[2423] *Id.* at 1245.

days past the fourth extended due date (and after his suspension had concluded), his employment was terminated.[2424]

The court was not persuaded that there was any causal link between the allegedly protected speech and the adverse employment actions.[2425] The court thus granted the defendants' motion for summary judgment on the First Amendment claim.[2426] Jolibois appealed to the Eleventh Circuit Court of Appeals.[2427] While Jolibois' counsel raised better arguments on appeal, such as the allegation that the collective-bargaining agreement was applied retroactively and could not have been the basis on which he was suspended or terminated, it was already too late.[2428] In addressing the issue of pretext, the appeals court cited Eleventh Circuit precedent that "failure to abide by the collective-bargaining agreement requirements, or breach of some other internal policy, alone, does not constitute a sufficient showing of pretext."[2429] The Eleventh Circuit affirmed the district court's ruling because Jolibois "failed to argue in his initial brief that the district court erred in granting summary judgment […] on his First Amendment retaliation claim, and thus, we refrain from analyzing that issue."[2430]

4.11.4. Miller v. University of Southern Alabama

In this case, Miller, an assistant professor of English, was not renewed after an alleged altercation with several of her colleagues who were serving on a hiring committee

---

[2424] *Id.* at 1246.
[2425] *Id.* at 1251.
[2426] *Id.*
[2427] *Jolibois v. Fla. Int'l Univ. Bd. of Trs.*, 654 Fed.Appx. 461 (11th Cir. 2016).
[2428] *Id.* at 464–65.
[2429] *Id.* at 464.
[2430] *Id.* at 465.

for three positions in the English department.[2431] During a departmental faculty meeting, Miller questioned the hiring committee members about potential bias after they had produced a short list of nine white-male faculty candidates for three new tenure-track positions in the English department.[2432] The colleagues, however, argued that there was nothing heated about the discussion whatsoever nor was there anything remarkable about her questions.[2433]

In conducting the First Amendment analysis, the district court for the Southern District of Alabama wrote, "Following *Garcetti*, our circuit has modified the analysis of the first step of the *Pickering* test for analyzing alleged government employer retaliation to determine if an employee's speech has constitutional protection by deciding at the outset (1) if the government employee spoke as an employee or citizen and (2) if the speech addressed an issue relating to the mission of the government employer or a matter of public concern."[2434] The court found that Miller's speech was made pursuant to her official duties which Miller basically conceded in her own affidavit.[2435] Thus the court granted the defendants' motions for summary judgment.[2436]

4.11.5. Seals v. Leath (Auburn University)

This case was brought by an Auburn University associate professor of economics—in collaboration with his colleague and department chair Dr. Stern (see

---

[2431] *Miller v. Univ. S. Ala.*, 2010 U.S. Dist. LEXIS 48643, *6-12 (S.D. Ala.).
[2432] *Id.* at *7-14.
[2433] *Id.* at *13-15.
[2434] *Id.* at *32-33. (Italicization added).
[2435] *Id.* at *36. Based on the court's first footnote in this decision, Miller seemed to have a bit more control over her case than may have been in her best interest; the court noted that "Miller's brief was unnecessarily excessive and contained irrelevant discussions regarding Miller's concerns and beliefs regarding diversity (e.g., the article Voodoo Genetics and Sea Chanteys: Locating the Whale's Footprint of Essentialism in Contemporary Departments of English)." *Id.* at note 1.
[2436] *Id.* at *37-40.

section 4.11.7)— who investigated and raised awareness about the clustering of student-athletes in the public administration major at Auburn.[2437] Seals and Stern served as sources for reporters who publicized the funding of the major by the athletics department after the faculty had voted overwhelmingly to end the major.[2438] Seals, like Stern, was a source for the *Wall Street Journal*, the *Alabama Gazette*, and the *Chronicle of Higher Education*.[2439] Additionally, Seals created a photo collage on his office door using photos of Auburn administrators linking arms with Joseph Stalin.[2440] The dean's photo was included in this collage, and when he found out about it he asked Seals to remove it and invited him to his office for "a better picture."[2441] Soon thereafter, in front of at least one witness, the dean told Seals "may the wings of corruption carry you far."[2442] In the meantime, the economics department was administratively removed from the college of liberal arts and for seven months the department chair reported to the office of the provost rather than the dean.[2443] A few semesters later in early spring 2018, an article was published in the *Chronicle of Higher Education* which mentioned Seals's collage.[2444] In March of 2018, Seals wrote to the new president of the university to inform him that the relocation of the economics department back under the college of liberal arts after only a few months was unacceptable.[2445] Seals told the president that due to the lack of explanation from the administration about the circumstances, he had no choice but to tell

---

[2437] *Seals v. Leath*, No. 3:19-cv-00468, 2019 WL 6997398, at *1 (M.D. Ala. Dec. 18, 2019).
[2438] *Id.*
[2439] *Id.* at *4.
[2440] *Id.* at *1.
[2441] *Id.*
[2442] *Id.*
[2443] *Seals v. Leath*, No. 3:19-cv-00468, 2022 WL 16701109, at *5 (M.D. Ala. Nov. 3, 2022).
[2444] *Seals v. Leath*, No. 3:19-cv-00468, 2019 WL 6997398, at *4.
[2445] *Seals v. Leath*, No. 3:19-cv-00468, 2022 WL 16701109, at *5-6.

the incoming graduate students that "we will likely not be able to provide them adequate training in graduate economics."[2446] The dean removed Seals from his position as graduate program director at the end of the spring semester of 2018 with no explanation as to why.[2447] In response to a student's complaint about Seals's demotion the dean wrote that he "did not take these actions without much contemplation and reflection."[2448] The court found that this statement contradicted "any implication by Defendants that too much time had passed between Seals' speech and the actions taken against him."[2449] Within a week, the department secretary was directed to tell all graduate students not to communicate with Seals; a graduate program committee was also formed without Seals's knowledge, and Seals's hours of teaching assistant support for one of the courses he was teaching were cut without explanation.[2450] The department secretary informed Seals of these actions taken against him, and was subsequently criticized and transferred to another department. [2451] Seals met with the provost the next semester to discuss these developments and the provost stated that the decisions were all made at the department level by the interim department chair; when Seals asked the department chair about this, he was told that "his decisions were guided by emails he received from [the provost]."[2452]

In their motion to dismiss, the defendants (president, provost, dean, and interim department chair) argued that Seals had failed to meet the pleading standard for a First Amendment retaliation claim, that the plaintiff's complaint contained facts relating to

---

[2446] *Id.* at *6.
[2447] *Seals v. Leath*, No. 3:19-cv-00468, 2019 WL 6997398, at *4.
[2448] *Id.*
[2449] *Id.*
[2450] *Id.* at *5.
[2451] *Id.*
[2452] *Id.*

others that were irrelevant and thus grounds for dismissal, and that the complaint was an impermissible shotgun pleading.[2453] The court determined that none of the defendants' arguments were persuasive and denied the motion to dismiss the First Amendment claim (count 1) in 2019.[2454] In the same order, the court did dismiss the plaintiff's claims (2 and 3) of conspiracy under federal and state law.[2455]

In 2022, the defendants moved for summary judgment.[2456] The court granted the defendants' motion for summary judgment on all but one of Seals's claims.[2457] Seals's claims of retaliation for the collage on his door failed at summary judgment because the court determined that a reasonable juror "could not find that the 'main thrust' of the collage addressed a matter of public concern."[2458] Seals's claim against the dean for the demotion from graduate program officer in retaliation for the *Chronicle of Higher Education* article survived the motion for summary judgment.[2459] No other defendants could be held liable for Seals's demotion as the dean was the sole decisionmaker.[2460] In the court's analysis of Seals's claim against the dean, the court found that there was sufficient evidence for a jury to conclude that the dean had a retaliatory motive when he removed Seals from his graduate program officer position. The dean claimed that he was

---

[2453] *Id.* at *3.
[2454] *Id.* at *7.
[2455] Notably, this decision was written by Andrew L. Brasher during his thirteen month stint (May 2019-June 2020) as a district court judge before he received his commission for the Eleventh Circuit. *Seals v. Leath*, No. 3:19-cv-00468, 2019 WL 6997398. See also, *Andrew Brasher*, BALLOTPEDIA: THE ENCYCLOPEDIA OF AMERICAN POLITICS, https://ballotpedia.org/Andrew_Brasher (last visited Dec. 6, 2022). The 2022 opinion in this case, therefore, was written by a different judge (R. Austin Huffaker). *Seals v. Leath*, No. 3:19-cv-00468, 2022 WL 16701109 (M.D. Ala. Nov. 3, 2022).
[2456] *Seals v. Leath*, No. 3:19-cv-00468, 2022 WL 16701109, at *1.
[2457] *Id.* Two claims made it to the causal link analysis but the court found that Seals could had not provided evidence of a retaliatory motive for the interim department chair to have awarded Seals a lower annual raise than Seals felt he deserved. *Id.* at *17.
[2458] *Id.* at *14.
[2459] *Id.* at *1.
[2460] *Id.* at *15.

unaware that Seals had been a source for the *Chronicle* article even though he admitted to reading the article in full.[2461] Nevertheless, the court was not convinced, finding that "the article describes Dr. Seals's collage (with Dean Aistrup had already seen) with such specificity that there can be no mistaking it as someone else's collage."[2462] The court stated that it should be left to a jury to decide if the dean's alleged non-retaliatory reason (Seals's March 2018 email to the president) for the dismissal was persuasive.[2463] The case is scheduled for a jury trial in April 2023.[2464]

4.11.6. Shi v. Alabama A&M University

In this case, Shi, an Asian male (of Chinese descent) associate professor, sent repeated emails to his colleagues and supervisors demanding the resignation of the dean of the school of engineering for alleged anti-democratic leadership practices.[2465] In the emails Shi compared the dean to dictators Gadaffi and Mubarak (during the year of the Arab spring).[2466] In response to his emails, the dean warned Shi that his behavior was unprofessional.[2467]

In August 2011, however, Shi spoke up during a college-wide meeting and accused the dean of lying and abusing his power, and he "also demanded Montgomery's resignation 'in an aggressive manner.'"[2468] Other faculty members complained that they

---

[2461] *Id.* at *16.
[2462] *Id.*
[2463] *Id.* at *18.
[2464] Amended Scheduling Order, *Seals v. Leath*, No. 3:19-cv-00468, Doc. 95 (M.D. Ala. 2022), https://www.courtlistener.com/docket/15996975/seals-v-leath/.
[2465] *Xingzhong Shi v. Ala. A&M Univ.*, 2015 WL 5675764, at *3-5 (N.D. Ala. Sep. 28, 2015); *Shi v. Montgomery*, 679 Fed.Appx. 828, 835–36 (11th Cir. 2017).
[2466] *Xingzhong Shi*, 2015 WL 5675764, at *4.
[2467] *Id.*
[2468] *Id.* at *5.

felt threatened by Shi's behavior; within two weeks he was suspended with pay.[2469] Despite being placed on leave, Shi continued to email the defendants and accuse the dean of misconduct. [2470] In December 2011 Shi's contract was not renewed. [2471]

Shi filed the instant case *pro se*, alleging violations of Title VII and infringement of his First Amendment freedom of speech.[2472] While analyzing Shi's free speech claim, the district court alluded to *Garcetti* stating, "assuming Shi could establish his speech was made as a citizen (instead of an employee dissatisfied with a supervisor's decisions regarding the employee and his department)".[2473] The court performed the *Pickering* balancing test and found that the defendants "were well within their rights to take disciplinary action in response to Shi's conduct."[2474] Importantly, the district court cited Eleventh Circuit precedent that states "'the First Amendment does not require a public employer to tolerate an embarrassing, vulgar, vituperative, ad hominin attack' even if such an attack touches on a matter of public concern..." [2475] The district court granted the defendants' motion for summary judgment on all claims. Shi appealed the decision to the Eleventh Circuit.

In the 2017 appeal opinion, the Eleventh Circuit Court affirmed the district court's decision. The Eleventh Circuit noted that "if the manner and content of an employee's speech is demeaning, disrespectful, rude, and insulting, and is perceived that way in the workplace, the government employer is within its discretion to take disciplinary action."

[2469] *Id.*
[2470] *Id.*
[2471] *Id.*
[2472] *Shi v. Montgomery*, 679 Fed.Appx. 828, 830 (11th Cir. 2017).
[2473] *Xingzhong Shi*, 2015 WL 5675764, at *13.
[2474] *Id.*
[2475] *Id.*

[2476] Thus, the court ruled affirmed that the defendants' interests outweighed Shi's and the university was well within its discretion not to renew his employment for his unprotected speech.[2477]

4.11.7. Stern v. Leath (Auburn University)

Stern is an associate professor of economics at Auburn University in Alabama who was thrice elected by his department faculty to serve as chair.[2478] During a University Senate meeting in 2014, Stern "engaged the faculty athletics representative" after she asserted that unlike other schools in the NCAA, Auburn did not have an issue with the "improper clustering of student-athletes in specified majors."[2479] Stern responded that he had reason to believe this statement was unfounded and that, in fact, football players were clustered in the public administration major.[2480] The faculty athletics representative claimed she was not familiar with this major and the conversation ended.[2481] A similar confrontation occurred at another University Senate meeting approximately a year later.[2482] Soon thereafter, Stern received a report written by a program review committee within the college of liberal arts which reported that an abnormally high proportion of student-athletes were majoring in public administration.[2483] The report also stated that this major was academically deficient in several ways.[2484] The committee recommended eliminating the major, which was

---

[2476] *Shi*, 679 Fed.Appx. at 835.
[2477] *Id.*
[2478] *Stern v. Leath*, No. 3:18-CV-807-WKW, 2022 WL 988376, at *1 (M.D. Ala. Mar. 31, 2022).
[2479] *Id.* at *4.
[2480] *Id.*
[2481] *Id.*
[2482] *Id.* at *5.
[2483] *Id.*
[2484] *Id.*

supported by the faculty.[2485] Stern spoke about his concerns related to student-athlete clustering in the public administration major in University Senate meetings and in various print outlets including the Wall Street Journal and the Chronicle of Higher Education.[2486] He also worked with a lawyer to file Freedom of Information Act (FOIA) requests to obtain university documents about the issue.[2487] Over the course of four years, Stern repeatedly raised concerns about the major which soured his relationship with the dean.[2488] At one point, the president of the university essentially removed the economics department from the college of liberal arts and made Stern (as chair) report to an associate provost instead of the dean despite the dean and the provost's opposition.[2489]

After a new university president was instated, the economics department was reassigned to the college of liberal arts.[2490] In the first academic year under the new president (2017-2018), Stern spoke at multiple University Senate meetings about his continued concerns that Auburn was not adequately addressing the issue of student-athlete clustering in an insufficiently rigorous major and he worked with a reporter at the Chronicle of Higher Education to publish an expose about the same concerns the Wall Street Journal had covered years earlier.[2491] That same semester, the dean removed Stern as chair prior to the end of his three-year elected term.[2492] Stern alleged multiple instances of protected speech and retaliatory acts which the court whittled down to a

---

[2485] *Id.*
[2486] *Id.* at *3.
[2487] *Id.* at *5.
[2488] See, for instance, *id.* at *29 (quoting an email from the dean, "My most favorite chair, Did you miss the lecture on diplomacy?").
[2489] *Id.* at *3.
[2490] *Id.*
[2491] *Id.* at *6-7.
[2492] *Id.* at *9.

select few that survived the standards for summary judgment.[2493] In 2019, the district court denied the defendants' motion to dismiss based on sovereign immunity.[2494] In 2021, the court granted the defendants' motion for summary judgment on the plaintiff's claims against a former president in his individual capacity and on the plaintiff's claim of conspiracy against all defendants.[2495]

In 2022, the district court denied the defendants' motion for summary judgment on Stern's claims against the dean and the provost(s).[2496] Two claims against the dean and the provost(s)[2497] went to trial: that Stern's (1) removal as chair of the economics department and (2) denial of raise and merit supplement during the 2018-2019 academic year were in retaliation for his speech related to the clustering of student athletes in the public administration major.[2498] A jury found for Stern on his claims against the dean for both the denial of the raise and merit supplement and the removal as chair.[2499] They awarded him $645,837 in damages,[2500] finding that the dean had acted with malice or reckless indifference to Stern's constitutional rights.[2501]

[2493] See *id.* at *24.
[2494] *Stern v. Leath*, No. 3:18-CV-807-WKW, 2019 WL 1573695, at *2 (District Court Apr. 11, 2019).
[2495] *Stern v. Leath*, No. 3:18-CV-807-WKW, 2021 WL 2874113, at *1 (M.D. Ala. Jul. 8, 2021).
[2496] *Stern v. Leath*, No. 3:18-CV-807-WKW, 2022 WL 988376, at *31.
[2497] The provost position was occupied by two different people over the course of the relevant time period, so the first claim was against the first provost defendant, and the second claim against a different provost defendant.
[2498] *Stern v. Leath*, No. 3:18-CV-807-WKW, 2022 WL 988376, at *31.
[2499] Jury Verdict, *Stern v. Leath*, No. 3:18-CV-807-WKW, Doc. 193 (M.D. Ala. 2022), https://storage.courtlistener.com/recap/gov.uscourts.almd.67848/gov.uscourts.almd.67848.193.0.pdf.
[2500] $250,000 in punitive damages for each infraction and 145,837 in backpay. *Id.*
[2501] *Id.*

4.11.8. Tracy v. Florida Atlantic University

Tracy was a professor of media and communication who repeatedly failed to file collective-bargaining agreement-mandated outside-activity paperwork.[2502] This resulted in multiple warnings, leading to his eventual termination.[2503] Tracy argued that, in fact, he was terminated for what he had published on his blog, and that this paperwork was just pretext for First Amendment retaliation.[2504]

Tracy's blog posts were well-known to the university, as he had been asked by the university to include a disclaimer on his blog that his views did not reflect those of the university.[2505] The content of Tracy's blog posts were extremely controversial, especially those related to the mass shooting at Sandy Hook elementary school; Tracy contented that "the Sandy Hook shooting had never taken place and was 'staged by the government to promote gun control.'"[2506] Parents of children killed at Sandy Hook published an op-ed shortly before Tracy was terminated alleging that Tracy had harassed them by asking for proof of the massacre.[2507] All parties agreed that the controversy surrounding Tracy's blog never fully subsided.[2508]

The district court for the Southern District of Florida denied the defendants' motion for summary judgment on Tracy's First Amendment retaliation claim, finding that issues of material fact persisted.[2509] The case went before a jury and after a nine-day trial,

---

[2502] *Tracy v. Florida Atlantic University Board of Trustees*, 980 F.3d 799, 803 (11th Cir. 2020).
[2503] *Tracy v. Fla. Atl. Univ. Bd. of Trs.*, 2018 WL 1933708, *2-3 (S.D. Fla.).
[2504] *Tracy*, 980 F.3d at 804.
[2505] *Id.* at 803.
[2506] *Tracy v. Fla. Atl. Univ. Bd. of Trs.*, 2017 WL 4962652, *1 (S.D. Fla.).
[2507] *Id.* at *6.
[2508] *Id.*
[2509] *Id.*

the jury found for the defendants.[2510] Tracy appealed both the jury verdict and the court's granting of summary judgment to the Eleventh Circuit after the district court denied his motion for a new trial.[2511]

The Eleventh Circuit Court affirmed the district court's finding that the outside activity requirements were not unconstitutionally vague or overbroad.[2512] Likewise, the court found that there was sufficient evidence for the jury to have reasonably found for the defendants in the trial, so the circuit court affirmed the district court's denial of the motion for a new trial/judgment as a matter of law.[2513] The evidence before the court included the advice of Tracy's union president to Tracy that he report his blog on his annual outside activities report,[2514] Tracy's own admission that he used his blog for research,[2515] and the fact that Tracy had published a book containing articles from his blog for which he had received remuneration but never reported as an outside activity.[2516] The district court noted that Tracy "made a deliberate, conscience [*sic*] choice to engage in insubordination"[2517] and was terminated as a result of these actions.[2518]

4.11.9. Conclusion

In sum, the six Eleventh Circuit cases have not yet addressed the question of an academic exception to *Garcetti*. As of summer 2022, there have been too few cases in the Eleventh Circuit to extrapolate more about its faculty speech jurisprudence.

[2510] *Tracy*, 980 F.3d at 804.
[2511] *Tracy v. Fla. Atl. Univ. Bd. of Trs.*, 2018 WL 1933708, *15 (S.D. Fla.).
[2512] *Tracy*, 980 F.3d at 806–10.
[2513] *Id.* at 811–12.
[2514] *Id.* n. 5.
[2515] *Tracy*, 2018 WL 1933708, *8.
[2516] *Id.* at *6-7.
[2517] *Id.* n. 19.
[2518] *Id.* at *15.

4.12. D.C. Circuit

The Circuit Court for the District of Columbia is the smallest circuit, predictably it also had the fewest cases. Technically, the database searches resulted in two cases in the D.C. Circuit; however, the second case was brought against a private university (George Washington University)[2519] and therefore did not meet the criteria for the analytic sample. Thus, the only remaining D.C. case in the sample is *Emergency Coalition to Defend Educational Travel* decided by the Court of Appeals in 2008.[2520]

4.12.1. Emergency Coalition to Defend Educational Travel v. U.S. Dept. Treas.

In this case an adjunct professor and three undergraduate students from Johns Hopkins University, and an associate professor from Howard University, formed a coalition to defend educational travel to Cuba, challenging the Office of the Secretary of the U.S. Treasury's amendments to the administrative regulations governing the Cuba trade embargo.[2521] The challenged policy stated that short-term educational travel was no longer permitted under the trade embargo with Cuba, and therefore all study-abroad travel lasting less than 10 weeks was banned.[2522] Likewise, the new regulations clarified that only full-time employees of accredited institutions could teach in Cuba, meaning that the adjunct professor at Johns Hopkins was no longer able to serve as the director of the Cuba education program.[2523]

[2519] *Woytowicz v. George Washington University*, 327 F.Supp.3d 105 (district.court 2018).
[2520] *Emergency Coal. Defend Educ. v. Us Dept., Treas.*, 545 F. 3d 4 (Court of Appeals, Dist. of Columbia Circuit 2008).
[2521] *Emergency Coalition to Defend Educational Travel v. US Dept. of Treasury*, 498 F. Supp. 2d 150, 153–54 (Dist. Court 2007).
[2522] *Id.* at 153.
[2523] *Id.* at 154.

The 2007 district court decision dismissed the coalition's claims with prejudice, stating that the restrictions were content-neutral and furthered an important government interest.[2524] The plaintiffs appealed; the D.C. Circuit Court agreed with the district court that the intermediate scrutiny test was all that was required of a content neutral regulation.[2525] Applying this standard, the Circuit Court affirmed the district court's finding that the government interest was "weighty" enough to survive the First Amendment challenge.[2526] The Circuit Court explained that Supreme Court precedent has clearly stated "that the federal judiciary [is] obliged to defer to the political branches on [questions of national security]."[2527]

While this case does not specifically involve a university employer, it is brought by faculty against a government actor for infringing on their "academic freedom" which they argue is rooted in the First Amendment.[2528] Nevertheless, the aspects of the D.C. Circuit's decision that are most relevant to this dissertation are twofold. First, the D.C. Circuit addressed standing: even if a First Amendment right to academic freedom inheres to institutions rather than individuals, an individual professor plaintiff was "still within the zone-of-interests of that constitutional protection for standing purposes."[2529] Second, the concurrences directly addressed judicial and scholarly conceptions of academic freedom.

[2524] *Id.* at 162.
[2525] *Emergency Coal. Defend Educ. v. Us Dept., Treas.*, 545 F. 3d at 12.
[2526] *Id.* at 14.
[2527] *Id.*
[2528] *Id.* at 8.
[2529] *Emergency Coal. Defend Educ. v. Us Dept., Treas.*, 545 F. 3d 4.

Senior Circuit Judge Edwards wrote a concurrence in which he cited *Garcetti*[2530] and Judith Areen's *Government as Educator*.[2531] Edwards stated that he believed it would be best if the DC Circuit Court left the questions surrounding academic freedom's place in the First Amendment to the Supreme Court for another day.[2532]

Senior Circuit Judge Silberman's concurrence likewise discussed academic freedom.[2533] Silberman wrote, it is "doubtful that a state legislature lacks authority to oversee the content of a state university's offerings."[2534] Silberman went on to say that he agrees with the findings in *Urofsky*:[2535] that the Supreme Court has never invalidated a state regulation on the grounds that it violated a right to academic freedom and that if such a right does exist it does not inhere to individual professors.[2536] Silberman concluded by disagreeing with his colleague (Edwards) and Professor Areen, writing, "I do not perceive any principled reason why the First Amendment should be thought to protect internal governance of certain academic institutions (are "think tanks" included?) but not other eleemosynary bodies or, for that matter, trade unions or corporations."[2537]

4.12.2. Conclusion

The Eleventh Circuit and D.C. Circuit both decided that the right of states to control public university activities such as educational or research travel outweighs

---

[2530] *Id.* at 16.
[2531] *Id.* at 15.
[2532] *Id.* at 18.
[2533] *Id.* at 18–20.
[2534] *Id.* at 18; For a thorough discussion of the concept of institutional academic freedom and the rights and interests of public colleges and universities to academic freedom, see section 7.1.7 of WILLIAM A. KAPLIN ET AL., LAW OF HIGHER EDUCATION 775–79 (JOSSEY-BASS INC, U S 6th ed. 2019).
[2535] Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).
[2536] *Emergency Coal. Defend Educ. v. Us Dept., Treas.*, 545 F. 3d at 19–20.
[2537] *Id.* at 20.

academic freedom when the government has a strong interest in national security.[2538] Nevertheless, as in the First and Eleventh Circuits, the D.C. Circuit has decided so few faculty speech cases, it is hard to say what the Circuit's application of *Garcetti* to faculty speech could look like in future cases.

5. Findings Part II – Themes from Qualitative and Quantitative Analyses

Chapter five discusses the findings of the qualitative and quantitative analyses performed on the textual and quantitative data derived from the 162 cases described in chapter four. This chapter is broken into four sections. Section 5.0 describes the dataset through an overview of select variables such as the faculty positions of the plaintiffs, the average number of docket entries, the length of the lawsuits, and so on. Section 5.1 analyzes how and when courts applied (and did not apply) *Garcetti* to faculty free speech cases. Section 5.2 discusses how and when the facts of the cases reflected academic expectations of institutional service and shared governance, and the prevalence of departmental politics, and abuses of power. Section 5.2 also discusses how and whether the courts understood academic culture as intertwined with or shaping these issues. Finally, section 5.3 reimagines and presents a theoretical inquiry based on the educational mission to better preserve academic freedom and shared governance. Section 5.3. analyzes a selection of cases using this alternative to consider how an educational-mission standard may be used in contrast with the current analyses derived from *Garcetti, Connick,* and *Pickering*.

[2538] *Faculty Senate of Florida Intern. Univ. v. Winn*, 616 F. 3d 1206 (Court of Appeals, 11th Circuit 2010); *Emergency Coal. Defend Educ. v. Us Dept., Treas.*, 545 F. 3d 4.

Other claims that commonly appeared with First Amendment claims such as, whistleblowing and discrimination (Title VII, Title IX) were not analyzed because they fell outside the scope of this study. Additional analysis on the co-occurrence of these claims in faculty lawsuits is warranted and is appropriate for further research.

5.0. Describing the Cases

The following sections describe the 162 cases summarized in chapter 4 above—and, as appropriate, the corresponding 245 opinions—according to a variety of characteristics, including for each case the federal judicial circuit, faculty positions of the plaintiffs, the length of the lawsuit, the number of docket entries, the number and types of adverse employment actions alleged, and the prevailing party. The cases were filed in federal courts spanning 41 states and two territories (D.C. and Puerto Rico).[2539]

5.0.1. Distribution of Faculty Positions

The 162 cases summarized in chapter 4 above were brought by faculty plaintiffs who occupied various faculty positions within their colleges and universities. Figure 3 below shows the distribution of plaintiffs by their titles, beginning with adjunct, then full-time non-tenure-track, the three tenure-track positions, and ending with an "other" category.

[2539] The nine states without cases in this sample include: Georgia, Montana, North Dakota, Rhode Island, South Carolina, Vermont, Washington, West Virginia, and Wyoming. This does not mean institutions of higher education in these states have not infringed on their faculty's rights of free expression. It simply means that such cases were not filed in federal court between 2006-2020 in those states or that they were not clearly labeled as First Amendment cases involving college or university faculty.

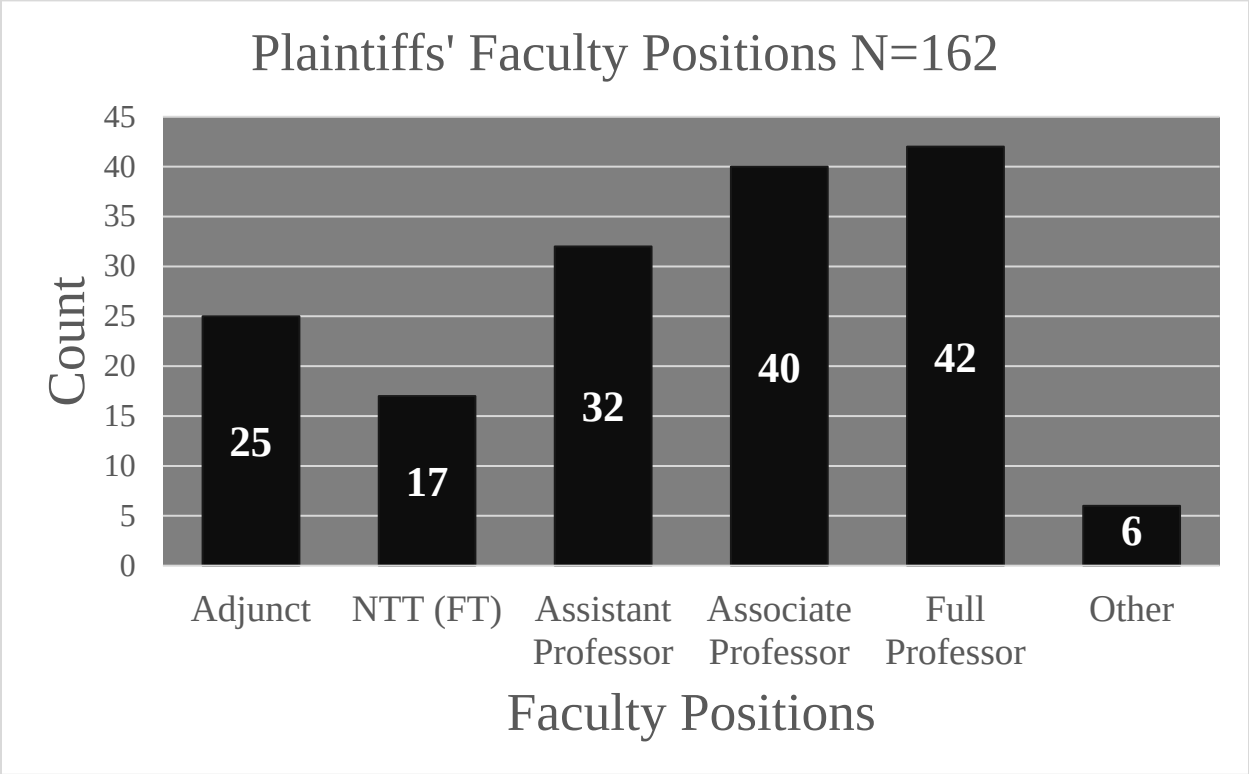
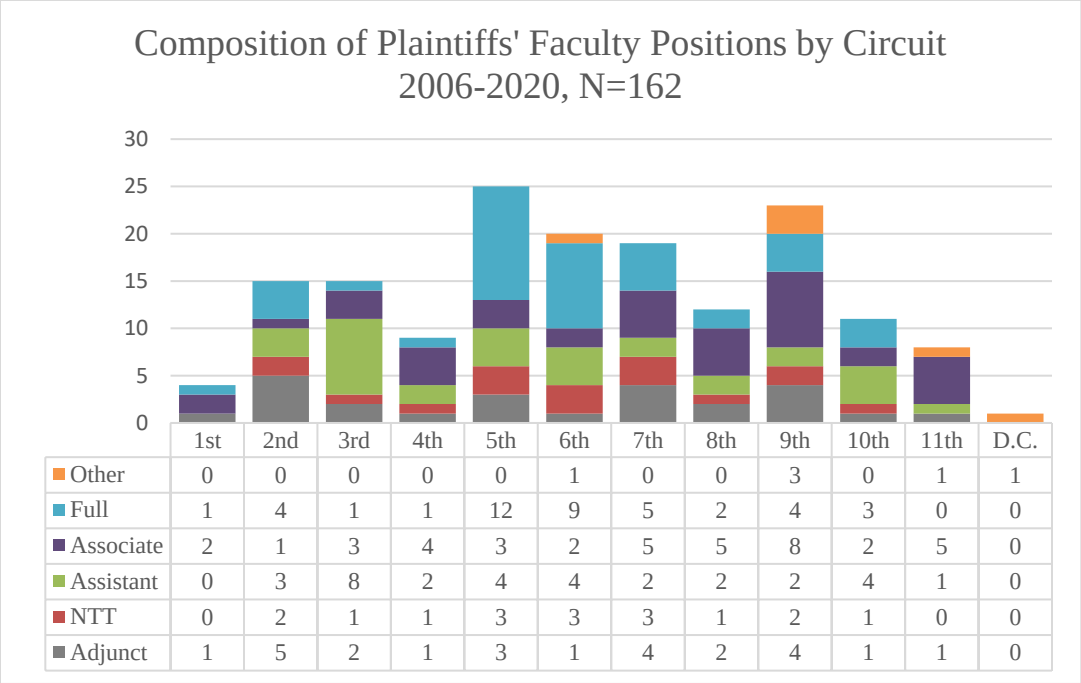


Figure 3 Distribution of Faculty Positions

Figure 3 demonstrates that there are nearly equal numbers of tenured (Associate and Full professors sum to 82) and non-tenured (adjunct, non-tenure-track, and assistant professors sum to 74) faculty members represented among the cases studied. The "other" category includes an applicant for a faculty position, a librarian faculty member, and cases in which the plaintiff was a faculty group or organization. Interestingly, more adjuncts sued their employers than full-time non-tenure-track employees; otherwise, the data indicate that as rank increases, more faculty members sue their employers.

The composition of faculty positions by circuit is indicated in Figure 4 below. A chi-squared test of the cross-tabulation of these variables was statistically significant ($p=0.003$). Clearly the Fifth and Sixth Circuits had the highest numbers of full-professor plaintiffs (twelve and nine, respectively). Likewise, the Ninth Circuit had the highest

number of associate-professor plaintiffs and the Third Circuit had the highest number of assistant-professor plaintiffs (both with eight). There was less of a concentration among non-tenure-track or adjunct plaintiffs; the Second Circuit had the highest number of adjunct plaintiffs with only five. This composition of faculty positions by circuit is an interesting finding, as it is not immediately clear why the distribution would not be (more or less) even across circuits.[2540]



	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	D.C.
Other	0	0	0	0	0	1	0	0	3	0	1	1
Full	1	4	1	1	12	9	5	2	4	3	0	0
Associate	2	1	3	4	3	2	5	5	8	2	5	0
Assistant	0	3	8	2	4	4	2	2	2	4	1	0
NTT	0	2	1	1	3	3	3	1	2	1	0	0
Adjunct	1	5	2	1	3	1	4	2	4	1	1	0

Figure 4 Faculty Positions by Circuit

5.0.2. Time from Filing a Lawsuit to Settlement

The case lengths, or times from filing a lawsuit to settlement, in the dataset ranged from just 63 days (two months, three days) for *Idaho State Faculty Association* and 3480 days (nine years, six months, and twelve days) in *Keating v. University of South Dakota*.

[2540] One hypothesis that may merit further testing is whether prior cases brought by plaintiffs from one rank may encourage plaintiffs in the same rank (or their attorneys) to pursue a case, whereas cases brought by plaintiffs in dissimilar positions might discourage further pursuit of a case.

Two other cases lasted over nine years in the courts, 3,288 days (nine years and one day) for *Stotter v. University of Texas at San Antonio* and 3378 days (nine years and three months) for *Plouffe v. Cevallos* (Kutztown University, Third Circuit).

The average case length across all circuits was 1250 days, or three years, five months, and three days. Figure 5 below depicts the average length of time between lawsuit and settlement by each Circuit (the D.C. Circuit is shown as "12"). The shortest average time from filing the faculty free speech lawsuit to settlement is found in the D.C. Circuit, which is also the smallest Circuit. The next lowest average case length is found in the Sixth Circuit (916 days or two years, six months, and five days), the only other Circuit with an average below 1000 days. The longest average case length is found in the Second Circuit at 1495 days, or four years, one month, and three days. The data indicate that a faculty free speech case is likely to last between three and four years in the courts, and the differences between the circuits is not statistically significant (p=.522).

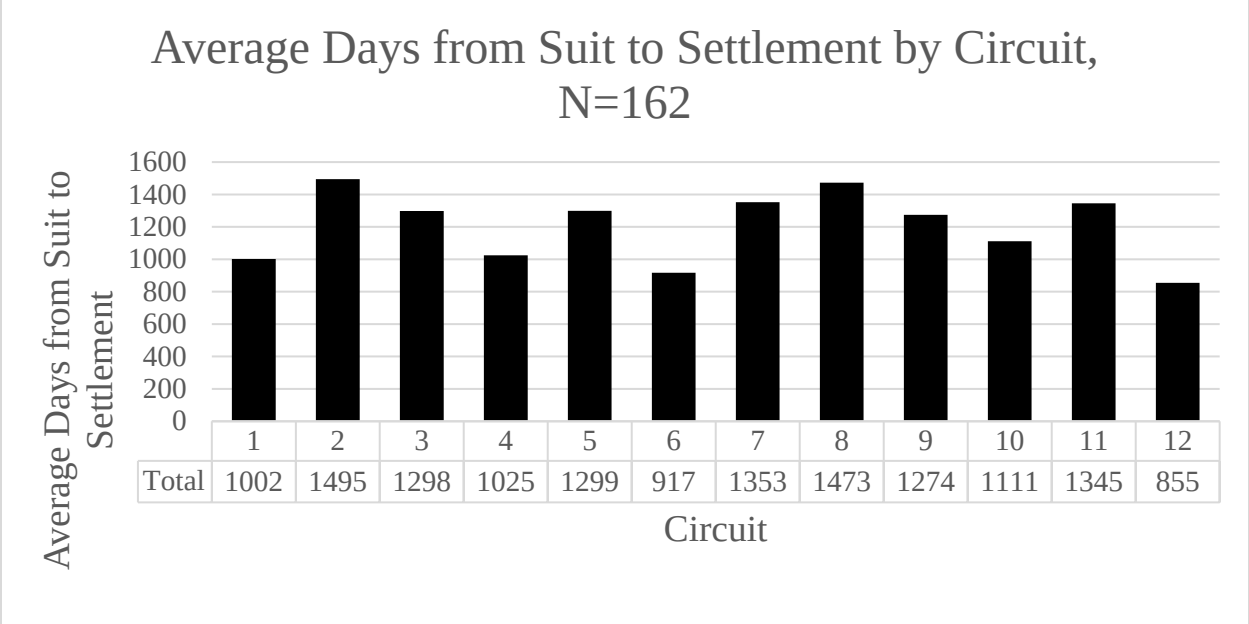


Figure 5 Average Days from Filing to Settlement by Circuit

5.0.3. Docket Entries

When a plaintiff files a lawsuit a docket number is assigned to the case, and this docket is where all documents filed in the case are kept. Each document added to the docket is counted as a docket entry, as is each update entered by the clerk or judge (e.g., a scheduling update, a phone conference between the judge and the parties). The number of docket entries can tell us about the activity of the case—how many times the parties filed a motion, the judge ruled, the parties met for a conference, etc.

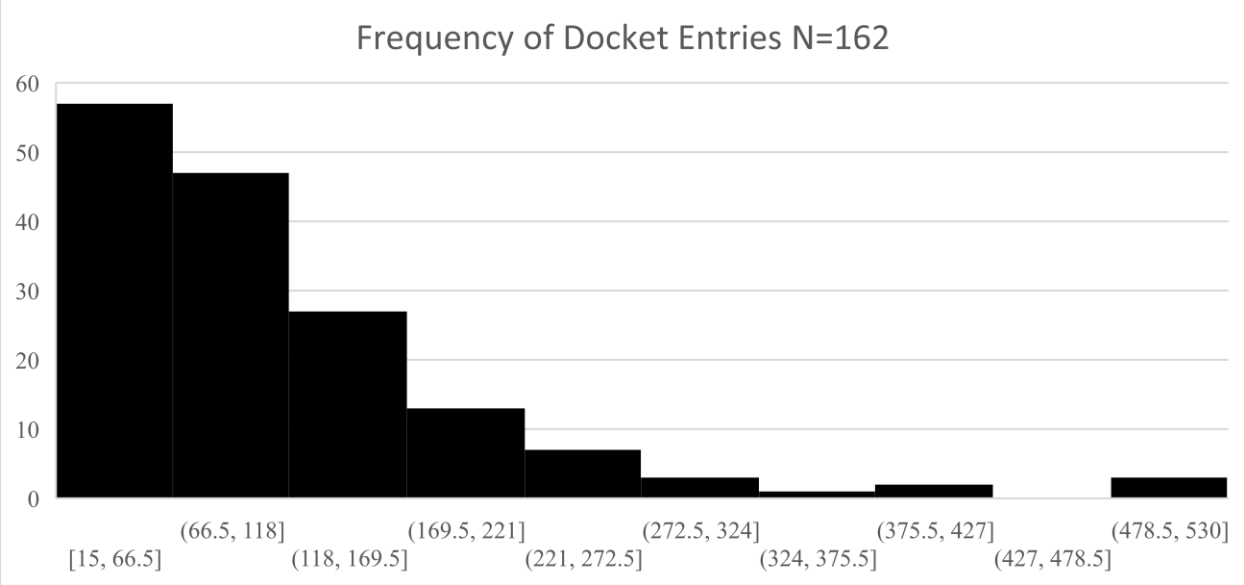


Figure 6 Histogram of Docket Entries

The database created for this dissertation research included a column for the number of docket entries. Figure 6 is a histogram showing the frequency of the number of docket entries across all 162 cases. The overall mean number of docket entries across all circuits was 114, whereas as the median was 87.5, and the mode was 45. The values ranged from five (*Coleman*)[2541] to 530 (*Plouffe*)[2542] docket entries with a standard

[2541] *Coleman v. Great Bay Community College*, No. 1:09-cv-00161, 2009 WL 3698398 (D.N.H. Oct. 30, 2009).
[2542] *Plouffe v. Cevallos*, No. 5:10-cv-01502, 2016 WL 1660626 (E.D. Pa. Apr. 27, 2016).

deviation of 92. Docket entries are a reasonable approximation of the number of times the court has attempted to communicate with the parties and vice versa; the greater number of docket entries, the more judicial time and resources were expended in the course of a case. If the courts moved at a steady pace, we could expect the number of docket entries to correlate directly with the length of time it took to dismiss a case; however, this is not how it works, and some cases took a very long time but did not have many entries and some had more entries but were resolved relatively quickly. As stated in section 5.0.3., *Plouffe* lasted more than nine years in the courts, which helps explain how the docket could have over 500 entries. Nevertheless, only two other cases lasted over nine years, and yet five cases had more than 300 docket entries.[2543] We can calculate the proportion of the average number of days between docket entries by dividing the days from suit to settlement by the number of docket entries. This proportion can be called the days-to-docket-entry ratio and the histogram of this proportion for each of the 162 cases can be seen in Figure 7 below.

[2543] With 485 entries, *Hussein v. Dugan*, No. 3:05-cv-00381, 2008 WL 11450829 (D. Nev. Oct. 22, 2008) which lasted seven years, eight months, and twenty-three days; 385 entries in *Klaassen v. University of Kansas School of Medicine*, 2015 WL 2400773 (May 15, 2015) which lasted five years, one month, and three days; *Madden v. Regional University System*, No. CIV-13-0393-HE (Dec. 24, 2014) also with 385 entries, and which lasted five years, seven months, and twelve days; and with 358 entries *Manning v. Jones*, No. 3:09-cv-00010, 2016 WL 9280153 (S.D. Iowa Jan. 22, 2016) which lasted seven years and two days.

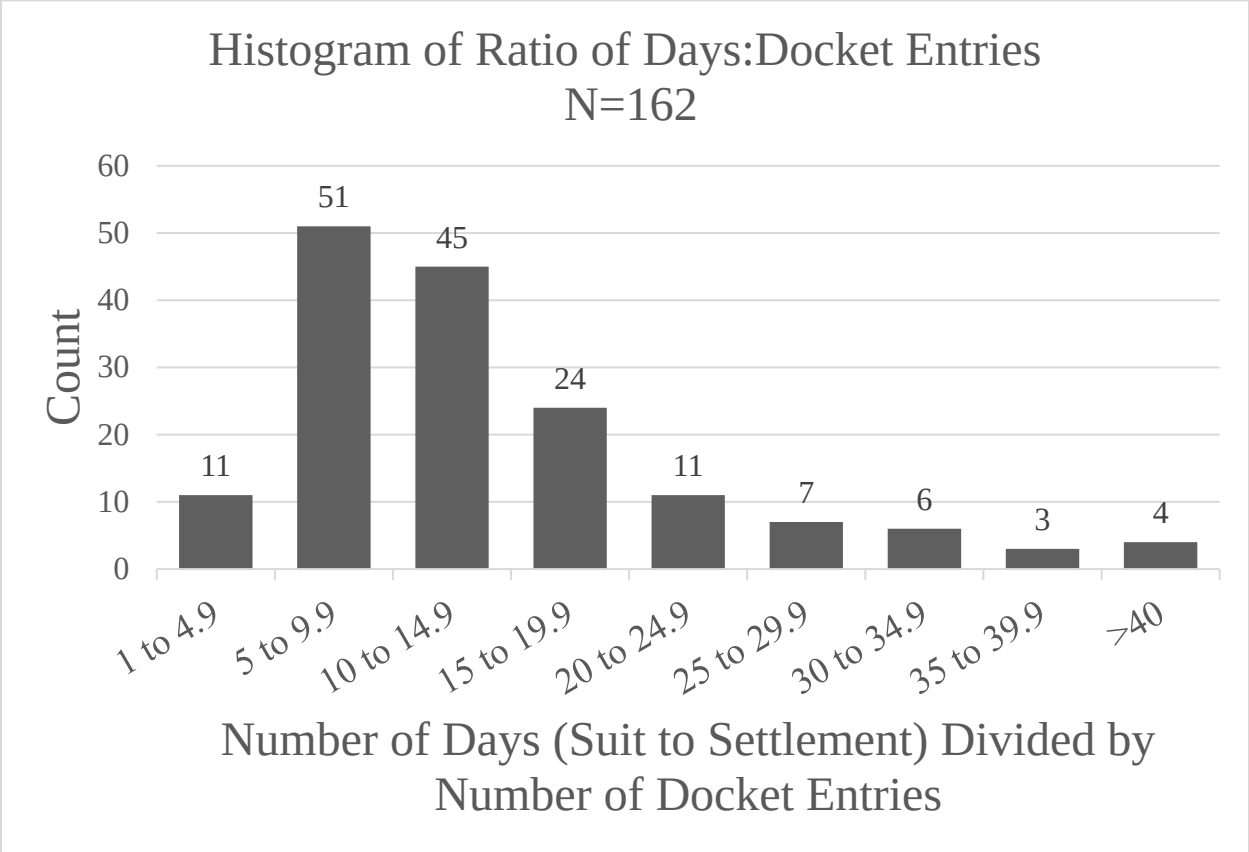


Figure 7 Histogram of Ratio of Days to Docket Entries

According to Figure 7, the average days-to-docket-entry ratio was between five and fifteen (mean =14.65), in other words, the average case adds a new docket entry about once every two weeks. Only nineteen cases (11.1%) have a ratio of greater than 25, so few cases average more than three weeks between docket entries. In contrast, twenty-eight (17.3%) cases had a proportion of less than seven, meaning on average, a new docket entry was added to these cases more than once per week. *Plouffe,* the second-longest case by duration, had a ratio of 6.37, meaning that on average, over the course of more than nine years, a new docket entry was added in Plouffe's case more than once a week. Similarly, *Tracy* lasted more than five years in the courts and had a ratio of 3.74; in that case new docket entries were added nearly twice a week on average for more than

half a decade. Given this analysis, the drain on judicial resources for faculty speech cases is extravagant, especially considering how few of the plaintiffs prevail.[2544]

5.0.4. Adverse Employment Actions

The next figure (below) is a histogram, showing the frequency of the number of adverse employment actions alleged in each case. Over half of the cases (83 out of 162) alleged only one adverse employment action, and three failed to allege any. The rest alleged multiple adverse employment actions: 41 cases alleged two adverse actions, twenty cases alleged three, eleven alleged four, and four alleged five adverse employment actions as seen in Figure 8 below.

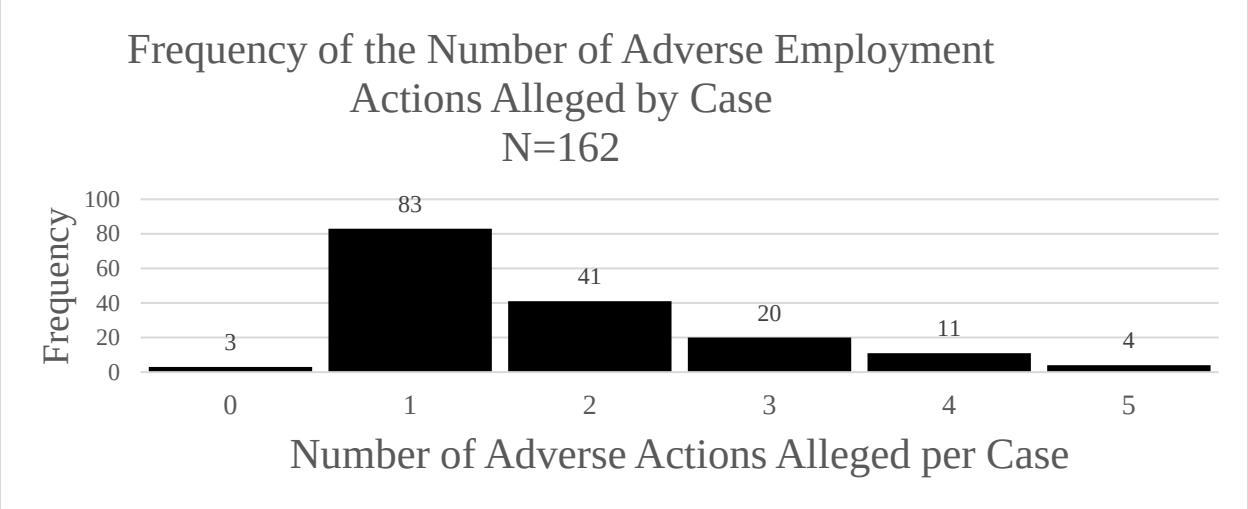


Figure 8 Histogram of Number of Adverse Actions Alleged

[2544] The drain on educational resources is also extravagant considering the numerous detrimental effects these cases have on the faculty members, many of whom are still employed, not to mention their colleagues and students. The institutions are also spending tens of thousands and sometimes hundreds of thousands of dollars litigating these cases, not to mention the costly distractions for administrators (e.g., discovery requests). For more on the costs of litigation in higher education see, LANOUE & LEE *supra* note 314.

To identify the various types of adverse employment actions alleged, the most severe actions alleged in each case were identified and their frequencies can be found in Figure 9 below.[2545]

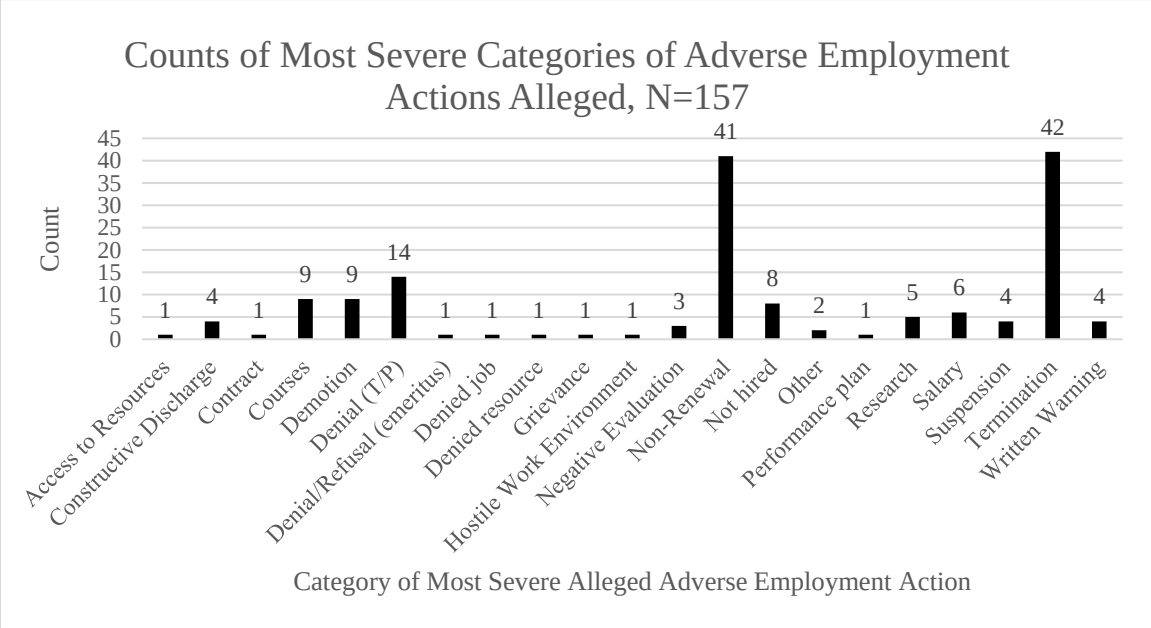


Figure 9 Most Severe Categories of Adverse Employment Actions

Figure 9 shows that among the most severe alleged adverse employment actions in each case, the most common categories were non-renewal and termination with 41 instances of each. The next most common category of alleged adverse employment actions was denial of tenure or promotion with fourteen instances. Other common adverse employment actions included negatively affecting salary (e.g., by terminating faculty from additional positions which offered extra pay, or denying a merit raise), changing course assignments, demotion (e.g., from department chair, from full-time to part-time), and constructive discharge. In the cases in which the plaintiff alleged multiple

[2545] Three cases were excluded because (for various reasons) they did not allege adverse employment actions.

actions, they may have alleged a sequence akin to a negative evaluation, a performance improvement plan, suspension, and termination.

5.0.5. Prevailing Party

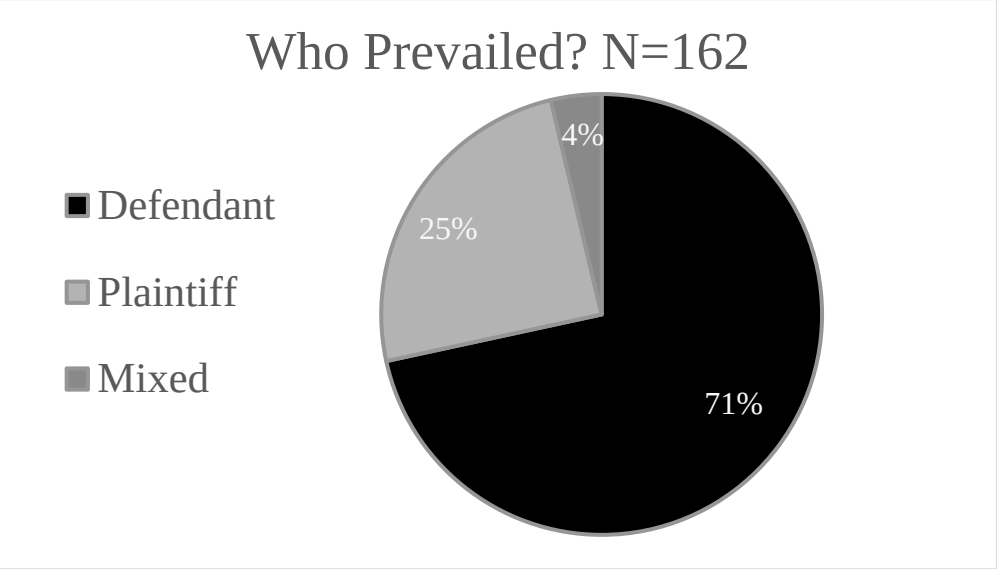


Figure 10 Prevailing Party

Figure 10 above, depicts when the plaintiff, defendant, or both parties prevailed in the 162 cases in the database. As the figure shows, over 70% of the time, the defendants prevailed. Only a quarter of the time did the plaintiffs prevail on their free speech claims. When both parties prevailed on one or more free speech claims they have been coded as "mixed."

Table 3 – How many cases went to trial? N=162

Was there a trial?	Frequency	Percent
Jury Trial	11	6.8
Bench trial	2	1.2
Trial on other claims	8	4.9
No trial	135	83.3
Pending	6	3.7
Total	162	100

Despite 27% of cases indicating that the plaintiff prevailed, very few cases went to a jury trial. Table 3 above shows how many of the 162 cases went to a jury or bench

trial, to a trial on claims besides the First Amendment claim, those which remain pending, and how many cases did not go to trial. Only thirteen cases went to a jury (eleven) or bench (two) trial, which makes up only 8% of the 162 cases. Of those thirteen cases, two ended in settlement prior to a verdict, in three the plaintiff prevailed, and in eight the defendants prevailed.

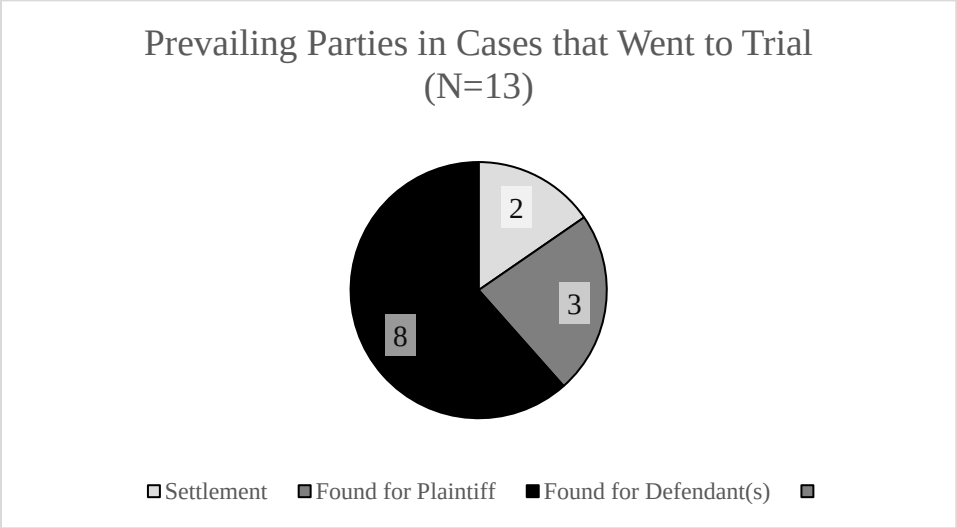


Figure 11 Prevailing Party in Cases that Went to Trial

An additional eight cases went to trial on other claims (4.9%), but overall, 135 (or 83.3%) cases did not make it to trial. Of those 134 cases that did not go to trial, twelve were settled by the parties; in the other 122 cases the courts ruled in favor of the defendants on either a motion for dismissal or for summary judgment.

5.0.5.1. Prevailing Party and Citizen Speech

As would be expected, the data show that outcomes in favor of the plaintiffs were associated with the judge finding that the plaintiff had spoken as a citizen. Figure 12 below shows that the cases in which the judge found the plaintiff had spoken as a citizen resulted in a finding for the plaintiff about half of the time (thirty out of fifty-seven cases). In contrast, only ten out of ninety-nine cases in which the judge did not find that

the plaintiff spoke as a citizen (or did not say) resulted in a finding for the plaintiff.[2546] The cases in which the plaintiff was not speaking as a citizen but did prevail indicate either the application of an academic exception to *Garcetti* (six cases) or the court not deciding whether or not the plaintiff spoke as a citizen (four cases).

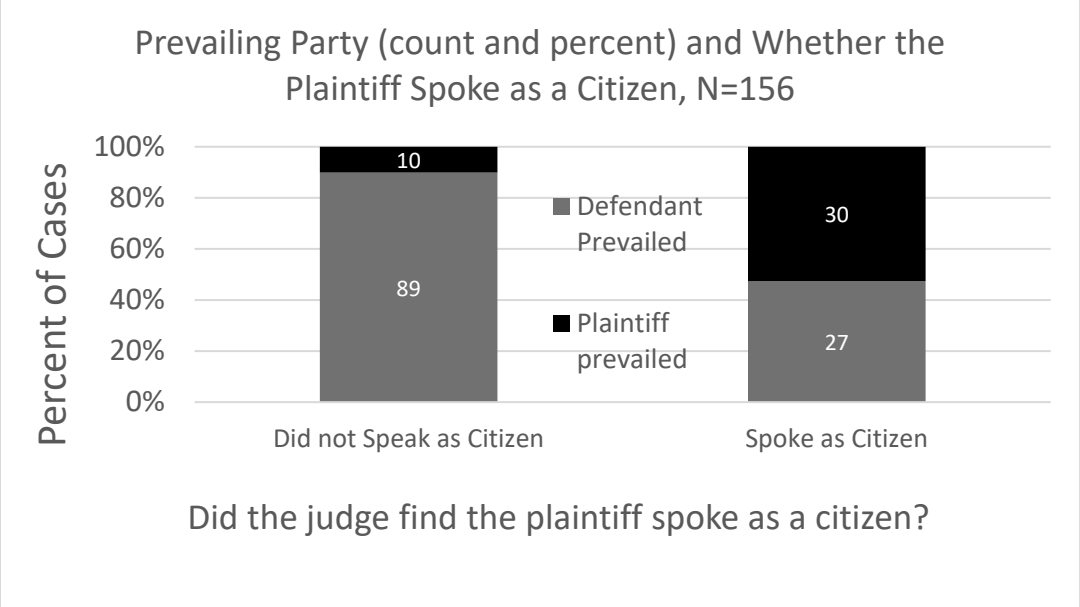


Figure 12 Prevailing Party by Whether the Plaintiff Spoke as a Citizen

[2546] In six cases the judge did not decide whether the plaintiff spoke as a citizen. These cases are coded as missing and are not included in Figure 12.

5.0.6. Opinion Publication Years

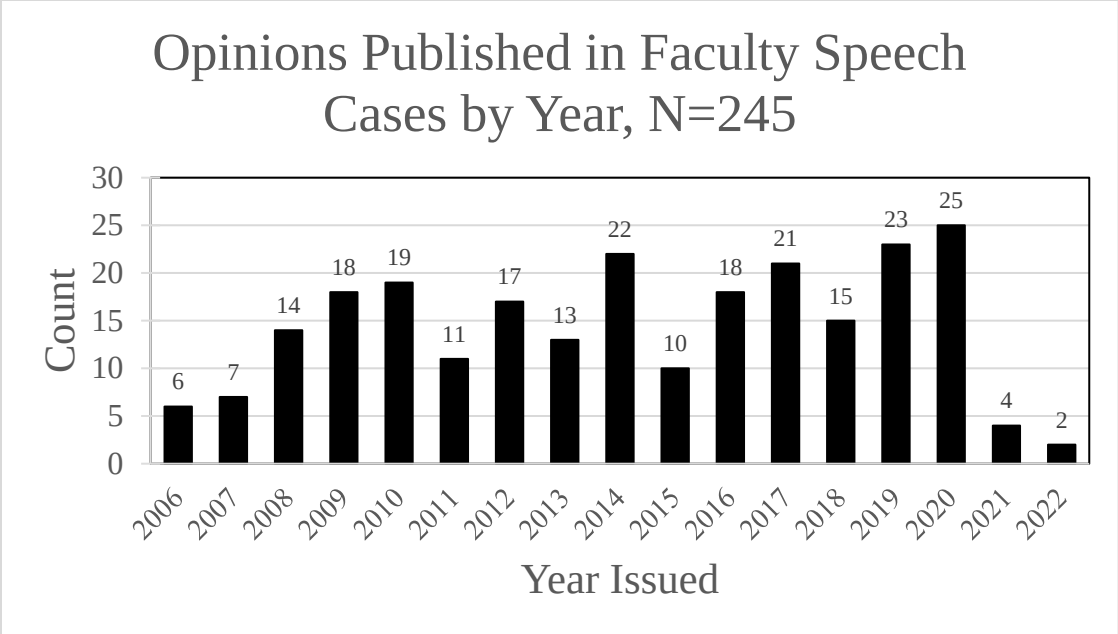


Figure 13 Opinions Published by Year

Figure 13 above shows the number of published opinions in faculty free speech cases by year 2006-2022. Only six opinions are included under 2021 and 2022 because no new cases were included after 2020; the only opinions published in 2021 and 2022 were opinions in cases that had already issued opinions between 2006-2020. The next lowest number of opinions published in a year occurred in 2006 (only six), followed by seven in 2007, and ten in 2015. Twenty-five opinions were published in 2020, and twenty-three in 2019. Thus, the number of opinions issued varied year-to-year but since 2007 has not dipped below ten opinions per year.

5.0.7. Summary of Quantitative Findings

In sum, the quantitative analyses of 162 faculty free speech cases in this study have found that non-tenured and tenured faculty sued in nearly equal numbers (Figure 3), the average case lasted nearly three and a half years (Section 5.0.2.), and the average

docket for these cases had around 100-120 entries (Section 5.0.3.). The most common adverse employment actions alleged were non-renewal or termination followed by denial of tenure or promotion (Section 5.0.4.). Nearly 70% of cases resulted in the courts finding for the defendants (Section 5.0.5.), and since 2007, in the federal courts, at least ten opinions in faculty free speech cases have been issued every year (Section 5.0.6.).

5.1. Legal Standards

This analysis of federal faculty free speech jurisprudence focuses on the application of legal standards in various cases across time and circuits. Thus, the subsections of 5.1. follow the standard for federal public employee free speech jurisprudence as laid out in Section 4.0.. First, the application of *Garcetti* is analyzed, followed by the *Connick* and *Pickering* questions and finally the question of a causal link between the protected speech and the adverse employment action(s) is discussed.

5.1.1. Application of *Garcetti*

When the courts ask whether a plaintiff spoke as a citizen, most of the time the court is citing *Garcetti*, though not always. This section reviews the quantitative and qualitative findings related to how and when the courts relied on *Garcetti* in faculty speech cases.

5.1.1.1. **Quantitative Findings**

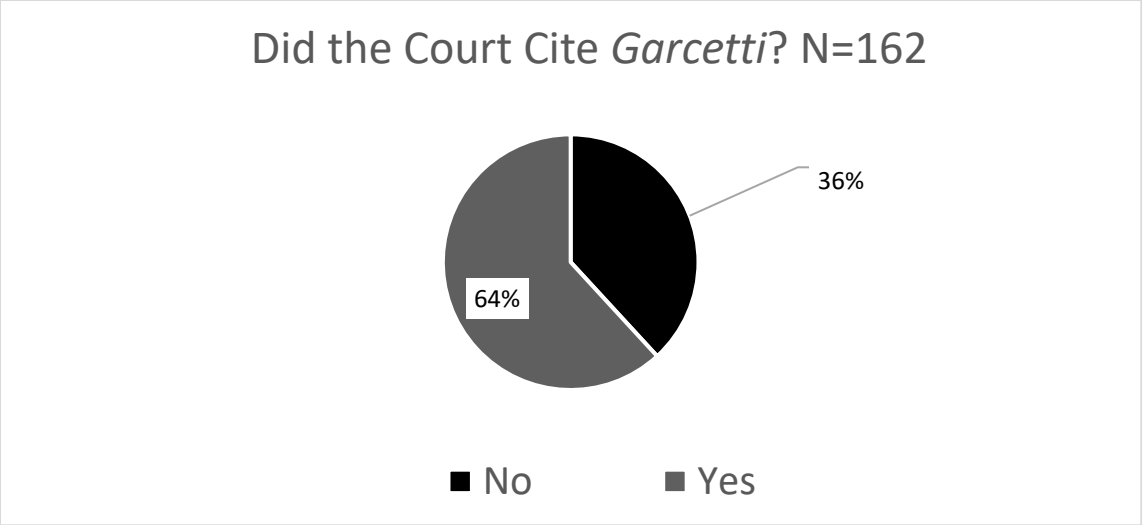


Figure 14 Did the Court Cite Garcetti?

While the *Garcetti* opinion was the last time the Supreme Court raised the question of how to address faculty free speech cases, a large minority of cases since then have not cited *Garcetti* directly. Figure 14, above, depicts the percentage of these 162 faculty free speech cases which do and do not cite *Garcetti*. Over 35% of these cases (58 of 162) did not cite *Garcetti*. In certain cases, this may be because both parties agreed that the plaintiff spoke as a citizen or that the plaintiff's speech/conduct was protected.[2547] Figure 15 below shows that of the 245 opinions analyzed in this project exactly 50% (120) of these opinions cited *Garcetti*. An additional 6% of cases cited *Garcetti* secondarily, meaning the courts cited controlling Circuit precedent that cites *Garcetti* but did not cite *Garcetti* directly.[2548] In contrast to the 64% of cases which cited *Garcetti*, judges cited scholarly publications in only sixteen (or ten percent) of 162 cases.

[2547] See Nwaubani v. Grossman, 199 F.Supp.3d 367, 381 (D. Mass. 2016) (stating "The Defendants agree that, by filing the above-named claims, Nwaubani engaged in protected conduct[.]").
[2548] Five opinions could not be analyzed for this question—they have been coded missing and left out of Figure 15.

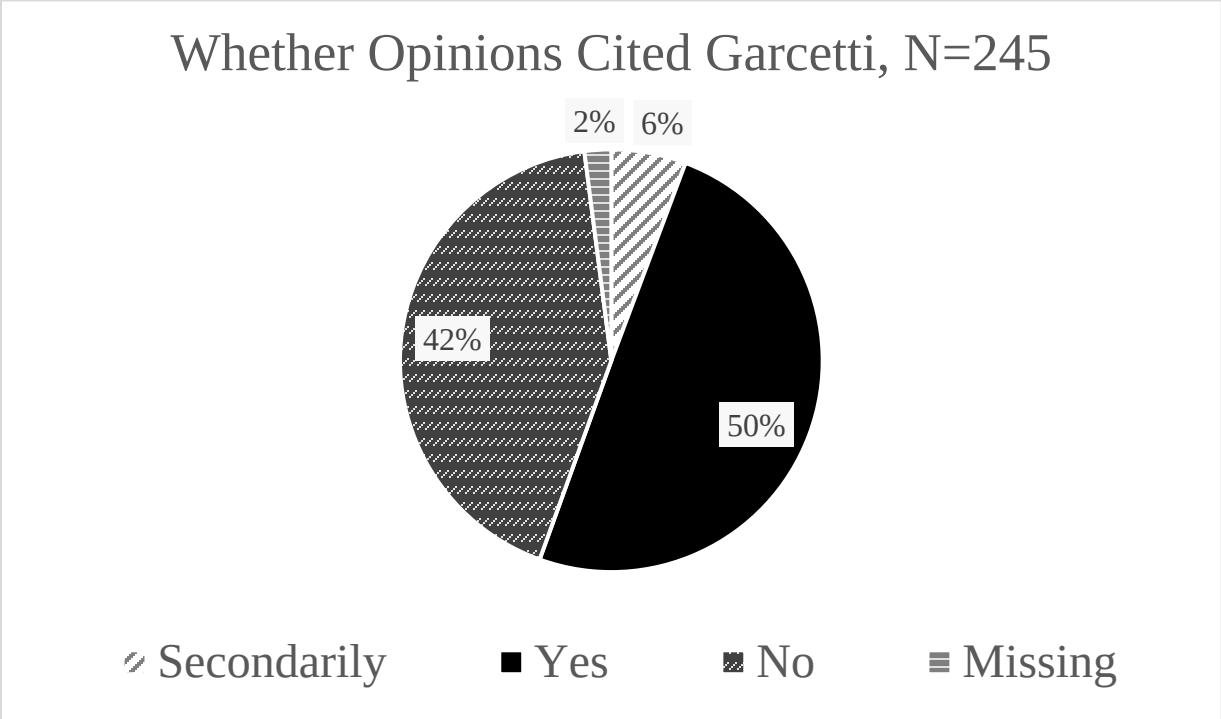


Figure 15 How Opinions Cited Garcetti

One might hypothesize that over time, courts would be more likely to cite *Garcetti* (either directly or secondarily) because it takes time for the circuits to develop their own caselaw in alignment with the Supreme Court. Nevertheless, the data do not appear to support that hypothesis, as can be seen in Figure 16 below.

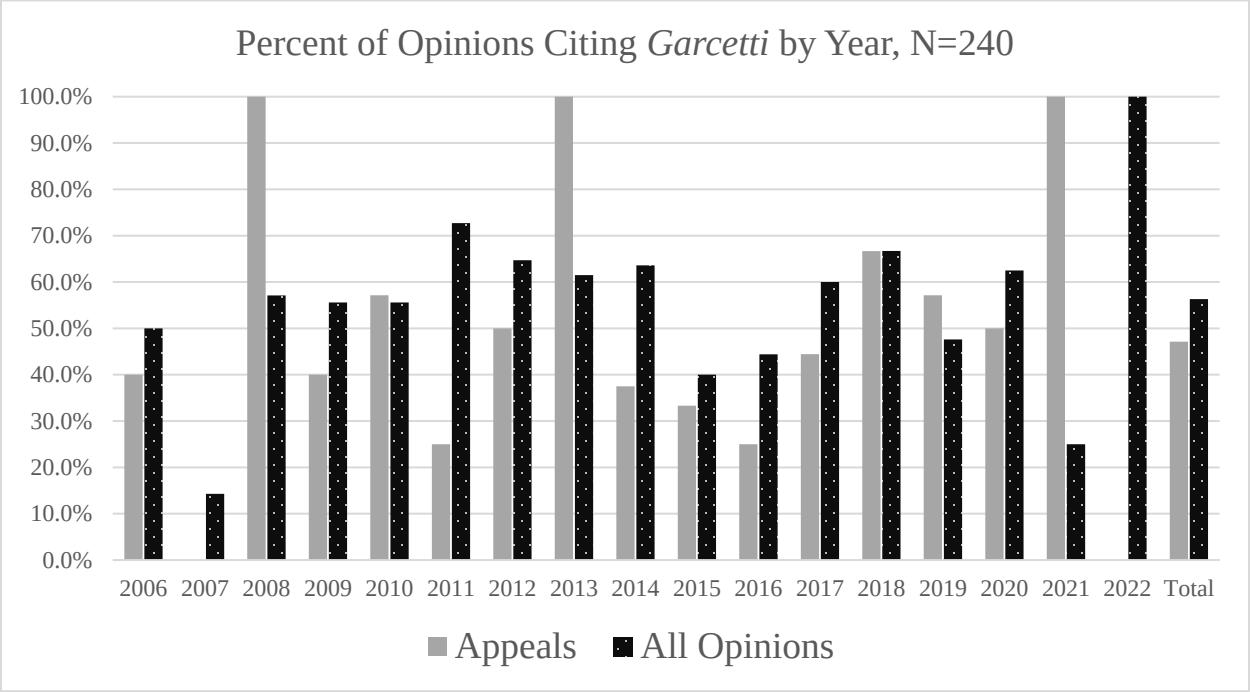


Figure 16 Percent of Opinions Citing Garcetti

In Figure 16, the bars show the percentage of opinions each year that cited *Garcetti*. The data show that the year after *Garcetti*—2007—had the fewest citations (14.3% or one out of seven cases), whereas the highest number of opinions citing *Garcetti* was in 2011 when 73%, or eight out of the eleven published opinions that year, cited *Garcetti.* Notably, later the same year *Garcetti* was published, 2006, there were six cases decided—half cited *Garcetti* and half did not. Overall, this figure does not indicate a visible pattern or increase in the citation of *Garcetti* in faculty free speech cases over time as may have been predicted. Instead, it is more likely, given these data, that courts have been relying on the facts of each individual case more than Supreme Court precedent, at least as long as the appropriate application of *Garcetti* to faculty speech remains unclear. This means that the application of *Garcetti* is as yet undetermined across the federal circuits, and therefore there is still an opportunity for scholarship to play a role in shaping the standards for faculty speech cases.

Figure 16 also provides the percentage of appeals court cases which cite *Garcetti* from 2006 to 2021 (N=70).[2549] In this period, the circuit courts have issued 33 opinions (47%) that cited *Garcetti*, while the other 37 did not. There is not an obvious association between the percentage of cases citing *Garcetti* and the years the cases were decided, despite the lowest percentage (0% or 0 of 2 opinions) of appeals court citations occurring in 2007, the year after *Garcetti* was decided. The second lowest percentage of appeals court citations occurred in 2011 and 2016; in both years only one of four decisions cited *Garcetti*. Instead of the year the decision was published, other factors, such as the facts of the case and whether the speech touched on a matter of public concern may be more correlated with the case citing *Garcetti*. For this reason, among others, qualitative analyses are merited in addition to the quantitative analyses in the previous section.

5.1.1.2. Qualitative Findings

The following sections discuss the qualitative findings related to the courts' applications of *Garcetti* in the 162 cases examined. First discussed is how the courts applied the question raised in *Garcetti*: whether the plaintiff spoke as a citizen or an employee. This first section also discusses which courts have recognized an academic exception (for teaching and scholarship)[2550] and which of those courts have also applied the academic exception. Second, the question from *Connick* is considered: whether the speech touched on a matter of public concern. Finally, the application of the *Pickering* balancing test in faculty speech cases is analyzed: whether the government's interest outweighed the citizen's right to free speech.

[2549] 2021 Appeals Court opinion in *Meriwether* has been included because the case was already included in the database before the opinion was issued.
[2550] *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

5.1.1.3. Spoke as Citizen or Employee

How *Garcetti* is applied to faculty speech cases varies significantly based on the court or circuit, the facts of the case, and how the specific judge(s) interpret(s) the *Garcetti* question. This is in part due to the fact that the Supreme Court left open the question of whether the *Garcetti* standard should be applied to faculty at public colleges and universities whose primary duties include teaching and scholarship or if there should be an academic exception for such employees.[2551] In the circuits where an academic exception has not been recognized, the possible outcomes of the *Garcetti* question (did the plaintiff speak as a citizen or an employee pursuant to official duties?) are limited to speech made in one's capacity either as a *citizen* or an *employee*.

5.1.1.3.1 Academic Exception

On one hand, some courts have eschewed the academic exception completely—for instance, the Eleventh Circuit has so far not acknowledged an academic exception in any of the three individual faculty speech cases it has decided since 2006.[2552] Still other circuits have recognized that an exception may be appropriate under certain circumstances but have so far refused to apply the exception to extant cases. For instance, the Second Circuit, in *Bhattacharya*, wrote that, "refusing to permit cheating by students" was "'part-and-parcel' of [Bhattacharya's] official duties," and found that such "speech involved neither scholarship nor teaching…rather it involved 'maintaining class discipline.'"[2553] The Third, Seventh, and Eighth Circuits likewise refused to apply an

---

[2551] *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).
[2552] *Jolibois v. Fla. Int'l Univ. Bd. of Trs.*, 654 Fed.Appx. 461 (11th Cir. 2016); *Shi v. Montgomery*, 679 Fed.Appx. 828 (2017); *Tracy v. Florida Atlantic University Board of Trustees*, 980 F.3d 799 (11th Cir. 2020).
[2553] *Bhattacharya v. Rockland Community College*, 719 Fed.Appx. 26 (Summary Order) 27 (2d Cir. 2017).

academic exception in *Howell, Wozniak* (despite the Seventh Circuit recognizing the possibility for such an exception in *Piggee),* and *Lyons*, respectively.[2554]

On the other hand, if the academic exception has been adopted by the circuit and applied in previous cases, the possible answers to the *Garcetti* question may be *citizen, employee,* and more specifically and triggering the exceptions, *teacher, and/or researcher.* However, a judge in the same circuit may view the scholar/researcher or teacher categories as subsumed under the citizen category. Furthermore, another judge may simply view the *Garcetti* question as not applying at all to faculty speech cases, and she may skip straight to the *Connick* question.[2555]

For instance, in *Heublein* the District Court for the District of Kansas applied a Tenth Circuit standard for classroom speech (spoke as teacher) which inquired as to "whether the actions taken by the college were reasonably related to a legitimate pedagogical interest it has."[2556] In other words, the court treated the teaching-related speech as though it was made as a citizen on a matter of public concern, but only required the government employer to show that it had a legitimate pedagogical interest for taking the contested actions. Similar to the Tenth Circuit, the Fifth Circuit has held that a faculty member's teaching-related speech must "serve an academic purpose" if it is to be found to address a matter of public concern.[2557] Likewise, the First Circuit recognized an academic exception for classroom speech that "communicates 'an idea transcending

---

[2554] *Howell v. Millersville University of Pennsylvania*, 749 Fed.Appx. 130, 136 (3d Cir. 2018); *Wozniak*, 932 F.3d at 1010; *Piggee v. Carl Sandburg College*, 464 F. 3d 667, 671 (2006); *Lyons v. Vaught*, 875 F.3d 1168, n. 4 (8th Cir. 2017).
[2555] See, *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550, 564 (4th Cir. 2011).
[2556] *Heublein v. Wefald*, 784 F.Supp.2d 1186, 1198 (D. Kan. 2011).
[2557] *Buchanan v. Alexander*, 919 F.3d 847, 853–54 (5th Cir. 2019).

personal interest or opinion which impacts our social and/or political lives,'" but found that the speech in *Alberti* did not qualify as such.[2558]

The standards in the First, Fifth, and Tenth Circuits, therefore, contrast with the Fourth Circuit's standard in *Adams*. In *Adams,* the Fourth Circuit held that *Garcetti* would not apply to Adams's speech related to teaching or scholarship thus skipping the *Garcetti* question and proceeded directly to the *Connick-Pickering* analysis.[2559] Further contrasting with the Fourth Circuit, in *Alozie* the District Court for the District of Arizona did not apply the Ninth Circuit's academic exception to *Garcetti* set forth in *Demers,* because the plaintiff could not show that his expressions in the context of interviewing for a deanship constituted academic speech under *Demers*.[2560] The court in *Alozie* noted that the Ninth Circuit had not yet delimited or defined the contours of academic speech which qualified for an exception to *Garcetti*.[2561]

Table 4 below shows the academic exceptions recognized and/or applied in each of the twelve Circuit Courts.[2562] The D.C. and Eleventh Circuits had not recognized an academic exception as of 2022. As is clear from

Table 4 – Academic Exception Application and Recognition by Circuit, what constitutes an academic exception differs significantly from circuit to circuit.

Table 4 – Academic Exception Application and Recognition by Circuit

Cir.	**Case**	**What did the court recognize/apply or not?**	**Steps of Inquiry**

[2558] *Alberti v. Carlo Izquierdo*, 548 Fed.Appx. 625, 639 (1st Cir. 2013).
[2559] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550, 564 (4th Cir. 2011).
[2560] *Alozie v. Arizona Bd. of Regents*, 431 F. Supp. 3d 1100, 1119 (D. Ariz. 2020).
[2561] *Id.*
[2562] The table has also been fitted to a single page in Appendix D for the reader's convenience.

1	Alberti	Recognized an exception for classroom speech that "communicates 'an idea transcending personal interest or opinion which impacts our social and/or political lives'" but said it did not apply to the instant case. [2563]	Not specified.
2	Bhatta-charya	Recognized an exception for teaching and scholarship but found that the speech in question was not teaching-related because it was maintaining class discipline—they called it "one of the core duties of a teacher." [2564]	*Garcetti* (to determine if academic exception applies), *Connick, Pickering.*
3	Howell	Did not recognize an exception for "classroom speech," stating that choosing classroom management strategies in contravention of school policy or dictates is not a constitutional right.[2565]	For classroom speech there is no exception, thus *Garcetti, Connick, Pickering.*
4	Adams	Recognized an exception for teaching and scholarship even when referenced in CV for promotion.[2566]	If speech relates to teaching or scholarship, *Connick, Pickering*
5	Buchanan	Recognized an exception for speech that serves a legitimate pedagogical purpose.[2567]	If the speech serves a legitimate pedagogical purpose, *Connick*, then *Pickering.*
6	Meri-wether (2021)	Recognized an exemption for "all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[2568]	If it is classroom speech, *Connick*, then *Pickering.*
7	Wozniak	Did not apply an academic exception for a faculty member who "acted in his capacity as a teacher" by "humiliating students as a matter of self-gratification."[2569] *Piggee* recognized an academic exception was possible but so far it has not yet been applied in the Seventh Circuit.[2570]	*Garcetti, Connick, Pickering.*
8	Lyons	Recognized that the academic exception question was left open, but found that Lyons's speech (concerns about favoritism towards student athletes) did not relate to scholarship or teaching.[2571]	*Garcetti, Connick, Pickering.*
9	Demers	Applied an academic exception for teaching and scholarship speech that addresses a matter of public concern—such speech is governed by *Pickering*. [2572]	Faculty speech related to scholarship and teaching is not governed by *Garcetti* but instead by *Pickering.*
10	Heublein	Applied an academic exception for in-class speech based on a pre-*Garcetti* Tenth Circuit case,	Whether the adverse employment actions were reasonably related

[2563] *Alberti v. Carlo Izquierdo*, 548 Fed.Appx. 625, 639 (1st Cir. 2013).
[2564] *Bhattacharya v. Rockland Community College*, 719 Fed.Appx. 26 (Summary Order) 27 (2d Cir. 2017).
[2565] *Howell v. Millersville University of Pennsylvania*, 749 Fed.Appx. 130, 136 (3d Cir. 2018).
[2566] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550, 564 (4th Cir. 2011).
[2567] *Buchanan v. Alexander*, 919 F.3d 847, 853–54 (5th Cir. 2019).
[2568] *Meriwether v. Hartop*, 992 F.3d 492, 494 (6th Cir. 2021).
[2569] *Wozniak v. Adesida*, 932 F.3d 1008, 1010 (7th Cir. 2019).
[2570] *Piggee v. Carl Sandburg College*, 464 F. 3d at 671 (7th Cir. 2006).
[2571] *Lyons v. Vaught*, 875 F.3d, n. 4 (8th Cir. 2017).
[2572] *Demers v. Austin*, 746 F. 3d 402, 406 (9th Cir. 2014).

		Vanderhurst v. Colorado Mountain College District.[2573]	to a school's legitimate pedagogical interest. [2574]
11	N/A	None of the five cases (*Jolibois*, Seals, *Shi*, *Stern*, and *Tracy*) argued for an academic exception.	*Garcetti*, *Connick*, *Pickering.*
DC	N/A	No relevant cases in the time period have raised the issue of an academic exception.	*Garcetti*, *Connick*, *Pickering.*

The Tenth Circuit's academic exception applies to the motivation of the defendants in taking the adverse employment action against a faculty plaintiff (did it serve legitimate pedagogical interests), rather than the capacity in which the plaintiff spoke.[2575] The Tenth Circuit's "exception" thus reflects an institutional understanding of academic freedom, rather than an individual academic freedom that may protect a professor's speech. While this may offer marginally more protection to a professor's speech than the question under *Pickering* (legitimate government interest), it may also offer less protection by placing otherwise protected speech under the lens of an institution's pedagogical interests.[2576] Among the circuits that have adopted and applied an academic exception (Fourth, Fifth, Sixth, and Ninth), the courts must ask if the speech touched on a matter of public concern (not solely a private matter) and then apply the *Pickering* balancing test.

5.1.2. On a Matter of Public Concern

As explained in the previous section (5.1.2.1.1.), even when the courts have adopted an academic exception to the *Garcetti* question, speech that failed to relate to a

---

[2573] *Vanderhurst v. Colorado Mountain College District*, 208 F.3d 908, 914 (10th Cir. 2000).
[2574] *Heublein v. Wefald*, 784 F.Supp.2d 1186, 1198 (D. Kan. 2011).
[2575] *Heublein v. Wefald*, 784 F.Supp.2d 1186, 1198 (D. Kan. 2011).
[2576] For instance, if the denial of *Adams's* promotion was scrutinized under this test, the university might claim that the legitimate pedagogical interest was related to various student and colleague complaints about Adams's creation of a hostile working or learning environment for women after the publication of his book decrying his feminist colleagues. The same could be said of the speech in *Meriwether.* See *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550; *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

matter of public concern was not protected by the First Amendment. In other words, even when *Garcetti* was not applied, the question in *Connick* still applied and was often dispositive.[2577] A lexical search conducted on all 245 opinions returned 892 hits in 146 documents for "Garcetti" and 956 hits in 179 documents for "matter of public concern," thus finding that the question from *Connick* was referenced in more decisions than *Garcetti* was.

When speech was found not to touch on a matter of public concern, often this was because the speech dealt with "employment-related" complaints, or other "personal grievances."[2578] This question was dispositive in at least one case in each of the First through Tenth Circuits.[2579] Perhaps the most obvious example of speech constituting "matters of only personal interest" is found in the District Court for the Middle District of Louisiana's opinion in *Buchanan v. Alexander*—a case brought by a professor of early childhood education—in which the court wrote "the Court finds that Plaintiff's use of

---

[2577]See, for example, *Austen v. Weatherford College*, 2012 WL 3223664, *10 (N.D. Tex.); *Bhattacharya v. Rockland Community College*, 2017 WL 1031279 1, *4 (2017); *Fuse v. Arizona Bd of Regents*, 2009 WL 2707237 1, *5; *Hong v. Grant*, 516 F. Supp. 2d 1158, 1169 (2007); *Hussein v. Nevada System of Higher Education*, 2008 WL 11450864, at *6 (Jun. 27, 2008); *Keating v. University of South Dakota*, 980 F. Supp. 2d 1137, 1144 (D.S.D. 2013); *Renken v. Gregory*, 541 F. 3d 769 (7th Cir. 2008); *Peterson v. Williams*, 2020 WL 1876225, at *3 (D. Utah Apr. 15, 2020).

[2578] See, *Howell v. Millersville University of Pennsylvania*, 283 F. Supp. 3d 309, 337 (E.D. Pa. 2017) (finding that Howell's speech was characterized as a personal grievance and failed to address a matter of public concern); *Kahan v. Slippery Rock University of Pennsylvania*, 50 F. Supp. 3d 667, 708 (W.D. Pa. 2014) (stating that "speech concerning disputes between individual employees does not add to the debate on matters of public importance and does not enjoy First Amendment protection.").

[2579] See, for example, *Alberti v. Carlo Izquierdo*, 548 Fed.Appx. 625 (1st Cir. 2013); *Ezuma v. City University of New York*, 367 F. App'x 178 (2010); *Howell v. Millersville University of Pennsylvania*, 749 Fed.Appx. 130 (3d Cir. 2018); *Weihua Huang v. Rector and Visitors of Univ. of Va.*, 896 F.Supp.2d 524; *Jingping Xu v. University of Texas Md Anderson*, 854 F. Supp. 2d 430 (2012); *Smock v. Board of Regents of University of Mich.*, 353 F. Supp. 3d 651 (E.D. Mich. 2018); *Wozniak v. Adesida*, 932 F.3d 1008 (2019); *Keating v. University of South Dakota*, 569 Fed.Appx. 469 (8th Cir. 2014); *Calmelet v. Board of Trustees of California State University*, No. 2:19-cv-02537-MCE-DMC, 2020 WL 5291925 (E.D. Cal. Sep. 4, 2020); *Joritz v. Gray-Little*, 822 Fed.Appx. 731 (10th Cir. 2020).

profanity and discussions regarding her own sex life and the sex lives of her students in the classroom […] are not matters of public concern."[2580]

In contrast, when speech was found to touch on a matter of public concern, this was because it touched on "any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[2581] There were various instances of successful *Connick* arguments among the dataset.[2582] In the case of *Kerr v. Hurd,* the plaintiff's speech was found to address a matter of public concern in part because the judge had recently encountered news coverage about the topic of Kerr's speech—the appropriate use of caesarian sections versus forceps during difficult childbirth.[2583]

In nearly half (46%) of the 162 cases, the court found that at least some of the plaintiff's speech addressed a matter of public concern as shown in Figure 17 below. The courts found that in 63 cases the plaintiff's speech touched on matters of public concern explicitly. In addition, in six cases, the courts found some speech to touch on a matter of public concern, and in five more cases the court assumed that the topic was a matter of public concern without deciding for a total of 74 or 46% of cases finding the plaintiff's speech addressed a matter of public concern. Only 39 cases (24%) were found by the courts not to address matters of public concern; however, in 43 cases (more than one

---

[2580] *Buchanan v. Alexander*, 284 F. Supp. 3d 792, 817 (M.D. La. 2018).
[2581] *Hale v. Emporia State University*, 266 F.Supp.3d 1261, 1272 (D. Kan. 2017) (citing *Lane v. Franks*, 573 U.S. 228, 2380 (2014)).
[2582] See, for instance, *Moore v. University of Kansas*, 118 F.Supp.3d 1242 (D. Kan. 2015); *Rodriguez v. Maricopa Cty. Community College Dist.*, 605 F. 3d 703 (9th Cir. 2010); *Meade v. Moraine Valley Community College*, 168 F. Supp. 3d 1094 (2016); *Rose v. Haney*, 2017 WL 1833188 1 (N.D. Ill. 2017); *Kerr v. Hurd*, 694 F. Supp. 2d 817 (District Court 2010); *Smith v. College of the Mainland*, 63 F.Supp.3d 712 (S.D. Tex. 2014).
[2583] *Kerr v. Hurd*, 694 F. Supp. 2d at 842–43.

quarter) the courts did not decide the question and in an additional four cases the question was not applicable.[2584] The most common reason the courts did not rule on the topic of the speech was because the judges had already ruled that the plaintiffs' speech was not protected because they spoke pursuant to official duties.[2585]

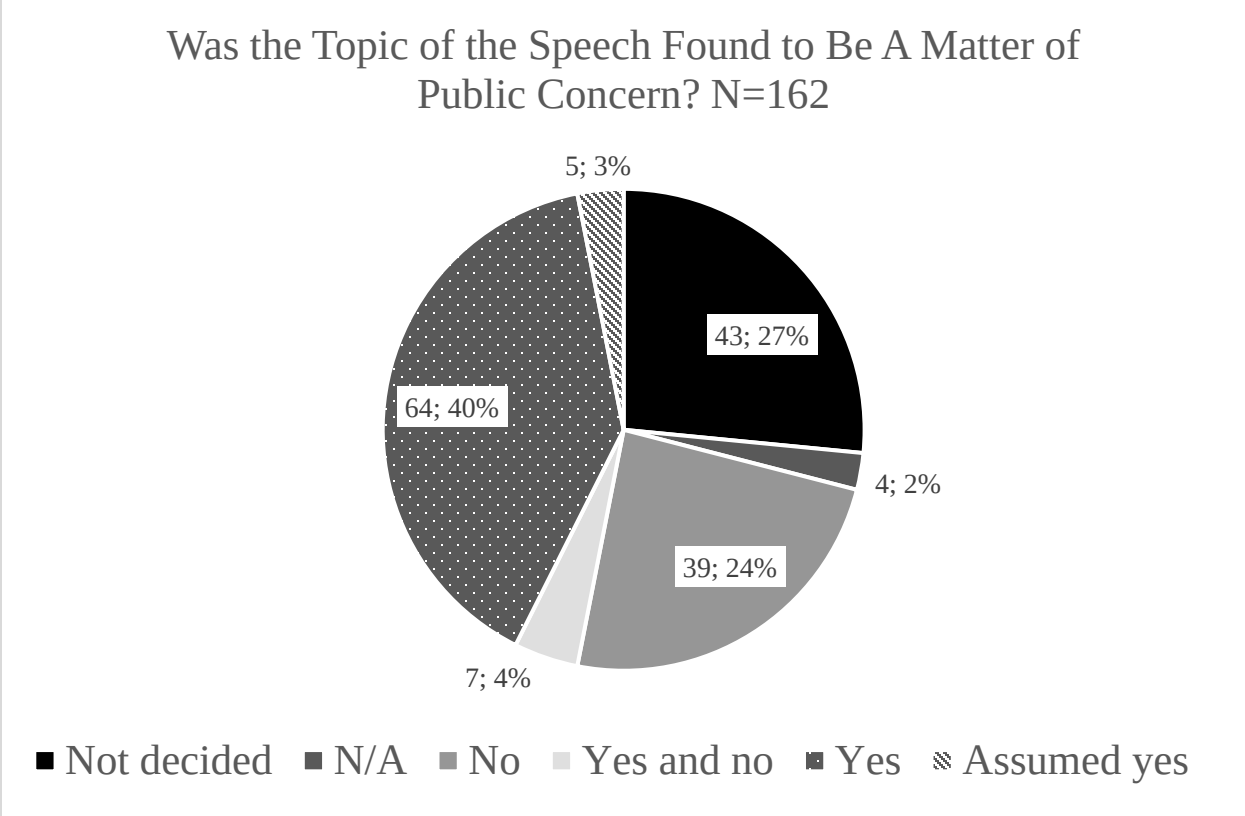


Figure 17 Was the Speech on a Matter of Public Concern?

Courts were not always consistent in how they judged what constitutes a matter of public concern under the law. This question is a matter of law rather than an issue of fact

[2584] For instance, because there was no specific speech in question, only a challenge to a policy, as in the travel restriction cases.

[2585] See, *Coleman v. Great Bay Community College*, 2009 WL (D.N.H. Oct. 30, 2009); *Hatcher v. Cheng*, 63 F. Supp. 3d 893 (2014); *Hays v. LaForge*, 113 F. Supp. 3d 883 (N.D. Miss. 2015); *Kahan v. Slippery Rock University of Pennsylvania*, 664 Fed.Appx. 170 (3d Cir. 2016); *Klaassen v. Atkinson*, 348 F.Supp.3d 1106 (2018); *Miller v. Univ. S. Ala.*, 2010 U.S. Dist. LEXIS 48643 1; *Nuovo v. The Ohio State University*, 726 F. Supp. 2d 829 (S.D. Ohio 2010); *Plouffe v. Cevallos*, 777 Fed.Appx. 594 (2019); *Renken v. Gregory*, 541 F. 3d 769 (7th Cir. 2008).

for a jury to decide, so it is up to the court.[2586]The Supreme Court has explained that the "content, form, and context" of the speech should be used to determine whether speech addressed a matter of public concern.[2587] In addition, the Eleventh Circuit has written, "a court may also consider the employee's attempt to make her concerns public along with the employee's motivation in speaking. However, 'a court cannot determine that an utterance is not a matter of public concern solely because the employee does not air the concerns to the public.'"[2588] Nevertheless, in some cases, judgments were made based on the court's interpretation of the speaker's motivation.[2589]

For the purposes of qualified immunity, courts have weighed a plaintiff's personal motivation in speaking about the matter over a presumed public interest in or public concern for the matter. For instance, in *Singh v. Cordle* the Tenth Circuit explained that even if Singh's *sole* purpose was not retaining his job when he expressed concerns about departmental racial discrimination, the court found that a "reasonable administrator could have believed that Plaintiff was motivated primarily by personal grievance. This belief may have been wrong, but so long as the error was reasonable, he is immune."[2590] In

---

[2586]*Alves v. Board of Regents of the Univ. Sys. of Ga.*, 804 F. 3d at 1159 (explaining that the steps in *Garcetti* "are questions of law for the court to resolve."); But *cf. Ezuma v. City University of New York*, 665 F. Supp. 2d 116, 124 (E.D.N.Y. 2009) (stating, "the evidence in the record as to his motivation cuts both ways, and therefore presents a question of fact.").
[2587] *Connick v. Myers*, 461 U.S. 138, 147–48 (1982).
[2588] *Alves v. Board of Regents of the Univ. Sys. of Ga.*, 804 F. 3d 1149, 1162 (11th Cir. 2015) (citations omitted).
[2589] *Calmelet*, No. 2:19-cv-02537-MCE-DMC, 2020 WL 5291925, at *4 ("Plaintiff's stated purpose for her Report, as articulated in the FAC, was to highlight the difference between Plaintiff's and the Committee's evaluation of a tenure-track professor. Therefore, the context of Plaintiff's Report was her disapproval of an individual employment action that ultimately led to a workplace power struggle between [the dean] and Plaintiff,") (citations omitted); *Joritz*, 822 Fed.Appx. at 741 (describing the Eleventh Circuit's precedent "recognizing that speech is not a matter of public concern if the plaintiff's *principal* motive is to serve her own personal interests rather than to expose some kind of governmental wrongdoing") (citing *Singh v. Cordle*, 936 F. 3d 1022, 1035–36 (10th Cir. 2019)).
[2590] *Singh v. Cordle*, 936 F. 3d at 1035–36.

applying this precedent in *Joritz,* the Tenth Circuit once again weighed the plaintiff's personal interests in removing discriminatory student evaluations from her faculty personnel record over the public good she advocated for when "she suggested ways to address the issue of student discrimination against faculty in the future."[2591]

5.1.3. *Pickering* Balancing Test

After applying *Garcetti* and *Connick* the court must apply *Pickering.* By the time the courts perform the *Pickering* balancing test, there is likely significant evidence that the speech in question ought to be protected. The defendants' threshold to prove that the disturbance to the institution's operations would be likely and not simply possible, also swings the odds into the plaintiff's favor.[2592]

A few examples of plaintiffs who succeeded in the balancing test include, Dyer, Wozniak, Kostic, and Smith. In *Dyer*, the plaintiff's right to free speech outweighed the college's interest in maintaining beneficial relationships with local law enforcement.[2593] *Wozniak v. Adesida* in the Seventh Circuit was decided by the *Pickering* balancing test as well—because Wozniak's speech specifically included personal identifying information

---

[2591] *Joritz*, 822 Fed.Appx. at 741. Courts treating complaints as speech which primarily reflect one's personal interest rather than a desire to make a better system for the future is especially detrimental for faculty who come from minoritized or underrepresented backgrounds and seek to make the academy more inclusive for people like them who come after them. This topic is discussed in Chapter 6.

[2592] *Higbee v. Eastern Michigan University*, 399 F. Supp. 3d 694, 703 (Dist. Court 2019) (finding the defendants had not provided evidence to show any predicted disruptions to the university's work were reasonable, since even protests a year prior had not been shown to have disrupted the work of the university). *But cf., Klaassen v. Atkinson*, 348 F.Supp.3d 1106, 1176 (D. Kan. 2018) (finding the plaintiff's speech was provably disruptive and ruling in favor of the defendants).

[2593] *Dyer v. Southwest Oregon Community College,* No. 6:16-cv-02261-AA, 2018 WL 3431930, at *15 (D. Or. Jul. 16, 2018) (finding that the college's interest in maintaining a beneficial relationship with local law enforcement did not outweigh the plaintiff's right to represent student defendants at trial.).; *but cf., Dyer v. Southwest Oregon Community College, et al.,* No. 6:16-cv-02261-AA, 2020 WL 7409053, at *4 (D. Or. Dec. 17, 2020) (finding that material issues of fact remained as to whether the college's interests in maintaining harmonious relationships with the district attorney/adjunct criminal justice instructor were motivated by unconstitutional retaliatory animus.).

about students, the balance favored the defendants.[2594] Kostic's speech was found to be both protected and unprotected under the *Pickering* balancing test, but his interest in speaking out against corruption, safety violations, and proselytizing within the chemistry department outweighed the university's interests in preventing disruptions.[2595] Similarly, in *Smith v. College of the Mainland*, Smith's interest in bringing credible First Amendment lawsuits against his employer outweighed the college's interest in preventing "disruptions."[2596] Despite improved odds, plaintiffs still failed at the *Pickering* stage too. For instance, Poulard lost on balancing test grounds because the university's interest in an inclusive learning environment outweighed Poulard's controversial classroom speech which was not immediately germane to the courses.[2597]

Taking the Second Circuit as an example, most of the cases in this circuit were decided by the questions from *Garcetti* and *Connick*, but Weinstein's case was decided based on the *Pickering* balancing test. Specifically, the U.S. District Court for the District of Connecticut balanced the disruption to the morale of the faculty and the ability of the Dean to fulfill his role against the "limited value of the plaintiff's speech."[2598] The court found that the defendants had adequate justification not to renew the plaintiff's contract.[2599] Likewise, *Faghri,* decided by the same court, stated that the university's interest in controlling the speech of administrative and policy-making employees

---

[2594] *Wozniak v. Adesida*, 932 F.3d 1008, 1245–46 (7th Cir. 2019).
[2595] *Kostic v. Texas A & M University at Commerce*, 11 F.Supp.3d 699, 721 (N.D. Tex. 2014).
[2596] *Smith v. College of the Mainland*, 63 F.Supp.3d 712, 718 (S.D. Tex. 2014) (the defendants argued that Smith's prior lawsuits were disruptive because they chilled other professors' speech, but the court ruled in favor of the plaintiff because "the filing of a bona fide First Amendment retaliation lawsuit *should* chill future unconstitutional conduct.").
[2597] *Poulard v. Trustees of Indiana University*, 2018 WL 4680010, at *10-11 (N.D. Ind. Sep. 28, 2018).
[2598] *Weinstein v. Earley*, 2017 WL 4953901, at *9 (D. Conn. Nov. 1, 2017).
[2599] *Id.*

outweighed the employee's right to free expression.[2600] The Second Circuit Court of Appeals stated that whether Faghri's speech was the motivating factor in the demotion was not material, since the university's interest in employing executives who support the university's purported goals (e.g., starting a branch campus in another country) outweighed the plaintiff's interest in decrying such goals. Therefore, the defendants were entitled to qualified immunity.[2601]

5.1.4. Causal Link Between Protected Speech and Adverse Employment Action(s)

Once a plaintiff has adequately shown that the speech in question was protected by the First Amendment, the plaintiff must demonstrate a causal link between the speech and the alleged retaliatory acts of the employer.[2602] Plaintiffs can establish a causal link by showing through a preponderance of evidence that the protected speech was a substantial or motivating factor in the adverse employment action.[2603] This step was dispositive in at least twenty-two cases within the First through the Tenth Circuits.[2604]

[2600] *Faghri v. University of Connecticut*, 621 F. 3d 92, 98 (2d Cir. 2010).
[2601] *Id.* at 99, footnote 1.
[2602] Tepper & White, *supra* note 143, at 151.
[2603] Tepper & White, *supra* note 143, at 151.
[2604] See, *Coleman v. Great Bay Community College*, 2009 WL at *6 (D.N.H. Oct. 30, 2009); *Nwaubani v. Grossman*, 2017 WL 3973915, at *1 (1st Cir. Jun. 21, 2017); *Filozof v. Monroe Community College*, 411 Fed.Appx. 423, 424 (2d Cir. 2011); *Gorum v. Sessoms*, 561 F. 3d 179, 188 (3d Cir. 2009); *Howell v. Millersville University of Pennsylvania*, 283 F. Supp. 3d 309, 334 (E.D. Pa. 2017); *Kahan v. Slippery Rock University of Pennsylvania*, 664 Fed.Appx. 170, 175 (3d Cir. 2016); *Kazar v. Slippery Rock University of Pennsylvania.*, 679 Fed.Appx. 156, 162 (3d Cir. 2017); *Patra v. Pennsylvania State System of Higher Education*, 2020 WL 2745727, at *8 (M.D. Pa. May 27, 2020); *Kazar v. Slippery Rock University of Pennsylvania.*, 679 Fed.Appx. at 162;*Stronach v. Va. State Univ.*, 631 F. Supp. 2d 743, 753 (E.D. Va. 2008); *Faculty Rights Coal. v. Shahrokhi*, 204 F. App'x 416, 419 (5th Cir. 2006); *Hays v. LaForge*, 113 F. Supp. 3d 883, 901, 905–6 (N.D. Miss. 2015); *Whiting v. University of Southern Mississippi*, 451 F.3d 339, 350–51 (5th Cir. 2006); *Frieder v. Morehead State University*, 770 F.3d 428, 430–31 (6th Cir. 2014); *Miller v. Michigan State University*, 2009 WL1885030, *7 (W.D. Mich. 2009); *Burton v. Board of Regents of University of Wisconsin System*, 2020 WL 5304493, at *14-15 (W.D. Wis. Sep. 4, 2020); *Meer v. Graham*, 611 F.Supp.2d 815, 830–31 (N.D. Ill. 2009); *Mullin v. Gettinger*, 450 F.3d 280, 281 (7th Cir. 2006); *Onyiah v. St. Cloud State University*, 5 F.4th 926, 931–33 (8th Cir. 2021); *Hussein v. Nevada System of Higher Education*, 2008 WL 11450864, at *6 (D. Nev. Jun. 27, 2008); *Pavel v. University of Oregon*, No. 6:16-cv-00819-AA, 2018 WL 1352150, at *10 (D. Or. Mar. 13, 2018); *Madden v. Regional University System, of Oklahoma*, 73 F. Supp. 3d 1341, 1347–48 (W.D. Okla. 2014).

Causal links are difficult to establish without direct evidence;[2605] in addition, a valid *Mt. Healthy* defense is as simple as showing that the same action would have been taken regardless of the plaintiff's speech.[2606] Direct evidence of an unconstitutional retaliatory animus linked to the adverse employment action within the 162 cases was rare—there were only seven cases in which the plaintiffs showed direct evidence of retaliation for their protected speech.[2607]

Within the seven cases in which the plaintiffs provided direct evidence of the defendant(s)'s retaliatory motivation, the defendants had written letters, reports, press statements, evaluations or emails stating that the cause for the adverse employment action was the protected speech in question. In three of the seven cases, the defendants stated that the plaintiffs had violated policy, and that was the impetus for the adverse employment action.[2608] But in the other four cases, the defendants offered no such excuse.[2609] All these cases were settled, and for obvious reason—such clear documentation of a constitutional violation is unusually damning evidence.

[2605] Most intellectuals with years of socialization into academic culture and knowledge of the First Amendment would instinctively avoid producing direct evidence of retaliatory animus, so this standard is often difficult for plaintiffs to meet.

[2606] Tepper & White, *supra* note 143, at 124 (citing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1976)); see also, Suzanne R. Houle, *Is Academic Freedom in Modern America on Its Last Legs after Garcetti v. Ceballos*, 40 CAP. U. L. REV. 265, 272 (2012).

[2607] *Crawford v. Columbus State Community College*, 196 F. Supp. 3d 766, 778 (S.D. Ohio 2016); *Hodge v. Antelope Valley Community College District*, 2014 WL 12776507, at *2 (Feb. 14, 2014); *Lopez v. Fresno City College*, 2012 U.S. Dist. LEXIS 32846 1, *13; *McGettigan v. Di Mare*, 173 F. Supp. 3d 1114, 1119–20 (D. Colo. 2016); *Meade v. Moraine Valley Community College*, 770 F. 3d 680, 6822 (7th Cir. 2014); *Sheldon v. Dhillon*, 2009 WL4282086 1, *2 (2009); *Smith v. College of the Mainland*, 63 F.Supp.3d 712, 719–20 (S.D. Tex. 2014).

[2608] *Hodge v. Antelope Valley Community College District*, 2014 WL 12776507, at *2; *Lopez v. Fresno City College*, 2012 U.S. Dist. LEXIS 32846, *13; *McGettigan v. Di Mare*, 173 F. Supp. 3d at 1119–20.

[2609] *Crawford v. Columbus State Community College*, 196 F. Supp. 3d 766, 778 (S.D. Ohio 2016); *Meade v. Moraine Valley Community College*, 770 F. 3d 680, 6822 (7th Cir. 2014); *Sheldon v. Dhillon*, 2009 WL4282086 1, *2 (2009); *Smith v. College of the Mainland*, 63 F.Supp.3d 712, 719–20 (S.D. Tex. 2014).

Without direct evidence, a plaintiff "must provide 'specific and substantial' circumstantial evidence" that the defendants' proffered reason for the adverse employment action is pretextual.[2610] Temporal proximity evidence longer than a few months was found to be insufficient to allege a causal link on its own, in most cases.[2611] In *Salaita* the president met with an unknown donor to discuss Salaita's appointment on the same day Salaita's contract was rescinded, a highly suspicious temporal proximity.[2612] In *Grigorescu*, the court found that the plaintiff had established a causal link through temporal proximity because within weeks of the defendant's appointment to a position in which he had the authority to affect Grigorescu's employment he had made policy changes that adversely affected her in particular.[2613] In contrast, in *Benison v. Ross*, the Sixth Circuit Court of Appeals stated that seven months between the protected speech and the adverse employment action was too long as evidence on its own.[2614] Benison also adduced evidence that she was the only professor the university had ever sued for repayment of her sabbatical pay (along with her husband's tuition remission); they showed that the hold on Benison's husband's transcript was also suggestive of a

---

[2610] *Alozie v. Arizona Bd. of Regents*, 431 F. Supp. 3d 1100, 1116 (D. Ariz. 2020).
[2611] *Appel v. Spiridon*, 2011 WL 3651353 1, *11 (D. Conn.) (finding that a temporal proximity of six weeks was sufficient to allege a causal link between the protected speech and the retaliatory action); *Faghri v. University of Connecticut*, 608 F. Supp. 2d 269, 275 (2009) (finding that whether the temporal proximity was six months or longer or only six weeks was a fact issue which precluded summary judgment); *Golovan v. University of Delaware*, 73 F. Supp. 3d 442, 455 (2014) (finding that temporal proximity of three months was not unusually suggestive of retaliatory animus); *Hays v. LaForge*, 113 F. Supp. 3d at 906 (finding that protected speech that occurred twenty-four to three years prior to the adverse employment action was insufficient to suggest a causal link).
[2612] *Salaita v. Kennedy*, 118 F.Supp.3d 1068, 1075 (N.D. Ill. 2015).
[2613] *Grigorescu v. Board of Trustees of San Mateo County Community College District*, 2019 WL 7050143, at *7 (N.D. Cal. Dec. 23, 2019). This finding was despite the fact that the retaliation occurred multiple years after the protected speech, because the defendant was not in a position to retaliate for multiple years.
[2614] *Benison v. Ross*, 765 F. 3d 649, 661 (6th Cir. 2014).

retaliatory animus, as it would not have been possible to place a hold on his transcript if the university had not sued Benison for repayment.[2615]

Other forms of circumstantial evidence can also adequately demonstrate a causal link. Bowers provided two examples of circumstantial evidence of a retaliatory animus: first, in swift succession, the defendant brushed off Bowers's complaints about her colleague and then took multiple adverse employment actions against the plaintiff, which served as temporal evidence of retaliation; second, the defendant made disparaging remarks to Bowers's colleagues about her, which suggested a possible retaliatory animus.[2616] In both cases involving faculty advisors to student newspapers (*Moore v. Watson* and *Scannell v. Pitt*), the plaintiffs were reprimanded in writing for the content of student articles published under their leadership, thus clearly documenting potential retaliatory animus.[2617]

5.2. The Courts and Academic Culture

The culture of academia inevitably shapes the conflicts that arise among academics and their institutions. This section examines how academic culture shows up in faculty free speech cases. The first subsection discusses the expectations of faculty in service and shared governance. The second subsection analyzes standards for professionalism among professors. The third and final section examines politics and "academic warfare," a term coined by the court in *Ezuma* to describe the kinds of conflict that occur when individual and institutional memories do not forget.[2618]

[2615] *Id.* at 661–63.
[2616] *Bowers v. University of Delaware*, 2020 WL 7025090, at *7 (D. Del. Nov. 30, 2020).
[2617] *Moore v. Watson*, 838 F.Supp.2d 735, 758 (N.D. Ill. 2012); *Scannell v. Pitt*, 2010 WL 2196580, at *2 (S.D. Cal. May 28, 2010).
[2618] *Ezuma v. City University of New York*, 665 F. Supp. 2d 116, 130 (E.D.N.Y. 2009).

5.2.1. Service and Shared Governance

When it comes to shared governance and institutional service, Areen has said that faculty governance speech ought to be protected by the First Amendment along with all other academic speech under an "academic matter" test.[2619] Nevertheless, the courts have not yet adopted Areen's more intuitive approach, and— except for *Demers v. Austin*— have mostly treated governance speech as unprotected under *Garcetti*.[2620]

The major exception for shared governance speech thus is found in *Demers v. Austin*.[2621] In *Demers*, the Ninth Circuit recognized that, "There may be some instances in which speech about academic organization and governance does not address matters of public concern," but still viewed Demers's speech regarding the reorganization of the communications school as falling under the academic exception to *Garcetti.*[2622] Notwithstanding the Ninth Circuit's ruling in *Demers*, the federal courts have mostly found that faculty speech made in the context of institutional service or shared governance was made "pursuant to official duties" and therefore fell outside the scope of the First Amendment.[2623] These cases can be classified into three categories:

1) Opposition to administration/policies
2) Advocacy for inclusion
3) Reporting misconduct or policy violations

[2619] Areen, *supra* note 3, at 994.
[2620] *Demers v. Austin*, 746 F. 3d at 416.
[2621] Id.
[2622] Id.
[2623] *Garcetti v. Ceballos*, 547 U.S. at 421.

5.2.1.1. Opposition to Administration or Policies

The following cases exemplify how faculty who opposed administrators or institutional policies were found to have spoken pursuant to official duties. In *Faghri v. University of Connecticut*, the Second Circuit Court of Appeals stated that a public university is not required to retain in policy making or management positions those who publicly oppose institutional policies.[2624] For this reason, Faghri, a dean of engineering who claimed his First Amendment rights had been infringed when he was demoted because of his outspoken opposition to university policies, was not protected by the First Amendment.[2625]

This ruling is problematic due to the dual-nature of the role of dean—deans serve as liaisons between the faculty and central/campus administration. Therefore, deans must represent both the interests of their faculty to their superiors, and the interests of their superiors to their school's faculty and staff. In *Faghri* the university administrators found fault with his vocal opposition to university policies, and about 1 in 4 faculty members within the school of engineering found the dean's leadership to be distasteful to them resulting in a petition of no-confidence.[2626] But given the nature of a job, a faculty approval rating of approximately 75% is nothing to scoff at.[2627] The fact that Dean Faghri

---

[2624] *Faghri v. University of Connecticut*, 621 F. 3d 92, 98 (2d Cir. 2010).
[2625] *Id.* at 98.
[2626] *Id.* at 95.
[2627] For some examples of deans' approval ratings, see, *Valuing Your Input*, UNIVERSITY OF KANSAS: DEAN'S OFFICE, https://collegedean.ku.edu/valuing-your-input (last visited Oct. 28, 2021) backed up to https://noraadevlin.files.wordpress.com/2022/10/valuing-your-input-_-dean_s-office_k_u.pdf; Conor Morris, *Faculty Give OU Deans Positive, Negative Marks in Annual Evals*, THE ATHENS NEWS, https://www.athensnews.com/news/campus/faculty-give-ou-deans-positive-negative-marks-in-annual-evals/article_d9313b34-49b4-11e5-9f95-0f638c461f86.html (last visited Oct. 28, 2021).

had recently initiated a merger of two departments almost surely played a role in this no-confidence petition.[2628]

Hays had opposed university-level changes to the undergraduate curriculum along with approximately one hundred other faculty members at his institution who signed a letter defending the current curriculum.[2629] The court found that because the speech concerned his employment and the curriculum changes would "impact [his] department" then the university curriculum "was conceivably a matter in which he was professionally involved as division chair."[2630] For these reasons, the court found that Hays spoke pursuant to his official duties and his speech was not subject to First Amendment protection.[2631]

In *Abcarian v. McDonald*, the court differentiated the plaintiff's speech from speech that would be protected under an academic exception to *Garcetti,* writing that Abcarian's speech addressed, "administrative policies that were much more prosaic than would be covered by principles of academic freedom."[2632] Abcarian had opposed allegedly inadequate university hospital policies relating to physicians' abuse of prescription drugs and operating room procedures.[2633] Such policies are not only fundamental to patient safety, but also essential to creating a productive and effective learning environment for medical students, interns, and residents. The Seventh Circuit's dismissal of such speech as "prosaic" is concerning, as it finds that the behaviors in

---

[2628] *Faghri v. University of Connecticut*, 621 F. 3d at 95.
[2629] *Hays v. LaForge*, 113 F. Supp. 3d 883, 903 (N.D. Miss. 2015).
[2630] Id.
[2631] Id.
[2632] *Abcarian v. McDonald*, 617 F. 3d 931, n. 5 (7th Cir. 2010).
[2633] *Id.* at 935.

question which threaten patient safety and the educational mission are quotidian *and* that the opposition to them lies outside of the scope of First Amendment protection.

Idaho State University Faculty Association for the Preservation of the First Amendment is a perfect example of shared governance in action. The administration censored a working draft of the new university senate constitution and bylaws by not allowing the working committee to send the draft to the faculty via an official list-serv because the draft was not sanctioned by the administration as it was written.[2634] The provost stated that she believed that the only reason the faculty would use the faculty-memos list-serv was to mislead the faculty into believing the administration had sanctioned the draft as written.[2635]

In *Isenalumhe* the district court for the eastern district of New York found that when the two plaintiffs spoke as a member of faculty committees, that speech was made by an employee and not a citizen.[2636] Specifically, the court concluded that the faculty plaintiff's complaints had to do with his ability to fulfill his role as a faculty member elected to and serving on various committees.[2637] The fact that the Second Circuit did not consider an academic exception for such faculty speech is concerning, since faculty committee speech is essential to the academic mission of the institution and is a major component of the shared/divided governance model. A department chair (an administrative role held by a faculty member) consistently interfering with faculty committee work can erode the power of shared governance to accomplish both the

---

[2634] *Idaho State University Faculty Association v. Idaho State University*, 857 F. Supp. 2d at 1058–59.
[2635] *Idaho State University Faculty Association v. Idaho State University*, 857 F. Supp. 2d 1055, 1059 (D. Idaho 2012).
[2636] *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367, 378–79 (E.D.N.Y. 2010).
[2637] *Id.* at 378.

educational mission and the business operations. Future review of cases wherein an administrator directly interferes in faculty governance procedures should require investigation into the purposes of the shared governance structure and ideally, testimony by expert witnesses as to how divergent the parties' behaviors were from the norm.

Shub is particularly illustrative in that it shows how both parties have behaved poorly (atrociously, even) and therefore neither party can be seen as sympathetic. When this is the case, it makes sense for judges to dismiss the case by relying on precedent, rather than to consider the issues at a more abstracted level. In *Shub*, the plaintiff had been chair of the academics committee within the faculty senate. In this capacity, the plaintiff raised concerns about the defendant, who would later become president of the college, and his behavior around students, specifically related to sexually inappropriate jokes.[2638] This speech by the plaintiff was seen as employee speech, despite the obvious concerns that the defendant may be negatively impacting the learning environment for the students (clearly an issue related to the core of the educational mission).[2639] One likely reason such speech was dismissed as employee speech, is the fact that the plaintiff himself was found to have committed sexual harassment against students numerous times and for this reason was asked to retire before he returned to teaching as an adjunct.[2640]

When courts view opposition to the administration or institutional policies as unprotected speech, they do so without recognizing the essential role faculty play in advocating for the educational mission within the shared governance structure of colleges and universities. When courts fail to view the work of faculty in shared governance as, at

---

[2638] *Shub v. Westchester Community College*, 556 F. Supp. 2d 227, 245 (S.D.N.Y. 2008).
[2639] *Id.*
[2640] *Id.* at 234–35.

times, necessarily oppositional or even adversarial to the administration and business operations of the institution, they further empower the administration to prioritize the business operations over the educational mission. Weakening the faculty's voice in shared governance by treating their speech on matters of public concern as unprotected because it was made "pursuant to official duties" does not take into account the shared governance context in which such speech is made. Students, contingent faculty, and local citizens rely on public colleges and universities to prioritize the educational mission for which they were founded and are funded to this day. The educational mission of public institutions of higher education is clearly a matter of public concern; to say to faculty that their essential role in this organizational structure is wholly undeserving of protection because it is too prosaic or self-serving ignores the organizational context in which the speech occurs.

5.2.1.2. **Advocating for More Inclusive Practices**

Two cases—*Alozie* (District of Arizona) and *Joritz* in the Tenth Circuit—exemplify how the courts have found faculty speech advocating for more inclusive practices as falling outside of the scope of First Amendment protections. These cases are noteworthy, not because they are representative of a common trend, but because of the precedents they set upon which future cases may rely. Importantly, *Joritz*'s case is "unpublished" in the sense that it cannot be used as binding precedent, however, it can be cited "for its persuasive value."[2641] If *Joritz* were the only case making the argument that advocating for inclusive practices was unprotected speech, its unpublished status may not

[2641] *Joritz v. Gray-Little*, 822 Fed.Appx. 731, n. * (10th Cir. 2020).

be quite so concerning, but because *Alozie* is precedential and makes a similar argument, the two together pose a substantial threat to future cases.

The judicial reasoning in *Alozie* is precarious. While the court found that Alozie's speech dealt with a matter of public concern (treatment and turnover of minoritized faculty members), the court ruled that the context of his speech showed he spoke pursuant to his official duties.[2642] The court found that Alozie, as a Black faculty member and chair of the ASU Black Caucus, wore "'two hats' at ASU [one of which] 'is that of diversity leader helping to build an environment conducive for women and minority scholars to succeed at ASU.'"[2643] In other words, the court ruled that as an underrepresented scholar of color, Alozie was hired to be a diversity leader and this was part of his official duties. The court does not address whether the same would or could be said of any white male faculty members. Indeed, it would appear that rather than a "hat" that Alozie wore because it was important to him to advocate for other underrepresented faculty in his school, his diversity-leader "hat" was actually something Alozie must wear because of his identity and failure to do so would be failure to fulfill his job expectations. Such a ruling is extremely troubling because of the differential effect it will have on faculty based on their minoritized identities.

Joritz, despite its "unpublished" non-precedent status, is similar to Alozie in the outcome, but using different reasoning. In this case, Joritz wanted to remove discriminatory (based on sex and national origin) student evaluations from her file, and advocated for practices that would promote equity for female and underrepresented

---

[2642] *Alozie v. Arizona Bd. of Regents*, 431 F. Supp. 3d 1100, 1118 (D. Ariz. 2020).
[2643] *Id.*

faculty members who are often discriminated against in their student surveys. The defendants argued, and the court agreed, that Joritz's complaints and advocacy for more inclusive practices related to student evaluations were not matters of public concern, but instead personal issues related to her own working conditions.[2644] The Tenth Circuit Court of Appeals found that "the context of her reports clearly manifests that her primary motive was personal" because, along with her suggestions of how to prevent future harms and stem discrimination, she had sought to have discriminatory remarks removed from her own personnel records.[2645] The court also found fault with Joritz's references to other women faculty who had had similar experiences because they chose to remain anonymous. The court wrote "conspicuously absent from this allegation is any indication that [Joritz] reported these instances of discrimination against other women, which strongly suggests that a concern for discrimination against others was not her principal motive."[2646] The court wrongly concluded that because Joritz did not violate her colleagues' trust by reporting instances of discrimination against their will, but instead simply advocated for them anonymously, that Joritz had actually only been out for herself in making her complaint. Indeed, there was ample evidence that Joritz had advocated for a change in institutional policy and procedure to be more inclusive of women and minority faculty who are most often on the receiving end of discriminatory student comments.[2647]

[2644] *Joritz*, 822 Fed.Appx. at 739.
[2645] *Id.* at 741. These remarks included students calling Joritz a Nazi because of her German heritage and accent.
[2646] Id.
[2647] *Id.* at 739.

5.2.1.3. Reporting Policy Violations or Misconduct

Numerous faculty members reported misconduct or policy violations and claimed First Amendment retaliation after suffering a subsequent adverse employment action. Some cases involved concerns related to public health and safety,[2648] while others related to discriminatory conduct on search committees[2649] or by individual colleagues or administrators.[2650] The vast majority of these cases were decided in favor of the defendants,[2651] many finding that when the plaintiffs reported the misconduct their speech was not protected under the First Amendment.[2652] As described in chapter four, a number of these plaintiffs reported the alleged misconduct or policy violations to staff or administrators outside of their chain of command, yet the courts still treated this speech as "chain of command" speech, unworthy of protection.[2653] In these cases, the courts have conflated "chain of command" speech with "intramural" speech, or any speech made within the institutional context. In doing so, the court has relied on a misunderstanding of

---

[2648] *Abcarian v. McDonald*, 617 F. 3d 931; *Khatri v. Ohio State Univ.*, 2020 WL 5340233; *Nuovo v. The Ohio State University*, 726 F. Supp. 2d 829 (S.D. Ohio 2010).
[2649] *Meyers v. California University of Pennsylvania*, 2013 WL 795059 (W.D. Pa. Mar. 4, 2013); *Plouffe v. Cevallos*, 777 Fed.Appx. 594 (3d Cir. 2019).
[2650] *Beverly v Watson*, 78 F. Supp. 3d 717 (N.D. Ill. 13-Jan-15); *Bowers v. University of Delaware*, 2020 WL 7025090 (Nov. 30, 2020); *Golovan v. University of Delaware*, 73 F. Supp. 3d 442 (2014); *Shearn v. West Chester University of Pennsylvania*, 2017 WL 1397236 1 (E.D. Pa. 4/19/17).
[2651] *Cf. Beverly v. Watson*, 2017 WL 4339795, at *3 (N.D. Ill. Sep. 29, 2017) (finding that plaintiffs had adequately adduced sufficient evidence of retaliation); *Bowers*, 2020 WL 7025090, at *5 (finding that the plaintiff had spoken as a citizen when she reported her colleague's discriminatory remarks and participated in the mediation hearing for his subsequent grievance).
[2652] *Abcarian v. McDonald*, 617 F. 3d at 937; *Khatri v. Ohio State Univ.*, 2021 WL 534904, at *8 (Feb. 12, 2021); *Meyers v. California University of Pennsylvania*, 2014 WL 3890357 1, *14; *Nuovo v. Tbe Ohio State Univ.*, 726 F. Supp. 2d at 843; *Plouffe v. Cevallos*, 777 Fed.Appx. at 603; *Shearn v. West Chester University of Pennsylvania*, 2017 WL 1397236, *11-12.
[2653] *Golovan v. University of Delaware*, 73 F. Supp. 3d at 454; *Khatri*, 2021 WL 534904, at *8; *Meyers v. California University of Pennsylvania*, 2014 WL 3890357, *14; *Plouffe v. Cevallos*, No. 5:10-cv-01502, 2016 WL 1660626, at *8 (E.D. Pa. Apr. 27, 2016).

organizational structures that further erodes whistleblower protections for public higher education faculty.

The ruling by the District Court for the Eastern District of Pennsylvania in *Shearn*, is concerning for another reason. In this case, the Spanish department chair blatantly and explicitly stated his intention to continue to disregard a portion of the faculty's collective bargaining agreement (CBA) for which Shearn had worked to raise awareness.[2654] After publicly admitting to the unwillingness of the department to honor its contractual obligations to its faculty, the department also cut Shearn's course load which eliminated her eligibility for health insurance, just one semester before she would have been eligible for a promotion under the aforementioned section of the CBA.[2655] Nevertheless, the district court ruled that Shearn's speech—raising awareness of this little-known section of the CBA, and reporting the department's determination not to honor it—was not a matter of public concern.[2656] How could a government entity breaching a contract not constitute a matter of public concern? Just because a breach of contract is *also* a matter of *personal* concern to the adjunct plaintiff in this case who lost her health insurance for her whole family, does not mean it is therefore not a matter of concern to the public whose tax dollars are supposed to be supporting the educational mission of the institution.

In conclusion, reporting policy violations, as well as opposing institutional policies and advocating for more-inclusive practices have all been found to be unprotected speech. Such speech is necessary for the effective and purpose-driven

---

[2654] *Shearn v. West Chester University of Pennsylvania*, 2017 WL 1397236, *3.
[2655] Id.
[2656] *Id.* at *11-12.

functioning of a public institution of higher education structured around principles of shared governance. Through service and shared governance structures (e.g., faculty senates, committees), faculty voices advocate for the centrality and prioritization of the educational mission over the business operations for which the administration is charged. The shared governance model charges faculty with holding the institution accountable to its educational mission, thus when faculty speak pursuant to this responsibility as the officers of the educational mission, they expect some pushback or opposition, but rarely expect retaliation. By treating this speech as not protected because it was made pursuant to official duties or because it was not a matter of public concern, the courts have imperiled not just the ability of the faculty to hold institutions accountable to their educational missions, but also jeopardized the efficacy of the most common organizational structure among public colleges and universities.

5.2.2. "Professional" Standards

One scenario in which the courts have justified deferring to the administrations of colleges and universities is when the institution can produce evidence that the faculty member behaved contrary to ordinary professional standards. What constitutes professional or appropriate behavior for professors is not always clear (e.g., when is a demand for "collegiality" a demand for marginalized faculty to submit to hostility or abuse without complaint?),[2657] while other instances of unprofessionalism are undeniable. In *Burton*, for instance, the plaintiff was found to have violated professional norms when

---

[2657] Tiffany D. Joseph & Laura E. Hirshfield, *'Why Don't You Get Somebody New to Do It?' Race and Cultural Taxation in the Academy*, 34 ETHNIC AND RACIAL STUDIES 121, 132 (Jan. 2011); Bridget Turner Kelly et al., *Recruitment without Retention: A Critical Case of Black Faculty Unrest*, 86 THE JOURNAL OF NEGRO EDUCATION 305, 313 (2017).

she provided recordings of faculty meetings including confidential personnel information to her husband who subsequently uploaded this sensitive material to his website.[2658] In *Buchanan*, the plaintiff was found to have behaved unprofessionally when she repeatedly used profanity and discussed the sex lives of her and her students during classes related to early-childhood education.[2659] Similarly, Professor D'Andrea was found to have "created a hostile environment that [made] problem solving and the civil exchange of ideas impossible."[2660] D'Andrea managed to file more than 70 formal complaints in 14 months and in one of the disciplinary actions brought against the plaintiff, a mutually-selected arbitrator characterized him as "assertive, disagreeable, abrasive, acerbic, insensitive, and abusive of people, process and procedure."[2661]

In some cases, allegations regarding a plaintiff's lack of collegiality or professionalism would co-occur alongside concerns that a plaintiff may be unfit for duty.[2662] For example, in *Miller v. University of Southern Alabama*, Miller's chair recommended her non-reappointment due to "serious problems regarding her collegiality" and stated that "she does not appear to be a good fit for our department."[2663] In *Smock v. Board of Regents of University of Michigan*, Smock was found to have behaved inappropriately and "failed to maintain professional boundaries with students"

[2658] *Burton v. Board of Regents of University of Wisconsin System*, 2020 WL 5304493, at *6 (W.D. Wis. Sep. 4, 2020).
[2659] *Buchanan v. Alexander*, 284 F. Supp. 3d 792, 817 (M.D. La. 2018).
[2660] *D'andrea v. University of Hawaii*, 686 F. Supp. 2d 1079, 1089 (D. Haw. 2010).
[2661] *Id.* at 1081.
[2662] *See DePree v. Saunders*, 588 F. 3d 282, 286 (5th Cir. 2009); *Appel v. Spiridon*, 2011 WL 3651353 1, *3-4; *Jensen v. Western Carolina University*, 2012 WL 6728360 1, *21 (W.D.N.C.); *Keating v. University of South Dakota*, 569 Fed.Appx. 469, 470 (8th Cir. 2014); *Martin v. Bailey*, 2015 WL 927716 1, *4 (2015); *Miller v. Univ. S. Ala.*, 2010 U.S. Dist. LEXIS 48643 1, *17; *Smock v. Board of Regents of University of Mich.*, 353 F. Supp. 3d 651, 654–55 (E.D. Mich. 2018); *Wozniak v. Adesida*, 932 F.3d 1008, 1010 (7th Cir. 2019).
[2663] *Miller v. Univ. S. Ala.*, 2010 U.S. Dist. LEXIS 48643, *17 (S.D. Ala. 2010).

and was subsequently sanctioned for three years because she was found to be unfit to work with graduate students in traditional ways expected of tenured faculty members.[2664] In *Wozniak*, the court wrote that "professors who harass and humiliate students cannot successfully teach them, and a shell-shocked student may have difficulty learning in other professors' classes. A university that permits professors to degrade students and commit torts against them cannot fulfill its educational functions."[2665] In other words, the judges for the Seventh Circuit even felt confident to say that Wozniak's behavior was unfitting for a professor working with students. Unfortunately, the judges in the Sixth Circuit did not take an analogous stance on similarly gender harassing and demeaning behaviors exhibited in *Meriwether*.[2666]

It is also worth noting that the validity or value of a faculty member's credentials was a repeat concern when questions of professionalism or fitness for duty arose. Multiple faculty members were found to have used fraudulent credentials to get their positions.[2667] In other cases, faculty members alleged that their colleagues had questionable credentials and claimed they were consequently victims of retaliation.[2668] Finally, in a few cases, allegedly less-qualified applicants were hired despite the plaintiffs' alleged superiority.[2669]

[2664] *Smock v. Board of Regents of University of Mich.*, 353 F. Supp. 3d 651, 654–55 (E.D. Mich. 2018).
[2665] *Wozniak v. Adesida*, 932 F.3d 1008, 1010 (7th Cir. 2019).
[2666] *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021).
[2667] *Martin v. Bailey*, 2015 WL 927716 1; *Grant v. The Trustees of Indiana University*, 870 F.3d 562 (7th Cir. 2017).
[2668] *Rehman v. State University of New York at Stony Brook*, 596 F.Supp.2d 643, 648 (E.D.N.Y. 2009); *Ezuma v. City University of New York*, 665 F. Supp. 2d 116, 118–19 (E.D.N.Y. 2009).
[2669] *Isabell v. Trustees of Indiana University*, 432 F.Supp.3d 786 (N.D. Ind. 2020); *Crawford v. Columbus State Community College*, 196 F. Supp. 3d 766 (2016); *Mtshali v. New York City College of Technology*, 2008 WL 4755681 (S.D.N.Y. 2008).

Professional standards in these faculty free speech cases generally revolve around the existence of one's academic credentials, non-confrontational behavior towards students and colleagues, and mental and psychological "fitness" for duty. These aspects of "professionalism" reflect concerns from colleagues and administrators about internal conflicts within the department or classroom. In contrast, professional standards for faculty in most higher education literature (as opposed to judicial decisions) would connote something more like disciplinary standards for peer review, research methods, and the like. While bullying students or colleagues, falsifying academic credentials, and lying about authoring a peer-reviewed article are obviously unprofessional behaviors committed by the *plaintiffs* in these cases, nevertheless, the courts have still had to state as much for the record in order to justify the dismissal of the claims.

5.2.3. Politics and "Academic Warfare"

An important theme throughout higher education law, but especially cases involving faculty plaintiffs is that of college/departmental politics. In *Ezuma*, the court called the years-long politically motivated dispute "open academic warfare"[2670] and the metaphor was cited by the court in *Isenalumhe* in describing the "nearly ten-year war of attrition" in that case.[2671] Cases involving "academic warfare" can be characterized by years-long conflicts that create dissension and sometimes fracture departments into opposing groups. As previously discussed, *Shub* involved an adjunct in the early 2000's who had been in conflict with the president of the university since the early 1980's.[2672] Additionally, the *Berrios* case described harassment and a hostile work environment for

---

[2670] *Ezuma v. City University of New York*, 665 F. Supp. 2d 116, 130 (E.D.N.Y. 2009).
[2671] *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367, 381 (E.D.N.Y. 2010).
[2672] *Shub v. Westchester Community College*, 556 F. Supp. 2d 227, 233 (S.D.N.Y. 2008).

over ten years after the plaintiff had allegedly discovered that one of the defendants had falsified scientific data.[2673]

5.2.3.1. Long-term Animosity

In many of the cases in which a faculty member opposes the administration, longstanding animosity between the parties leads to bad facts which often lead to bad law. The issue in *Isenalumhe* and in *Shub* is that the plaintiffs specifically complained about the inappropriate behavior of their respective defendants within the context of an academic "war." The problem is that in war all parties are adversaries and all parties' behaviors can be seen as suspicious, unkind, or retaliatory at one point or another. Judges are tempted to settle the issue through reliance on the established law to dispose of the case as quickly as possible and avoid having to choose between the lesser of two evils. But this does not leave room for developing a more robust case law when it comes to faculty expression, especially relating to matters directly supporting the educational mission of the public college or university. Judge Aiken for the District of Oregon, on the other hand, demonstrates outstanding finesse and nuance in an especially delicate case, writing "I recognize that, as a practical matter, institutional memory can be long, and individuals may not forget exercises of free speech rights that they disagreed with, going back two, four, or ten years."[2674] This observation is especially poignant in light of the numerous cases described below which show how retaliation can and does occur even years after protected speech was originally made.

[2673] *Berrios v. State Univ. of New York at Stony Brook*, 518 F. Supp. 2d 409, 414 (E.D.N.Y. 2007).
[2674] *Pavel*, 2018 WL 1352150, at *8.

One example of waiting until the moment was right is from *Bowers*—a case in which the plaintiff served as department chair while one of the professors in the department made disparaging racist comments about students.[2675] Bowers reported the comments according to university policy and included the remarks in her annual evaluation of the professor in question.[2676] The issue resulted in arbitration at which Bowers testified.[2677] The court found both the reporting of the comments, the inclusion of them in the annual evaluation and the arbitration, when viewed in the light most favorable to the plaintiff, were protected speech.[2678] After Bowers participated in the two-year-long arbitration process prompted by the grievance proceedings surrounding the racist comments, the vice provost for faculty affairs made it clear that nothing would be done to address the inappropriate behavior of the professor in question.[2679] Shortly thereafter, the same vice provost retaliated against Bowers by requiring her to undergo behavioral and mental health evaluation, requiring her to take voluntary leave at the threat of termination, and more.[2680] This exemplifies long-term animosity and academic warfare because the vice provost used his political power to wage a multi-year war against Bowers who had merely attempted to report inappropriate behavior that violated university policy.

An even longer time passed between Grigorescu's protected speech and her experiences of retaliation. In this case, Grigorescu had been party to a lawsuit against her

---

[2675] *Bowers v. University of Delaware*, 2020 WL 7025090, at *1 (D. Del. Nov. 30, 2020).
[2676] *Id.*
[2677] *Id.* at *2.
[2678] *Id.* at *5-6.
[2679] *Id.* at *2.
[2680] *Id.*

college employer on behalf of a campus and community organization created to prevent an open-space garden on campus from being converted into a parking lot.[2681] One of the attorneys for the college during this lawsuit—who knew of Grigorescu's involvement and leadership—became an administrator at the college while the lawsuit continued through the courts, but nearly three years after the filing of the lawsuit.[2682] Grigorescu provided evidence that the administrator began retaliating against her within weeks of assuming his administrative role at the college.[2683] She thus showed that he had been waiting years until he had the power and the chance to retaliate against her for her involvement in the lawsuit.

Other cases spanned a shorter timeframe. In *Weinstein v. University of Connecticut*, the plaintiff's speech predated his adverse employment action by approximately one year.[2684] Meanwhile, the administrators in *Krukenkamp* took an adverse action against the plaintiff approximately six months after the plaintiff's protected speech.[2685] The defendants' motions for summary judgment were denied and eventually the case was settled for $150,000. Importantly, the court recognized in *Krukenkamp* that defendants wait to act against a plaintiff until the moment is right (as in *Grigorescu*), which is especially true in the academic workplace.[2686]

[2681] *Grigorescu v. Board of Trustees of San Mateo County Community College District*, 2019 WL 7050143, at *1 (N.D. Cal. Dec. 23, 2019).
[2682] *Id.* at *2.
[2683] Id.
[2684] *Weinstein v. University of Connecticut*, 136 F.Supp.3d 221, 229–30 (D. Conn. 2016).
[2685] *Krukenkamp v. State University of New York at Stony Brook*, 2010 395 Fed.Appx. 747, 750 (2d Cir.).
[2686] Id.

5.2.3.2. Departmental Outcasts

One apparent example of how one's speech can result in becoming the departmental outcast, can be found in the case of *Appel v. Spiridon*.[2687] Appel, an art professor at Western Connecticut State University (WCSU) testified for a plaintiff in a discrimination suit against Appel's department at WCSU, attesting to the discriminatory conduct taken by her colleagues.[2688] Within one week she received a written warning from the department chair, and within months all of her full-time colleagues in the art department had signed and filed a petition complaining about Appel.[2689] Consider how being treated with hostility by every one of one's coworkers might affect her behavior. Unsurprisingly, any defensiveness or paranoia exhibited by Appel was taken as further evidence that she was "unprofessional."[2690]

Like Appel, *Plouffe v. Cevallos* is a case in which a complaint about the plaintiff's colleagues' discriminatory conduct resulted in a departmental schism. This case also includes a decade-long conflict. Plouffe, an assistant professor of criminal justice, was terminated after he served on a search committee for a temporary faculty role and subsequently filed a complaint about policy violations that occurred in the process of the search. After Plouffe blew the whistle on the inappropriate conduct of his colleagues, his relationships with his colleagues in his department soured.[2691] In fact, the department filed a complaint with the dean alleging 140+ issues with Plouffe.[2692] The reasons given

---

[2687] *Appel v. Spiridon*, 2011 WL 3651353 1, *3 (D. Conn.).
[2688] Id.
[2689] Id.
[2690] Id.
[2691] *Plouffe v. Cevallos*, No. 5:10-cv-01502, 2016 WL 1660626, at *3 (E.D. Pa. Apr. 27, 2016).
[2692] Id.

for his termination was "failure to develop constructive relationships, [and] contributing to significant conflicts preventing the Criminal Justice Department from functioning."[2693] Plouffe appeared to be a scapegoat for the academic warfare taking place within his department following his whistleblowing activity. The original whistleblowing took place in Spring 2009, and the case took a decade to resolve (the Third Circuit issued its final decision in June 2019), evincing how long political academic conflicts can last.[2694]

In *Depree v. Saunders*,[2695] Dean Williams—DePree's dean—alleged in a letter to the university president that

> 'Dr. DePree has engaged in behaviors that have severely constrained the capacity of SAIS [School of Accountancy and Information Systems] and the College of Business' and that DePree had helped to create 'an environment in which faculty members and students do not feel safe to go about their usual business.' Williams described specific and ongoing instances of what he perceived to be DePree's negative and disruptive behavior. Williams also asserted that DePree was the only Accounting [*sic*] faculty member who had failed to 'engage in the scholarly or professional activities necessary to be labeled academically-qualified or professionally-qualified by the University's accrediting agency, AACSB' [Association to Advance Collegiate Schools of Business].[2696]
>
> Enclosed with this letter were eight other letters from professors who described DePree's disruptive and intimidating behavior.[2697] In addition to the complaints of

---

[2693] *Id.* at *4.
[2694] *Plouffe v. Cevallos*, 777 Fed.Appx. 594 (3d Cir. 2019).
[2695] *DePree v. Saunders*, 588 F. 3d 282 (5th Cir. 2009).
[2696] *Id.* at 284–85.
[2697] Id.

> administrators about DePree's behavior and fitness for duty, eight faculty colleagues found DePree to be a bully and did not want to work with him. Likewise, DePree "refused to comply with the professional research requirements" of his department, which must have made him even less likeable, in addition to negatively affecting the department's standing with its professional accreditors.[2698]

Like DePree, *Gadling-Cole* was a case in which the department turned against the plaintiff.[2699] *Gadling-Cole* was a Black woman social work professor who applied for a tenure-track job in the department where she had been employed as an adjunct, only to be denied the position due to her political/religious stance on LGBTQ rights.[2700] The case decided in 2012 (prior to *Obergefell*), and the rest of the social work department (all white) found her religious views offensive.[2701] Whether or not the plaintiff's views were ever relevant to her work or her interactions with her colleagues is unclear from the record, but the colleagues were united in their belief that she should not be hired due to her failure to vocally support LGBTQ people.[2702] Indeed, the plaintiff's colleagues continually discouraged students from attending events organized by the plaintiff. While the plaintiff's First Amendment claims were dismissed, her Title VII religious

---

[2698] *Id.* at 285.
[2699] *Id.* at 393.
[2700] *Id.* at 392.
[2701] *Id.* at 394.
[2702] *Gadling-Cole v. West Chester University*, 868 F.Supp.2d 390, 392 (E.D. Pa. 2012).

discrimination claim went before a jury and the defendants were found to have retaliated against the plaintiff based on her religious beliefs.[2703]

Howell similarly exemplifies the trend of the department targeting a faculty member who does not belong or "fit" with the rest of the department.[2704] In this case, Howell alleged that he was denied promotion to full professor, demoted, and suffered in a hostile work environment for various unlawful reasons, including in retaliation for his free speech.[2705] In this case, the plaintiff was a professor at one PA State System of Higher Education (PASSHE) school but found out he would be retrenched, so he applied to the corresponding position (Choral Director) at another PASSHE school, Millersville University, which was at the rank of Associate Professor.[2706] PASSHE's collective-bargaining agreement only required that the plaintiff be minimally qualified for the position.[2707] The faculty of Millersville's music department voted that he was not minimally qualified, despite his doctorate in music with a secondary concentration in choral conducting, because the job posting advertised the applicant at minimum should have completed all the requirements for a doctorate in choral conducting except the dissertation.[2708] Despite the faculty's belief that the plaintiff was not qualified, the university president made the final decision and did find the plaintiff was minimally qualified.[2709] Thus the plaintiff was hired into a department that was already set against

---

[2703] Judgment, *Gadling-Cole v. West Chester University of Pennsylvania*, No. 2:11-cv-00796, Doc. 72 (E.D. Pa. May 27, 2014), https://www.courtlistener.com/docket/5007082/gadling-cole-v-west-chester-university/.
[2704] See *supra* section 4.3.5..
[2705] *Howell v. Millersville University of Pennsylvania*, 283 F. Supp. 3d 309, 316 (E.D. Pa. 2017).
[2706] *Id.* at 317.
[2707] Id.
[2708] Id.
[2709] Id.

him.[2710] Unsurprisingly, the department members were not thrilled with the president's executive decision, and plaintiff's role as choral director was limited to the Men's Glee Club while an adjunct continued conducting the "more advanced choral ensembles."[2711] In addition to the department chair's tight leash on the plaintiff's activities, several members of the department met with the dean to complain about the plaintiff as well.[2712] This continued over the course of multiple years, during which the department faculty continued to express their beliefs that the plaintiff was underqualified for his position.[2713] This case thus exemplifies departmental/institutional politics and academic warfare because from the moment of the plaintiff's hire, he was treated as an outsider in the department.[2714]

5.2.3.3. Consequences of Critiquing the Administration

In one example of drawing battle lines among academics, the plaintiff in *Zelnik v. Fashion Institute of Technology* (FIT) spoke out repeatedly and very publicly against his employer, because of FIT's plan to alter the flow of the street he lived and worked on.[2715] When his department attempted to award him with the title of "professor emeritus" the effort was blocked by the president who found the plaintiff's behavior inappropriate for someone with such an honorific.[2716] While this case does not include the sort of

---

[2710] Id.
[2711] Id.
[2712] *Id.* at 319.
[2713] *Id.* at 320.
[2714] *Id.* at 317-321.
[2715] *Zelnik v. Fashion Institute of Technology*, 464 F. 3d 217, 220–21 (2d Cir. 2006).
[2716] *Id.* at 223.

dissension seen within some departments, it is a good example of what can happen when faculty speak so bluntly as to border on slander.[2717]

In contrast to the FIT case, *Faghri v. University of Connecticut* was a case where the conflict drew battle lines across an entire school. The plaintiff, the dean of the school of engineering, had initiated plans to merge two departments.[2718] This upset some of the professors affected by the merger, and prompted them to partner with administrators who were already unhappy with Dean Faghri for other reasons, to circulate petitions for a vote of no confidence in the dean and to request his removal from the deanship.[2719] Faculty members and administrators partnered with each other to take down the dean who had been vocally disagreeing with other members of leadership.

Benison v. Ross at Central Michigan University also described retaliation for critiquing administrators, but it is unusual because the speech was made by the faculty member's spouse and not the faculty member herself.[2720] After Benison's husband initiated a no-confidence vote in the president and the provost in the university senate, Benison was targeted for retaliation.[2721] Evidence of the political animosity can be found in her dean's emails to her chair, the provost, and two other administrators documenting the chair's frustrations with Benison's service while her application for salary

---

[2717] *Id.*
[2718] *Faghri v. University of Connecticut*, 621 F. 3d 92, 95 (2d Cir. 2010).
[2719] *Id.*
[2720] *Benison v. Ross*, 765 F. 3d 649, 654 (6th Cir. 2014).
[2721] *Id.* at 656.

adjustment[2722] based on an outside offer was still pending.[2723] Likewise, when Benison protested the allegations that her service was inadequate to merit promotion or salary adjustment, the chair allegedly responded "don't bother filing an appeal because the dean will only go along with me."[2724]

In *Wilkerson v. University of North Texas*, Wilkerson was fired on the pretext that he had an inappropriate relationship with a student (before she ever became a student at the university); Wilkerson argued the real reason was because he did not support renewal of his department chair.[2725] Despite a Title IX investigation finding that Wilkerson had not violated policy, his chair fired him "for cause" citing his "poor judgment" and made false representations to the dean who approved the plaintiff's non-renewal.[2726] There was additional evidence that the dean and the chair repeatedly disregarded policy and procedure throughout the plaintiff's termination and grievances.[2727]

Additionally, Toth, Peterson, and Meyers, also claimed they were victims of retaliation after they had been critical of administrators. Toth stands out because as union president, she was retaliated against for the speech in the union's newsletter, including inappropriate physical contact by her supervisor in front of colleagues.[2728] Peterson had criticized the president of Dixie State University in Utah and in a strange series of events,

---

[2722] In academia, it is common for institutions to view an outside/external offer as the primary means by which to prompt salary adjustments or other contract negotiations for an individual faculty member. These are often referred to as "retention adjustments." For example, see, University of Washington, *Retention Salary Adjustments*, UNIVERSITY OF WASHINGTON: POLICIES AND PROCEDURES, https://ap.washington.edu/ahr/policies/compensation/retention-salary-adjustments/ (last visited Nov. 10, 2022).
[2723] *Benison v. Ross*, 765 F. 3d, at 654.
[2724] Id.
[2725] *Wilkerson v. University of North Texas*, 223 F.Supp.3d 592, 606–7 (E.D. Tex. 2016).
[2726] *Id.* at 600.
[2727] *Id.* at 599-600.
[2728] *Toth v. California University of Pennsylvania*, 844 F. Supp. 2d 611, 621 (W.D. Pa. 2012).

the disciplinary procedure leading to Peterson's termination was outsourced to a state higher education official rather than being conducted according to university policy because of the president's potential conflict of interest.[2729] Finally, in Meyers, an untenured graphic design professor reported his department chair for misconduct and policy violations resulting in a hostile work environment, and attempts by the chair to corrupt the work of the faculty hiring committee Meyers was chairing.[2730] The art department had become divided into those who supported the department chair and those who sided with Meyers and believed the chair's behavior was inappropriate and unethical.[2731]

While long-term animosity, departmental divisions, and the critiquing of administrators were each common themes on their own, they often overlapped with each other under the larger umbrella of academic warfare. As the court in *Smith* noted, Sayre's law, a common adage, states that "academic politics is the most vicious and bitter form of politics, because the stakes are so low."[2732] The cases reviewed in section 5.2.3. exemplify the low stakes referenced—rarely was anything more than ego at stake for at least one of the parties involved (often both). Even though Sayre's law was cited in *Smith v. College of the Mainland,* this was the only appearance of the adage in the thousands of pages of the more than two-hundred decisions. As evidenced in this section, faculty free speech cases repeatedly demonstrate the idiosyncratic culture of the academy, yet the

---

[2729] *Peterson v. Williams*, 2020 U.S. Dist. LEXIS 68206 1, *3-4 (D. Utah).
[2730] *Meyers v. California University of Pennsylvania*, 2013 WL 795059, at *2-3 (W.D. Pa. Mar. 4, 2013).
[2731] *Id.* at *3.
[2732] *Smith v. College of the Mainland*, 63 F.Supp.3d 712, 718 (S.D. Tex. 2014) citing *Sayre's Law*, WIKIPEDIA, https://en.wikipedia.org/wiki/Sayre%27s_law (last visited Dec. 9, 2022).

courts still have not adopted a jurisprudence that recognizes the unique traits of a mission-driven culture developed throughout a history of shared governance.

5.3. Educational Mission

Only a small number of the 162 cases in this dissertation directly mentioned the "educational mission" of colleges and universities in court decisions.[2733] It is not unreasonable to infer that the educational mission was not central to the legal analyses conducted by the courts in these cases. The cases analyzed in this dissertation indicate that federal courts are not considering the values of academic freedom and shared governance when analyzing faculty speech cases. Indeed, the analysis indicates that the educational mission of the institution does not fit anywhere under the current judicial standard. This section, therefore, posits that to protect academic freedom and shared governance, the courts should shift their approach to faculty free speech cases by focusing their inquiry on the educational mission of institutions of higher education.

As stated above in Section 1.2., the courts' deference towards universities has generally inhered with the administration rather than the faculty;[2734] however, this dissertation argues that based on the bifurcation of responsibilities between administrators and faculty which bestows faculty with the work of carrying out the educational mission of the institution, the deference of the courts ought to be awarded to

---

[2733] *Alberti v. University of Puerto Rico*, 818 F. Supp. 2d 452, 475 (D.P.R. 2011); *Beverly v. Watson*, 2017 WL 4339795, at *10 (Sep. 29, 2017); *Buchanan v. Alexander*, 284 F. Supp. 3d 792, 828 (M.D. La. 2018); *Lyons v. Vaught*, 875 F.3d 1168, 962 (8th Cir. 2017); *McReady v. O'Malley*, 804 F.Supp.2d 427, 444, 447 (D. Md. 2011); *Piggee v. Carl Sandburg College*, 464 F. 3d 667, 672 (7th Cir. 2006); *Tracy v. Fla. Atl. Univ. Bd. of Trs.*, 2017 WL 4962652, *5 (S.D. Fla.).

[2734] See, for instance, James D. Jorgensen & Lelia B. Helms, *Academic Freedom, the First Amendment and Competing Stakeholders: The Dynamics of a Changing Balance*, 32 THE REVIEW OF HIGHER EDUCATION 1, 8–9 (Johns Hopkins University Press Aug. 2008).

the faculty rather than the administration. Based on Areen's government-as-educator doctrine, a judicial standard based on the educational mission would grant deference to academic decisions made or authorized by the faculty (or a faculty committee). This contrasts with certain high-profile cases since *Garcetti* in which courts overturned academic decisions made by faculty (e.g., *Adams v. The Trustees of UNC-Wilmington*).[2735] Likewise, Post's assertion (that institutions ought to be primarily afforded deference in accordance with their need to carry out their missions) logically extends to this dissertation's argument that judicial deference ought to be awarded to the party who is most responsible for the institutional missions, which in higher education is the faculty. Thus, this section lays out a theoretical reimagining of what courts ought to consider based on the educational mission of higher education if they want to protect academic freedom and shared governance. While this section does not present a *legal* standard, it does define a theoretical, mission-based inquiry, offering considerations to preserve academic freedom and shared governance. Five exemplar cases are then analyzed by contrasting the application of the theory-driven educational mission inquiry with the real outcome of the cases.

[2735] *Adams v. Trustees of the Univ. of NC-Wilmington*, 640 F. 3d 550 (4th Cir. 2011). Analysis of this case in the dissertation will also include a discussion of Paul Horwitz's structural institutionalist approach to the First Amendment as developed in his book First Amendment Institutions.HORWITZ, *supra* note 48.

5.3.1. An Alternative Inquiry

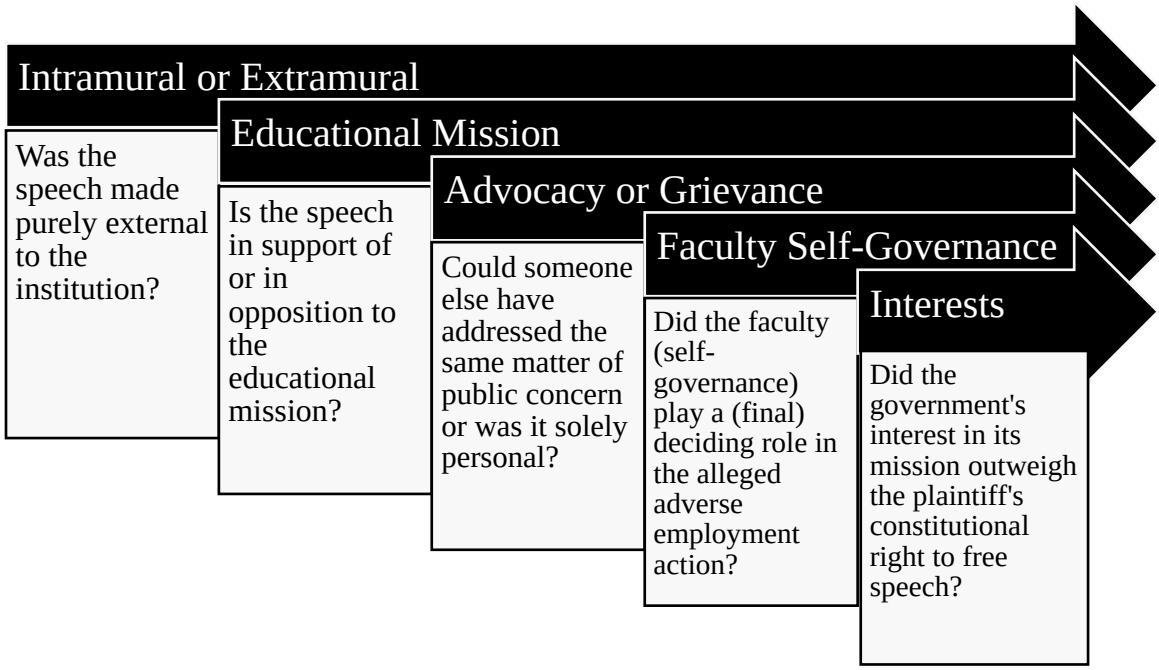


Figure 18 An Educational-Mission-Based Inquiry

Figure 18 An Educational-Mission-Based Inquiry, above depicts a theoretical inquiry in faculty speech cases proposed in light of the failures of the *Garcetti* standard for public higher education faculty free speech jurisprudence. First, the inquiry considers whether the speech was intramural or extramural.[2736] This question is included because it asks by what authority the government can discipline the speech in context (governing or managerial authority, see section 1.1. above). If the speech addressed a matter of public concern and was clearly made as a citizen fully outside of one's capacity as a faculty member (e.g., as in *Grigorescu* wherein the plaintiff acted as a community member and

[2736] See *supra* section 2.4. Academic Freedom and Intramural Speech: Scholarly Literature

citizen to organize a lawsuit that would bar the college from paving over a community garden), the government would be acting according to its governing authority and thus has extremely limited discretion to police free speech.[2737]

The educational mission question asks whether the speech hinders or supports the educational mission. This question assesses the managerial authority of the institution in determining the outcome of the speech. Any question that analyzes the content, form, and context of faculty speech will inevitably be subjective, as is already the case under the current matter of public concern test.[2738] Whether the speech's content, form, and context support or hinder the educational mission, however, is a question better tailored to evaluate the institution's exercise of its managerial authority than *Connick*'s public concern test.

The next consideration is whether the speech addressed matters of public concern or merely a personal grievance. As shown in Table 5 below, whether the speech supported or hindered the educational mission, and whether the speech was personal or advocacy create a two-by-two matrix. Speech may support the educational mission in a broad sense, but come down to a personal matter, for instance if one complains about an error with their paycheck or not being selected for a teaching award. If speech opposes the educational mission (e.g., by harassing a student) and does not address a matter of public concern the institution should be afforded deference to discipline individuals for such speech. If the speech opposes the educational mission but does address a matter of

---

[2737] As addressed further in section 6.1.4. Inclusion in Tension with Free Speech *infra*, applying the educational mission question to extramural speech may be warranted in certain cases of purposeful and continued pursuit of adverse notoriety as in *Adams* and *Tracy*.

[2738] For the matter of public concern test, see, e.g., *Duckett v. Oklahoma ex rel. Bd. of Regents of University of Oklahoma*, 986 F.Supp.2d 1249, 1256 (W.D. Okla. 2013).

public concern (e.g., a faculty member states a personal belief during an unrelated class discussion that certain people should have fewer rights than others based on their sexual orientation or gender identity),[2739] other faculty should be involved in the disciplinary process, to ensure transparency in applying institutional policy and procedure and due process for the speaker. If the speech supports the educational mission, the court should then inquire as to the involvement of the faculty in the disciplinary procedure—if the facts show that the faculty were not involved or their recommendations were disregarded, it is best to defer to the faculty to make a decision. If the faculty were sufficiently involved, and their recommendations were carried out by the institution, the court may then balance the interests of the plaintiff and the defendants according to the specific facts of the case.

	Supports Mission	Hinders Mission
Advocacy Example	A faculty member reports improper training of laboratory personnel in the handling of controlled and dangerous substances; complains that requests for appropriate training and support have been ignored.	A faculty member states a personal belief during an unrelated class discussion that certain people should have fewer rights than others based on their sexual orientation or gender identity
Considerations	Faculty (and ideally ombuds) oversight in handling the report/investigation to balance the business interests of the institution with the educational mission. Transparency to	Faculty involvement in the disciplinary process to ensure transparency in applying institutional policy and procedure and due process for the speaker. Balanced with need for inclusive learning environments.

[2739] Discussing controversial topics in class in ways that do not alienate students is carried out every day on college campuses. By pointing to this hypothetical, the researcher does not mean to imply that faculty should not be allowed to share their beliefs in class; however, especially when the speech is not germane to the course material, student complaints should be handled with care and concern.

	prevent cover-ups if liability is a concern.	
Personal Matter Example	Complaint to supervisor about not winning a teaching award.	Harassing a student who awarded someone else a teaching award.
Considerations	Necessitates faculty involvement in disciplinary measures	Defer to institution to discipline such speech

Table 5 – Mission and Advocacy Matrix

When faculty governance procedures have been employed already, that would incentivize the courts to defer to the faculty's academic judgment (as described in *Ewing*).[2740] Areen relies on *Ewing*, in which the faculty in a medical school program dismissed a student for his academic failure and the Supreme Court upheld the decision.[2741] Areen, citing the Supreme Court in *Ewing* argues that, "judges should not override a faculty's professional judgment unless it is 'such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment.'"[2742] Thus, as the educational officers (AAUP 1940 Statement) responsible for the educational mission of the institution, the faculty are entitled to judicial deference in academic decisions as long as they exercise professional judgment.

Providing evidence of an adverse employment action can remain the same. Showing a causal link between the speech and the adverse employment action should be contextualized to the molasses-like speed of academe, in which grudges can last decades and opportunities for retaliation among peers may come many years later. If courts were to adapt their legal standards to include the educational mission of the university faculty,

---

[2740] *Ewing v. Board of Regents of University of Michigan*, 552 F. Supp. 881 (Dist. Court 1982).
[2741] Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L. J. 945, 978 (2009).
[2742] Id.

it may further complicate these cases; however, courts could start by encouraging the use of faculty governance procedures by finding for the faculty plaintiffs when faculty involvement in or oversight of employment decisions is lacking.

5.3.2. Applying the Educational Mission Inquiry

The most important question in the proposed educational mission inquiry asks if the speech in question supports or hinders the educational mission. While there will inevitably be cases in which courts get this step wrong, the Tenth Circuit has already provided examples of the courts getting the analogous question (matter of public concern) wrong under their current standard as in *Joritz* and *Singh*.[2743] It is reasonable to hope that by invoking the educational mission, federal courts are persuaded that this question is one on which experts should weigh in before a decision is made. Relying on expert testimony in such cases would help clarify what interests are at odds and why, which would hopefully lead to quicker resolution.

While this dissertation argues that a reimagined inquiry based on the educational mission of institutions is superior to the current legal standard, it is also undeniable that this standard would not transform all difficult cases into easy ones. Indeed, bad facts cannot be changed by judicial standards. For instance, in *Adams*, the fundamental issue—how to treat protected speech which is subsequently included in one's dossier/CV submitted to one's colleagues to assess for promotion—will persist regardless of the standard applied by the courts.[2744] Nevertheless, an inquiry that focuses on the educational mission and, by extension, the faculty as those appointees primarily

---

[2743] See, *supra* section 5.1.2. discussing *Joritz* and *Singh*.
[2744] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550 (4th Cir. 2011).

responsible for that mission,[2745] can refocus the questions in a case like *Adams* back onto faculty self-governance and away from the content of the speech in question. Faculty colleagues must assess an application for promotion based on the academic standards of the department and institution, and if the departmental faculty have exhibited so much bias as to call the procedure into question, then faculty at sister institutions should be called upon to perform the task in their stead. A coordinated effort to adopt such a policy could be made and executed by accrediting agencies—bodies that already compile lists of sister institutions for regular peer evaluations. Should such an issue as the one in *Adams* be brought as far as the Federal Court of Appeals, the final decision as to a faculty member's promotion should still always be a matter decided by qualified academicians, and not judges or juries as was the case in *Adams*.[2746]

Each case in the sections that follow is analyzed according to the proposed educational-mission inquiry. Some cases will have the same outcome regardless of the questions asked (e.g., *Rodriguez v. Serna*), while the outcome of others would change (e.g., *Meriwether*). *Idaho State Faculty Association* was included for its explicit reference to the mission of the institution. *Meriwether* and *Wozniak* were selected for their contrasting approaches to the tension between inclusion and free speech when it comes to how faculty interact with students. *Shearn* was selected for its approach to dealing with issues of policy and what happens when faculty speak to the failure of administrators to comply with institutional (or in that case, statewide) policy. *Rodriguez v. Serna* was chosen for its facts which make it an example of whistleblowing by a faculty member and

---

[2745] See, Kreiser *supra* note 81 at 295.
[2746] *Adams v Trustees of University of North Carolina-Wilmington*, No. 7:07-CV-64-H, 2014 WL 7721820, at *2 (E.D.N.C. Apr. 8, 2014).

the undeniable retaliation faced for doing so. *Isenalumhe* is included because it deals with issues related to professional standards in nursing (broadly, medicine), and re-analyzing it under the educational-mission inquiry offers the opportunity to address the tensions and even conflicts between vertical (bureaucratic and academic) and horizontal (professional) authorities. Finally, *Adams* was selected for the role faculty played in evaluating Adams' academic speech (e.g., the contents of a his CV and dossier submitted for promotion) and how deference should be afforded to faculty conducting peer review when there is evidence of potential bias or (viewpoint) discrimination.

5.3.2.1. Idaho State Faculty Association

As fully summarized in section 4.9.14. above, *Idaho State University Faculty Association* was brought by members of Idaho State University's provisional faculty senate who had wanted to use a university list-serv email address (an email list) to distribute a draft of a revised faculty constitution to the entire ISU faculty.[2747] The vice president of academic affairs (VPAA) said the faculty could not use the list-serv to organize a poll regarding the draft of the constitution at the time they requested and she provided the plaintiffs with reasons why the list-serv should not be used for such purposes.[2748] The VPAA disagreed with the document, as well as the contents of the email, and forbade its distribution over the list-serv.[2749] The faculty formed an association that sued the university requesting injunctive relief for violations of their First Amendment rights.[2750]

[2747] *Idaho State University Faculty Association v. Idaho State University*, 857 F. Supp. 2d 1055, 1058 (D. Idaho 2012).
[2748] *Id.* at 1058–59.
[2749] *Id.* at 1059.
[2750] *Id.* at 1058.

The school argued, and the court agreed, that even though it was clear that the email messages sent through the list-serv were written by individuals, the university administration still moderated the messages and therefore they could be reasonably understood to have been "approved" by the administration.[2751] The court explained that the *Pickering* balancing test enables courts to "reconcile[s] the employee's right to engage in speech and the government's right to protect its own legitimate interests in performing its mission."[2752] But the court did not reach the balancing test, or further elaborate on the mission, because the analysis ended once it was determined that the speech was made in their roles as public employees and not as citizens.[2753] In this case, the court afforded the university and VPAA defendants judicial deference when it came to carrying out the mission of the institution.

If the same case were to be analyzed with the proposed alternative inquiry, the first question would still be whether the speech was intramural or extramural (employee or citizen), but finding that they spoke as employees would not end the inquiry. The next question would be did the speech in question (a draft of the revised faculty constitution) further or hinder the educational mission? In this case, the plaintiffs were participating in shared governance and faculty self-governance through procedures which sought to involve and seek input from the full faculty. At the very least, their attempts to share the

---

[2751] *Id.* at 1062.
[2752] *Idaho State University Faculty Association for Preservation of First Amendment v. Idaho State University*, No. Case No. 4:12-cv-00068-BLW, slip op. at 1062 (D. Idaho Mar. 13, 2012).
[2753] *Idaho State University Faculty Association v. Idaho State University*, 2012 WL 1313304, at 1065 (D. Idaho Apr. 17, 2012).

draft constitution with the full faculty was not *hindering* the educational mission.[2754] The third question is easy to answer; given that the plaintiffs in this case were a collective, the speech was not a simply an individual's personal grievance.

The next question inquires as to the role of the faculty in the alleged employment action and the answer is clearly the faculty were not involved in censoring their own email. At this stage, a judge using the alternative inquiry could conduct a *Pickering* balancing test to determine if the university's interest in efficiently carrying out its mission outweighed the plaintiffs' rights; however, given that the faculty are responsible for the educational mission, the university's interest, in this case, should be in the faculty's self-governance rather than the administration's interest in censoring their self-governance. That said, just because the faculty carry out the educational mission does not mean that the administration's interest in efficiently carrying out the mission will always lose to the faculty's interests. For instance, if the faculty were prolonging a process (e.g., curriculum development and approval), to the point of significant educational losses, it would be clear that the faculty were hindering the educational mission more than carrying it out. Likewise, if the facts of *Idaho State Faculty* had been that the draft constitution included a libelous preamble calling the VPAA names, this would clearly undermine their assertion that their primary objective was governance rather than politics.[2755]

According to an educational-mission-based analysis, the faculty senate (temporary or otherwise) should have reasonably unfettered access to a complete faculty

---

[2754] The draft may not have been what the administration was hoping for in terms of content, but it is difficult to imagine how distributing the draft faculty constitution (to the faculty it would directly affect) could be seen as an obstacle to carrying out the mission.

[2755] Further research could consider whether (and how) name-calling could support the educational mission.

email list to facilitate and encourage democratic self-governance. An appropriate settlement in this case would have been to create a duplicate faculty list-serv that could be used to differentiate which emails came from the administration or the faculty senate. Instead, by refusing to apply an academic exception to *Garcetti*, the court hindered the faculty's ability to self-govern and therefore made more service work for them outside of their primary duties as researchers and teachers. In other words, the faculty were distracted from their roles as appointees primarily responsible for the educational mission, and instead spent time and energy fighting with the administration about how to email the entire faculty.

5.3.2.2. **Wozniak v. Adesida**

As summarized in section 4.7.19. above, *Wozniak v. Adesida* involved a professor at University of Illinois at Urbana-Champaign who had repeatedly harassed two student leaders of an honor society when they awarded a different professor a teaching award to which Wozniak felt entitled.[2756]

When it comes to the intramural or extramural question, Wozniak called one of the students into his office to interrogate her about why he did not receive the award; the student apologized repeatedly and began crying during the conversation.[2757] Acting as a professor, eligible for the teaching award, this speech was clearly intramural. The other ways Wozniak harassed these students may have been less explicitly in his capacity as a professor (e.g., when he filed a breach of contract lawsuit against them so that he could "interrogate the students regarding the teaching award selection process, with the plan to

---

[2756] *Wozniak v. Adesida*, 368 F. Supp. 3d 1217, 1225–26 (C.D. Ill. 2018).
[2757] *Id.* at 1225.

dismiss the lawsuit after getting the information" or when he gave a video-recorded interview about the conversation in which he made the student cry and then shared the link to the video in his email signature).[2758] Nevertheless, since the speech was generally addressed to students who knew Wozniak only in his capacity as a professor, he was acting in his professorial capacity when he confronted the student.[2759]

The next question, then, is whether Wozniak's speech supported or hindered the educational mission. The Seventh Circuit directly addressed this question in their opinion, writing "professors who harass and humiliate students cannot successfully teach them, and a shell-shocked student may have difficulty learning in other professors' classes. A university that permits professors to degrade students and commit torts against them cannot fulfill its educational functions."[2760] Essentially, the court found that repeatedly harassing and humiliating his students was hindering, if not subverting, the educational mission of the university.

At least when it comes to this case, the answer to whether Wozniak's speech was advocacy, or merely addressed a personal grievance is fairly obvious. Wozniak was not advocating on anyone else's behalf, and no one else was advocating for Wozniak. The Seventh Circuit likewise concluded that Wozniak's complaints did not address a matter of public concern, but instead was a matter of personnel administration.[2761] Indeed, the court wrote, "[b]y humiliating students as a matter of self-gratification and persisting in

---

[2758] *Id.* at 1226.
[2759] Wozniak also clearly took the fact that he was not given the award as a personal affront and made it his personal mission to get revenge. Personal vendettas (at least those against students) are not usually understood to be within the purview of a scholar-teacher's vocation or professional duties.
[2760] *Wozniak v. Adesida*, 932 F.3d 1008, 1010 (7th Cir. 2019).
[2761] Id.

defiance of the Dean's instructions, Wozniak left himself open to discipline consistent with the Constitution."[2762]

Thus far, the educational mission questions have determined that Wozniak's speech both hampered the educational mission and addressed a personal grievance—thus Wozniak's speech was not constitutionally protected. The inquiry need not continue after the educational mission question in this instance, but for the educational value, the final two questions are also examined. When it comes to the role of faculty self-governance in the decision, Wozniak's tenure-revocation and dismissal proceedings were reviewed by the faculty senate's committee on academic freedom and tenure (CAFT).[2763] The committee recommended that Wozniak remove all reference to the award and the students involved from his email signatures, website, and any other public or quasi-public means of communication.[2764] After Wozniak did not immediately comply, "The Faculty Advisory Committee unanimously advised that the administration should consider any new evidence of violations of the CAFT Report's recommendations as part of the pending [tenure-revocation and termination] proceeding, without needing to file additional charges."[2765] Thus it is clear that the faculty were not only involved in the disciplinary process, but also supported the administration's decisions to terminate Wozniak for his tortious behavior. Under the educational mission inquiry, the courts would do well to defer to the expertise of the plaintiff's faculty colleagues who found his behavior warranted sanctions as severe as tenure revocation and even termination.

[2762] Id.
[2763] *Wozniak v. Adesida*, 368 F. Supp. 3d at 1228–29.
[2764] *Id.* at 1229.
[2765] Id.

Since Wozniak's constitutional rights were not at all invoked in this case, balancing interests simply does not apply. The only interest truly at stake in this case was that of the university to carry out its educational mission. The Seventh Circuit and District Court for the Central District of Illinois both found for the defendants as well, in accordance with the educational mission inquiry. The same cannot be said for the case for the following case.

5.3.2.3. Meriwether v. Shawnee State University

As summarized in full in 4.6.10. and 4.6.10.1., the *Meriwether* case was settled out of court following the Sixth Circuit Court of Appeals reversal of the district court's dismissal of Meriwether's First Amendment claims.[2766] *Meriwether*, like *Wozniak*, dealt with a professor's treatment of a student in violation their university's anti-harassment policy.[2767] Meriwether's speech took place in his political philosophy classroom. Meriwether repeatedly singled out a transgender student by referring to her only by her last name, but to all the other students with a gendered title and their last name (e.g., Ms. Bennett).[2768] Meriwether stated he refused to recognize this student's gender and use feminine pronouns because it contradicted his religious beliefs.[2769] After the student made a formal complaint about his discriminatory behavior, an investigation found that Meriwether's speech had violated the university's anti-harassment policy; the provost agreed with the finding and approved the dean's issuing of a written warning.[2770]

[2766] *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) reversing *Meriwether v. Trustees of Shawnee State University*, No. 1:18-cv-00753, 2019 WL 4333598 (S.D. Ohio Sep. 5, 2019).
[2767] *Wozniak v. Adesida*, 368 F. Supp. 3d at 1249; *Meriwether v. Trs. of Shawnee State Univ.*, No. 1:18-cv-00753, 2019 WL 4333598, at *5-6.
[2768] *Meriwether v. Trs. of Shawnee State Univ.*, No. 1:18-cv-00753, 2019 WL 4333598, at *5.
[2769] *Id.* at *1.
[2770] *Id.* at *5-6.

When it comes to analyzing this case according to the educational mission inquiry, the answer to the intramural question is clear—Meriwether was undisputedly speaking in his capacity as a professor when he repeatedly discriminated against a student in his class. The Sixth Circuit decided to apply the academic exception in *Meriwether*,[2771] but under the educational-mission inquiry, Meriwether's speech would not be entitled to such sweeping protections.

The next question is if Meriwether's speech supported or hindered the educational mission. Meriwether's speech clearly and repeatedly discriminated against an individual due to her gender identity which was explicitly prohibited by the university's anti-discrimination policy.[2772] The Title IX investigator, the dean, and the provost all recognized Meriwether's behavior as discriminatory thus creating a hostile environment.[2773]

In response to Meriwether's union grievance, the provost and interim president assigned Shawnee State's labor relations director and general counsel to meet with Meriwether to discuss the issue.[2774] These officials found that this was a "differential treatment" case rather than a hostile environment case, but nevertheless affirmed the dean's discipline; the president adopted the officials' recommendation.[2775] While the Sixth Circuit make this "differential treatment" argument out to contradict the original

---

[2771] *Meriwether v. Hartop*, 992 F.3d at 507. Some may disagree with the application of the academic exception in this particular case due to Meriwether's speech primarily reflecting his personal religious beliefs and not content germane to the course.
[2772] *Id.* at 501.
[2773] Id.
[2774] *Id.* at 502.
[2775] Id.

hostile environment argument,[2776] the fact is that blatant differential treatment of a single student based only (and obviously) on her gender identity inevitably creates a hostile educational environment. Indeed, the university anti-harassment policy explains that a hostile environment in the educational context encompasses "any situation in which there is harassing conduct that limits, interferes with or denies educational benefits or opportunities, from both a subjective (the complainant's) and an objective (reasonable person's) viewpoint."[2777] The educational benefit clearly denied the student is that of being addressed in the same "formal manner" as all the other students, which the plaintiff himself described as "an important pedagogical tool" which he believes "foster[s] an atmosphere of seriousness and mutual respect."[2778] If Meriwether did not view this practice as so fundamental to his pedagogy, he likely would have less of a problem abandoning the practice for one that was more egalitarian. Instead, this practice was foundational to his teaching; the student in question was denied the educational benefit of being treated the same as all of Meriwether's other students. Likewise, the other students were denied the benefit of being in a classroom where all students were treated equally by the professor. In the end, the educational mission is hindered by hostile learning environments caused by discriminatory treatment based on gender and by disrespectful conduct by a teacher towards a student in front of the entire class, just as much the educational mission was hindered by Wozniak's tortious treatment of his students.

Once again, the inquiry could stop here with the finding that Meriwether's speech hindered the educational mission, but for educational purposes we will review the

---

[2776] Id.
[2777] *Id.* at 501.
[2778] *Id.* at 499.

remaining questions. When it comes to the question of whether the speech was advocacy or merely a personal grievance, it is only fair to say that by stating the concern in terms of one's sincerely-held religious beliefs, Meriwether was advocating for a religious accommodation for anyone to whom it may apply, not just for himself.

In terms of faculty involvement in this decision, the adverse decision was only a written reprimand in the plaintiff's file—hardly a punishment worthy of faculty involvement. Nevertheless, the faculty were not involved, thus it would be reasonable for the plaintiff to appeal the grievance to a faculty committee to review and weigh in on the issue prior to filing a lawsuit. Even so, the *Pickering* balancing test weighs heavily in favor of the educational mission and in this case that means deference to the university.

5.3.2.4. Shearn v. West Chester University of Pennsylvania

Under the educational-mission inquiry, *Shearn* (summarized in section 4.3.13.) offers an interesting case study. Shearn's allegedly protected speech dealt with a clause in the PASSHE faculty collective-bargaining agreement.[2779] The policy—11(G)—stated that after 10 semesters as a full-time non tenure-track faculty member she would be eligible for a vote by the department faculty to transition her to a tenure-track position.[2780] Shearn only learned of this clause in a meeting with the union president to discuss how her department had assigned a new adjunct to teach summer courses instead of Shearn (a nine-semester veteran) in contravention of the collective-bargaining agreement's (CBA) seniority policy.[2781] Nevertheless, after she became aware of 11(G), Shearn organized a meeting between union representatives and other non-tenure-track

---

[2779] *Shearn v. West Chester University of Pennsylvania*, 2017 WL 1397236 1, *1-2 (E.D. Pa. 4/19/17).
[2780] *Id.* at *1.
[2781] *Id.* at *1-2.

faculty to raise awareness about the policy that may benefit them in the future.[2782] When someone else raised a question about the policy in a department meeting, the department chair said the department "did not honor" the policy.[2783] She was subsequently only assigned a part-time courseload and no longer qualified for 11(G) or health insurance.[2784] She then filed an employee grievance, and eventually a lawsuit. The court analyzed only the meeting with the union representative and the employee grievance when assessing whether Shearn's speech was protected; the court did not analyze Shearn's organization of the meeting between other NTT faculty and the union.[2785]

The first question under the educational-mission inquiry is whether Shearn's speech was intramural or extramural. The answer to this question is intramural, but the answer to the analogous *Garcetti* question depends on which instance of speech we analyze. When it comes to Shearn's meeting with the union president or employee grievance, these were made in her official capacity, though surely not pursuant to her official duties (which as an adjunct was limited to teaching and potentially some minimal service responsibilities). In contrast, Shearn's organization of a meeting between other adjunct faculty and the union was clearly outside of Shearn's official duties as an adjunct instructor. Indeed, such a task is much more likely to be the duty of an employee or officer of the union than an adjunct. Thus, under *Garcetti* Shearn's case is one of mixed

---

[2782] *Id.* at *2.
[2783] *Id.* at *3.
[2784] *Id.*
[2785] *Id.* at *11-12. The court does not acknowledge either the meeting held with the union *and* other adjuncts or Shearn's initial email to other temporary professors to gauge interest in such a meeting as potential protected activity that may have prompted retaliation. It is unclear from the court opinion whether these activities were referenced as protected activity in Shearn's filings, since both instances clearly are much more indicative of public concerns than personal grievances.

speech—speech made both as a citizen and as an employee. Under the educational mission inquiry, Shearn's speech is intramural and the university wields managerial authority when it disciplines such speech.

The second question is whether Shearn's speech supported or hindered the educational mission. It is at this question that the level of abstraction of the analyst is likely to determine the decision. At the most basic level, Shearn's speech dealt with her official grievances filed against her department that were so specific that they were unlikely to have any effect on the educational mission whatsoever. This speech was likely neutral, neither weighing in favor nor against Shearn in the analysis. On the other hand, Shearn's union-related speech—organizing a meeting of the adjuncts and the union to discuss 11(G)— is in and of itself an educative project aimed at raising awareness among the adjuncts of their rights under their collective bargaining agreement. Given the educational purpose of the meeting, Shearn's organization of the meeting should be understood as supportive of the mission.

The next question is whether Shearn's speech advocated for others on a matter of public concern or expressed a mere personal grievance. A reasonable person could potentially view Shearn's motivation as personal when she acted as an employee; however, Shearn clearly acted as an advocate when she organized the meeting with other adjunct faculty and the union. Shearn's organizing was supportive of the educational mission, addressing a matter of public concern (a collective bargaining policy which applies to all PASSHE colleges), *and* in advocacy for others.

When it comes to faculty involvement and self-governance in the case, Shearn's organization of the meeting clearly supported faculty self-governance, as does section

11(G) which dictates the faculty voting procedure involved in tenure-track conversion/promotion for consistently reliable adjunct faculty. In contrast, the department chair's unilateral pronouncement that the department "did not honor" section 11(G) of the collective-bargaining agreement did not reflect the democratic or educational-mission focused aims of faculty self-governance, and, of course, was also a blatant violation of the CBA.[2786]

Finally, the interests test asks whether Shearn's right to speak outweighs the government's interest in an efficient workplace. When it comes to efficiency, it is counterintuitive to argue that the university would be better off hiring new untrained faculty unfamiliar with the campus, procedures, policies, and students than simply promoting their veteran teachers into long-term contracts with greater job security. Likewise, the government's interest in violating the PASSHE collective bargaining agreement is outweighed by the employees' interests in the institution honoring their contract.

In conclusion, the educational-mission inquiry demands a refocusing of Shearn's case on her organization of the adjuncts meeting with the union representatives to learn about the terms of the collective-bargaining agreement. This refocusing would allow the judge to analyze the case through a more educationally-minded lens, shedding light on the value of informed and educated employees to the educational mission of the institution; retaliation for such acts undermines the educational mission of the university.

[2786] *Id.* at *3. The Association of Pennsylvania State College and University Faculties (APSCUF) bargaining unit includes department chairs. See, PASSHE, *Labor Relations*, PENNSYLVANIA'S STATE SYSTEM OF HIGHER EDUCATION, https://www.passhe.edu/inside/HR/LR/Pages/default.aspx (last visited Dec. 8, 2022).

5.3.2.5. Rodriguez v. Serna

Rodriguez v. Serna (see section 4.10.10.), takes the issue of whistleblowing hinted at in *Shearn* and brings it into the spotlight. Like Shearn, Rodriguez was also an adjunct who experienced retaliation for investigating some of the administration's practices that appeared to contradict state law.[2787] To quickly summarize, Rodriguez discovered suspicious financial practices at the institution that led her to request and review public records revealing that over $300,000 in unbid contracts were awarded to two campus employees, Brandi and Ryan Cordova.[2788] Rodriguez created and maintained a public website in early 2015 (after her contract was not renewed in 2014) explaining and providing evidence of the allegations against the Cordovas.[2789] The site was taken down by the webhosting agency because administrators alleged (false) copyright infringement.[2790] In addition to being physically threatened and assaulted outside the public records office,[2791] Rodriguez's contract was not renewed, she was banned from campus, and banned from teaching at the college.[2792]

When it comes to the first question, Rodriguez maintained a website that was unassociated with her role as an adjunct faculty member, and conducted her investigation into the accounting as a concerned citizen and taxpayer even after she was fired.[2793] This speech is clearly extramural, even though the content of the speech related to the institution. Likewise, the retaliation continued, however, long after she was no longer an

---

[2787] *Rodriguez v. Serna*, 2019 WL 2340958, *9 (D.N.M. 2019).
[2788] *Rodriguez v. Serna*, 2019 WL 2340958, *9 (D.N.M. 2019).
[2789] *Id.* at *5, *9, *11.
[2790] *Id.* at *11.
[2791] *Id.*
[2792] *Id.* at *6.
[2793] *Id.* at *6.

employee.[2794] This also answers the third question, by showing that any citizen could have investigated the public records and created and maintained the website, since Rodriguez was no longer even employed when she did so.

Rodriguez's website containing the evidence of malfeasance and financial misconduct of the defendant administrators was created to shed light on how government contracts were funneling money into the pockets of administrators without any oversight. She provided evidence of excessive or improper institutional spending. The front page of Rodriguez's website clearly asserted that due to excessive administrative spending, the board of the college had told the students and faculty that *they* must make sacrifices to balance the budget. [2795] The website stated "President Barceló and her Executive Team are entrusted with providing a public service and paid with taxpayers' dollars, which they are increasingly funneling upwards to growing Executive [*sic*] salaries and away from the educational goals of our institution of higher education."[2796] In other words, Rodriguez was concerned with the educational mission and how the administrators' actions hindered that mission.

The fourth question asks what role faculty self-governance played in Rodriguez's adverse employment decisions. The court decisions make little mention of any faculty involvement in the decisions, and at times the plaintiff's department's wishes were

---

[2794] Id.
[2795] *WayBack Machine Capture of Northern New Mexico College Study Group*, NORTHERN NEW MEXICO COLLEGE STUDY GROUP, https://web.archive.org/web/20151201200139/http://www.nnmcstudygroup.org/ (last visited Nov. 25, 2022).
[2796] Id.

directly contradicted by administrators.[2797] Additionally, Rodriguez filed multiple grievances but they were all ignored by administrators.[2798]

Finally, the educational-mission inquiry balances the parties' interests to determine which weighs more heavily, Rodriguez's right to speak freely or the college's right to efficiently carry out its mission. Since Rodriguez's speech points directly to the college's decisions to prioritize its business operations and administrative salaries over its educational mission, Rodriguez's interests clearly outweigh the college's.

5.3.2.6. Isenalumhe v. McDuffie

As fully summarized in section 4.2.7. above, *Isenalumhe* was a case against the college and its administrators brought by two nursing professors (Isenalumhe and Gumbs) at Medgar Evers College. [2799] In brief, the plaintiffs claimed that they were repeatedly retaliated against for criticizing and complaining about their department chair.[2800] The allegedly protected speech consisted of comments made as committee members, formal grievances and conversations with union representatives, and chain of command complaints.[2801] The allegedly retaliatory adverse employment actions in question included a non-teaching administrative position rather than a teaching assignment in Spring 2005 (Gumbs), having personal property stored in a locked office/cabinet to which only the department chair had the key and refused to open it for them (both), not providing plaintiffs with proper offices or keys to their offices (both),

---

[2797] *Rodriguez v. Serna*, 2019 WL 2340958, *7 (D.N.M. 2019).
[2798] *Id.* at *4.
[2799] *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367, 369–70 (E.D.N.Y. 2010).
[2800] Id.
[2801] *Id.* at 378-379.

reassignment of preferred courses to less senior faculty, and assigning Isenalumhe to a course he was unqualified to teach.[2802]

The first question under the educational-mission inquiry whether the speech was intramural or extramural. In this case, both plaintiffs seem to have spoken in their capacities as faculty members, so their speech was intramural. The next question asks if the speech supported or hindered the educational mission. Isenalumhe made various complaints about the department chair's behavior which Isenalumhe believed undermined the educational mission.[2803] These complaints included that Isenalumhe was assigned to teach a course he was not qualified to teach and therefore might endanger patients and students in doing so, a complaint that one of his courses was knowingly understaffed in violation of state regulation and to the detriment of the students, and that a peer evaluation was conducted in his course without prior warning such that he was humiliated in front of his students.[2804] The plaintiffs also complained about grades being entered without the instructor's authorization, the department chair misrepresenting the departmental committee's vote on proposed curriculum changes, the department chair's hiring of less qualified candidates by bypassing the department's faculty personnel and budget committee, and the department chair's refusal to reassign appropriate offices and issue keys to the plaintiffs after a departmental reorganization.[2805] While other issues, like the departmental reorganization and favoritism/nepotism, were also mentioned, a large

---

[2802] *Id.* at 374.
[2803] *Id.* at 370-371.
[2804] Id.
[2805] *Id.* at 371-374.

portion of the topics of the complaints pointed to the department chair's undermining of the faculty's ability to carry out the educational mission.[2806]

The next question of the proposed inquiry asks if the speech was so personal to the plaintiffs that no one else could or would have raised the concerns. The speech in this case addressed both personal grievances and matters of public concern which could have been brought by other faculty, staff members, students, or even patients treated by the plaintiff's students. What program the faculty members were assigned to in the departmental reorganization is more of a personal grievance; however, hiring underqualified faculty candidates into a nursing program or assigning an unqualified instructor to teach a medical-surgical nursing course would very much constitute a matter of public concern that could be the subject of anyone's complaint.[2807]

The involvement of faculty in the disciplinary or adverse employment actions was limited, if not undermined in this case. The plaintiffs alleged that the department chair provided false representations of the faculty committees' votes related to curriculum changes to a college-wide committee, repeatedly bypassed faculty involvement in hiring and personnel decisions, and exhibited bias in her faculty evaluations including submitting only selections of student evaluations that supported her beliefs about faculty members to the personnel and budget committee.[2808] Indeed, the plaintiffs' arguments advocated for democratic, faculty-involved procedures, while the defendants argued that faculty who speak as members of committees are speaking pursuant to their official duties. In an educational-mission-based inquiry, the question of faculty involvement is

---

[2806] Id.
[2807] *Id.* at 372, 370.
[2808] *Id.* at 370-374.

recentered and made a focus of the inquiry. A faculty committee would be better suited than a judge to determine if the acts of the department chair were retaliatory, appropriately disciplinary, or otherwise and offer recommendations accordingly.

The final question is the balancing of the parties' interests. In this case, Isenalumhe's and Gumbs's interests in their right to express complaints about matters of public concern, hindrances to the educational mission, and even concerns about patient safety must be balanced against the defendant's interest in efficiency in carrying out the educational mission. As the plaintiffs' speech concerns the department chair's persistent interference in the faculty's ability to carry out the educational mission, under an educational-mission based inquiry, the faculty or academic experts are better equipped than a judge to make recommendations in such a case. Moreover, because this case specifically deals with a professional program (nursing), the court and the faculty must consider how the clinical educational environment and the standards of the field were accounted for in the administrative decisions under scrutiny.

5.3.2.7. Adams v. University of North Carolina–Wilmington

In this case, Adams sued his university when his department voted not to promote him to full professor, arguing that he had been the victim of viewpoint discrimination based on his evangelical Christian beliefs.[2809] At the time of the lawsuit, Adams had an established history of outspokenness about his beliefs as well as criticisms of his colleagues and university in the media, on his blog, and in books.[2810] Thus, the protected activity in this case is less a specific instance of speech and more of a viewpoint. The

---

[2809] A full summary of this case can be found in section 4.4.1. above.
[2810] *Id.* at *7-*8.

facts in this case make the analysis more difficult because Adams chose to include much of this protected speech in his application for promotion.[2811] Doing so placed his colleagues in the position of having to assess the protected activity for quality and relevance to his area of scholarly expertise (*not* relevance to his media persona).[2812]

Under the proposed educational-mission inquiry, the first question asks if the speech in question was intramural or extramural. The district court originally determined that by referencing his speech in his CV, Adams had spoken pursuant to official duties;[2813] however, the Fourth Circuit Court of Appeals reversed this ruling, stating that protected speech cannot be converted into unprotected speech after the fact.[2814] Under an educational-mission inquiry, though, this distinction need not be dispositive.[2815] We can assume that Adams's speech as originally made was extramural, while still recognizing that by including his appearances, blog posts, and non-scholarly publications in his promotion packet that his speech was also intramural—it was submitted for evaluation by his peers. Thus, we still must consider whether his speech supported the educational mission.

Much of Adams's speech disparaged higher education for having a liberal "ideological climate" where, for instance, the voices of homosexuals and feminists were given too much weight.[2816] Faculty colleagues found his television appearances and blog

---

[2811] *Id.* at *39.
[2812] *Id.* at *26-28.
[2813] *Id.* at *40.
[2814] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550, 561–62 (4th Cir. 2011).
[2815] While additional weight can be given to the speech of citizens and the need to protect it, referencing the speech in an application for promotion places that speech within the realm of appropriate assessment according to shared scholarly standards. As the speech in question was not scholarly at all, the assessment that it did not support the applicant's case for promotion is a wholly appropriate conclusion and need not be retaliatory in motive.
[2816] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 2010 U.S. Dist. LEXIS 146414 1, *8 (E.D.N.C.).

posts to have a "wannabe right wing [*sic*] pundit" air to them and Adams himself claimed he wanted to emulate the writing style of Ann Coulter.[2817] Faculty and administrators found Adams's speech similar to talk-show rhetoric in its lack of intellectual rigor; some colleagues even called him a pathological liar.[2818] Importantly, Adams's area of scholarly expertise was sociology and criminal justice, and his protected speech rarely ever touched on those areas.[2819] Overall, the speech in question often criticized higher education faculty for their beliefs and identities (e.g., sexual orientation, gender identity, feminism, atheism),[2820] and decried higher education for indoctrinating students and "destroying America."[2821] Adams's speech did not *necessarily* hinder the educational mission of institutions, but it was not clearly in support of the educational mission either.[2822] The record indicates that Adams was expressing his personal *opinion* in non-peer-reviewed outlets and his interest was thus mainly personal.

Adams's self-interest becomes especially clear when the next question is considered: whether Adams was advocating on behalf of others on a matter of public concern. Often criticizing the university and its faculty for their ideological and social climates, Adams aimed to recenter his own conservative Christian viewpoints and beliefs. While some of Adams's protected activity may have consisted of advocacy, the vast majority of his speech consisted of merely his opinion about matters to which he had no

---

[2817] *Id.* at *8-9.
[2818] Id.
[2819] *Id.* at *24.
[2820] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550, 565 (4th Cir. 2011).
[2821] *Id.* at 554.
[2822] For additional discussion of these issues see, *infra* section 6.1.4. Inclusion in Tension with Free Speech.

claim to scholarly expertise.[2823] Despite the issue in question touching on matters of public concern, Adams's opinions—expressed in print, live in lectures, or on television—often dealt with his own complaints about university campuses and his workplace in particular.[2824] Even assuming that the plaintiff's activity was advocacy on a matter of public concern, the issue of faculty involvement in the decision is of even greater importance in this case, especially given that the courts eventually retroactively promoted Adams without any further faculty involvement.[2825]

The penultimate question in the educational-mission inquiry asks about the degree of faculty involvement in the alleged retaliatory action. In this case, the faculty—especially the senior faculty within Adams's department—assessed Adams's promotion application and concluded it was lacking in the areas of both research and service (two of the three criteria for promotion).[2826] Nine senior faculty members voted 7-2 against Adams's promotion.[2827] Had the department supported the application for promotion, the dossier would have been submitted to the dean, provost, chancellor, and board of trustees for review and approval.[2828] At any stage these administrators would have had the opportunity to deny the promotion; one of the senior faculty colleagues involved in the review of Adams's application even predicted that a departmental recommendation to "promote plaintiff would be rejected at higher levels of university review if the

---

[2823] For instance, Adams held no degree in higher education, he had never published in a peer-reviewed journal on the topic of higher education, he had never published a book with an academic publisher on a topic related to higher education, etc.
[2824] *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 2010 U.S. Dist. LEXIS 146414, *7.
[2825] *Adams v Trustees of University of North Carolina-Wilmington*, No. 7:07-CV-64-H, 2014 WL 7721820, at *2 (E.D.N.C. Apr. 8, 2014).
[2826] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d at 555–56.
[2827] Id.
[2828] *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 2010 U.S. Dist. LEXIS 146414, *26.

department could not offer a strong case for promotion based on plaintiff's performance since his last promotion."[2829] At this stage under the educational-mission inquiry, it would be wise to ask the university to identify external faculty members from the same departments (sociology and criminal justice) in peer institutions (e.g., University of North Carolina at Greensboro, Chapel Hill, or elsewhere) who could serve on an ad-hoc promotion review committee. This would prevent bias in the proceedings while encouraging *more* peer-review.[2830] Ensuring the proceedings went back to the faculty (though not the same faculty of whom there was evidence of bias) to make the appropriate decision is essential to preserving academic freedom.

Finally, the balancing of interests may be analyzed, but this case presents a challenge at this stage as well. Adams clearly had a constitutional right to speak freely about his opinions and concerns related to his religious and political beliefs. The university and its faculty also clearly have a right to determine who is employed as full professor at their institution based on the disciplinary standards of each department and the scholarly contributions of their faculty.[2831] The university's interest is in not only efficiency but in faculty self-governance, disciplinary standards, and scholarly rigor and

---

[2829] *Id.* at *24.

[2830] Assuming that ad-hoc committee were to support the application for promotion, it would then proceed through the rest of the appropriate steps as outlined in the faculty handbook. At any step, a body or decisionmaker could recuse themselves and ask for an external replacement. Similarly, the ad-hoc body expressed concern about the inappropriate inclusion of the protected speech in the promotion application, that feedback could be presented to Adams with a request to remove any activity for which he holds no scholarly credentials.

[2831] The faculty also have an interest in ensuring that their colleagues agree on which publications support one's application for promotion and which are superfluous. The fact that Adams included many appearances, blog-posts, and op-eds addressing topics far outside his area of expertise could be seen as a deviation from disciplinary or scholarly norms. It is unclear why the university did not first ask Adams simply to resubmit his promotion packet after removing any and all reference to his extramural writing and speaking engagements outside of his area of scholarly expertise.

the freedom to conduct its business without non-expert (judicial) oversight. Adams's interest in his application for promotion was in not being assessed by biased individuals with whom he vehemently and publicly disagrees on many issues. Adams's interest in (and right to) a non-discriminatory process and the university's interest in (and right to) self-governance according to academic standards could have been easily balanced by sending Adams's promotion materials to other senior faculty within the UNC system but outside of the plaintiff's department. If they also were to come to the same conclusion as the plaintiff's colleagues, it is unlikely that personal vendettas have played a role; instead, all involved could rest assured that Adams's scholarly record was insufficient for promotion at the time.

The biggest problem with the way *Adams* was handled by the District Court for the Eastern District of North Carolina is that by retroactively promoting Adams, the court bypassed all other aspects of institutional procedure for the entire UNC system. No other professor in the UNC system could say they were promoted without *review* (let alone approval) at the dean, provost, chancellor, and board levels. The purpose of these multiple levels of review is to ensure that uniform standards are met by every candidate for promotion. Without multiple levels of review, equivalent bias in favor of a candidate could easily run rampant with senior faculty fast-tracking their friends for promotion despite deficient dossiers. For the same reason it was not fair for an allegedly biased committee to have the final decision in Adams's case, it is just as unfair for a judge to have the final decision in the case without further institutional review.

5.4. Conclusion

In sum, this chapter has discussed the description and analysis of the 162 faculty-free-speech court cases decided in the federal courts between 2006 and 2020. In terms of quantitative findings, this study has found that: non-tenured and tenured faculty sued in nearly equal numbers (Figure 3); the average case lasted nearly three and a half years (Section 5.0.2.); the average docket for these cases had around 100-120 entries (Section 5.0.3.); the most common adverse employment actions alleged were non-renewal or termination followed by denial of tenure or promotion (Section 5.0.4.); nearly 70% of cases resulted in the courts finding for the defendants (Section 5.0.5.); and since 2007, in the federal courts, at least ten opinions in faculty free speech cases have been issued every year (Section 5.0.6.).

Section 5.1. discussed the jurisprudential findings and the application of *Garcetti*, *Connick*, and *Pickering* in faculty free speech cases from 2006-2020. The majority of cases studied cited *Garcetti* (5.1.1.1.), but fewer than the majority of cases dealt with speech on a matter of public concern (5.1.2.). By the time the court gets to the balancing test, plaintiffs are more likely to succeed as they will have already adduced ample evidence of the protected nature of the speech in question (5.1.3). Finally, the causal link between protected speech and the adverse employment action alleged was considered.

When it comes to academic culture, the cases studied provided numerous examples of speech related to service and shared governance (5.2.1.), the double-edged sword of "professional standards" (5.2.2) and what courts in the Second Circuit have called "academic warfare" (5.2.3.). The courts have taken various approaches to

addressing these concerns and some decisions have been more problematic than others, as this chapter has explained.

Finally, as argued throughout this dissertation, the educational mission is central to the role of the faculty and to understanding a faculty member's role while speaking. In addition, when evaluating faculty free speech conflicts, keeping the educational mission as the focus enables one to protect the values of academic freedom and shared governance that are integral to that mission. The final section of this chapter offered a radical reimagining of how to analyze faculty free speech conflicts by placing the educational mission at the center of the inquiry. This educational mission approach relies on Post's assertion that judicial deference be granted to institutions based on their pursuit of their missions (a legitimate governmental interest), as well as Areen's recommendation that judicial deference be granted to decisions made or authorized by the faculty (or a faculty committee).[2832] When difficult fact patterns arise in faculty free speech cases, the courts would be better equipped to support faculty self-governance and the educational mission of institutions if they could remand cases back to faculty governing bodies to review the appropriate decisions and/or make recommendations. While this is not within the federal courts' constitutionally allocated power, state laws could provide additional protections for public higher education employees by implementing an educational mission standard within the state courts, grievance systems, or institutional policies.

[2832] Post, *supra* note 31, at 1834; Areen, *supra* note 9 at 994.

6. Findings Part III

This chapter provides critiques and recommendations based on this study's examination of 245 faculty free-speech court opinions. First, overall critiques of the faculty speech cases are offered. Then, recommendations for courts, faculty, unions, administrators, attorneys, and conflict resolution professionals are shared. The chapter concludes with a short synopsis of each subsection.

6.0. Critiques

This section offers critiques related to legal reasoning, administrative decision-making, and faculty behavior as evidenced in the cases studied. The judicial records examined above, raise questions like "what are institutions of higher education for?" "how do they accomplish their goals?" and "who do they serve?" In line with standards for humanities-oriented research, this section thus raises questions about the court records such as "whose versions of events are privileged and who decides which events or aspects are included and/or omitted."[2833] These questions are concerned with power, privilege, and justice. In-tandem with section 6.1., this section focuses on how the educational purposes of higher education could be better served by an educational-mission oriented theoretical inquiry which considers the power, privilege, and equity issues inherent to free speech conflicts in higher education.

6.0.1. Power

Feminist scholar Sara Ahmed defines power as "the right to suspend what is binding for others."[2834] Often in free speech cases involving whistleblowing and

---

[2833] AERA, *supra* note 299, at 486.
[2834] SARA AHMED, COMPLAINT! 48 (Duke University Press Aug. 2021).

discrimination claims, institutions suspend for themselves what is binding for others, for instance, when institutions violate or do not follow their own policy and procedures. The courts, however, often do not recognize this touting of power as such. The courts rarely even recognized that divergence from institutional policy/procedures might be evidence of pretense, or even pose a red flag. For instance, in *Jolibois*, the Eleventh Circuit held that "failure to abide by the CBA requirements, or breach of some other internal policy, alone, does not constitute a sufficient showing of pretext."[2835] Indeed, in their haste to clarify that policy deviations are not constitutionally actionable in themselves, the divergence from policy or procedure is otherwise ignored by the federal courts in this study. In *Nuovo*, the District Court for the Southern District of Ohio explained that some procedure "violations are constitutionally impermissible, while others are not."[2836] The District Court for the District of Kansas stated that because the right to procedural due process is not defined by the university's policies or procedures, any alleged failure to follow those procedures "does not clearly substantiate a procedural due process violation."[2837] The court then proceeded to otherwise ignore any evidentiary value posed by a faculty committee's findings that an administrator had violated university policy in order to hamstring the plaintiff's tenure case.[2838] The assumed evidentiary value of plaintiffs' evidence of a defendant's violation of policy is further discussed in section 6.0.5. (Evidence), below.

[2835] *Jolibois v. Fla. Int'l Univ. Bd. of Trs.*, 654 Fed.Appx. 461, 464 (11th Cir. 2016).
[2836] *Nuovo v. Tbe Ohio State Univ.*, 726 F. Supp. 2d at 853.
[2837] The court continues, "We further note that this court's role is not to serve as a super-personnel board to reverse incorrect or ill-advised decisions, in spite of plaintiff's extensive factual allegations and results with which the court may have 'some discomfort.'"*Joritz v. University of Kansas*, No. 17-4002-SAC-JPO, 2019 WL 1515251, at *14 (D. Kan. Apr. 8, 2019) (citations omitted).
[2838] Id.

Given Ahmed's definition of power and the courts' tendency to view constitutionally permissible policy violations as generally immaterial to the plaintiff's case, the courts have affirmed the very power differential between plaintiffs and their institutions that the plaintiffs felt had been abused to begin with. When institutional policies are created to protect employees or other complainants, an institution's decisions to disregard those policies could constitute abuses of power—only treating those policies as binding for some and not others. In cases like *Tracy*—involving the allegedly wrongful termination of a man who repeatedly harassed parents of victims of the Sandy Hook massacre, calling the whole catastrophe a hoax and calling grieving parents liars—the line between appropriate use of and abuse of power[2839] is blurred.[2840] On the other hand, in cases wherein the defendants allegedly violated policies that were specifically meant to protect whistleblowers, victims of harassment, and the like, there is an inherently unequal power dynamic between the institution and the complainant who, without the institution's protection, is apt to fall victim to retaliation.

According to Ahmed's research, policies governing whistleblowing, harassment, and discrimination are primarily written to protect complainants; however, when it comes to implementation, the actions taken are often those in the institution's best interest—not

---

[2839] Appropriate use of power is the wielding of power according to the policies and procedures by which the power has been limited and directed. Abuse of power is the wielding of power outside of or contradictory to those policies and procedures.

[2840] In *Tracy*, the administration terminated Tracy based on his refusal to submit a conflict of interest/outside activity report. While this was technically allowable under the university's policies, it was outside of the ordinary operating procedure of universities. A large proportion of professors do not complete administrative paperwork on time or at all—this is to be expected in academia—but very few are ever disciplined for it, let alone terminated. It is reasonable to interpret the university's discipline of Tracy's paperwork avoidance as a pretext for retaliating against him for his protected speech and thus an abuse of power. On the other hand, his protected speech was arguably related to his area of expertise such that his opinions and assertions may have been evidence of academic incompetence had he been investigated by his colleagues…but that is not what happened. See section 4.11.8. *supra.*

the complainants. For this reason, institutions can tout their protective policies and then simply not implement them anytime it poses too great a risk to their budgets or reputations. Faculty—whose entire careers are built on peer review, procedure, cooperation, tradition, and the integrity of the written word—are incentivized to believe that policies and procedures (e.g., those for hiring, tenure, publication, even grading) can and do produce fair and meritorious outcomes. Indeed, the entire academic structure of shared governance relies on the faculty's belief in these very policies and procedures without which the institution would cease to function.

When a faculty member complains about academic misconduct according to the institution's policy, and the institution's response is to violate procedure whenever it is in its best interest to do so, we can end up with cases like *Plouffe*, which took over nine years in the courts.[2841] In *Plouffe*, in response to Plouffe's complaint, the HR director conducted an investigation and wrote a report, "but did not save her underlying notes, despite a school policy requiring all documents relating to discipline to be maintained for seven years."[2842] Like many of the whistleblowers discussed herein, Plouffe had evidence that his supervisor was trying to wield his power to violate institutional policy (i.e., make what is binding for others, not binding for him) for his own interests.[2843] Furthermore, in Plouffe's case, the aims of his supervisor also hindered the educational mission—the candidate the supervisor wanted to hire had not only lied about his academic credentials, he was also unqualified for the job.[2844]

[2841] See section 5.0.2. *supra.*
[2842] *Plouffe v. Cevallos*, 777 Fed.Appx. 594, 599 (3d Cir. 2019).
[2843] *Plouffe v. Cevallos*, No. 5:10-cv-01502, 2016 WL 1660626, at *3 (E.D. Pa. Apr. 27, 2016).
[2844] Id.

In sum, in the role of upholding and carrying out the educational mission, faculty can be confronted with conflicts of interest and unchecked power to choose their own interests over the educational mission. When colleagues point this out to the institution, administrators may view the situation through a risk-management lens, rather than through the lens of the educational mission. This upsets the balance of power necessary for shared governance, and tips the scales in favor of the administration. For this reason, a reliance on an educational-mission-based inquiry for faculty conflicts, and further reliance on faculty involvement in any disciplinary measures or complaint procedures is recommended to recenter the educational mission in these cases.

6.0.1.1. On Tenure

Legally speaking, tenure is a contractual right establishing a property interest in one's continued employment.[2845] That means tenure cannot be taken away without due process. At minimum, tenure is a right to notice and a hearing before a tenured professor can be terminated or lose their tenure. In *Wetherbe v. Smith* and *Wetherbe v. Texas Tech University*, the plaintiff, Professor Wetherbe, chose not to accept the tenure his employer bestowed up him.[2846] Thus, it was due to his choice that he did not have the designation of tenure when he applied for an internal position within his school.[2847] When the search committee determined that a requirement of the position would be tenure, this may well have singled Wetherbe out for a choice he had made, but that choice was not protected speech—it was his personal preference.[2848] Someone could easily be removed from the

---

[2845] KAPLIN ET AL., *supra* note 2526, at 685.
[2846] *Wetherbe v. Smith*, 593 Fed.Appx. 323 (5th Cir. 2014); *Wetherbe v. Texas Tech University* 699 Fed.Appx. 297 (5th Cir. 2017).
[2847] *Wetherbe*, 593 Fed.Appx. at 327.
[2848] *Wetherbe*, 593 Fed.Appx. at 327.

applicant pool for other choices they made related to their career including choosing to publish in only non-peer-reviewed journals or presenting only at regional—rather than national—conferences.[2849]

Academically speaking, tenure is a method used to enforce adherence to disciplinary norms and expectations. Tenure (and by extension the processes through which tenure is awarded) thus can be seen as the mechanism by which faculty affirm and re-affirm their commitment to existing disciplinary or professional expectations.[2850] If one is to believe Judith Butler, the process of peer review within one's discipline can go two ways—judgment can be based on the best application of a "pre-given norm," or the reviewer can aim for the "best possible judgment in the fray" while being "open to a clash of norms."[2851] Thus, for Butler, the prospect of approving a candidate for tenure whose research fundamentally questions the norms historically embraced by the discipline could be either a threat to the field or a step towards developing more rigorous disciplinary norms. Simply put, tenure can serve to crystallize a discipline (and the perspectives it privileges), or to redefine it. Sometimes the perspectives privileged in a discipline can discriminate based on protected classes (e.g., historically many disciplines excluded women or people of color who wrote about their own embodied experiences).[2852] The power to decide which kinds of scholarship are legitimate, however,

---

[2849] Nevertheless, in the second case (*Wetherbe v. Texas Tech University*), it is clear that the plaintiff's speech was more of the cause for the retaliatory conduct than his choice not to have tenure. Still, it is likely Wetherbe would not have had to take such disputes to court if he actually had accepted tenure, since he would be entitled to due process within the university. See, *Wetherbe v. Texas Tech University* 699 Fed.Appx. 297 (5th Cir. 2017)

[2850] Butler, Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom, supra note 211, at 114.

[2851] *Id.* at 122.

[2852] See, AHMED, *supra* note 2816, at 152-153.

lies with the already tenured; this can be understood as disciplinary power. The ways disciplines have historically marginalized some voices while prizing others continues to affect tenure and promotion processes today and can be seen in some of the cases discussed.[2853] Such phenomena are more common when faculty members publicly advocate for a stance stemming from their areas of expertise and/or identities.[2854] Section 6.1.3. discusses the issues that can arise when disciplinary power comes into conflict with institutional power.

6.0.2. Motivations for Speaking

In *Singh v. Cordle,* the Tenth Circuit reversed the district court's denial of summary judgment for the First Amendment claim against the defendant (provost) Cordle.[2855] The court stated that "the relevant legal question [is] whether the employee's *primary* purpose was to raise a matter of public concern" or address personal grievances.[2856] The Tenth Circuit explained that Cordle was entitled to qualified immunity because a reasonable administrator could have assumed that Singh's primary motive when compiling the binder alleging schoolwide discrimination was personal rather than to raise awareness about an issue of public concern.[2857] This Tenth Circuit

---

[2853] *Cravey v. Univ. of N.C. at Chapel Hill*, 2018 WL 4471732 1, *1-2 (M.D.N.C.) (in which a feminist geography professor alleged she was denied promotion for her feminist advocacy); *Abdulhadi v. Wong*, N.D. Cal. Civil, 2019 2019 WL 3859008 1, *1-7 (Aug. 16, 2019) (arguing that the plaintiff's research on Palestinian freedom and resultant advocacy was the cause for alleged institutional retaliation); *Van Duyne v. Stockton University*, 2020 WL 6144769, at *4-7 (Oct. 20, 2020) (alleging that the plaintiff, affiliated with the gender studies department, was threatened by academic supervisors and retaliated against for advocating for improved sexual assault protections on campus); *Salaita v. Kennedy*, 118 F.Supp.3d 1068, 1083 (N.D. Ill. 2015) (finding that the plaintiff's tweets on matters of public concern related to Israel-Palestine relations were protected speech).
[2854] See *supra* note 2833.
[2855] *Singh v. Cordle*, 936 F. 3d 1022, 1044 (10th Cir. 2019).
[2856] *Id.* at 1035.
[2857] *Id.* at 1036.

precedent is worthy of critique for two reasons. First, treating personal motivations as outweighing public interest/public concern or even motivations to improve systems for future faculty, is a tactic for isolating and individualizing complaints, as Ahmed has explained.[2858] Second, this precedent has been cited in other cases finding for the defendants because the plaintiffs have a personal investment in the application of a policy or procedure even when they also advocate for a change to the policy for the benefit of other similarly situated persons.[2859]

Ahmed writes that there is an institutional logic that acts to minimize a complaint by isolating or individualizing it in order to make complaints legible to the institution.[2860] She explains that complaints representing the concerns of multiple complainants are illegible to universities and thus, "Individuation and atomization can be determined at any point in the complaint process. A response to a collective can be to treat the collective as an individual. The collectivity of complaints is often erased by how complaints are received."[2861] In other words, even when complainants are documenting harms to multiple similarly situated individuals (past, present, or future), institutions tend to minimize such complaints by treating them as personal or individual gripes or grievances about mistreatment. This minimizing allows institutions to ignore the larger issues the complaint aims to address, i.e., demands for cultural, policy, or procedural changes. The plaintiffs' attempts to advocate for their colleagues in *Singh v. Cordle,* as well as *Joritz* and *Alozie* were all viewed as primarily reflecting their own self-interests,

---

[2858] AHMED, *supra* note 2816, at 278.
[2859] See, *supra* section 5.2.1.2. Advocating for More Inclusive Practices
[2860] Id.
[2861] Id.

rather than the common good.[2862] By ignoring the larger ramifications of placing greater burdens on faculty with marginalized identities, the courts, like the institutions, were able to reframe these cases into issues of minor workplace grievances, rather than demands for cultural change or a more equitable and welcoming work environment.

6.0.3. Complaints

In *Complaint!* Sara Ahmed discusses how complaints can be traumatic. A participant in Ahmed's study described meeting up with another victim of sexual harassment who shared in her complaint experience as being like "veterans' reunions."[2863] While there is a general understanding of physical violence as warfare and all the trauma that comes with that, it is not as common to recognize the epistemic violence faced by those who have felt betrayed by their colleagues and/or institutions. It is important to differentiate those who have felt they had been betrayed because of their own misbehavior from those who felt betrayed due to their commitment to the mission of the very institution betraying them.

Ahmed's book repeatedly shows how in the process of filing a complaint, even in those instances in which the complaint is filed by a collective, the procedure itself sets out to isolate and individuate each complainant from any other complainant.[2864] Perhaps this is a legal strategy justified by admissibility of hearsay, or perhaps this is because detangling multiple shared testimonies is too much work at the outset of an investigation, or perhaps it is just for simplicity's sake. The consequence of this policy, as documented

---

[2862] *Alozie v. Arizona Bd. of Regents*, 431 F. Supp. 3d 1100 (D. Ariz. 2020); *Joritz v. Gray-Little*, 822 Fed.Appx. 731 (2020); *Singh v. Cordle*, 936 F. 3d 1022.
[2863] AHMED, *supra* note 2816, at 282.
[2864] *Id.* at 278.

by Ahmed, however, is to undermine the power of a collective voicing of shared concerns.[2865] Such policies reduce the problem to an individual dispute rather than an endemic problem with the institutional or departmental culture.[2866] Ahmed's work shows that the effects on the individual complainants are destructive and haunting. One participant explained that when she meets up with others involved in her complaint,

> You go back and you talk about the past and how it is haunting all of you. So, for my own protection, I needed distance, because we would invariably go back and it would upset me. It would destabilize me. It would pull me back. I need to put all my energy in rebuilding everything they destroyed: self-esteem, self-belief, self-worth.[2867]

The fact that one's experience complaining within their workplace could result in so much emotional and personal destruction is further discussed in the following section.

6.0.4. Institutional Betrayal

Smith and Freyd's article *Institutional Betrayal* in the September 2014 issue of *American Psychologist* lays out in accessible language what institutional betrayal is and how it can affect anyone who has experienced a traumatic experience within an institution.[2868] While Smith and Freyd's article focused mainly on the added trauma of

---

[2865] Id.
[2866] *Id.* at 278-281.
[2867] *Id.* at 282.
[2868] Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AMERICAN PSYCHOLOGIST 575 (2014). Freyd's research first came to the attention of the author of this dissertation because of Freyd's own experience of institutional betrayal in which she experienced gender pay discrimination at her employer of over 30 years, University of Oregon. See, *Freyd v. University of Oregon*, 990 F. 3d 1211 (9th Cir. 2021). Freyd's case was resolved by a settlement which included $350,000 for attorney's fees, back pay, and emotional distress, and a $100,000 donation to the Center for Institutional Courage, founded by Freyd to educate the public about institutional betrayal and how to prevent it. For more information about the

institutional betrayal for victims of physical and/or sexual violence, they recognize that victims of discrimination or other forms of chronic stress and mistreatment are also trauma victims who may experience institutional betrayal.[2869] Certain types of institutional actions and inactions were found by Smith and Freyd to be associated with institutional betrayal.[2870] These institutional (in)actions included: failure to prevent abuse,[2871] normalizing abusive contexts,[2872] difficult reporting procedures and inadequate responses,[2873] supporting cover-ups and misinformation,[2874] and punishing victims and whistleblowers.[2875] A careful reader will notice that many of the cases examined for this dissertation also exhibited these same actions and inactions, further exacerbating for many of the faculty plaintiffs the negative effects of their conflicts with their employer.

Smith and Freyd's recommendations include transparency and member protection.[2876] Freyd has since founded a non-profit, the Center for Institutional Courage, which seeks to educate the public about institutional courage and transformation to prevent institutional betrayal; many recommendations and guidance for administrators and institutions can be found under "resources" on the Center's website.[2877]

---

settlement see, AAUW Legal Advocacy Fund, *Past Cases: Freyd v. University of Oregon*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, https://www.aauw.org/resources/legal/laf/past-cases/freyd-v-university-of-oregon/ (last visited Dec. 13, 2022).

[2869] *Id.* at 577.

[2870] *Id.* at 582.

[2871] See, *Rodriguez v. Serna*, 2019 WL 2340958, *8 (D.N.M. 2019).

[2872] See, *Khatri v. Ohio State Univ.*, No. 21-3193, 2022 WL 620147, at *1 (6th Cir. Jan. 25, 2022).

[2873] See, *Berrios v. State Univ. of New York at Stony Brook*, 518 F. Supp. 2d 409, 420 (E.D.N.Y. 2007); *Bowers v. University of Delaware*, 2020 WL 7025090, at *2 (D. Del. Nov. 30, 2020).

[2874] See, *Nuovo v. The Ohio State University*, 726 F. Supp. 2d 829, 835 (S.D. Ohio 2010).

[2875] See, *Khatri v. Ohio State Univ.*, No. 21-3193, 2022 WL 620147, at *1; *Nuovo v. The Ohio State University*, 726 F. Supp. 2d 829, 835 (S.D. Ohio 2010); *Van Duyne v. Stockton University*, 2020 WL 6144769, at *6 (D.N.J. Oct. 20, 2020); Smith & Freyd, *supra* note 2840, at 582–83.

[2876] Smith & Freyd, *supra* note 2840, at 584.

[2877] *Home*, CENTER FOR INSTITUTIONAL COURAGE, https://www.institutionalcourage.org (last visited Dec. 13, 2022).

6.0.5. Evidence

This dissertation research has demonstrated the difficulty individual plaintiffs face in providing evidence that their institutions violated their First Amendment rights. For the plaintiffs who viewed themselves as whistleblowers, their complaints had the potential to transform them into "complainers," or adversaries to the institutional status quo.[2878] Adversaries are viewed not as supportive of the educational mission but toxic to it because they challenge the way things work and this is often conflated with challenging the work altogether. Nevertheless, many whistleblowers in this study were advocating for changes that would support the educational mission or pointing to issues where the institution was failing its mission. The adversarial posture was what the institutions responded to, however—not the content of the complaints, reports, or letters of concern. The most common institutional response to an adversary among the employees is to discredit, minimize, and then bury their claims; as Ahmed shows, many institutional policies have found an efficient, if not expedient, way to do this by drowning the complainants in paperwork[2879] and bureaucracy and expectations of legibility[2880] until the complainants bury the complaints themselves.[2881] Likewise, deviating from institutional policy is a common tactic used by defendants to avoid conflict.[2882]

[2878] AHMED, *supra* note 2816, at 148-149.
[2879] AHMED, *supra* note 2816, at 31-33.
[2880] *Id.* at 278.
[2881] *Id.* at 276.
[2882] *Id.* at 47, explaining, "having evidence that the organization has failed to follow its own policies and procedures becomes evidence of insubordination because that evidence implies that those who govern the university should be bound by something other than themselves. Of course, we might answer by saying that those who govern or manage educational institutions should be bound by laws, policies, and procedures. What should be the case is not always the case. In making a complaint or in challenging the decision of a 'superior body' you are coming up against the emptiness of that *should*. That *should*—should be bound—

Unfortunately, plaintiffs may view these policy deviations as clear evidence of retaliation or discrimination, while federal courts are more likely to view constitutional policy violations as permissible (and thus irrelevant).[2883]

The disconnect between what constitutes evidence of retaliation for the courts and evidence of retaliation in the minds of the plaintiffs is made clear through judges' responses to pro-se faculty plaintiffs. For instance, in *Burton*, the district court could tell that the plaintiff had tried to do her homework (figuratively speaking) on the rules of procedure, but when she failed to comply with such procedures (as is to be expected with pro se plaintiffs) the court documented her failures.[2884]

> Burton is familiar with the court's summary judgment procedures because she cites them extensively in her responses to defendants' proposed findings of fact. Burton is a sophisticated, highly educated litigant, more capable than most pro se parties of assembling her evidence and presenting it to the court as required. She has failed to do so.
>
> In opposition to defendants' motion for summary judgment, Burton submitted 707 proposed findings of fact. Most of Burton's proposed findings contain no citation to record evidence. Some that refer to evidence cite lengthy audio or video recordings without providing timestamp or other indication of the

---

not only means nothing, but those who suggest it does mean something become insubordinates. Policies become for others to follow. As [a research participant] explained, 'They are not bound by their own policies and frankly they can rewrite them if they don't like them.' She later qualifies, 'They don't even think they have to rewrite the policies they don't like.' The implication here is that only those who are in subordinate positions are bound or even should be bound by policy. […] 'Policies are for others."

[2883] See, Section 6.0.1. *supra.*

[2884] *Burton v. Board of Regents of University of Wisconsin System*, 2020 WL 5304493, at *1 (W.D. Wis. Sep. 4, 2020) (citations omitted). The researcher does not mean to imply that the plaintiff was wholly undeserving of the court's treatment of her *pro se* filings or of the court's assertation that she was not immunized "from the consequences of her grossly unprofessional conduct." *Id.*

> relevant portions. Burton's proposed facts are often merely argumentative. See, e.g., (proposing "That's just ridiculous" as a finding of fact). Some are naked legal conclusions. See, e.g., ("This was a protected activity."). Burton's deficiencies made the task of verifying her version of the facts nearly impossible.[2885]

Such failure to communicate in the same language on the part of judges and plaintiffs was not uncommon. For instance, in *Joritz*, the court found that Joritz's failure to report other instances of discriminatory student evaluations of other women faculty "strongly suggests that a concern for discrimination against others was not her principal motive."[2886] It is very possible that Joritz had not been given permission by her colleagues to report their student evaluations for myriad reasons, not the least of which being that they feared retaliation and a tenure denial (as was alleged by Joritz). Nevertheless, the court was not sensitive to this possibility and viewed her failure to report as evidence of her less than selfless motivation.

As further discussed in section 5.2.1., plaintiffs often failed to provide the courts with the necessary background in the relevant academic or institutional contexts for their claims. For instance, Oller failed to provide evidence that his faculty appointment to one "track" or another would materially affect his salary or benefits.[2887] Likewise, Benison failed to explain the context of academic salary adjustments and the (often unwritten) requirement that one be given an offer elsewhere to expedite negotiations for adjustment

---

[2885] Id.
[2886] *Joritz v. Gray-Little*, 822 Fed.Appx. 731, 741 (10th Cir. 2020).
[2887] *Oller v. Roussel*, 609 Fed.Appx. 770, 774 (5th Cir. 2015).

at one's current institution.[2888] In any attempt to resolve conflicts between faculty and their institutions, third-parties outside of academia (e.g., attorneys, mediators, arbitrators, judges) must be adequately briefed on the academic context in which the conflict arose if they are to come to a fair and equitable resolution.

6.1. Recommendations

This section offers recommendations based on the findings and critiques laid out in the previous sections. The recommendations offered relate to whistleblowing, tenure, professional programs, inclusion, academic freedom, and dealing with troublesome personalities. These recommendations are written for a broad audience including courts, attorneys, plaintiffs, higher education administrators, trustees or board members, union officers, and faculty writ large.

6.1.1. Whistleblowing

In large part because of *Garcetti,* whistleblower protections for public higher education staff and faculty vary greatly by state and even municipality.[2889] While a complete discussion of the ramifications of *Garcetti* for higher education whistleblowers is not appropriate for this dissertation, Appendix C contains a guide based on this research for those who are writing or revising institutional policies to protect whistleblowers.[2890]

When it comes to whistleblowers, it is difficult to make recommendations without the detailed fact pattern; however, before going to the media or otherwise expressing

---

[2888] *Benison v. Ross*, 983 F. Supp. 2d 891, 903 (District Court 2013).
[2889] Nora Devlin, *Vulnerable Integrity: Two Whistleblower Cases in Public Universities*, 46 J.C. & U.L. 360, 365–66 (2021).
[2890] The researcher also published an article dedicated to the particular discussion of whistleblowers in higher education. See, *Id.*

concerns publicly about misconduct or corruption (even artistically), it is recommended that potential whistleblowers speak with an attorney familiar with whistleblowing cases in their state so that they can ensure protection under the applicable state whistleblower statutes. Under no circumstance should whistleblowers assume their speech will be protected by the First Amendment; as evidenced by the 162 cases in this dissertation, success on a First Amendment claim against a college or university is extremely unlikely. Finally, finding what Ahmed calls a complaint collective and working together to find creative (even artistic) solutions can be helpful if not cathartic.[2891]

6.1.1.1. **An ideal whistleblower policy should account for:**

Institutions would be wise to complete an audit or self-audit of their current policies with the following priorities in mind:

- Shared Governance: Faculty peer-review when investigating (motivation of) reports of unsafe conditions and when reviewing allegations of retaliation; faculty (especially contingent faculty) and postdoc and graduate student involvement in developing policies, protections, and procedures related to whistleblowing; clear limitations on administrative overruling of faculty governance/oversight mechanisms/procedures to prevent retaliation based on monetary incentives/funding priorities.

[2891] Ahmed cites an interactive art exhibit at the Tate Museum by "The Guerilla Girls" called *Complaints Department* in which office hours were held and visitors were invited to voice their complaints face-to-face. See AHMED, *supra* note 2816, at 289. See also, AHMED, *supra* note 2816, at 298, describing *The Pansy Project* in which Paul Harfleet planted pansies where acts of homophobic violence had occurred. For instance, if each time a professor felt like their complaint was not taken seriously, she created a small paper crane or square of knitting, when connected and displayed all together this art could convey a powerful message.

- Response protections: Anonymity of reporter/complainant, speedy response, confidentiality, clarity of protections available to complainants (especially protections for intra-institutional speech that is outside of one's chain of command), data collection on reports/complaints and how quickly they are resolved, data collection on instances of retaliation.
- Safety and security: of data/substances/etc., of employees/workers/students
- Reporting Procedures: Clarity, anonymity, simplicity of reporting procedures (online, one form, phone number, Zoom room, etc.), ease of finding and completing report/complaint (big link, easily searched, etc.), Reference to statutory protections available for workers who report to government (state/federal) agencies, with clear instructions on how to do that.

  These areas are discussed further in Appendix C.

6.1.2. Tenure Expectations

Many of the cases analyzed involved a dispute over a tenure denial.[2892] In many cases, the denial was allegedly due to the plaintiff's failure to meet the supervisor's or department's expectations. It is recommended that colleges and universities train their department chairs to give explicit written feedback on all ways an assistant professor's dossier is not meeting expectations beginning as early in the faculty member's employment with the school as possible. This should also be codified in institutional

[2892] See, for example, *Min Li v. Qi Jiang*, 673 Fed.Appx. 470, 471 (6th Cir. 2016); *Joritz v. Gray-Little*, 822 Fed.Appx. 731, 735 (2020); *Whiting v. University of Southern Mississippi*, 451 F.3d 339, 339 (2006); *Hatcher v. Board of Trustees of Southern Illinois University*, 829 F. 3d 531, 534 (2016); *Webb v. Kentucky State University*, 2012 WL 858639, at 517 (6th Cir. Mar. 14, 2012); *Sun v. Board of Trustees of University of Il*, 429 F. Supp. 2d 1002, 1006–7 (C.D. Ill. 2006); *Frieder v. Morehead State University*, 770 F.3d 428, 430–31 (6th Cir. 2014).

policy, and enforcement should be the domain of the deans. In certain cases, the feedback that was not given explicitly pertained to the plaintiff's (lack of) dedication to the school or department.[2893] Had this feedback been made explicit well in advance of the tenure application process, it is unlikely the dispute would have resulted in a lawsuit.[2894] Likewise, tenure-track faculty are aware that pre-tenure they are expected to meet high standards in order to prove themselves; nevertheless, unclear expectations are nearly impossible to meet, while high expectations are achievable. Likewise, unclear expectations leave room for feelings of unfairness and/or discrimination when colleagues are held to different standards. Such feelings can fester into full on conflict after time. When in doubt, be very explicit about what tenure expectations are and what they are not and apply them fairly to all faculty.

6.1.3. Professional Programs

Professional programs within colleges and universities create unique challenges when faculty conflicts arise. This is in large part due to the fact that professional programs often have a practical or clinical element to them—an expectation that the students practice, and faculty supervise them, in clinical (or hands-on) settings. This is common practice in many professional programs, such as law, medicine, nursing, education, social work and counseling psychology, engineering, accounting, and even business. Professional schools are often accredited by national or international professional organizations that aim to regulate the profession through qualifications for entry and enforceable standards of conduct.

[2893] See, *Li v. Jiang*, 164 F. Supp. 3d 1012, 1023 (N.D. Ohio 2016).
[2894] At the very least, it would be much more unlikely for the plaintiff to find adequate representation with such a flimsy case.

What happens when mandatory professional standards conflict with supervisor expectations or demands? A faculty member in such a position is torn between opposing forces—is a credential from the accrediting body worth more than an employment contract if losing the contract could just as easily end one's career? Post calls this dilemma one of differential authorities, explaining that "professionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards."[2895] This restricts employers' abilities to deploy their professional employees to work towards the employer's goals by placing firm boundaries around what constitutes appropriate behavior or ethics for professionals.[2896] As Ahmed's definition of power clarifies, power is the ability to suspend for yourself what is binding for others; in other words, when the institution's interests are served by suspending the power of the discipline or profession to self-govern, it will (attempt to) assert the power to do so.[2897] This sort of dilemma arises more often than one might expect. Faculty in professional programs experienced tension between their employers' demands and their commitment to professional standards in at least six cases examined for this project.[2898] The various judges handled these cases very differently, and thus there is room for courts to improve and synchronize

---

[2895] Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 172 (1996).
[2896] Id.
[2897] AHMED, *supra* note 2816, at 48.
[2898] See, *Maa v. Ostroff*, 2013 WL 5755043; *Rehman v. State University of New York at Stony Brook*, 596 F.Supp.2d 643 (2009); *Nuovo v. The Ohio State University*, 726 F. Supp. 2d 829 (2010); *Coleman v. Great Bay Community College*, 2009 WL (Oct. 30, 2009); *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367; *Rose v. Haney*, 2017 WL 1833188 1 (N.D. Ill. 2017). An additional two cases dealt with the failure of faculty members to meet professional standards—see, *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019); *DePree v. Saunders*, 588 F. 3d 282.

approaches. Three of the cases are briefly discussed here along with the questions raised by the courts' rationales, followed by recommendations.

Rehman, a professor of surgery, was repeatedly disrupted during his surgeries and denied proper equipment by his supervisors. The District Court for the Eastern District of New York found that, "such actions, if true, might well have dissuaded Rehman's complaints for fear that his ability to carry out his professional duties would be compromised."[2899] Here the court explicitly—though whether the distinction was deliberate is known only to the court—labeled the plaintiff's duties as a surgeon as "professional" rather than employment duties.

In this case, the District Court for the Southern District of Ohio found that the "[p]laintiff's speech concerning OSU policies, practices, and problems was speech made pursuant to his official duties, whether by contractual or professional obligation." The district court held that despite any difference between professional obligations and official (contractual) duties, neither would be protected under the First Amendment because the plaintiff was employed as a professional. But such reasoning raises the question of what protection should be available to faculty physicians, nurses, or other instructors in professional programs who must operate according to professional standards even when their college or university employer demands they do otherwise? Should freedom of expression really not extend to the self-governance of professional bodies such as the American Medical Association and their members employed as faculty in public higher education contexts?

[2899] *Rehman v. State University of New York at Stony Brook*, 596 F.Supp.2d 643, 653 (E.D.N.Y. 2009).

In *Isenalumhe*, the faculty plaintiffs' supervisor allegedly violated professional nursing standards by needlessly placing patients and students at risk in retaliation for the plaintiff's opposition to administrative decisions. Upon complaining about the supervisor's disregard for safety, the retaliation continued. The court acknowledged that assigning Isenalumhe to teach a medical-surgical nursing course for which he was unqualified had put patients[2900] at risk, but that this did not "outweigh the overriding personal nature of the complaints."[2901] In light of this lack of concern for patient safety, what are professional associations expecting from the colleges and universities whose responsibility it is educating the next generation(s) of professionals according to professional accreditation and ethical standards? What recourse do professional associations have when confronted with evidence of academic warfare among faculty and administrators in their professions? What recourse might professional associations have when institutions close ranks around an administrator who has repeatedly violated professional standards?

Given the courts' disagreements regarding how to balance the opposing demands professional organizations and public higher education employers place on faculty, the following recommendations are offered. First, professional schools, programs, or departments could sign memoranda of understanding (MOUs) with their corresponding professional organization that could outline the recourses available to faculty who find themselves in a similar dilemma to those discussed above and report it to their professional organization. Likewise, courts can cite the precedent in *Maa* (arguing that

---

[2900] And students…
[2901] *Isenalumhe v. McDuffie*, 697 F. Supp. 2d 367, 380 (E.D.N.Y. 2010).

planning to testify truthfully in a wrongful death lawsuit in a way that will complicate his employer's defense was not part of his official duties) and *Rehman* (finding that complaining about repeated interruptions of surgery and denial of proper equipment put patients at risk).[2902] Such precedents align with the reasoning that when professional obligations of medical doctors conflict with employment expectations, it is in the best interest of the public for doctors to adhere to their professional ethical obligations even against the will of their employers. A once-and-for-all solution to the power imbalance between employers of professionals and their professional organizations is not obvious. Nevertheless, contracts, regulatory policy, legislation, and caselaw could all be leveraged by professional organizations or unions to compel institutions to uphold professional standards even when it opposes an institution's interests.

6.1.4. Inclusion in Tension with Free Speech

In cases across the federal circuits (Third,[2903] Fourth,[2904] Fifth,[2905] Sixth,[2906] Seventh[2907] and Ninth[2908] Circuits), faculty have alleged their protected speech was made pursuant to their sincerely held religious beliefs. Faculty plaintiffs have asserted that their religious freedom essentially outweighs the interests of their public employers in creating

---

[2902] *Maa v. Ostroff*, No. 12-cv-00200-JCS, 2013 WL 1703377, at *24 (N.D. Cal. Apr. 19, 2013); *Rehman*, 596 F.Supp.2d at 653.
[2903] *Gadling-Cole v. West Chester University*, 868 F.Supp.2d 390 (E.D. Pa. 2012). This case is slightly more nuanced, given the other aspects of discrimination present. There are multiple aspects of inclusion/discrimination present in this case, and at least one interpretation of the facts is that the white pro-LGBTQ faculty used Gadling-Cole's religious beliefs as an excuse for their racist behavior towards her, to the point of religious discrimination (as determined by a jury).
[2904] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550 (4th Cir. 2011).
[2905] *Nichols v. University of Southern Mississippi*, 669 F. Supp. 2d 684 (S.D. Miss. 2009); *Payne v. University of Southern Mississippi*, 681 Fed.Appx. 384 (5th Cir. 2017).
[2906] *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).
[2907] *Poulard v. Trustees of Indiana University*, 2018 WL 4680010 (N.D. Ind. Sep. 28, 2018); *Piggee v. Carl Sandburg College*, 464 F. 3d 667 (2006); *Wozniak v. Adesida*, 932 F.3d 1008 (7th Cir. 2019).
[2908] *Lopez v. Fresno City College*, 2012 U.S. Dist. LEXIS 32846 1, *20-28 (E.D. Cal.).

inclusive and welcoming learning environments for historically marginalized students (e.g., LGBTQ students, religious and/or racial minorities, women). The circuits have split on this issue, with the Seventh Circuit providing a rationale most closely reflecting an educational-mission based approach.[2909]

When faculty make historically marginalized students feel excluded in their classrooms, departments, or office hours, it is an abuse of power which hinders the educational mission of the institution. It is recommended to prioritize the creation of inclusive educational environments where all students may learn over the "freedom" of more powerful individuals to make students feel unwelcome or discriminated against. Likewise, when religious freedom (especially among the protestant Christian majority in the United States) is used as an excuse to discriminate or mistreat students (see *Meriwether*[2910]), faculty, students, and administrators must all be empowered to create and enforce reasonable boundaries. For instance, regardless of religious beliefs, students should not be repeatedly singled out and subject to mis-gendering in every lecture.[2911] This creates a hostile learning environment and models discriminatory and disrespectful behavior, not just for one student, but for the entire class. An educational-mission based approach to such dilemmas should prioritize the inclusion of historically marginalized communities through creation of a welcoming learning environment.

[2909] *Wozniak*, 932 F.3d at 1010.
[2910] See, *supra* section 4.6.10. and 4.6.10.1. for full summary of *Meriwether*.
[2911] See, *Meriwether v. Trustees of Shawnee State University*, No. 1:18-cv-00753, 2019 WL 4333598 (S.D. Ohio Sep. 5, 2019).

6.1.5. Academic Freedom

An academic exception to *Garcetti* has also been called an academic freedom exception.[2912] Academic freedom, however, is not a right that trumps all other rights—academic freedom for faculty members is held in tension with the academic freedom of the institution, the autonomy of professions and disciplines, and the rights of students to learn in an inclusive learning environment, among others. In all matters related to academic freedom, it is recommended that peer-review by faculty members (who are not involved in the dispute) play a role in determining preliminary disciplinary matters prior to any final administrative decisions. Within a shared-governance model of higher education, the faculty collectively must be empowered to protect the academic freedom of all members of the professoriate from undue discipline or retaliation.

When it comes to teaching, as explained in section 6.1.4., the educational mission prioritizes the needs of the students over the mere desires or beliefs of the faculty outside of their areas of expertise. Nevertheless, when conflicts over teaching relate to grading and/or institutional nepotism/favoritism (e.g., favoring student athletes), the academic freedom of the instructor is an important factor worthy of consideration in the resolution of the dispute. In *Lyons*, for instance, the court did not consider an academic freedom exception for Lyons's concerns related to grading, despite Lyon's opposition to allowing a student athlete to resubmit a midterm paper in Lyons's course after final grades had been awarded.[2913] An educational-mission inquiry in Lyons's case would have inquired

---

[2912] See, *Buchanan v. Alexander*, 284 F. Supp. 3d 792, 822 (M.D. La. 2018); *Sadid v. Vailas*, 936 F. Supp. 2d 1207, 1224 (D. Idaho 2013); *Savage v. Gee*, 716 F. Supp. 2d 709, 718 (S.D. Ohio 2010); *Kerr v. Hurd*, 694 F. Supp. 2d 817, 844 (S.D. Ohio 2010).
[2913] *Id.* at 1170.

into the faculty involvement in the grade dispute process before allowing for the conclusion that no academic freedom exception should apply.

As DeMitchell et al. have explained, educators can garner adverse notoriety when their public speech goes viral and has adverse effects on their professional reputation, their ability to work with students, and their relationship with their employer.[2914] Adverse notoriety perfectly describes the community responses to Adams who for years spoke about topics—outside of his area of expertise—that alienated historically marginalized students, staff, and colleagues.[2915] Unlike in the case of Mike Adams who virtually never spoke publicly about his scholarly research, adverse notoriety can nevertheless come into conflict with professors' academic freedom. For instance, in *Salaita v. Kennedy,* Dr. Salaita tweeted about the conflict between Israel and Palestine[2916]—a primary area of his scholarly expertise on anti-Arab sentiment and decolonialism. Salaita's inflammatory tweets were directly related to his area of expertise, and thus must be protected under the First Amendment—indeed, according to an educational mission inquiry, it is in the best interest of the institution to encourage faculty to speak truth to power in their areas of expertise, even when it is unpopular.

[2914] Todd A. DeMitchell et al., *Adverse Notoriety, the Student Protest, & the Viral Facebook Posts: Immoral Conduct and Evident Unfitness to Serve: Crawford v. Commission on Professional Competence,* 391 ED. LAW REP. 426, 431 (Sep. 2021).
[2915] See, Tasneem Nashrulla, *Professor's Racist And Anti-Gay Language Sets Off Free-Speech Battle On Campus*, BUZZFEED NEWS (Nov. 29, 2016), https://www.buzzfeednews.com/article/tasneemnashrulla/uncw-professor-free-speech-debate (verbally attacking a queer Muslim student online, equating her with a suicide bomber and accusing her of jihad); Jordan Culver & N'dea Yancey-Bragg, *North Carolina Professor Who Resigned amid Controversy over His "vile" Tweets Found Dead*, USA TODAY (Jul. 24, 2020), https://www.usatoday.com/story/news/nation/2020/07/24/uncw-professor-mike-adams-retired-tweets-found-dead/5500318002/ (treating the pandemic precautions taken by the government of North Carolina as slavery and equating his own experience with that of a slave by referring to the governor as a slaveholder).
[2916] *Salaita v. Kennedy*, 118 F.Supp.3d at 1082.

On the other hand, when faculty speak outside of their areas of expertise but still manage to alienate their students or colleagues, continued achievement of adverse notoriety can call into question one's commitment to the educational mission or fitness to teach. This does not mean that previously protected speech should be any less protected just because it can or does go viral on the internet; however, such viral faculty whose speech targets or alienates students or colleagues based on their marginalized identities for solely their own gratification can create a great deal of trouble for educational institutions. Based on the preceding study, it is recommended that faculty who garner adverse notoriety for publicly "punching down" or targeting students or fellow employees with less institutional or disciplinary power than themselves, be considered for discipline for their hindering of the educational mission to create and disseminate knowledge within an environment conducive to learning which is inclusive of people of minoritized identities. Under *Pickering*, the institution's interest in carrying out its educational mission can and should outweigh the interests of individual faculty in punching down in order to go viral on the internet.

6.1.6. Dealing with Troublesome Personalities (Obnoxious Jerks)

Some people are just mean. In the everyday situations in which most faculty find themselves, cruelty is rarely helpful. On the other hand, for many professors, their doctoral and post-doc training was full of being taken advantage of and/or being made to place their research above everything else in their lives. [2917] Such experiences can be

---

[2917] Aaron Cohen & Yehuda Baruch, *Abuse and Exploitation of Doctoral Students: A Conceptual Model for Traversing a Long and Winding Road to Academia*, 180 JOURNAL OF BUSINESS ETHICS 505, 505–7 (Oct. 2022) (explaining that doctoral student attrition is primarily caused by the relationship between student and

traumatizing, and the training itself is as much about how to survive a toxic culture of competition and endless work as it is about how to conduct rigorous scholarly research.

There is a difference between individual personalities, individual behavior, and systemic and cultural expectations when it comes to workplace behaviors. Any job working with other human beings will mean having to work with someone disagreeable at one point or another. Nevertheless, some work environments tolerate and support toxic behavior more than others. In academia, a culture of passivity and conflict aversion has allowed abusive, exploitative, and discriminatory behavior to run rampant for centuries.[2918] Academic systems and traditions, like tenure, enable and promote conflict aversion[2919] for some while instilling hypervigilance for others. Risk and conflict aversion among academic supervisors often affirm the myth that tenured faculty cannot be disciplined.[2920] Legal scholars have already addressed the legal issues that can ensnare institutions trying to dismiss tenured faculty for cause.[2921] Instead, the recommendations offered here are more prophylactic in nature. After adequate training of academic supervisors in their legal rights and responsibilities, and how to manage professionals, the

---

advisor, that the culture of scientific reward can encourage faculty to usurp authorship credit, and that rates of bullying in academia are higher than in other workplace environments). See also David F. Feldon et al., *Ph.D. Pathways to the Professoriate: Affordances and Constraints of Institutional Structures, Individual Agency, and Social Systems*, *in* HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH: VOLUME 38, 1, 41 (Laura W. Perna ed., Springer International Publishing 2023).

[2918] For a complete history of how American universities were built and maintained over the centuries through the continual systematic exploitation and abuse of enslaved Black people, see CRAIG STEVEN WILDER, EBONY AND IVY: RACE, SLAVERY, AND THE TROUBLED HISTORY OF AMERICA'S UNIVERSITIES (Bloomsbury Publishing USA Sep. 2013).

[2919] Lee & Rinehart, *supra* note 268 at 390.

[2920] See, J. Royce Fichtner & Lou Ann Simpson, *Trimming the Deadwood: Removing Tenured Faculty for Cause*, 41 J.C. & U.L. 25, *25-26 (2015).

[2921] See, Fichtner & Simpson, *supra* note 2889; Lee & Rinehart, *supra* note 268; David M Rabban, *The Regrettable Underenforcement of Incompetence as Cause To Dismiss Tenured Faculty*, 91 IND. L.J. 20 (2015); Timothy B. Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J.C. & U.L. [i] (1983–1984).

next step is to address disagreements before they have a chance to escalate into conflicts. Supervisors can leverage options like mediation, restorative justice programs, and other alternative dispute resolution mechanisms with such faculty. The earlier the issue is addressed, the more normal and necessary the procedures will become in the faculty members' minds. Supervisors must not allow bullying among faculty. If one person finds ways to make everyone uncomfortable or upset, it is absolutely imperative to take the time to have difficult conversations. If the faculty member is permitting or encouraging students to enact abusive, bullying, or discriminatory behavior, those students and the faculty member should be put through the appropriate disciplinary processes immediately.

One conversation worth having within a department or unit is to discuss how each individual wants to deal with conflict and/or constructive feedback. Indeed, department chairs can and should have these conversations regularly with each faculty member in the department. Practicing offering constructive feedback in the way each member has requested will also help the group members to gain self-awareness about their preferences both giving and receiving feedback. Likely the most important thing one can do to dismantle a culture of conflict-aversion is to model for colleagues and students an openness towards soliciting and implementing constructive feedback and an authentic desire to adapt one's behavior to improve the overall climate for historically marginalized members of our campus communities. If a dispute then spirals out of control, or escalates into grievances or lawsuits, at the very least the supervisor and departmental colleagues will know she had done everything she could to find a solution. To summarize, institutions can better serve their educational mission by expecting from faculty the same

willingness to implement constructive feedback when it comes to their interpersonal behaviors as in their scholarly work and that they expect from their students. Frequent check-ins, frank discussions, and/or progressive discipline should be implemented whenever faculty do not meet expectations for appropriate conduct.

Finally, courts should be more willing to address the elephant in the room in many of these cases—that administrators ignored the problem for as long as they could and failed to prevent the case going to court. Courts are positioned to call out inappropriate and unprofessional behavior by defendants as well as plaintiffs. The responsibility for enabling and even contributing to academic warfare lies with the administrators who are so conflict averse they refuse to intervene to settle a dispute, even when retaliations become dangerous (e.g., when a faculty member is told he must teach a course in surgical nursing that he is unqualified to teach, as in *Isenalumhe*). Based on the faculty free speech caselaw analyzed herein, the researcher recommends that courts be educated on the conflict-averse culture of academia and how this culture shapes the behavior exhibited by both faculty and administrators alike.

6.2. Conclusion

Chapter six enumerated five critiques and six recommendations based on the analysis of the 162 cases and 245 decisions for this dissertation. Incorporating Sara Ahmed's research on complaints in higher education contexts, section 6.0.1. critiqued the understanding of power exhibited in the faculty free speech caselaw. Institutional power was exhibited in many cases, both in this study and in Ahmed's, by an administration's decision to ignore or neglect to implement the appropriate institutional policy or procedure. Section 6.0.1.1. extended the critique of power to faculty's embrace or

rejection of tenure and how tenure is wielded to preserve disciplinary power—the power to legitimize or delegitimize scholarship and expertise.

Section 6.0.2. critiqued the Tenth Circuit's "purpose" for speaking standard and a similar application in the District Court of Arizona in *Alozie*. This section evaluated courts that determined the "primary purpose" of a plaintiff's speech to be personal in nature (not to address a matter of public concern) when it was clear that the speech was intended to serve not just self-interest but the public good. The danger of ignoring the concerns of faculty for their colleagues, especially those with marginalized identities, is that it affirms the systemic dismissal of complaints aimed at changing discriminatory or abusive workplace cultures.

Sections 6.0.3. and 6.0.4. incorporated feminist and psychological literature into the critique of courts' understanding of the ramifications of faculty conflicts and complaints. Many of the faculty plaintiffs in this study believed they were advocating for the educational mission, despite facing institutional opposition. Faculty who have suffered at the hands of their institutions for their protected speech may experience institutional betrayal. Understanding of this literature is not currently present in the caselaw and would likely help courts understand the effects of disputes on the plaintiffs. Section 6.0.5. then critiqued the disconnect between the plaintiffs' and the courts' understanding of what constitutes material evidence in a case. Academic plaintiffs must adequately brief the courts (and any third-party neutral) on academic customs, culture, and procedure if they are to have a chance at an equitable settlement.

Section 6.1. provided recommendations related to whistleblowing, tenure expectations, professional programs, inclusion, academic freedom, and troublesome

faculty members. Section 6.1.1. offered a critique of how *Garcetti* affected the whistleblower protections available to public college and university faculty. Section 6.1.1.1. then offered a list of what considerations must be made to develop an ideal institutional whistleblower policy; these recommendations are further developed in the guide for whistleblower policy development in Appendix C.

Section 6.1.2. offered recommendations for tenure expectations in light of the numerous cases reviewed in which tenure denials resulted in free speech litigation. Section 6.1.3. discussed the divergent expectations of faculty members who teach in professional schools or programs in which the requirements of a professional organization or accreditation body might come into conflict with the demands of one's employer. As further explained above, professional organizations and/or unions could leverage contracts, regulatory policy, legislation, and caselaw to compel institutions to uphold professional standards even when it opposes an institution's interests.

Section 6.1.4. dealt with the tension between free speech and the value and interest of inclusion within the academy. An educational mission-based approach is recommended to resolve disputes based on this tension. If an individual's interest in free speech is at odds with the institution's educational mission, the educational mission should outweigh the individual's interests. Likewise, section 6.1.5. recommends an educational mission standard that places the mission of the institution above individual interests of members of the faculty or administration. Section 6.1.5. also differentiates between speech in one's area of expertise from speech outside of one's expertise. In the case of a faculty member's penchant for garnering adverse notoriety, whether or not the

speech is within one's expertise is an important factor in determining an appropriate institutional response.

Finally, section 6.1.6. provided recommendations for how faculty and administrators can manage troublesome personalities. These recommendations included prophylactic practice of giving and receiving feedback, leveraging informal dispute resolution mechanisms, proper training for administrators on how to address conflict, and any other appropriate steps towards changing academic culture into one that views conflict as a healthy and necessary part of work.

7. Summary and Conclusion

This research built on the established academic freedom scholarship in education, the humanities, social sciences, and law, as well as the original unionist AAUP sources (*The 1940 Statement* and *The 1915 Declaration*) to clarify and understand multiple perspectives on academic freedom. In doing so, this dissertation developed a theoretical argument that finds common ground among unionists, academic freedom scholars, and administrators by centering on the educational missions of colleges and universities. Dozens of cases, systematically examined through legal analysis, served as building blocks for a framework of First Amendment academic freedom that prioritizes institutional educational missions and the role of faculty governance in carrying out these missions.

Prior to this analysis, there was little systematic research on how the courts have applied *Garcetti* across all twelve Federal Circuits. The costs and risks of filing a free speech lawsuit against a higher education institution were quantified in Chapter five. This

study also brought into focus how the educational mission has and has not been considered by the courts in cases like *Wozniak* and *Meriwether*.[2922]

Reflecting on the concerns raised by the courts' failures to consider the educational mission in cases like *Meriwether*, this dissertation offered an educational-mission based inquiry as a necessary alternative to *Garcetti* if the values of academic freedom and shared governance are to be protected. The considerations of this alternative extend the work of legal scholars Areen and Post who have also advocated for a specially tailored First Amendment standard in academic contexts.[2923] The researcher argued that a professional academic freedom and an institutional academic freedom can be one and the same, by recognizing judicial deference should be granted to faculty governance bodies rather than the administrative bodies of the institutions. The potential applications and extensions of this research are far-reaching, from recommendations for managerial practices and policies to prevent lawsuits and protect faculty speech internally, to the development of a full-scale litigation plan to improve common-law protections for whistleblowing, academic freedom, and shared governance. This final chapter summarizes the previous six chapters and then offers suggestions for future research.

7.0. Summary

Chapter one offered a conceptual framework based on legal scholarship on and theories of the First Amendment. The conceptual framework relied on Post's assertion that judicial deference be granted to institutions based on their pursuit of their missions,

---

[2922] See *supra* sections 5.3.2.2. Wozniak v. Adesida and 5.3.2.3. Meriwether v. Shawnee State University.
[2923] See, Areen *supra* note 3; Post *supra* note 10.

as well as Areen's recommendation that judicial deference be granted to decisions made or authorized by the faculty (or a faculty committee).[2924]

Chapter two reviewed the multi-disciplinary scholarship on the First Amendment, free speech in the higher education context, academic freedom, and faculty labor. Section 2.6. demonstrated that the structures of academic institutions start out inequitable. "Neutral" policies that aim to treat faculty the same based on race, gender, discipline, or marketability simply affirm the social order that pre-existed the diversification of faculty. Unspoken norms and values are at the heart of this, and these very same unspoken norms and values (what Liera calls the culture of niceness) shape how the academy deals with confrontations and the need for meaningful and structural changes for equity.[2925]

Chapter three explained the methodological underpinnings of the dissertation and the methods employed to accomplish this research. Analyzing the current landscape of faculty speech cases allowed the researcher to see how the courts, institutions, and faculty have responded to and defined the realities of higher education and the values reflected by these realities. This level of analysis was written up as theory which provides "the perspective which will enable the educational profession to see [its problems] in their proper relationship to each other and to the task of education as a whole."[2926] Once synthesized with the legal scholarly and unionist research, the analysis of the court cases resulted in both a theoretical mission-centered argument, as well as a mission-centered

---

[2924] Post, *supra* note 31, at 1834; Areen, *supra* note 9 at 994.
[2925] Liera *supra* note 288 at 1-2.
[2926] Archibald W. Anderson, *The Task of Educational Theory*, 1 EDUCATIONAL THEORY 9–21, 21 (1951), *available at* https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1741-5446.1951.tb00408.x.

legal argument for faculty academic freedom, thus achieving both goals of the dissertation project.

Prior to this research, no comprehensive study of post-*Garcetti* faculty speech cases across all twelve Federal Circuits had been published. Chapter four thus laid out the national faculty free speech jurisprudence post-*Garcetti*. This chapter systematically summarized an analytical sample consisting of 245 decisions in 162 federal cases filed between 2006-2020; these cases spanned 41 states and two territories (D.C. and Puerto Rico). The cases were organized first by Federal Circuit and then alphabetically by the plaintiff's last name.

Chapter five then described the quantitative findings of the study, clarified the courts' applications of *Garcetti* to faculty speech cases, analyzed the courts' understandings of academic culture, and proposed an argument for an educational-mission based inquiry for faculty speech cases. In terms of quantitative findings, chapter five reported that: non-tenured and tenured faculty sued in nearly equal numbers (Figure 3); the average case lasted nearly three and a half years (Section 5.0.2.); the average docket for these cases had around 100-120 entries (Section 5.0.3.); the most common adverse employment actions alleged were non-renewal or termination followed by denial of tenure or promotion (Section 5.0.4.); nearly 70% of cases resulted in the courts finding for the defendants (Section 5.0.5.); and since 2007, in the federal courts, at least ten opinions in faculty free speech cases have been issued every year (Section 5.0.6.).

Section 5.1. discussed the jurisprudential findings and the application of *Garcetti*, *Connick*, and *Pickering* in faculty free speech cases from 2006-2020. The majority of cases studied cited *Garcetti* (5.1.1.1.), but fewer than the majority of cases dealt with

speech on a matter of public concern (5.1.2.). By the time the court gets to the balancing test, plaintiffs are more likely to succeed as they will have already adduced ample evidence of the protected nature of the speech in question (5.1.3). Finally, the causal link between protected speech and the adverse employment action alleged was considered.

When it comes to academic culture, the cases studied provided numerous examples of speech related to service and shared governance (5.2.1.), the double-edged sword of "professional standards" (5.2.2) and what courts in the Second Circuit have called "academic warfare" (5.2.3.). Notwithstanding the Ninth Circuit's ruling in *Demers*, the federal courts have mostly found that faculty speech made in the context of institutional service or shared governance was made "pursuant to official duties" and therefore fell outside the scope of the First Amendment.[2927] These cases were classified into three categories: opposition to administration/policies, advocacy for inclusion, and reporting misconduct or policy violations. The next section (5.2.2.) detailed the instances in which the cases raised questions related to professionalism. What constitutes professional or appropriate behavior for professors is not always clear (e.g., when is a demand for "collegiality" a demand for marginalized faculty to submit to hostility or abuse without complaint?),[2928] while other instances of unprofessionalism were undeniable.

Chapter five concluded with the introduction of an educational-mission based inquiry. As argued throughout the dissertation, the educational mission is central to the

---

[2927] *Garcetti v. Ceballos*, 547 U.S. at 421.
[2928] Tiffany D. Joseph & Laura E. Hirshfield, *'Why Don't You Get Somebody New to Do It?' Race and Cultural Taxation in the Academy*, 34 ETHNIC AND RACIAL STUDIES 121, 132 (Jan. 2011); Bridget Turner Kelly et al., *Recruitment without Retention: A Critical Case of Black Faculty Unrest*, 86 THE JOURNAL OF NEGRO EDUCATION 305, 313 (2017).

role of the faculty and to understanding a faculty member's role while speaking. The researcher argued that a professional academic freedom and an institutional academic freedom can be one in the same, by recognizing judicial deference should be granted to faculty governance bodies rather than the administrative bodies of the institutions. When difficult fact patterns arise in faculty free speech cases, the courts would be better equipped to support academic freedom, faculty self-governance, and the educational mission of institutions if they could rely on the recommendations of faculty governing bodies or other academic experts. Chapter five offered additional yet necessary considerations based on the educational mission that the current *Garcetti, Connick,* and *Pickering* standards fail to address.

Chapter six offered critiques and recommendations of court and administrative practices based on the shift in focus from the *Garcetti* question to the educational mission. By synthesizing the jurisprudence analyzed in Chapter five with relevant scholarship, Chapter six offered a complementary theoretical argument for viewing faculty free speech conflicts through an educational-mission based paradigm. Section 6.0.1., for example, relied on Ahmed's definition of power to clarify how an educational mission based paradigm can reveal the source of conflict between faculty and administrators. Sections 6.0.3. and 6.0.4. also synthesized Ahmed's work on complaints and Freyd's research on institutional betrayal to shed light on the effects conflicts between faculty and their institutions can have on a complainant's personal life and career.

Chapter six then proposed various recommendations as means of applying the educational-mission based paradigm. Expanding on section 6.1.1., Appendix C, for

instance, consists of a guide for policymakers aiming to expand whistleblower protections at public colleges and universities. Section 6.1.2. offered recommendations for tenure expectations in light of the numerous cases reviewed in which tenure denials resulted in free speech litigation. Section 6.1.3. discussed the divergent expectations of faculty members who teach in professional schools or programs in which the requirements of a professional organization or accreditation body might come into conflict with the demands of one's employer. As further explained above, professional organizations and/or unions could leverage contracts, regulatory policy, legislation, and caselaw to compel institutions to uphold professional standards even when it opposes an institution's interests. Section 6.1.4. argued that an educational mission-based approach was recommended to resolve disputes based on the tension between free speech and the value and interest of inclusion within the academy. Section 6.1.5. also recommended an educational mission inquiry that places the mission of the institution above individual personal or academic freedom interests of members of the faculty or administration. In the case of a faculty member's penchant for garnering adverse notoriety, an important factor in determining an appropriate institutional response is whether or not the speech is within one's expertise. Finally, section 6.1.6. provided recommendations for how faculty and administrators can manage troublesome personalities. These recommendations included prophylactic practices of giving and receiving feedback, leveraging informal dispute resolution mechanisms, proper training for administrators on how to address conflict, and any other appropriate steps towards changing academic culture into one that views conflict as a healthy and necessary part of work.

7.1. Future Research

Based on the findings in Chapter five, future qualitative research methods could be used to investigate more deeply the human costs of litigation brought by higher education faculty. For instance, the data collected in this project about the burden of these cases on the judiciary (time from filing the suit to settlement and the number of docket entries) could be augmented through interviews with judges, attorneys, parties, and potential plaintiffs who opted not to file suit.

Additional research may also extend the qualitative findings of how judicial and legal professionals understand academic culture and governance. Interviews with judges, clerks, and attorneys could provide further insight into how academia differs from other workplaces, institutions, and/or public offices. In this study, judges cited scholarly publications in only sixteen (or about ten percent) of 162 cases. Long-term quantitative measures of judicial reliance on and citations of academic scholarship in faculty free speech cases should be incorporated into future studies to continue to shed light on how, when, and what academic research filters into judicial opinions.

Research on the implementation of the recommendations offered in Chapter six would also be useful in understanding how to address a culture of conflict aversion, inclusion of historically marginalized groups, and the protection of whistleblowers—especially within professional programs—and academic freedom. Likewise, continued research on how academic plaintiffs understand evidence, how institutions process complaints, and how the courts interpret plaintiffs' motivations for speaking would be extremely helpful for academic labor unions and bargaining units like the AAUP-AFT.

Research on freedom of expression lawsuits brought by faculty under state constitutions would contribute to a complete understanding of the legal landscape for faculty freedom of expression. Appendix A, containing a list of faculty First Amendment cases that were brought in state courts and therefore did not meet the requirements for the analytical sample of this project, could be used as a starting point for research into state faculty freedom of expression claims.

Finally, continued research is recommended on the often-overlapping phenomena of discrimination and/or whistleblowing and First Amendment retaliation and how these occurrences result in experiences of institutional betrayal. The work of Freyd's Center for Institutional Courage should be further incorporated into future research on conflict in higher education. This branch of scholarship could also be applicable to studies on higher education conflicts outside the judicial realm, such as in mediation, alternative dispute resolution, and restorative justice literatures.

Cases Cited

Abcarian v. McDonald, 2009 WL 596575 (N.D. Ill. Mar. 9, 2009).
Abcarian v. McDonald, 617 F. 3d 931 (7th Cir. 2010).
Abdulhadi v. Wong, 2022 WL 842588 (N.D. Cal. Mar. 4, 2022).
Abdulhadi v. Wong, N.D. Cal. Civil, 2019 2019 WL 3859008 1 (Aug. 16, 2019).
Adams v Trustees of University of North Carolina-Wilmington, No. 7:07-CV-64-H, 2014 WL 7721820 (E.D.N.C. Apr. 8, 2014).
Adams v. Trs. of the Univ. of N.C. - Wilmington, 2010 U.S. Dist. LEXIS 146414 1 (E.D.N.C.).
Adams v. Trs. of the Univ. of N.C. - Wilmington, 2013 WL 10128923 (E.D.N.C. Mar. 22, 2013).
Adams v. Trs. of the Univ. of N.C. - Wilmington, 2014 WL 7721821 (District Court Jun. 10, 2014).
Adams v. Trs. of the Univ. of N.C. - Wilmington, 640 F. 3d 550 (4th Cir. 2011).
Adler v. Board of Ed. of City of New York, 342 U.S. 485 (1952).
Alberti v. Carlo Izquierdo, 548 Fed.Appx. 625 (1st Cir. 2013).
Alberti v. University of Puerto Rico, 818 F. Supp. 2d 452 (D.P.R. 2011).
Alozie v. Ariz. Bd. of Regents, 562 F. Supp. 3d 203 (D. Ariz. 2021).
Alozie v. Arizona Bd. of Regents, 431 F. Supp. 3d 1100 (D. Ariz. 2020).

Alozie v. Arizona Board of Regents, 2017 WL 11537899 (D. Ariz. Sep. 21, 2017).
Alves v. Board of Regents of the Univ. Sys. of Ga., 804 F. 3d 1149 (11th Cir. 2015).
Appel v. Spiridon, 2011 WL 3651353 1 (D. Conn.).
Appel v. Spiridon, 2d Cir. Summary Order, 521 Fed. Appx. 9 (Mar. 27, 2013 Mar. 27, 2013) (No. 1223250).
Appel v. spiridon, No. 06-cv-01177 (D. Conn.), https://www.courtlistener.com/docket/4848729/appel-v-spiridon/#entry-208.
Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).
Austen v. Weatherford College, 564 Fed.Appx. 89 (5th Cir. 2014).
Austen v. Weatherford College, 2012 WL 3223664 (N.D. Tex.).
Austin v. University of Florida Board of Trustees, No. 1:21cv184-MW/GRJ, 2022 WL 195612 (N.D. Fla. Jan. 21, 2022).
Batson v. Kentucky, 476 U.S. 79 (1986).
Benison v. Ross, 2015 WL 13688201 (E.D. Mich. Mar. 31, 2015).
Benison v. Ross, 765 F. 3d 649 (6th Cir. 2014).
Benison v. Ross, 771 F. 3d 331 (6th Cir. 2014).
Benison v. Ross, 983 F. Supp. 2d 891 (District Court 2013).
Benison v. Ross, No. 1:12-cv-15226 (Aug. 6, 2015).
Berrios v. State Univ. of New York at Stony Brook, 518 F. Supp. 2d 409 (E.D.N.Y. 2007).
Beverly v Watson, 78 F. Supp. 3d 717 (N.D. Ill.).
Beverly v. Watson, 2017 WL 4339795 (N.D. Ill. Sep. 29, 2017).
Bhattacharya v. Rockland Community College, 2017 WL 1031279 1 (S.D.N.Y. 2017).
Bhattacharya v. Rockland Community College, 719 Fed.Appx. 26 (Summary Order) (2d Cir. 2017).
Bierman v. Dayton, 900 F. 3d 570 (8th Cir. 2018).
Bowers v. University of Delaware, 2020 WL 7025090 (D. Del. Nov. 30, 2020).
Buchanan v. Alexander, 284 F. Supp. 3d 792 (M.D. La. 2018).
Buchanan v. Alexander, 919 F.3d 847 (5th Cir. 2019).
Bugg v. Benson, No. 4:22-cv-00062 (D. Utah), https://www.courtlistener.com/docket/64934277/bugg-v-benson/.
Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006).
Burton v. Board of Regents of University of Wisconsin System, 2020 WL 5304493 (W.D. Wis. Sep. 4, 2020), *aff'd* No. 20-2910, 2022 WL 16948602 (7th Cir. Sep. 4, 2020).
Calmelet v. Board of Trustees of California State University, No. 2:19-cv-02537-MCE-DMC, 2020 WL 5291925 (E.D. Cal. Sep. 4, 2020).
Calmelet v. Board of Trustees of the California State University, No. 2:19-cv-02537-MCE-DMC (E.D. Cal.), https://www.courtlistener.com/docket/18415159/calmelet-v-board-of-trustees-of-the-csu/.
Capeheart v. Hahs, 2011 WL 657848 (N.D. Ill. Feb. 14, 2011).
Capeheart v. Northeastern Illinois University, 2010 WL 894052 (N.D. Ill. Mar. 9, 2010).
Capeheart v. Terrell, 695 F. 3d 681 (7th Cir. 2012).
Churchill v. Univ. of Colorado at Boulder, 285 P. 3d 986 (Colorado Supreme Court 2012).
Coleman v. Great Bay Community College, 2009 WL 3698398 (D.N.H. 2009).

Committe v. Board of Trustees of the Florida State University, No. 4:15cv228-MW/CAS, 2016 WL 4942015 (N.D. Fla. Sep. 15, 2016).
Committe v. Gentry, No. 1:19-CV-00122, 2020 WL 3442303 (W.D. La. Jun. 23, 2020), *aff'd* No. 20-30456, 2021 WL 5513982 (5th Cir. 2021).
Committe v. Gentry, No. 1:19-cv-00122, 2020 WL 3443022 (W.D. La. May 8, 2020).
Committe v. Georgetown University, No. 18-0018 (RBW), 2018 WL 4778927 (D.D.C. Oct. 3, 2018).
Committe v. John Carroll University, No. 1:18CV01372, 2019 WL 2295347 (N.D. Ohio May 30, 2019).
Committe v. Miami University, No. 1:16cv563, 2017 WL 680633 (S.D. Ohio Feb. 21, 2017).
Committe v. Miller Nash Graham & Dunn, LLP, 2020 WL 410189 (D. Or. Jan. 23, 2020).
Committe v. Northern Michigan University, No. 2:16-CV–81, 2016 WL 8738358 (W.D. Mich. Jun. 21, 2016).
Committe v. Oregon State University, 2015 WL 2170122 (D. Or. May 8, 2015).
Committe v. Oregon State University, 683 Fed.Appx. 607 (9th Cir. 2017).
Committe v. Oregon State University, No. 3:13-cv-01341-ST, 2015 WL 2170122 (D. Or. May 8, 2015).
Committe v. Oregon State University, No. 6:16-cv-00962-MC, 2016 WL 4374945 (D. Or. Aug. 11, 2016).
Committe v. Oregon State Unversity, 2018 WL 4623159 (D. Or. Sep. 26, 2018).
Committe v. Pippin, No. 3:17-cv-00446-MMD-WGC, 2017 U.S. Dist. LEXIS 167053 (D. Nev. Oct. 10, 2017).
Committe v. Terry, No. 2:17-CV-131, 2018 WL 4519319 (N.D. Tex. Aug. 31, 2018).
Committe v. University of Cincinnati, No. 1:15cv653, 2016 WL 4944500 (S.D. Ohio Sep. 16, 2016).
Committe v. University of Nebraska, No. No. 8: 21CV257, 2022 WL 170621 (District Court Jan. 19, 2022).
Committe v. Yen, 764 Fed.Appx. 68 (2d Cir. 2019).
Committe v. Yen, No. 6:17-cv-0784 (MAD/TWD), 2018 WL 2108193 (District Court May 7, 2018).
Committe v. Zhu, No. 1:17 CV 1534, 2017 WL 4512479 (N.D. Ohio Aug. 17, 2017).
Connick v. Myers, 461 U.S. 138 (1982).
Cravey v. Univ. of N.C. at Chapel Hill, 2018 WL 4471732 1 (M.D.N.C.).
Cravey v. Univ. of N.C. at Chapel Hill, No. 1:17-cv-01014 (District Court), https://www.courtlistener.com/docket/7894409/cravey-v-university-of-north-carolina-at-chapel-hill/.
Crawford v. Columbus State Community College, 196 F. Supp. 3d 766 (S.D. Ohio 2016).
Cunningham v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, 2008 WL (M.D. La. Sep. 17, 2008).
D'Andrea v. Hawaii, 2011 WL 4842542 (9th Cir. Oct. 13, 2011).
D'andrea v. University of Hawaii, 686 F. Supp. 2d 1079 (D. Haw. 2010).
Dambrot v. Central Michigan University, 55 F. 3d 1177 (Court of Appeals 1995).
Demers v. Austin, 729 F. 3d 1011 (9th Cir. 2013).
Demers v. Austin, 746 F. 3d 402 (9th Cir. 2014).

DePree v. Saunders, 2008 WL 4457796 (S.D. Miss. Sep. 30, 2008).
DePree v. Saunders, 588 F. 3d 282 (5th Cir. 2009).
DePree v. Saunders, No. 2:07-cv-00185 (S.D. Miss.), https://www.courtlistener.com/docket/4819112/depree-v-saunders/.
Duckett v. Oklahoma ex rel. Bd. of Regents of University of Oklahoma, 986 F.Supp.2d 1249 (W.D. Okla. 2013).
Dyer v. Southwest Oregon Community College, 2018 WL 3431930 (D. Or. Jul. 16, 2018).
Dyer v. Southwest Oregon Community College, et al., 2020 WL 7409053 (District Court Dec. 17, 2020).
Emergency Coal. Defend Educ. v. Us Dept., Treas., 545 F. 3d 4 (Court of Appeals, Dist. of Columbia Circuit 2008).
Emergency Coalition to Defend Educational Travel v. US Dept. of Treasury, 498 F. Supp. 2d 150 (Dist. Court 2007).
Evans-Marshall v. Board of Educ. of Tipp City, 428 F. 3d 223 (6th Cir. 2005).
Ewing v. Board of Regents of University of Michigan, 552 F. Supp. 881 (Dist. Court 1982).
Ezuma v. City University of New York, 367 F. App'x 178 (2d Cir. 2010).
Ezuma v. City University of New York, 665 F. Supp. 2d 116 (E.D.N.Y. 2009).
Faculty Rights Coal. v. Shahrokhi, 204 F. App'x 416 (5th Cir. 2006).
Faculty S. of Fla. Int'l Univ. v. Roberts, 574 F.Supp.2d 1331 (S.D. Fla. 2008).
Faculty Senate of Florida Intern. Univ. v. Winn, 616 F. 3d 1206 (Court of Appeals, 11th Circuit 2010).
Faghri v. University of Connecticut, 608 F. Supp. 2d 269 (D. Conn. 2009).
Faghri v. University of Connecticut, 621 F. 3d 92 (2d Cir. 2010).
Filozof v. Monroe Community College, 411 Fed.Appx. 423 (2d Cir. 2011).
Filozof v. Monroe Community College, 583 F. Supp. 2d 393 (W.D.N.Y. 2008).
Fisher v. University of Texas at Austin, No. 11-345 133 S. Ct. 2411 (2013).
Fisher v. University of Texas at Austin, No. 14-981 136 S. Ct. 2198 (2016).
Freyd v. Univ. of Oregon, 384 F. Supp. 3d 1284 (U.S. District Court for the District of Oregon 2019).
Freyd v. University of Oregon, 990 F. 3d 1211 (9th Cir. 2021).
Frieder v. Morehead State University, 2012 WL 6187786 1 (E.D. Ky. 2013).
Frieder v. Morehead State University, 770 F.3d 428 (6th Cir. 2014).
Fuse v. Arizona Bd of Regents, 2009 WL 2707237 1 (D. Ariz.).
Gadling-Cole v. West Chester University of Pennsylvania, No. 2:11-cv-00796 (E.D. Pa.), https://www.courtlistener.com/docket/5007082/gadling-cole-v-west-chester-university/.
Gadling-Cole v. West Chester University, 868 F.Supp.2d 390 (E.D. Pa. 2012).
Garcetti v. Ceballos, 547 U.S. 410 (2006).
Golovan v. University of Delaware, 73 F. Supp. 3d 442 (D. Del. 2014).
Gorum v. Sessoms, 2008 WL 399641 (D. Del. Feb. 12, 2008).
Gorum v. Sessoms, 561 F. 3d 179 (3d Cir. 2009).
Grant v. The Trustees of Indiana University, 870 F.3d 562 (7th Cir. 2017).
Grant v. Trustees of Indiana University, 2016 WL 1222344 1 (S.D. Ind.).
Gratz v. Bollinger, No. 02-516 539 U.S. 244 (2003).

Grigorescu v. Board of Trustees of San Mateo County Community College District, 2019 WL 1790472 1 (N.D. Cal.).
Grigorescu v. Board of Trustees of San Mateo County Community College District, 2019 WL 4082898 (N.D. Cal. Aug. 29, 2019).
Grigorescu v. Board of Trustees of San Mateo County Community College District, 2019 WL 7050143 (N.D. Cal. Dec. 23, 2019).
Grigorescu v. Board of Trustees of San Mateo County Community College District, No. 3:18-cv-05932 (N.D. Cal. Jul. 18, 2022), https://www.courtlistener.com/docket/13554867/grigorescu-v-board-of-trustees-of-the-san-mateo-county-community-college/.
Grosz v. Lassen Community College Dist., 572 F. Supp. 2d 1199 (E.D. Cal. 2008).
Grosz v. Lassen Community College District, No. 2:07-cv-00697 (District Court), https://www.courtlistener.com/docket/5765109/grosz-v-lassen-community-college-district/.
Grosz v. Lassen Community College, 360 Fed.Appx. 795 (9th Cir. 2009).
Grutter v. Bollinger, No. 02-241 539 U.S. 306 (2003).
Hale v. Emporia State University, 266 F.Supp.3d 1261 (D. Kan. 2017).
Hale v. Emporia State University, No. 16-cv-4182-DDC (D. Kan.), https://storage.courtlistener.com/recap/gov.uscourts.ksd.114742/gov.uscourts.ksd.114742.133.0.pdf.
Hale v. Vietti, 2019 WL 1255247 (D. Kan. Mar. 19, 2019).
Hatcher v. Board of Trustees of Southern Illinois University, 829 F. 3d 531 (7th Cir. 2016).
Hatcher v. Board of Trustees of Southern Illinois University, No. 3:13-cv-00407-SMY-SCW (S.D. Ill.), https://www.courtlistener.com/docket/5227638/hatcher-v-cheng/.
Hatcher v. Cheng, 63 F. Supp. 3d 893 (S.D. Ill. 2014).
Hays v. LaForge, 113 F. Supp. 3d 883 (N.D. Miss. 2015).
Heublein v. Wefald, 784 F.Supp.2d 1186 (D. Kan. 2011).
Higbee v. Eastern Michigan University, 2019 WL 2502733 1 (United States District Court, E.D. Michigan, Southern Division.).
Higbee v. Eastern Michigan University, 399 F. Supp. 3d 694 (Dist. Court 2019).
Hodge v. Antelope Valley Community College District, 2014 WL 12776507 (C.D. Cal. Feb. 14, 2014).
Hong v. Grant, 2010 WL 4561419 (9th Cir. Nov. 12, 2010).
Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal. 2007).
Howell v. Millersville University of Pennsylvania, 283 F. Supp. 3d 309 (E.D. Pa. 2017).
Howell v. Millersville University of Pennsylvania, 749 Fed.Appx. 130 (3d Cir. 2018).
Hussein v. Dugan, 2008 WL11450829 1 (D. Nev.).
Hussein v. Dugan, 454 Fed.Appx. 541 (9th Cir. 2011).
Hussein v. Nevada System of Higher Educ., 2011 WL 5592831 (9th Cir. Nov. 17, 2011).
Hussein v. Nevada System of Higher Education, 2008 WL 11450864 (D. Nev. Jun. 27, 2008).
Idaho State University Faculty Association for Preservation of First Amendment v. Idaho State University, No. Case No. 4:12-cv-00068-BLW (D. Idaho Mar. 13, 2012).
Idaho State University Faculty Association v. Idaho State University, 857 F. Supp. 2d 1055 (D. Idaho 2012).

Idaho State University Faculty Association v. Idaho State University, 2012 WL 1313304 1 (D. Idaho).
Isabell v. Trustees of Indiana University, 432 F.Supp.3d 786 (N.D. Ind. 2020).
Isenalumhe v. McDuffie, 697 F. Supp. 2d 367 (E.D.N.Y. 2010).
Jackler v. Byrne, 658 F. 3d 225 (Court of Appeals, 2nd Circuit 2011).
Jackson v. Texas Southern University, 997 F. Supp. 2d 613 (S.D. Tex. 2014).
Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448 (2018).
Jason Jorjani v. New Jersey Institute of Technology, 2021 WL 100207 (D.N.J. Jan. 12, 2021).
Jason Jorjani v. New Jersey Institute of Technology, 2021 WL 82325 (D.N.J. Jan. 11, 2021).
Jensen v. Western Carolina University, 2012 WL 6728360 1 (W.D.N.C.).
Jensen v. Western Carolina University, 538 Fed.Appx. 359 (4th Cir. 2013).
Jingping Xu v. University of Texas Md Anderson, 854 F. Supp. 2d 430 (S.D. Tex. 2012).
Johnson v. Dist. Bd. of Trs. of Broward Cmty. Coll. Fla., 2007 WL 9701014 1 (S.D. Fla.).
Jolibois v. Fla. Int'l Univ. Bd. of Trs., 654 Fed.Appx. 461 (11th Cir. 2016).
Jolibois v. Fla. Int'l Univ. Bd. of Trs., 92 F.Supp.3d 1239 (S.D. Fla. 2015).
Joritz v. Gray-Little, 822 Fed.Appx. 731 (10th Cir. 2020).
Joritz v. University of Kansas, No. 17-4002-SAC-JPO, 2019 WL 1515251 (D. Kan. Apr. 8, 2019).
Jorjani v. Deek, 2020 WL 5422802 (D.N.J. Sep. 10, 2020).
Jorjani v. New Jersey Institute of Technology, 2019 WL 1125594 (D.N.J. Mar. 12, 2019).
Jorjani v. New Jersey Institute of Technology, 2019 WL 2611128, slip op., 1 (D.N.J. 2019).
Kahan v. Slippery Rock University of Pennsylvania, 50 F. Supp. 3d 667 (W.D. Pa. 2014).
Kahan v. Slippery Rock University of Pennsylvania, 664 Fed.Appx. 170 (3d Cir. 2016).
Kaplan v. University of Louisville, 2020 WL 4275042 (W.D. Ky. Jul. 24, 2020), *aff'd*, *Kaplan v. University of Louisville*, 10 F.4th 569 (6th Cir. 2021).
Kazar v. Slippery Rock University of Pennsylvania, 2016 WL 1247233 (W.D. Pa.).
Kazar v. Slippery Rock University of Pennsylvania., 679 Fed. Appx. 156 (3d Cir. 2017).
Keating v. University of South Dakota, 569 Fed.Appx. 469 (8th Cir. 2014).
Keating v. University of South Dakota, 980 F. Supp. 2d 1137 (D.S.D. 2013).
Kerr v. Hurd, 694 F. Supp. 2d 817 (District Court 2010).
Keyishian v. Board of Regents of Univ. of State of NY, 385 U.S. 589 (1967).
Khatri v. Ohio State Univ., 2020 WL 533040 (N.D. Ohio Feb. 3, 2020).
Khatri v. Ohio State Univ., 2020 WL 5340233 (N.D. Ohio).
Khatri v. Ohio State Univ., 2021 WL 534904 (N.D. Ohio Feb. 12, 2021).
Khatri v. Ohio State Univ., No. 21-3193, 2022 WL 620147 (6th Cir. Jan. 25, 2022).
Klaassen v. Atkinson, 348 F.Supp.3d 1106 (D. Kan. 2018).
Klaassen v. University of Kansas School of Medicine, 2015 WL 2400773 (D. Kan. May 15, 2015).
Klaassen v. University of Kansas School of Medicine, 2016 WL 7117183 (D. Kan. Dec. 7, 2016).
Klaassen v. University of Kansas School of Medicine, 84 F.Supp.3d 1228 (D. Kan. 2015).

Kohlhausen v. Suny Rockland Cmty. College, 2011 U.S. Dist. LEXIS 42055 1 (S.D.N.Y.).
Kostic v. Texas A & M University at Commerce, 11 F.Supp.3d 699 (N.D. Tex. 2014).
Kostic v. Texas A&M University-Commerce, 2016 WL 407357 (N.D. Tex. Feb. 3, 2016).
Krejci v. Board of Trustees, 2010 WL 1815407 1 (D. Neb.).
Krukenkamp v. State University of New York at Stony Brook, 2010 395 Fed. Appx. 747 (2d Cir.).
Krukenkamp v. State University of New York at Stony Brook, No. 07-cv-00992 (E.D.N.Y.), https://www.courtlistener.com/docket/4319177/krukenkamp-v-state/#entry-117.
Krukenkamp v. SUNY at Stony Brook, 2009 WL 10701322 (E.D.N.Y. Oct. 26, 2009).
Lada v. Delaware County Community College, Nos. 08-cv–4754, 2009 WL 3217183 (E.D. Pa. Sep. 30, 2009).
Lane v. Franks, 573 U.S. 228 (2014).
LaRavia v. Cerise, 2010 WL 11469112 (M.D. La. Dec. 14, 2010).
LaRavia v. Cerise, 462 Fed.Appx. 459 (5th Cir. 2012).
Laverie v. Wetherbe, 517 SW 3d (Tex. 2017).
Li v. Jiang, 164 F. Supp. 3d 1012 (N.D. Ohio 2016).
Lifter v. Cleveland State University, 202 F. Supp. 3d 779 (N.D. Ohio 2016).
Lifter v. Cleveland State University, 707 Fed.Appx. 355 (6th Cir. 2017).
Lopez v. Fresno City College, 2012 U.S. Dist. LEXIS 32846 1 (E.D. Cal.).
Lopez v. Fresno City College, No. 1:11-cv-01468 (E.D. Cal. Aug. 30, 2013), https://www.courtlistener.com/docket/5896900/lopez-v-fresno-city-college/.
Lyons v. Vaught, 2015 WL 10936765 (W.D. Mo. Dec. 14, 2015).
Lyons v. Vaught, 781 F. 3d 958 (8th Cir. 2015).
Lyons v. Vaught, 875 F.3d 1168 (8th Cir. 2017).
Maa v. Ostroff, 2013 WL 1703377 1 (N.D. Cal. Apr. 19, 2013) (No. 1703377).
Maa v. Ostroff, 2013 WL 5755043 (N.D. Cal. Oct. 23, 2013).
Maa v. Ostroff, No. 3:12-cv-00200-JCS (N.D. Cal.), https://www.courtlistener.com/recap/gov.uscourts.cand.250209/gov.uscourts.cand.250209.130.3_1.pdf.
Madden v. Regional University System, No. CIV-13-0393-HE (W.D. Okla. Dec. 24, 2014).
Madden v. Regional University System, of Oklahoma, 73 F. Supp. 3d 1341 (W.D. Okla. 2014).
Magee v. Trustees of the Hamline University Minn., 957 F.Supp.2d 1047 (D. Minn. 2013).
Manning v. Jones, 875 F.3d 408 (8th Cir. 2017).
Manning v. Jones, No. 3:09-cv-00010, 2016 WL 9280153 (S.D. Iowa Jan. 22, 2016).
Martin v. Bailey, 2015 WL 927716 1 (D. Conn. 2015).
McGettigan v. Di Mare, 173 F. Supp. 3d 1114 (D. Colo. 2016).
McGettigan v. DiMare, No. 1:15-cv-00097 (D. Colo.), https://www.courtlistener.com/docket/4196503/mcgettigan-v-dimare/.
McReady v. Montgomery Cmty. Coll., 2020 WL 5849481 (D. Md. Sep. 30, 2020).
McReady v. O'Malley, 804 F.Supp.2d 427 (D. Md. 2011).
Meade v. Moraine Valley Community College, 168 F. Supp. 3d 1094 (N.D. Ill. 2016).

Meade v. Moraine Valley Community College, 770 F. 3d 680 (7th Cir. 2014).
Meade v. Moraine Valley Community College, No. 1:13-cv-07950, RECAP Doc No. 102 (N.D. Ill.).
Meer v. Graham, 524 F. Supp. 2d 1044 (N.D. Ill. 2007).
Meer v. Graham, 611 F.Supp.2d 815 (N.D. Ill. 2009).
Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).
Meriwether v. Trustees of Shawnee State University, No. 1:18-cv-00753, 2019 WL 4333598 (S.D. Ohio Sep. 5, 2019).
Meyers v. California University of Pennsylvania, 2013 WL 795059 (W.D. Pa. Mar. 4, 2013).
Meyers v. California University of Pennsylvania, 2014 WL 3890357 1 (W.D. Pa.).
Miller v. Michigan State University, 2009 WL1885030 (W.D. Mich. 2009).
Miller v. Univ. S. Ala., 2010 U.S. Dist. LEXIS 48643 1 (S.D. Ala.).
Min Li v. Qi Jiang, 38 F. Supp. 3d 870 (N.D. Ohio 2014).
Min Li v. Qi Jiang, 673 Fed.Appx. 470 (6th Cir. 2016).
Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271 (1984).
Mitchell v. Winston-Salem State Univ., 2020 WL 1516537 (M.D.N.C. Mar. 30, 2020).
Moore v. University of Kansas, 118 F.Supp.3d 1242 (D. Kan. 2015).
Moore v. Watson, 738 F.Supp.2d 817 (N.D. Ill. 2010).
Moore v. Watson, 838 F.Supp.2d 735 (N.D. Ill. 2012).
Morreim v. University of Tennessee, 2013 U.S. Dist. LEXIS 149436 1 (W.D. Tenn.).
Mtshali v. New York City College of Technology, 2008 WL 4755681 (S.D.N.Y. 2008).
Mullin v. Gettinger, 450 F.3d 280 (7th Cir. 2006).
Munn-Goins v. Board of Trustees of Bladen Community College, 2010 WL 3377333 (4th Cir. Aug. 26, 2010).
Munn-Goins v. Board of Trustees of Bladen Community College, 658 F. Supp. 2d 713 (E.D.N.C. 2009).
Nichols v. University of Southern Mississippi, 669 F. Supp. 2d 684 (S.D. Miss. 2009).
NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).
Nuovo v. The Ohio State University, 726 F. Supp. 2d 829 (S.D. Ohio 2010).
Nwaubani v. Grossman, 199 F.Supp.3d 367 (D. Mass. 2016).
Nwaubani v. Grossman, 2017 WL 3973915 (1st Cir. Jun. 21, 2017).
Obergefell v. Hodges, 576 U.S. 644 (2015).
Oller v. Roussel, 609 Fed. Appx. 770 (5th Cir. 2015).
Onyiah v. Peiyi Zhao, 2019 WL 4221347 (D. Minn.).
Onyiah v. St Cloud State University and Board of Trustees, 2017 WL 9249434 1 (D. Minn.).
Onyiah v. St. Cloud State University, 5 F.4th 926 (8th Cir. 2021).
Pace v. Portland Community College, 2020 WL 7090130 (D. Or. Oct. 5, 2020).
Palade v. Bd. of Trs. of the Univ. of Ark., 2020 U.S. Dist. LEXIS 126640 (E.D. Ark. 2020).
Palade v. Board of Trustees University of Arkansas System, 830 Fed.Appx. 171 (8th Cir. 2020).
Patra v. Pennsylvania State System of Higher Education, 2020 WL 2745727 (M.D. Pa. May 27, 2020).

Patra v. Pennsylvania State System of Higher Education, 779 Fed.Appx. 105 (3d Cir. 2019).
Pavel v. University of Oregon, 2017 WL 1827706 (D. Or. May 3, 2017).
Pavel v. University of Oregon, 774 Fed.Appx. 1022 (9th Cir. 2019).
Pavel v. University of Oregon, No. 6:16-cv-00819-AA, 2018 WL 1352150 (D. Or. Mar. 13, 2018).
Payne v University of Southern Mississippi, 2014 WL 691563 1 (S.D. Miss. 2014).
Payne v. the University of Arkansas, No. 2:04-cv-02189-RTD (W.D. Ark. Sep. 8, 2006), https://storage.courtlistener.com/recap/gov.uscourts.arwd.5802/gov.uscourts.arwd.5802.76.0.pdf.
Payne v. University of Arkansas Ft Smith ex rel Bd of Trustees of University of Arkansas 2006 WL 2091859 (W.D. Ark. 2006).
Payne v. University of Southern Mississippi, 643 Fed.Appx. 409 (5th Cir. 2016).
Payne v. University of Southern Mississippi, 681 Fed.Appx. 384 (5th Cir. 2017).
Peterson v. Williams, 2020 U.S. Dist. LEXIS 68206, 2020 WL 1876225 (D. Utah Apr. 15, 2020).
Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563 (1968).
Piggee v. Carl Sandburg College, 464 F. 3d 667 (7th Cir. 2006).
Plouffe v. Cevallos, 2016 WL 1660626 (E.D. Pa. Apr. 27, 2016).
Plouffe v. Cevallos, 777 Fed. Appx. 594 (3d Cir. 2019).
Poulard v. Trustees of Indiana University, 2018 WL 4680010 (N.D. Ind. Sep. 28, 2018).
Poulard v. Trustees of Indiana University, 2018 WL 4680010 1 (N.D. Ind.).
Rehman M.D. v. State University of New York at Stony Brook, No. 2:08-cv-00326 (E.D.N.Y.), https://www.courtlistener.com/docket/12704232/rehman-md-v-state/.
Rehman v. State University of New York at Stony Brook, 596 F.Supp.2d 643 (E.D.N.Y. 2009).
Reiff v. Board of Regents of the University of Wisconsin-System, 2014 WL 4546041 1 (W.D. Wis. 2014).
Reisman v. Associated Faculties of University of Maine, 356 F.Supp.3d 173 (D. Me. 2018).
Reisman v. Associated Faculties of University of Maine, 939 F.3d 409 (1st Cir. 2019).
Renken v. Gregory, 541 F. 3d 769 (7th Cir. 2008).
Richmond v. Coastal Bend College District, 2009 WL 10694155 1 (S.D. Tex. 2009).
Richmond v. Coastal Bend College District, 883 F.Supp.2d 705 (S.D. Tex. 2012).
Rodriguez v. Maricopa Cty. Community College Dist., 605 F. 3d 703 (9th Cir. 2010).
Rodriguez v. Serna, 2019 WL 2340958 (Dist. Court, D. New Mexico 2019).
Rose v. Haney, 2017 WL 1833188 1 (N.D. Ill. 2017).
Rushing v. Bd. of Supervisors of Univ. of La. Sys., 2011 WL 6047097 (M.D. La. Dec. 5, 2011).
Rushing v. Board of Sup'rs of University of Louisiana System, 2008 WL 4200292 (M.D. La.).
Ryan v. Blackwell, 2019 WL 6119212 (D. Ky. Nov. 18, 2019).
Ryan v. Blackwell, 979 F.3d 519 (6th Cir. 2020).
Sadid v. Vailas, 936 F. Supp. 2d 1207 (D. Idaho 2013).
Salaita v. Kennedy, 118 F.Supp.3d 1068 (N.D. Ill. 2015).

Satcher v. Board of Trustees of University of Ark., 2008 WL 906692 (E.D. Ark.).
Satcher v. Univ. of Arkansas at Pine Bluff Bd. of Trs., 558 F.3d 731 (8th Cir. 2009).
Savage v. Gee, 665 F. 3d 732 (6th Cir. 2011).
Savage v. Gee, 716 F. Supp. 2d 709 (S.D. Ohio 2010).
Scannell v. Pitt, 2010 WL 2196580 (S.D. Cal. May 28, 2010).
Seals v. Leath, No. 3:19-cv-00468 (M.D. Ala. Nov. 8, 2022), https://www.courtlistener.com/docket/15996975/seals-v-leath/.
Seals v. Leath, No. 3:19-cv-00468, 2019 WL 6997398 (M.D. Ala. Dec. 18, 2019).
Seals v. Leath, No. 3:19-cv-00468, 2022 WL 16701109 (M.D. Ala. Nov. 3, 2022).
Sengupta v. University of Alaska Fairbanks, 336 Fed.Appx. 751 (9th Cir. 2009).
Sengupta v. University of Alaska, 139 P.3d 572 (Alaska 2006).
Setayesh v. Tennessee, 2018 U.S. Dist. LEXIS 114502 (M.D. Tenn.).
Setayesh v. Tydings, 2019 WL 1460882 (M.D. Tenn. Apr. 2, 2019).
Shearn v. West Chester University of Pennsylvania, 2017 WL 1397236 1 (E.D. Pa.).
Sheldon v. Dhillon, 2009 WL4282086 1 (N.D. Cal. 2009).
Shi v. Montgomery, 679 Fed.Appx. 828 (11th Cir. 2017).
Shub v. Westchester Community College, 556 F. Supp. 2d 227 (S.D.N.Y. 2008).
Simpson v. Alcorn State University, 25 F.Supp.3d 711 (S.D. Miss. 2014).
Singh v. Cordle, 936 F. 3d 1022 (10th Cir. 2019).
Singh v. Shonrock, No. 15-cv-9369-JWL, 2017 WL 4552139 (D. Kan. Oct. 12, 2017).
Smith v. College of the Mainland, 63 F.Supp.3d 712 (S.D. Tex. 2014).
Smock v. Board of Regents of University of Mich., 353 F. Supp. 3d 651 (E.D. Mich. 2018).
Stern v. Leath, No. 3:18-CV-807-WKW (M.D. Ala. Nov. 15, 2022), https://storage.courtlistener.com/recap/gov.uscourts.almd.67848/gov.uscourts.almd.67848.193.0.pdf.
Stern v. Leath, No. 3:18-CV-807-WKW, 2019 WL 1573695 (District Court Apr. 11, 2019).
Stern v. Leath, No. 3:18-CV-807-WKW, 2021 WL 2874113 (M.D. Ala. Jul. 8, 2021).
Stern v. Leath, No. 3:18-CV-807-WKW, 2022 WL 988376 (M.D. Ala. Mar. 31, 2022).
Stolle v. Kent State University, 610 Fed. Appx. 476 (6th Cir. 2015).
Stotter v. University of Texas at San Antonio, 2010 369 Fed.Appx. 641 (5th Cir.).
Stotter v. University of Texas at San Antonio, 508 F.3d 812 (5th Cir. 2007).
Stronach v. Va. State Univ., 2008 WL 161304 (E.D. Va. Jan. 15, 2008).
Stronach v. Virginia State University, 631 F. Supp. 2d 743 (E.D. Va. 2008).
Sun v. Board of Trustees of University of Il, 429 F. Supp. 2d 1002 (C.D. Ill. 2006).
Sun v. Board of Trustees of University of IL, 473 F.3d 799 (7th Cir. 2007).
Sweezy v. New Hampshire, 354 U.S. 234 (1957).
Tanner v. Board of Trustees of the University of Illinois, 2018 U.S. Dist. LEXIS 35126 1 (C.D. Ill.).
Tanner v. Board of Trustees of the University of Illinois, No. 3:17-cv-03039-EIL, RECAP https://storage.courtlistener.com/recap/gov.uscourts.ilcd.68674/gov.uscourts.ilcd.68674.42.0.pdf (C.D. Ill. Mar. 16, 2018).
Tarasenko v. University of Arkansas, 2014 WL 7335026 1 (W.D. Ark. 2014).
Tarasenko v. University of Arkansas, 616 Fed.Appx. 214 (8th Cir. 2015).
Tarasenko v. University of Arkansas, 63 F.Supp.3d 910 (E.D. Ark. 2014).

Taylor v. St. Louis Community College, 2018 WL 5078360 (E.D. Mo. Oct. 18, 2018).
Taylor v. St. Louis Community College, 2020 WL 1065651 (E.D. Mo. Mar. 5, 2020).
Texas A & M University v. Starks, 500 S.W.3d 560 (Tex. Ct. App. 2016).
Toth v. California University of Pennsylvania, 844 F. Supp. 2d 611 (W.D. Pa. 2012).
Tracy v. Fla. Atl. Univ. Bd. of Trs., 2017 WL 4962652 (S.D. Fla.).
Tracy v. Fla. Atl. Univ. Bd. of Trs., 2018 WL 1933708 (S.D. Fla.).
Tracy v. Florida Atlantic University Board of Trustees, 2017 WL 681977 (S.D. Fla.).
Tracy v. Florida Atlantic University Board of Trustees, 980 F.3d 799 (11th Cir. 2020).
Udeigwe v. Texas Tech University, 733 Fed.Appx. 788 (5th Cir. 2018).
University of California Regents v. Bakke, No. 76-811 438 U.S. 265 (1978).
Uradnik v. Inter Faculty Association, 2019 WL 6608784 (D. Minn. Dec. 5, 2019).
Urofsky v. Gilmore, 216 F. 3d 401 (4th Cir. 2000).
Van Duyne v. Kesselman, No. 1:19-cv-21091 (D.N.J.), https://www.courtlistener.com/docket/16551079/van-duyne-v-kesselman/.
Van Duyne v. Stockton University, 2020 WL 6144769 (D.N.J. Oct. 20, 2020).
Van Heerden v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll., 2011 WL 5008410 1 (M.D. La. 2011).
Van Heerden v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll., 2012 WL 1493834 (M.D. La. Apr. 27, 2012).
Vanderhurst v. Colorado Mountain College District, 208 F.3d 908 (10th Cir. 2000).
Wagner v. Jones, 2010 WL 11534328 (S.D. Iowa 2010).
Wagner v. Jones, 664 F.3d 259 (8th Cir. 2011).
Wagner v. Jones, 758 F.3d 1030 (8th Cir. 2014).
Webb v. Kentucky State University, 2012 WL 858639 (6th Cir. Mar. 14, 2012).
Weihua Huang v. Rector and Visitors of Univ. of Va., 896 F.Supp.2d 524 (W.D. Va. 2012).
Weinstein v. Earley, 2017 WL 4953901 (D. Conn. Nov. 1, 2017).
Weinstein v. University of Connecticut, 136 F.Supp.3d 221 (D. Conn. 2016).
Weinstein v. University of Connecticut, 676 Fed.Appx. 42 (2d Cir. 2017).
Weinstein v. University of Connecticut, 753 Fed.Appx. 66 (2d Cir. 2018).
Weintraub v. Board of Educ. of City of New York, 593 F. 3d 196 (2d Cir. 2008).
Wetherbe v. Goebel, 2018 WL 1177633 (Tex. Ct. App. Mar. 6, 2018).
Wetherbe v. Nail, et al., No. 5:15-CV-119-Y (N.D. Tex. Dec. 3, 2019), https://www.courtlistener.com/recap/gov.uscourts.txnd.259081/gov.uscourts.txnd.259081.111.0.pdf.
Wetherbe v. Smith, 2013 U.S. Dist. LEXIS 191270 (N.D. Tex. 2013).
Wetherbe v. Smith, 593 Fed.Appx. 323 (5th Cir. 2014).
Wetherbe v. Texas Tech University System, 2016 WL 1273471 1 (N.D. Tex.).
Wetherbe v. Texas Tech University System, 699 Fed.Appx. 297 (5th Cir. 2017).
Whiting v. University of Southern Mississippi, 451 F.3d 339 (5th Cir. 2006).
Widmar v. Vincent, 454 U.S. 263 (1981).
Wilkerson v. University of North Texas, 223 F.Supp.3d 592 (E.D. Tex. 2016).
Woytowicz v. George Washington University, 327 F.Supp.3d 105 (district.court 2018).
Wozniak v. Adesida, 368 F. Supp. 3d 1217 (C.D. Ill. 2018).
Wozniak v. Adesida, 368 F.Supp.3d 1217 (C.D. Ill. 2018).
Wozniak v. Adesida, 932 F.3d 1008 (7th Cir. 2019).

Xingzhong Shi v. Ala. A&M Univ., 2015 WL 5675764 (N.D. Ala. Sep. 28, 2015).
Yohn v. Coleman, 639 F. Supp. 2d 776 (E.D. Mich. 2009).
Zelnik v. Fashion Institute of Technology, 464 F. 3d 217 (2d Cir. 2006).

Bibliography

AAUP Committee A. "In Defense of Knowledge and Higher Education." Statement, January 2020. https://www.aaup.org/file/DefenseofKnowledge.pdf.

AAUW Legal Advocacy Fund. "Past Cases: Freyd v. University of Oregon." American Association of University Women. Accessed December 13, 2022. https://www.aauw.org/resources/legal/laf/past-cases/freyd-v-university-of-oregon/.

"About the University Record | The University Record." Accessed March 18, 2022. https://record.umich.edu/about/.

AERA. "Standards for Reporting on Humanities-Oriented Research in AERA Publications." *Educational Researcher* 38, no. 6 (August 2009): 481–86. https://doi.org/10.3102/0013189X09341833.

Ahmed, Sara. *Complaint!* Duke University Press, 2021.

Alliance Defending Freedom. "Adams v. The Trustees of the University of North Carolina–Wilmington." Organization. Alliance Defending Freedom, July 16, 2014. https://adfmedia.org/case/adams-v-trustees-university-north-carolina-wilmington.

Almanac 2019. "Tenure Status of Full-Time and Part-Time Faculty Members, Fall 2017." *The Chronicle of Higher Education*, August 18, 2019. https://www.chronicle.com/article/Tenure-Status-of-Faculty/246310.

Am. Ass'n of Univ. Professors. "1915 Declaration of Principles on Academic Freedom and Academic Tenure." *Bulletin of the American Association of University Professors* VII, no. 8 (1922): 487–555.

Amar, Vikram David, and Alan E. Brownstein. "A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty." *Minnesota Law Review* 101 (2016): 1943–86.

American Association of University Professors. "1940 Statement of Principles on Academic Freedom and Tenure." *AAUP*, 1940.

An Act Relating to Travel to Terrorist States, Fla. Stat. § §112.061(3)(e), 1011.81(3). Accessed May 11, 2022. http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=1000-1099/1011/Sections/1011.81.html.

Anderson, Archibald W. "The Task of Educational Theory." *Educational Theory* 1, no. 1 (1951): 9–21. https://doi.org/10.1111/j.1741-5446.1951.tb00408.x.

Ballotpedia: The Encyclopedia of American Politics. "Andrew Brasher." Accessed December 6, 2022. https://ballotpedia.org/Andrew_Brasher.

April 14, FIRE and 2014. "EMT Instructor Deemed Insufficiently 'Sensitive to Diversity' Vindicated; Settlement Reached." *FIRE* (blog), April 14, 2014. https://www.thefire.org/emt-instructor-deemed-insufficiently-sensitive-to-diversity-vindicated-settlement-reached/.

Areen, Judith. “Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance.” *Georgetown Law Journal* 97 (2009): 945–1000.

Babbitt, Ellen M., Ann H. Franke, and Barbara A. Lee. “Shared Governance: New Pressure Points in the Faculty/Institutional Relationship.” *Journal of College and University Law* 41, no. 1 (2015): 93–116.

Barchi, Robert. “Rutgers President on Free Speech and Academic Freedom | Office of the President.” Rutgers University. Accessed August 14, 2020. https://web.archive.org/web/20191218071923/https://president.rutgers.edu/public-remarks/speeches-and-writings/rutgers-president-free-speech-and-academic-freedom.

Bard, Jennifer S. “The Professor as Whistleblower: The Tangled World of Constitutional and Statutory Protections.” *Dartmouth Law Journal* 13, no. 1 (2015): 163–282.

Barsky, Robert F. “Academia in the Era of Homeland Security.” Edited by Edward J. Carvalho. *Works & Days*, Academic Freedom and Intellectual Activism in the Post-9/11 University, 26–27, no. 51–54 (2009): 95–124.

Bauries, Scott R. “Individual Academic Freedom: An Ordinary Concern of the First Amendment Symposium Edition on Education Law.” *Mississippi Law Journal* 83, no. 4 (2014): 677–744.

Beckstrom, Darryn Cathryn. “Reconciling the Public Employee Speech Doctrine and Academic Speech after Garcetti v. Ceballos Note.” *Minnesota Law Review* 94 (2009): 1202–38.

Ben-Porath, Sigal R. *Free Speech on Campus*. University of Pennsylvania Press, 2017.

Bensimon, Estela Mara, and Catherine Marshall. “Like It Or Not: Feminist Critical Policy Analysis Matters.” *The Journal of Higher Education* 74, no. 3 (May 14, 2003): 337–49. https://doi.org/10.1353/jhe.2003.0021.

Bérubé, Michael. “Academic Freedom as Fragile as Ever.” Edited by Edward J. Carvalho. *Works & Days*, Academic Freedom and Intellectual Activism in the Post-9/11 University, 26–27, no. 51–54 (2009): 73–84.

Bilgrami, Akeel, and Jonathan R. Cole. *Who’s Afraid of Academic Freedom?* Columbia University Press, 2015.

Bladen County. “Dr. Ophelia Munn-Goins.” Government. Bladen County, NC Commissioner, District 1. Accessed July 18, 2022. https://bladennc.govoffice3.com/index.asp?SEC=9E1E8C6A-BCB9-452F-8BBF-07B54C55C37D&DE=70DCEC23-86A8-44BD-9F81-C746A11378E7&Type=B_DIR.

Bousquet, Mark. “Take Your Ritalin and Shut Up.” Edited by Edward J. Carvalho. *Works & Days*, Academic Freedom and Intellectual Activism in the Post-9/11 University, 26–27, no. 51–54 (2009): 437–58.

RECAP. “Bowers v. University of Delaware, 1:19-Cv-01883 – CourtListener.Com.” Database. Accessed June 17, 2022. https://www.courtlistener.com/docket/16302571/bowers-v-university-of-delaware/.

Bredo, Eric. “How Can Philosophy of Education Be Both Viable and Good?” *Educational Theory* 52, no. 3 (2002): 263–71. https://doi.org/10.1111/j.1741-5446.2002.00263.x.

Butler, Judith. “A Dissenting View from the Humanities on the AAUP’s Statement on Knowledge.” *Academe*, 2020.

———. “Academic Norms, Contemporary Challenges: A Reply to Robert Post on Academic Freedom.” In *Academic Freedom after September 11*, edited by Beshara Doumani, 107–42. New York : Cambridge, Mass: Zone Books, 2006.

———. “Critique, Dissent, Disciplinarity.” *Critical Inquiry* 35, no. 4 (January 1, 2009): 773–95. https://doi.org/10.1086/599590.

Byrne, J. Peter. “Academic Freedom: A" Special Concern of the First Amendment".” *The Yale Law Journal* 99, no. 2 (1989): 251.

———. “Constitutional Academic Freedom after Grutter: Getting Real about the Four Freedoms of a University Horowitz, Churchill, Columbia - What Next for Academic Freedom.” *University of Colorado Law Review* 77, no. 4 (2006): 929–54.

———. “Neo-Orthodoxy in Academic Freedom Book Review.” *Texas Law Review* 88, no. 1 (2009): 143–70.

———. “The Social Value of Academic Freedom Defended Symposium: Academic Freedom for the Next 100 Years.” *Indiana Law Journal* 91 (2015): 5–16.

Cain, T. *Establishing Academic Freedom: Politics, Principles, and the Development of Core Values.* New York, NY, USA: Palgrave Macmillan, 2016.

Cain, Timothy Reese. “A Historiography of Academic Freedom for American Faculty, 1865–1941.” In *Higher Education: Handbook of Theory and Research*, edited by Michael B. Paulsen, 157–215. Higher Education: Handbook of Theory and Research. Cham: Springer International Publishing, 2016. https://doi.org/10.1007/978-3-319-26829-3_4.

———. “Academic Freedom in an Age of Organization, 1913–1941.” Ph.D., University of Michigan, 2005. https://search.proquest.com/docview/305453543/abstract/C7D41050F73945F0PQ/1.

———. “Campus Unions: Organized Faculty and Graduate Students in U.S. Higher Education.” *ASHE Higher Education Report* 43, no. 3 (2017): 1–175.

———. “‘Friendly Public Sentiment’ and the Threats to Academic Freedom.” *History of Education Quarterly* 58, no. 3 (August 2018): 428–35. https://doi.org/10.1017/heq.2018.19.

Carpenter, Zoë. “How A Right-Wing Political Machine Is Dismantling Higher Education in North Carolina.” *The Nation*, June 8, 2015. https://www.thenation.com/article/how-right-wing-political-machine-dismantling-higher-education-north-carolina/.

Carvalho, E., and D. Downing, eds. *Academic Freedom in the Post-9/11 Era*. Education, Politics and Public Life. Palgrave Macmillan US, 2010. https://doi.org/10.1057/9780230117297.

Carvalho, Edward J. “‘The Crystallizing of a Consensus’: Confronting Visible and Invisible Wars on Post-9/11 Academic Freedom.” Edited by Edward J. Carvalho. *Works & Days*, Academic Freedom and Intellectual Activism in the Post-9/11 University, 26–27, no. 51–54 (2009): 7–27.

Chemerinsky, Erwin. *Constitutional Law*. 4 edition. New York: Wolters Kluwer, 2013.

Chemerinsky, Erwin, and Howard Gillman. *Free Speech on Campus*. Yale University

Press, 2017.
Chynoweth, Paul. “Legal Research.” In *Advanced Research Methods in the Built Environment*, 28–38, 2008.
Clark, Burton R. *The Academic Life: Small Worlds, Different Worlds*. A Carnegie Foundation Special Report. Princeton, N.J. : Lawrenceville, N.J: Carnegie Foundation for the Advancement of Teaching ; Available from the Princeton University Press, 1987.
Clark, Shirley M., and Mary E. Corcoran. “Faculty Renewal and Change.” *New Directions for Institutional Research* 16, no. 3 (1989): 19–32.
Clemens, Paul G. E. *Rutgers since 1945*. Rutgers University Press, 2015.
Cohen, Aaron, and Yehuda Baruch. “Abuse and Exploitation of Doctoral Students: A Conceptual Model for Traversing a Long and Winding Road to Academia.” *Journal of Business Ethics* 180, no. 2 (October 2022): 505–22. https://doi.org/10.1007/s10551-021-04905-1.
Cohen, Jodi S. “University of Illinois OKs $875,000 Settlement to End Steven Salaita Dispute.” *Chicago Tribune*. November 12, 2015, sec. News. https://www.chicagotribune.com/news/breaking/ct-steven-salaita-settlement-met-20151112-story.html.
Cooper, Brittney C. *Beyond Respectability : The Intellectual Thought of Race Women*. Women, Gender, and Sexuality in American History. Urbana, IL: University of Illinois Press, 2017. http://bit.ly/2P4eSuO.
Cope, Kevin L. “Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty after Garcetti.” *JC & UL* 33 (2007): 313.
Crenshaw, Kimberle. “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics.” *U. Chi. Legal F.* 1989, no. 1 (1989): 139.
Culver, Jordan, and N’dea Yancey-Bragg. “North Carolina Professor Who Resigned amid Controversy over His ‘vile’ Tweets Found Dead.” *USA TODAY*, July 24, 2020, sec. Nation. https://www.usatoday.com/story/news/nation/2020/07/24/uncw-professor-mike-adams-retired-tweets-found-dead/5500318002/.
DeGeorge, Richard, Walter E. Block, Ralph F. Fuchs, Robert W. McGee, Richard Rorty, and John R. Searle. *Academic Freedom and Tenure: Ethical Issues*. Rowman & Littlefield Publishers Inc., 1997.
“Demers v. Austin – Campus Speech.” Accessed April 21, 2022. https://campus-speech.law.duke.edu/campus-speech-incidents/demers-v-austin/.
DeMitchell, Todd A. “Commentary: Academic Freedom—Whose Rights? The Professor’s or the University’s?” *West’s Education Law Reporter* 168 (2002): 1–19.
DeMitchell, Todd A., Suzanne Eckes, and Richard Fossey. “Adverse Notoriety, the Student Protest, & the Viral Facebook Posts: Immoral Conduct and Evident Unfitness to Serve: Crawford v. Commission on Professional Competence,.” *West’s Education Law Reporter*, Education Law into Practice, 391 (September 16, 2021): 426–35.
Devlin, Nora. “Labor as Contingent as Free Speech? Adjunct First Amendment Cases

Since 2006." Manuscript in Progress, March 31, 2020.
———. "Vulnerable Integrity: Two Whistleblower Cases in Public Universities." *Journal of College and University Law* 46 (2021): 360.
Dewey, John. "Academic Freedom." *Educational Review* 23 (1902): 1–14.
Dijk, Teun A. "Principles of Critical Discourse Analysis." *Discourse & Society* 4, no. 2 (April 1993): 249–83. https://doi.org/10.1177/0957926593004002006.
Donoghue, Frank. "Competing in Academia." In *The Last Professors*, 24–54. The Corporate University and the Fate of the Humanities, Tenth Anniversary Edition. Fordham University Press, 2018. https://doi.org/10.2307/j.ctt201mpbx.7.
Doumani, Beshara, ed. *Academic Freedom after September 11*. New York : Cambridge, Mass: Zone Books, 2006.
Duderstadt, James J. *The View from the Helm: Leading the American University During an Era of Change*. Ann Arbor, UNITED STATES: University of Michigan Press, 2007. http://ebookcentral.proquest.com/lib/rutgers-ebooks/detail.action?docID=3414480.
Eagan Jr, M. Kevin, and Jason C. Garvey. "Stressing Out: Connecting Race, Gender, and Stress with Faculty Productivity." *The Journal of Higher Education* 86, no. 6 (October 27, 2015): 923–54. https://doi.org/10.1353/jhe.2015.0034.
Eastman, Nicholas J., and Deron Boyles. "In Defense of Academic Freedom and Faculty Governance: John Dewey, the 100th Anniversary of the AAUP, and the Threat of Corporatization." *Education and Culture* 31, no. 1 (January 1, 2015): 17–43.
Ellis, Elizabeth M. "Garcetti v. Ceballos: Public Employees Left to Decide Your Conscience or Your Job Note." *Indiana Law Review* 41 (2008): 187–214.
English, Fenwick W. "Chain of Command." In *Encyclopedia of Educational Leadership and Administration*, 111–12. Thousand Oaks, CA: SAGE Publications, Inc., 2022. https://doi.org/10.4135/9781412939584.
Fairclough, Norman. *Critical Discourse Analysis: The Critical Study of Language*. Routledge, 2013.
Feaga, M. K., and P. A. Zirkel. "Academic Freedom of Faculty Members: A Follow-up Outcomes Analysis." *West's Education Law Reporter* 209 (2006): 597–607.
Feldon, David F., Annie M. Wofford, and Jennifer M. Blaney. "Ph.D. Pathways to the Professoriate: Affordances and Constraints of Institutional Structures, Individual Agency, and Social Systems." In *Higher Education: Handbook of Theory and Research: Volume 38*, edited by Laura W. Perna, 1–91. Higher Education: Handbook of Theory and Research. Cham: Springer International Publishing, 2023. https://doi.org/10.1007/978-3-030-94844-3_4-1.
Fernandes, Jason D, Sarvenaz Sarabipour, Christopher T Smith, Natalie M Niemi, Nafisa M Jadavji, Ariangela J Kozik, Alex S Holehouse, et al. "A Survey-Based Analysis of the Academic Job Market." Edited by Helena Pérez Valle, Peter Rodgers, and Adriana Bankston. *ELife* 9 (June 12, 2020): 1–30. https://doi.org/10.7554/eLife.54097.
Fichtner, J. Royce, and Lou Ann Simpson. "Trimming the Deadwood: Removing Tenured Faculty for Cause." *Journal of College and University Law* 41 (2015): 25–44.
Finkin, Matthew W., and Robert C. Post. *For the Common Good: Principles of American Academic Freedom*. New Haven, Conn.: Yale University Press, 2009.

Fish, Stanley. *Save the World on Your Own Time*. x vols. Oxford University Press, USA, 2008.

———. *Versions of Academic Freedom: From Professionalism to Revolution*. University of Chicago Press, 2014.

Flaherty, Colleen. "A Matter of Public Concern." *Inside Higher Ed*. November 21, 2022, sec. News. https://www.insidehighered.com/news/2022/11/21/auburn-professor-awarded-646k-damages-speech-case.

———. "'An Affront to Open Discourse.'" *Inside Higher Ed*. June 9, 2022, sec. News. https://www.insidehighered.com/news/2022/06/09/aacu-and-pen-america-oppose-divisive-concepts-bans.

———. "Northeastern Illinois Settles with Professor in Defamation Suit." *Inside Higher Ed*. January 28, 2014, sec. Quick Takes. https://www.insidehighered.com/quicktakes/2014/01/28/northeastern-illinois-settles-professor-defamation-suit.

———. "University System of Georgia Censured Over Tenure Changes." *Inside Higher Ed*. March 7, 2022, sec. News. https://www.insidehighered.com/quicktakes/2022/03/07/university-system-georgia-censured-over-tenure-changes.

Fuchs, Ralph F. "Academic Freedom. Its Basic Philosophy, Function, and History." *Law and Contemporary Problems* 28, no. 3 (1963): 431–46.

Fuller, Steve. "The Genealogy of Judgement: Towards a Deep History of Academic Freedom." *British Journal of Educational Studies*, no. 2 (2009): 164. https://doi.org/10.1111/j.1467-8527.2009.00434.x.

Gambol, Anthony. "The Twombly/Iqbal Plausibility Pleading Standard And Affirmative Defenses: Gooses and Ganders Ten Years Later." *Pace L. Rev.* 41, no. 1 (2020): 193–233.

Gerber, Larry G. "College and University Governance." *Academe*, January 2015.

Ginsberg, Benjamin. *The Fall of the Faculty*. Cary, UNITED STATES: Oxford University Press, Incorporated, 2011. http://ebookcentral.proquest.com/lib/rutgers-ebooks/detail.action?docID=737425.

Goodman, Sylvia. "Researchers Did a Deep Dive Into Efforts to Restrict Critical Race Theory. Here's What They Found." *The Chronicle of Higher Education*. August 3, 2022, sec. Academic Freedom. https://www.chronicle.com/article/researchers-did-a-deep-dive-into-efforts-to-restrict-critical-race-theory-heres-what-they-found.

Griffin, Kimberly A. "Institutional Barriers, Strategies, and Benefits to Increasing the Representation of Women and Men of Color in the Professoriate." In *Higher Education: Handbook of Theory and Research: Volume 35*, edited by Laura W. Perna, 277–349. Higher Education: Handbook of Theory and Research. Cham: Springer International Publishing, 2020. https://doi.org/10.1007/978-3-030-31365-4_4.

Griffin, Oren R. "Academic Freedom and Professional Speech in the Post-Garcetti World." *Seattle University Law Review* 37, no. 1 (2013): 1–54.

Habib, Hilary. "Academic Freedom and the First Amendment in the Garcetti Era Note." *Southern California Interdisciplinary Law Journal* 22, no. 2 (2012): 509–52.

Harris, Michael S. *How to Get Tenure: Strategies for Successfully Navigating the*

Process. 1 edition. New York: Routledge, 2018.
Heins, Marjorie. "'Priests of Our Democracy': The Origins of First Amendment Academic Freedom." *Journal of Supreme Court History* 38, no. 3 (November 2013): 386–412. https://doi.org/10.1111/j.1540-5818.2013.12025.x.
Hendrickson, Robert M., Jason E. Lane, James T. Harris, and Richard H. Dorman. *Academic Leadership and Governance of Higher Education: A Guide for Trustees, Leaders, and Aspiring Leaders of Two- and Four-Year Institutions*. Stylus Publishing, LLC, 2013.
Henry, Megan. "Shawnee State to Pay Professor $400,000 in Settlement over Student's Preferred Pronouns." *The Columbus Dispatch*. April 19, 2022, sec. News. https://www.dispatch.com/story/news/2022/04/19/shawnee-state-pay-professor-400-000-settle-pronoun-lawsuit/7358716001/.
Hertzog, Matthew Jay. "The Misapplication of Garcetti in Higher Education." *Brigham Young University Education and Law Journal* 2015 (2015): 203–26.
Hoeller, Keith. *Equality for Contingent Faculty: Overcoming the Two-Tier System*. Nashville, Tennessee: Vanderbilt University Press, 2014.
Hofstadter, Richard, and Walter P. Metzger. *The Development of Academic Freedom in the United States*. New York: Columbia University Press, 1955. https://catalog.hathitrust.org/Record/001116454.
Holloway, Jonathan. "On Academic Freedom and Free Speech." Rutgers University, 2023. https://www.rutgers.edu/president/academic-freedom-free-speech.
Center for Institutional Courage. "Home." Accessed December 13, 2022. https://www.institutionalcourage.org.
Horwitz, Paul. *First Amendment Institutions*. Cumberland, UNITED STATES: Harvard University Press, 2013. http://ebookcentral.proquest.com/lib/rutgers-ebooks/detail.action?docID=3301200.
Houle, Suzanne R. "Is Academic Freedom in Modern America on Its Last Legs after Garcetti v. Ceballos." *Cap. U. L. Rev.* 40 (2012): 265.
Hutchens, Neal H. "A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom." *Journal of College and University Law* 36, no. 1 (2009): 145–90.
Hutchens, Neal H, and Jeffrey C Sun. "The Tenuous Legal Status of First Amendment Protection for Individual Academic Freedom." *Journal of the Professoriate* 7, no. 1 (2013): 25.
Hutchison, Christy. "Anatomy of a Free Speech Lawsuit: Demers against Washington State University (2014)." *Journal of Behavioral and Applied Management* 17, no. 3 (2017).
Inazu, John D. "Institutions in Context." *Tulsa Law Review* 50, no. 2 (2014): 491–502.
James, Russell. *Tenure Hacks: The 12 Secrets of Making Tenure*. CreateSpace Independent Publishing Platform, 2014.
Jean, Violet. *How to Get Tenure: Life as an Assistant Professor*. Editor World LLC, 2017.
Jones, Victoria. "Developing a Speech Standard for Public University Faculty in the Academic Environment," January 25, 2017. https://dx.doi.org/10.2139/ssrn.2906100.
Jorgensen, James D., and Lelia B. Helms. "Academic Freedom, the First Amendment and

Competing Stakeholders: The Dynamics of a Changing Balance." *The Review of Higher Education* 32, no. 1 (August 27, 2008): 1–24. https://doi.org/10.1353/rhe.0.0036.

Joseph, Tiffany D., and Laura E. Hirshfield. "'Why Don't You Get Somebody New to Do It?' Race and Cultural Taxation in the Academy." *Ethnic and Racial Studies* 34, no. 1 (January 1, 2011): 121–41. https://doi.org/10.1080/01419870.2010.496489.

Julius, Daniel, and Nicholas DiGiovanni. "Academic Collective Bargaining: Status, Process, and Prospects." *Academic Labor: Research and Artistry* 3, no. 1 (November 22, 2019). https://digitalcommons.humboldt.edu/alra/vol3/iss1/11.

Kant, Immanuel. *The Conflict of the Faculties*. Translated by Mary J. Gregor. University of Nebraska Press, 1992.

Kaplin, William A., Barbara A. Lee, Neal H. Hutchens, and Jacob H. Rooksby. *Law of Higher Education*. 6th ed. 2 vols. San Francisco, CA: JOSSEY-BASS INC, U S, 2019.

Kelly, Bridget Turner, Joy Gaston Gayles, and Cobretti D. Williams. "Recruitment without Retention: A Critical Case of Black Faculty Unrest." *The Journal of Negro Education* 86, no. 3 (2017): 305–17. https://doi.org/10.7709/jnegroeducation.86.3.0305.

Kelsky, Karen. *The Professor Is In: The Essential Guide To Turning Your Ph.D. Into a Job*. New York: Three Rivers Press, 2015.

Kendi, Ibram X. *How to Be an Antiracist*. Random House Publishing Group, 2019.

Kerr, Clark. "THE IDEA OF A MULTIVERSITY." In *The Uses of the University*, 1–34. Harvard University Press, 2001. https://www.jstor.org/stable/j.ctt6wpqkr.5.

Kezar, Adrianna, Tom DePaola, and Daniel T. Scott. *The Gig Academy: Mapping Labor in the Neoliberal University*. JHU Press, 2019.

Kleinbrodt, Julian W. "Pro-Whistleblower Reform in the Post-Garcetti Era." *Michigan Law Review* 112, no. 1 (October 2013): 111–38.

Kreiser, B. Robert. "Appendix I: 1915 Declaration of Principles on Academic Freedom and Academic Tenure." In *Policy Documents & Reports*, Ninth., 291–301. Washington, D.C., 2001. https://eric.ed.gov/?id=ED456693.

Kruth, Susan. "Northeastern Illinois Professor Settles with University in Years-Long Retaliation Case." *FIRE* (blog), February 13, 2014. https://www.thefire.org/northeastern-illinois-professor-settles-with-university-in-years-long-retaliation-case/.

Lang, James M. *Life on the Tenure Track: Lessons from the First Year*. 1st edition. Baltimore: Johns Hopkins University Press, 2005.

LaNoue, George R., and Barbara A. Lee. *Academics in Court: The Consequences of Faculty Discrimination Litigation*. University of Michigan Press, 1987.

Lauren Robel. "On the First Amendment." Indiana University Bloomington, November 20, 2019. https://provost.indiana.edu/statements/archive/first-amendment.html.

Lee, Barbara A. "A New Generation of Tenure Problems: Legal Issues and Institutional Responses." In *School Law Update*, edited by Thomas N. Jones and Darel P. Semler, 97–112, 1986. https://eric.ed.gov/?id=ED272999.

———. "Faculty Role in Academic Governance and the Managerial Exclusion: Impact of the Yeshiva University Decision." *Journal of College and University Law* 7,

no. 3–4 (1980): 222–66.
Lee, Barbara A., and Kathleen A. Rinehart. “Dealing with Troublesome College Faculty and Staff: Legal and Policy Issues.” *Journal of College and University Law* 37, no. 2 (2010): 359–402.
LeRoy, Michael H. “How Courts View Academic Freedom.” *Journal of College and University Law* 42 (2016): 1–58.
Levinson, Rachel. “Academic Freedom, Shared Governance, and the First Amendment after Garcetti v. Ceballos,” 1–36. Stetson University: AAUP, 2011. https://www.aaup.org/NR/rdonlyres/4C126513-1194-4317-8123-459BD9F30A6D/0/Stetson2011AcadFreedomFirstAmdmtoutline.pdf.
Levy, Richard E. “The Tweet Hereafter: Social Media and the Free Speech Rights of Kansas Public University Employees.” *Kansas Journal of Law & Public Policy* 24 (2014): 78–135.
Liera, Román. “Moving Beyond a Culture of Niceness in Faculty Hiring to Advance Racial Equity.” *American Educational Research Journal*, December 6, 2019, 0002831219888624. https://doi.org/10.3102/0002831219888624.
Lloyd-Jones, Brenda. “African-American Women in the Professoriate: Addressing Social Exclusion and Scholarly Marginalization through Mentoring.” *Mentoring & Tutoring: Partnership in Learning* 22, no. 4 (August 8, 2014): 269–83. https://doi.org/10.1080/13611267.2014.945737.
Lovain, Timothy B. “Grounds for Dismissing Tenured Postsecondary Faculty for Cause.” *Journal of College and University Law* 10, no. 3 (1983): [i]-434.
Marowski, Steve. “UM Settles Professor’s Lawsuit over Due Process in Harassment Case - Mlive.Com.” *Michigan Live*. January 29, 2020. https://www.mlive.com/news/ann-arbor/2020/01/um-settles-professors-lawsuit-over-due-process-in-harassment-case.html.
Matsuda, Mari J. “Public Response to Racist Speech: Considering the Victim’s Story.” *Michigan Law Review* 87, no. 8 (1989): 2320–81.
———. *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*. New Perspectives on Law, Culture, and Society. Boulder, Colo: Westview Press, 1993.
Matthew, Patricia A., ed. *Written/Unwritten: Diversity and the Hidden Truths of Tenure*. 1 edition. Chapel Hill: University of North Carolina Press, 2016.
Menand III, Louis. *The Future of Academic Freedom*. University of Chicago Press, 1996.
Metzger, Walter P. “Profession and Constitution: Two Definitions of Academic Freedom in America.” *Texas Law Review* 66, no. 7 (1988): 1265–1322.
Miller, Ben. “Graduate School Debt: Ideas for Reducing the $37 Billion in Annual Student Loans That No One Is Talking About.” Washington, D.C.: Center for American Progress, January 13, 2020. https://www.americanprogress.org/issues/education-postsecondary/reports/2020/01/13/479220/graduate-school-debt/.
Miss. Const., § art. XIV, sec. 263a (n.d.).
FIRE. “Mission.” Accessed August 1, 2022. https://www.thefire.org/about-us/mission/.
“Mississippi Marriage Definition, Amendment 1 (2004).” In *Ballotpedia*. Accessed July 26, 2022. https://ballotpedia.org/Mississippi_Marriage_Definition,_Amendment_1_(2004).

Morris, Conor. “Faculty Give OU Deans Positive, Negative Marks in Annual Evals.” The Athens NEWS. Accessed October 28, 2021. https://www.athensnews.com/news/campus/faculty-give-ou-deans-positive-negative-marks-in-annual-evals/article_d9313b34-49b4-11e5-9f95-0f638c461f86.html.

Moss, Scott. “Against Academic Deference: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine.” *Berkeley Journal of Employment & Labor Law* 27, no. 1 (March 1, 2006): 1. https://doi.org/10.15779/Z38R330.

Mystkow, Wyatt. “Legislation to Limit Critical Race Theory at Colleges Has Reached Fever Pitch.” *The Chronicle of Higher Education*. June 8, 2022, sec. Political Influence. https://www.chronicle.com/article/legislation-to-limit-critical-race-theory-at-colleges-has-reached-fever-pitch.

Nahmod, Sheldon. “Academic Freedom and the Post-Garcetti Blues.” *First Amend. L. Rev.* 7 (2008): 54.

Nashrulla, Tasneem. “Professor’s Racist And Anti-Gay Language Sets Off Free-Speech Battle On Campus.” *BuzzFeed News*, November 29, 2016. https://www.buzzfeednews.com/article/tasneemnashrulla/uncw-professor-free-speech-debate.

National Science Foundation. “Survey of Earned Doctorates: Doctorate Recipients from U.S. Universities 2018.” Survey of Earned Doctorates, December 2019. https://ncses.nsf.gov/pubs/nsf20301/.

Nelson, Cary. *No University Is an Island: Saving Academic Freedom*. NYU Press, 2011.

Newfield, Christopher. *Ivy and Industry: Business and the Making of the American University, 1880–1980*. Duke University Press, 2003.

Niehoff, Leonard M. “Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context.” *Journal of College and University Law* 35 (2008): 75–98.

Nugent, Bridget R., and Julee T. Flood. “Rescuing Academic Freedom for Garcetti v. Ceballos: An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech.” *Journal of College and University Law* 40 (2014): 115–58.

Office of the Chief of Protocol. “Protocol Reference.” Government. U.S. Department of State. Accessed July 21, 2022. https://www.state.gov/protocol-reference/.

Olivas, Michael A. “Reflections on Professorial Academic Freedom: Second Thoughts on the Third ‘Essential Freedom.’” *Stanford Law Review* 45, no. 6 (1993): 1835–58. https://doi.org/10.2307/1229129.

Olswang, Steven G., and Barbara A. Lee. *Faculty Freedoms and Institutional Accountability :Interactions and Conflicts /*. Washington, D.C. :, 1984. http://hdl.handle.net/2027/pur1.32754078075409.

O’Meara, Kerry Ann. “Beliefs about Post-Tenure Review: The Influence of Autonomy, Collegiality, Career Stage, and Institutional Context.” *The Journal of Higher Education* 75, no. 2 (2004): 178–202.

———. “Inside the Panopticon: Studying Academic Reward Systems.” In *Higher Education: Handbook of Theory and Research*, edited by J. C. Smart and M. B. Paulsen, 161–220, 2011.

https://www.researchgate.net/publication/227144102_Inside_the_Panopticon_Studying_Academic_Reward_Systems.

O'Neil, Robert M. "Academic Freedom as a 'Canonical Value.'" *Social Research: An International Quarterly* 76, no. 2 (2009): 437–50.

———. *Academic Freedom in the Wired World: Political Extremism, Corporate Power, and the University*. Cambridge, Mass: Harvard University Press, 2008.

———. "Academic Freedom to Deny the Truth: Beyond the Holocaust." *Minnesota Law Review* 101 (2016): 2065–88.

———. "Academic Speech in the Post-Garcetti Environment Symposium: Public Citizens, Public Servants: Free Speech in the Post-Garcetti Workplace." *First Amendment Law Review* 7 (2008): 1–21.

———. "Judicial Deference to Academic Decisions: An Outmoded Concept." *Journal of College and University Law* 36 (2009): 729–48.

O'Neil, Robert M., Judith C. Areen, Matthew W. Finkin, Larry G. Gerber, William W. Van Alstyne, and Cary Nelson. "Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos." *Academe*, 2009.

Palfrey, John. *Safe Spaces, Brave Spaces: Diversity and Free Expression in Education*. MIT Press, 2017.

PASSHE. "Labor Relations." Pennsylvania's State System of Higher Education. Accessed December 8, 2022. https://www.passhe.edu/inside/HR/LR/Pages/default.aspx.

Perlmutter, David D. *Promotion and Tenure Confidential*. 1 edition. Cambridge, Mass: Harvard University Press, 2010.

Post, Robert C. "Between Governance and Management: The History and Theory of the Public Forum." *UCLA Law Review* 34 (1987): 1713.

———. "Debating Disciplinarity." *Critical Inquiry* 35, no. 4 (January 1, 2009): 749–70. https://doi.org/10.1086/599580.

———. *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State*. Reprint edition. Place of publication not identified: Yale University Press, 2013.

———. "Subsidized Speech." *Yale L.J.* 106 (1996): 151.

———. "The Structure of Academic Freedom." In *Academic Freedom after September 11*, edited by Beshara Doumani, 61–106. New York : Cambridge, Mass: Zone Books, 2006.

———. "Why Bother with Academic Freedom." *FIU Law Review* 9, no. 1 (2013): 9–20.

Rabban, David. "A Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment." *Law and Contemporary Problems* 53, no. 3 (July 1, 1990): 227–301.

Rabban, David M. "Academic Freedom, Professionalism, and Intramural Speech." *New Directions for Higher Education* 1994, no. 88 (1994): 77–88. https://doi.org/10.1002/he.36919948808.

Rabban, David M. "The Regrettable Underenforcement of Incompetence as Cause To Dismiss Tenured Faculty." *Indiana Law Journal* 91, no. 1 (2015): 20.

Reichman, Henry. *The Future of Academic Freedom*. Baltimore: Johns Hopkins University Press, 2019.

Rhoades, Gary. "Bargaining Quality in Part-Time Faculty Working Conditions: Beyond

Just-In-Time Employment and Just-At-Will Non-Renewal." *Journal of Collective Bargaining in the Academy* 4, no. 1 (February 20, 2013). https://thekeep.eiu.edu/jcba/vol4/iss1/4.

Rice, Harvey. "Fired Mainland Professor Settles Lawsuit." *Houston Chronicle*. December 15, 2014, sec. U.S. & World. https://www.houstonchronicle.com/news/article/Fired-Mainland-professor-settles-lawsuit-5958998.php.

Roberts, Robert. "Developments in the Law: Garcetti v. Ceballos and the Workplace Freedom of Speech Rights of Public Employees." *Public Administration Review* 67, no. 4 (July 1, 2007): 662–72. https://doi.org/10.1111/j.1540-6210.2007.00751.x.

Roberts, Robert North. "The Deconstitutionalization of Academic Freedom After Garcetti v. Ceballos?" *Review of Public Personnel Administration* 32, no. 1 (March 1, 2012): 45–61. https://doi.org/10.1177/0734371X11421494.

Rockquemore, Kerry Ann, and Tracey Laszloffy. *The Black Academic's Guide to Winning Tenure--Without Losing Your Soul*. Boulder: Lynne Rienner Publishers, 2008.

Rosinger, Kelly Ochs, Barrett J. Taylor, Lindsay Coco, and Sheila Slaughter. "Organizational Segmentation and the Prestige Economy: Deprofessionalization in High-and Low-Resource Departments." *The Journal of Higher Education* 87, no. 1 (2016): 27–54.

Ross, Lauren K. "Pursuing Academic Freedom After Garcetti v. Ceballos." *Texas Law Review* 91, no. 5 (April 2013): 1253–81.

Saldaña, Johnny. *The Coding Manual for Qualitative Researchers*. SAGE, 2012.

Wikipedia. "Sayre's Law." Accessed December 9, 2022. https://en.wikipedia.org/wiki/Sayre%27s_law.

Schrecker, Ellen. *No Ivory Tower: McCarthyism and the Universities*. Oxford University Press, 1986.

———. "Subversives, Squeaky Wheels, and 'Special Obligations': Threats to Academic Freedom, 1890–1960." *Social Research: An International Quarterly* 76, no. 2 (2009): 513–40.

Scott, Joan W. "Knowledge, Power, and Academic Freedom." *Social Research: An International Quarterly* 76, no. 2 (2009): 451–80.

Scott, Joan Wallach. *Knowledge, Power, and Academic Freedom*. Columbia University Press, 2019.

Seligman, Edwin RA, Chairman Charles E. Bennett, James Q. Dealey, Richard T. Ely, Henry W. Farnam, Frank A. Fetter, Franklin H. Giddings, et al. "AAUP's 1915 Declaration of Principles," n.d.

Seltzer, Rena, and Frances Rosenbluth. *The Coach's Guide for Women Professors: Who Want a Successful Career and a Well-Balanced Life*. Sterling, Virginia: Stylus Publishing, 2015.

Siow, Aloysius. "Tenure and Other Unusual Personnel Practices in Academia." *Journal of Law, Economics, & Organization* 14, no. 1 (1998): 152–73.

Slaughter, Sheila, and Gary Rhoades. *Academic Capitalism and the New Economy: Markets, State, and Higher Education*. Baltimore: Johns Hopkins University Press, 2004.

Smith, Carly Parnitzke, and Jennifer J. Freyd. “Institutional Betrayal.” *American Psychologist* 69, no. 6 (2014): 575–87. https://doi.org/10.1037/a0037564.

Smith, Stacy E. “Who Owns Academic Freedom: The Standard for Academic Free Speech at Public Universities The Washington and Lee Law Alumni Association Student Notes Colloquium.” *Washington and Lee Law Review* 59, no. 1 (2002): 299–360.

Smolla, Rodney A. “Academic Freedom and Political Correctness in Uncivil Times Symposium: Essay.” *First Amendment Law Review* 14 (2015): 267–92.

Spurgeon, Larry D. “The Endangered Citizen Servant: Garcetti versus the Public Interest and Academic Freedom.” *Journal of College and University Law* 39 (2013): 405–66.

Srikanth, Rajini. “The Axis of Power and Academic Freedom.” *Journal of Asian American Studies* 19, no. 1 (February 2016): 105–10.

Steffen, Heather. “Imagining Academic Labor in the US University.” *New Literary History* 51, no. 1 (2020): 115–43.

———. “Inventing Our University: Student-Faculty Collaboration in Critical University Studies.” *Radical Teacher* 108, no. 1 (2017): 19–27.

Strauss, Valerie. “No More Poverty in North Carolina? UNC Panel Wants to Close School’s Poverty Center.” *Washington Post*. February 19, 2015, sec. Answer Sheet. https://wapo.st/2lx4JOG.

Styres, Sandra. “Reconciliaction: Reconciling Contestation in the Academy - Sandra Styres,.” *Power and Education*, April 14, 2020. https://journals.sagepub.com/doi/10.1177/1757743820916845.

Sullivan, Larry. “Chain of Command (Education).” In *The SAGE Glossary of the Social and Behavioral Sciences*, 1:69. Thousand Oaks, CA: SAGE Publications, Inc., 2022. https://doi.org/10.4135/9781412972024.

Tepper, Robert J., and Craig G. White. “Speak No Evil: Academic Freedom and the Application of Garcetti v Ceballos to Public University Faculty.” *Catholic University Law Review* 59 (2009): 125–82.

Tiede, Hans-Joerg, and Michael Bérubé. *University Reform: The Founding of the American Association of University Professors*. Baltimore, UNITED STATES: Johns Hopkins University Press, 2015. http://ebookcentral.proquest.com/lib/rutgers-ebooks/detail.action?docID=4398482.

Twenge, Jean M., and Andrew B. Blake. “Increased Support for Same-Sex Marriage in the US: Disentangling Age, Period, and Cohort Effects.” *Journal of Homosexuality* 68, no. 11 (September 19, 2021): 1774–84. https://doi.org/10.1080/00918369.2019.1705672.

University of Washington. “Retention Salary Adjustments.” University of Washington: Policies and Procedures, June 11, 2020. https://ap.washington.edu/ahr/policies/compensation/retention-salary-adjustments/.

University of Kansas: Dean’s Office. “Valuing Your Input,” December 13, 2018. https://collegedean.ku.edu/valuing-your-input.

“Van Heerden Deal Cost State $435,000 | News | Theadvocate.Com.” Accessed March 10, 2021. https://www.theadvocate.com/baton_rouge/news/article_4d788cc9-

840e-5a5d-94ef-5df8a1ef06d5.html.
Veysey, Laurence R. *The Emergence of the American University*. Chicago: University of Chicago Press, 1965.
W. E. B. Du Bois. "Academic Freedom." Address, University of Wisconsin, April 26, 1952. MS 312. Special Collections and University Archives, University of Massachusetts Amherst Libraries. http://credo.library.umass.edu/view/full/mums312-b202-i029.
Northern New Mexico College Study Group. "WayBack Machine Capture of Northern New Mexico College Study Group," December 1, 2015. https://web.archive.org/web/20151201200139/http://www.nnmcstudygroup.org/.
White, Lawrence. "Fifty Years of Academic Freedom Jurisprudence." *Journal of College and University Law* 36, no. 3 (2009): 791–842.
Whittington, Keith E. *Speak Freely: Why Universities Must Defend Free Speech*. Princeton University Press, 2019.
Alliance Defending Freedom. "Who We Are." Accessed August 1, 2022. https://adflegal.org/about-us/who-we-are.
Wilder, Craig Steven. *Ebony and Ivy: Race, Slavery, and the Troubled History of America's Universities*. Bloomsbury Publishing USA, 2013.
Wilson, John K. "Marketing McCarthyism: The Media's Role in the War on Academic Freedom." Edited by Edward J. Carvalho. *Works & Days*, Academic Freedom and Intellectual Activism in the Post-9/11 University, 26–27, no. 51–54 (2009): 125–38.
Woolston, Chris. "Huge Variations in US Postdoc Salaries Point to Undervalued Workforce." *Nature*, February 18, 2019. https://doi.org/10.1038/d41586-019-00587-y.
Yook, Eunkyong Lee. *Culture Shock for Asians in U.S. Academia: Breaking the Model Minority Myth*. Lexington Books, 2013.

A. Appendix A — State-Court Cases

Thirteen cases otherwise met the criteria for the analytic sample but were decided in state court. Some of these cases were also brought in federal court, but others were only litigated in state courts. For the reader's reference I have listed the cases below.

A.1. Board of Trustees of Purdue University v. Eisenstein

A.2. Churchill v. University of Colorado at Boulder

A.3. Donahue v. Central Washington University

A.4. Ex parte Hugine

A.5. Knudsen v. Washington State Executive Ethics Board

A.6. McAdams v. Marquette University

A.7. McBrearty v. Kentucky Community and Technical College System

A.8. Mills v. Western Washington University

A.9. Moosa v. Trustees of the California State University

A.10. Sadid v. Idaho State University

A.11. Sengupta v. University of Alaska

A.12. Texas A&M University, Mark Hussey, Ph.D. v. Starks

A.13. Wetherbe v. Goebel

B. Appendix B — Honorable Honorables

All judges in the United States, whether appointed or elected, have bestowed upon them the title "honorable." How many of them are worthy of that title is a matter of opinion and debate. Only those for whom I have found evidence of their worthiness of such a title are honored here.

B.1. The Honorable Ann Aiken, United States District Court Judge for the District of Oregon

Judge Aiken is one of the most skilled jurists when it comes to addressing issues related to faculty governance and academic politics. This is likely due to her decades-long marriage to a political science professor at the University of Oregon, which surely

gave her insight into the dynamics (dysfunctions?) of academic departments and university governance. As an example of Judge Aiken's aptitude when it comes to the inner-workings of the academy, I direct readers to her decisions in *Pavel*, *Committe v. Miller Nash Graham and Dunn*, and *Dyer*.[2929] Judge Aiken demonstrates outstanding finesse and nuance in an especially delicate case, writing "I recognize that, as a practical matter, institutional memory can be long, and individuals may not forget exercises of free speech rights that they disagreed with, going back two, four, or ten years."[2930] Throughout this opinion, Judge Aiken carefully balances the dignity of the academic profession and the protection of the First Amendment for professors, with the dignity and protection of the student complainant who had been harassed by the professor plaintiff. Judge Aiken's fairness is also demonstrated in her opinions in *Dyer*—first denying the defendants' motion to dismiss, and then later denying the plaintiff's motion for partial summary judgment; her identification of issues of material fact for a jury is all too rare an occurrence in faculty speech cases.[2931]

[2929] *Pavel v. University of Oregon*, 2018 WL 1352150 (D. Or. Mar. 13, 2018); 2017 WL 1827706 (May 3, 2017); *Committe v. Miller Nash Graham & Dunn, LLP*, 2020 WL 410189 (Jan. 23, 2020); *Dyer v. Southwest Oregon Community College*, No. 6:16-cv-02261-AA, 2018 WL 3431930 (Jul. 16, 2018); *Dyer v. Southwest Oregon Community College, et al.*, No. 6:16-cv-02261-AA, 2020 WL 7409053 (D. Or. Dec. 17, 2020).

[2930] *Pavel*, 2018 WL 1352150, at *8.

[2931] *Dyer v. Southwest Oregon Community College*, No. 6:16-cv-02261-AA, 2018 WL 3431930 (D. Or. Jul. 16, 2018); *Dyer v. Southwest Oregon Community College, et al.*, No. 6:16-cv-02261-AA, 2020 WL 7409053 (D. Or. Dec. 17, 2020).

B.2. The Honorable Dr. Ophelia Munn-Goins,[2932] Commissioner for Bladen County North Carolina

I try not to get invested in cases, but the wrongs that the Honorable Dr. Munn-Goins suffered by her employer and then by the courts really bothered me. Her case is a perfect example of intersectionality and the failure of a "but for" standard when plaintiffs occupy multiple minoritized identities. Nevertheless, she persisted, reaffirming her commitment to her community by running for county commissioner and winning election and then reelection. Dr. Munn-Goins is truly a badass and deserves recognition for her determination, persistence, and hope in the face of discrimination and colorblindness.

B.3. The Honorable Judges Wood, Easterbrook, and Hamilton of the Seventh Circuit

In *Wozniak v. Adesida* the three-judge panel above relied on the educational mission of the university to guide their decision. Easterbrook wrote for the panel, "Professors who harass and humiliate students cannot successfully teach them, and a shell-shocked student may have difficulty learning in other professors' classes. A university that permits professors to degrade students and commit torts against them cannot fulfill its educational functions."[2933] While these statements might seem glaringly obvious, compared to some of the radioactive goo that oozed out of the ears of the Sixth

---

[2932] According to the U.S. State Department all elected officials in the U.S. are entitled to the honorific "honorable." Office of the Chief of Protocol, government, *Protocol Reference*, U.S. DEPARTMENT OF STATE, https://www.state.gov/protocol-reference/ (last visited Jul. 21, 2022).
[2933] *Wozniak v. Adesida*, 932 F.3d 1008, 1010 (7th Cir. 2019).

Circuit judges in *Meriwether*, Easterbrook's prose reflects the highest level of literary genius.[2934]

B.4. The Honorable Mark E. Walker, Chief United States District Judge for the Northern District of Florida

Judge Walker wrote an excellent opinion in the case, *Austin v. University of Florida Board of Trustees*.[2935] He aptly compared the case of University of Florida professors who were banned from testifying against the Florida government to the removal of the Tiananmen Square statue on the campus of the University of Hong Kong.[2936] Further examples of Judge Walker's entitlement to a place on this list of honorable mentions can be found in his sassy footnotes. I was especially delighted by the note commenting on the University of Florida's refusal to recognize *Pickering* as controlling precedent in the case; it reads in part,

> This Court then gave Defendants another chance to brief the issue. But what Defendants submitted was hardly a brief. Sure, it had words, citations, etc.—all of the trappings of a brief. Yet it was utterly devoid of meaningful content. Finally, Defendants had a fourth chance to discuss the issue at the second hearing. Defendants, however, quickly announced that they had said everything they wanted to say about *Pickering* in their brief—i.e., nothing.[2937]

Throughout Judge Walker's footnotes his sass and impatience for incompetence is a breath of fresh air, especially after reading so many poorly written and ill-informed

---

[2934] This is especially noteworthy because Easterbrook was appointed by Reagan. But he received his bachelor's degree from Swarthmore and I dare say he did them proud with this case.
[2935] *Austin v. University of Florida Board of Trustees*, 2022 WL 195612 (N.D. Fla. Jan. 21, 2022).
[2936] *Austin*, No. 1:21cv184-MW/GRJ, 2022 WL 195612, at *1.
[2937] *Austin*, No. 1:21cv184-MW/GRJ, 2022 WL 195612, n. 41.

opinions. His appreciation and respect for academic freedom and the participation of professors in the judicial process as expert witnesses is also visible throughout his opinion. Yet, Judge Walker maintains a fair perspective throughout, relying on the court record rather than a preconceived bias towards one party or the other. For these reasons, I honor his work.

B.5. The Honorable Mary Elizabeth "Beth" Phillips, Chief Judge of the United States District Court for the Western District of Missouri

In *Lyons v. Vaught,* Judge Beth Phillips showed her work, citing multiple scandals at other universities related to grade inflation and favoritism among student athletes.[2938] Her use of this knowledge bolstered her finding that speech related to "academic improprieties involving interscholastic athletes is an issue of public concern."[2939] Unfortunately, the Eighth Circuit Court of Appeals reversed Judge Phillips's findings, and for that they are not included in this list.

B.6. The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.)

Rodriguez v. Maricopa County Community College District[2940] is the only case studied in this dissertation that was heard by a former United States Supreme Court Justice. Justice O'Connor, sitting by designation for the case, did not write the opinion, so I cannot presume to know how exactly she influenced the decision. Nevertheless, I like to imagine the final paragraph read in Justice O'Connor's voice. It reads:

[2938] *Lyons v. Vaught*, 2015 WL 10936765, n. 5 (W.D. Mo. Dec. 14, 2015).
[2939] Id.
[2940] *Rodriguez v. Maricopa Cty. Community College Dist.*, 605 F. 3d 703 (9th Cir. 2010).

> It's easy enough to assert that Kehowski's ideas contribute nothing to academic debate, and that the expression of his point of view does more harm than good. But the First Amendment doesn't allow us to weigh the pros and cons of certain types of speech. Those offended by Kehowski's ideas should engage him in debate or hit the "delete" button when they receive his emails. They may not invoke the power of the government to shut him up.[2941]

A humble “thank you” to Justice O’Connor for continuing her service to the citizens of the United States long after her supposed retirement. I acknowledge her here also for choosing to deal with people whose “ideas contribute nothing to academic debate” or whose “expression of [their] point of view does more harm than good” when she could rightly choose never to speak to another fool again.

C. Appendix C — Institutional Whistleblower Protection Policies: A Guide

This guide has been prepared to assist faculty in the consideration, development, creation, and revision of institutional whistleblower protection policies at U.S. colleges and universities. This work was inspired by *Khatri v. Ohio State University* which clarified that whistleblowers who experience retaliation at public colleges and universities are better off relying on contractual protections than the First Amendment in court. The following material was first presented by the author at the 2021 AAUP Shared Governance Conference.

[2941] *Id.* at 711.

C.1. An ideal policy should account for:

- Faculty peer-review when investigating (motivation of) reports of unsafe conditions and when reviewing allegations of retaliation.
- Faculty (especially contingent faculty) and Postdoc and graduate student involvement in developing policies, protections, and procedures related to whistleblowing
- Anonymity of reporter/complainant
- Swift response
- Confidentiality
- Safety and security of data/substances/etc.
- Safety and security of employees/workers/students
- Clarity of reporting procedures (how to do so anonymously, etc.)
- Simplicity of reporting procedures (online, one form, phone number, zoom room, etc.)
- Ease of finding and completing report/complaint (big link, easily searched, etc.)
- Clarity of protections available to complainants (especially protections for intra-institutional speech that is outside of one's chain of command).
- Clear limitations on administrative overruling of faculty governance/oversight mechanisms/procedures to prevent retaliation based on monetary incentives/funding priorities.
- Reference to statutory protections available for workers who report to government (state/fed) agencies, with clear instructions on how to do that.

- Data collection on reports/complaints and how quickly they are resolved. Data collection on instances of retaliation, etc.

C.2. Faculty peer-review

When investigating (motivation of) reports of unsafe conditions and when reviewing allegations of retaliation, faculty peer review should be an essential part of the procedure. Whenever multiple complaints are made about a single laboratory or faculty member (either alleging misconduct or retaliation pursuant to this policy) a panel of no fewer than three faculty members from other departments or schools (if school is smaller than the size of some departments in other schools). At least two of these faculty members should be of the same rank as a faculty complainant. If the complainant is a graduate student (pre-PhD) the committee should also include a graduate student and a post-doctoral fellow (also from other departments). There shall also be a specialist in the alleged unsafe condition and/or in retaliation in accordance with the allegations in the complaints. If unbiased reviewers of these types cannot be identified, representatives of equivalent expertise from a peer institution should be asked to consult. All potential panelists should be nominated to a panel pool by post-docs, doc students, and research scientists every two years. The panel pool shall convene by quorum to choose panelists for each case based on expertise and other relevant criteria described above. The chosen panel for each case shall review all investigative materials and reports compiled by administrative offices along with all complaints produced by the complainant and conduct their own analysis of the facts. The panel shall make a ruling on whether the allegations were made in good faith, what issues still need to be addressed (and how), if

there was any conduct which violated this policy, and what discipline (if any) they recommend for any wrongdoing.

C.3. (Contingent) Faculty, postdoc, and graduate student involvement in policy development

Faculty at all ranks including adjuncts or part-time/lecturers, post-docs, research scientists, and graduate students shall be involved in the development or revision of any policy, protection, or procedure related to whistleblowing activity. This includes any and all institutional policies related to research misconduct, mandatory reporting of noncompliance with internal or governmental policies/regulations, laboratory health and safety, etc.

C.4. Anonymity of reporter/complainant

Policies to address whistleblowing within the university structure first need to provide proper protocols for anonymous reporting. This can be accomplished through an ombuds office—a report can be made through this office, and then anonymized by the office who then relays the report to the appropriate office for policy enforcement. Anonymizing complaints is essential when preventing retaliation. Likewise, anonymizing after the fact enables the ombuds office to determine if multiple complainants have come forward about the same issue or if it was the same complainant multiple times. If the same complainant raises 3 or more complaints within a year or two, the policy provides for peer review of the situation to determine whether the complaints were properly and swiftly addressed, if there are any signs of retaliation or ongoing policy violations, and/or if the complainant has misused the reporting procedures.

C.4.1. Sample policy language for protecting anonymity follows:

To protect the anonymity of contingent or otherwise vulnerable workers and citizens who raise concerns relating to laboratory safety or misconduct, all complaints shall be filed through the office of the University Ombuds. The Ombuds office will only disclose the identity of the complainant to faculty panels investigating the matter in cases where: The complainant has filed more than 3 complaints in one year and the motivation for those complaints has come into question. The faculty panel investigating the matter has evidence to convince the Ombuds that disclosure of the name of the complainant would bring about justice in a case. There is absolutely no possibility of retaliation (e.g., the complainant could not possibly be harmed by the faculty committee knowing their identity because they no longer work in academia).

C.5. Swift response

Workplace safety and research misconduct allegations must be swiftly investigated and resolved. All reasonable precautions to prevent retaliation against complainants should be taken as soon as possible. While time frames can and likely should vary from case to case, institutions should implement a plan to prevent retaliation within 30 days of complainants filing complaints. Depending on the severity and risk of harm posed by the allegations, preliminary investigation into the misconduct/unsafe conditions should begin within no more than 5-15 business days. High-risk situations which require immediate attention should be treated as emergencies and any delay in investigating these circumstances could lead to legal liability for the institution.

C.6. Confidentiality

Reasonable measures should be taken to preserve the confidentiality of any personnel information and all faculty and staff involved in the shared governance procedures should keep any details of the investigation confidential until the case has been resolved. Identifying information should not be shared outside of the committee of those involved in investigating or hearing the case. Breaches of confidentiality should result in appropriate discipline and/or removal from the committee.

C.7. Safety and security of data/substances/etc.

Essential to the occupational health and safety of the institution's employees is a clear policy ensuring the safety and security of any confidential data, dangerous substances, and research equipment.

C.7.2. Sample policy language for safety and security of data/substances/equipment

Conduct which constitutes a violation of this policy includes:

- The improper handling or storage of dangerous substances
- Inadequate training on how to handle or store dangerous substances
- Noncompliance with any other institutional Environmental Health and Safety policies
- Misuse of research or laboratory equipment
- Presence in a laboratory while intoxicated or under the influence of federally illicit substances
- Improper handling or storage of confidential human subjects' data

- Noncompliance with OSHA or any other Federal or state legislation governing workplace or laboratory conditions.

C.8. Safety and security of employees/workers/students

If employees, students, or junior researchers (post-docs, graduate students, un-tenured faculty) have genuine concerns about their own safety or the safety of others within a campus laboratory or other research context due to negligence, misconduct, or any other inappropriate behaviors, under this policy they are entitled to file a complaint with the university ombuds.

C.9. Clarity of reporting procedures (how to do so anonymously, etc.)

To ensure the clarity of reporting procedures, institutions should develop the policy based on the following questions:

- What measures will be put in place to protect the anonymity of reporters/complainants?
- How will complaints be handled if they constitute an emergency or require urgent action?
- How will non-urgent complaints be handled?
- What department will be in charge of handling complaints?
- Who will be in charge of ensuring the accuracy of the information about reporting procedures and contact information on the website?
- How will people find the instructions for how to file a complaint?

C.10. Simplicity of reporting procedures

The simpler the reporting procedures the better. It is appropriate to offer multiple modalities to accommodate people with varying abilities (visual, speech, hearing, etc.), but they should be streamlined to all request the same information and all reports should populate the same database. The reporting/complaint process should not require more than one form, and should not take more than 5 minutes (plus the time to type the factual background). Complainants should be given the opportunity to attach documents and evidence to their original report prior to submission, and ideally should be allowed the chance to upload additional evidence after submission as well.

C.11. Ease of finding and completing report/complaint

Instructions for how to file a complaint/report should be easily encountered through a search in both the institution's search bar, and a full web search (i.e., google.com). Likewise, EHS department websites should feature a prominent link to the reporting instructions if the process is not handled within EHS. The policy should also include a stable URL that will not break even over time.

C.12. Clarity of protections available to complainants

It is essential to have clear due process procedures available for any complainant/reporter who feels they have experienced retaliation related to their genuine complaints. It is also recommended that the faculty and staff handbook(s) specifically state that speech made in good faith outside of one's chain of command (e.g., to other departments like EHS, HR) will be recognized as protected speech such that it would constitute a breach of contract for a faculty or staff member to experience an adverse employment action based on such speech. Likewise, a finding of clear and convincing

evidence of retaliation by the appropriate body (e.g., a faculty panel for faculty or an EEO investigator for staff) against a complainant/reporter will result in disciplining the retaliator.

C.13. Clear limitations on administrative overruling

Limitations on administrative overruling of faculty governance/oversight mechanisms/procedures are necessary to prevent retaliation based on monetary incentives/funding priorities. Especially when grants/funding or monetary incentives could be usurped if the complainant were to be terminated, there must be extra faculty oversight to prevent administrators from retaliating.

C.14. Reference to statutory protections

Policies should reference the statutes providing protection for workers who report to government (state/fed) agencies, with clear instructions on how to do that.

- Clear instructions on statutory protections for complainants
- Clear instructions on how to contact government (state/federal) agencies (e.g., OSHA) for a free inspection/assessment.

C.15. Data collection

Working with the Institutional Research Office, the faculty panel, EH&S, and the Ombuds office, the institution shall compile data on instances and resolutions of complaints, including dates of reporting/complaints, dates of panel meetings, date of resolution, number of retaliation complaints filed per case, and so on.

D. Table 4 – Academic Exception Application and Recognition by Circuit

Table 6 – Academic Exception Application and Recognition by Circuit

Cir.	Case	What did the court recognize/apply or not?	Steps of Inquiry
1	Alberti	Recognized an exception for classroom speech that "communicates 'an idea transcending personal interest or opinion which impacts our social and/or political lives'" but said it did not apply to the instant case. [a]	Not specified.
2	Bhatta-charya	Recognized an exception for teaching and scholarship but found that the speech in question was not teaching-related because it was maintaining class discipline—they called it "one of the core duties of a teacher." [b]	*Garcetti* (to determine if academic exception applies), *Connick*, *Pickering.*
3	Howell	Did not recognize an exception for "classroom speech," stating that choosing classroom management strategies in contravention of school policy or dictates is not a constitutional right.[c]	For classroom speech there is no exception, thus *Garcetti*, *Connick*, *Pickering.*
4	Adams	Recognized an exception for teaching and scholarship even when referenced in CV for promotion.[d]	If speech relates to teaching or scholarship, *Connick*, *Pickering*
5	Buchanan	Recognized an exception for speech that serves a legitimate pedagogical purpose.[e]	If the speech serves a legitimate pedagogical purpose, *Connick*, then *Pickering.*
6	Meri-wether (2021)	Recognized an exemption for "all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."[f]	If it is classroom speech, *Connick*, then *Pickering.*
7	Wozniak	Did not apply an academic exception for a faculty member who "acted in his capacity as a teacher" by "humiliating students as a matter of self-gratification."[g] *Piggee* recognized an academic exception was possible but so far it has not yet been applied in the Seventh Circuit.[h]	*Garcetti*, *Connick*, *Pickering.*
8	Lyons	Recognized that the academic exception question was left open, but found that Lyons's speech (concerns about favoritism towards student athletes) did not relate to scholarship or teaching.[i]	*Garcetti*, *Connick*, *Pickering.*
9	Demers	Applied an academic exception for teaching and scholarship speech that addresses a matter of public concern—such speech is governed by *Pickering*.[j]	Faculty speech related to scholarship and teaching is not governed by *Garcetti* but instead by *Pickering.*
10	Heublein	Applied an academic exception for in-class speech based on a pre-*Garcetti* Tenth Circuit case, *Vanderhurst v. Colorado Mountain College District.*[k]	Whether the adverse employment actions were reasonably related to a school's legitimate pedagogical interest. [l]
11	N/A	None of the five cases (*Jolibois*, Seals, *Shi*, *Stern*, and *Tracy*) argued for an academic exception.	*Garcetti*, *Connick*, *Pickering.*

DC	N/A	No relevant cases in the time period have raised the issue of an academic exception.	*Garcetti*, *Connick*, *Pickering.*

[a] *Alberti v. Carlo Izquierdo*, 548 Fed.Appx. 625, 639 (1st Cir. 2013).
[b] *Bhattacharya v. Rockland Community College*, 719 Fed.Appx. 26 (Summary Order) 27 (2d Cir. 2017).
[c] *Howell v. Millersville University of Pennsylvania*, 749 Fed.Appx. 130, 136 (3d Cir. 2018).
[d] *Adams v. Trs. of the Univ. of N.C. - Wilmington*, 640 F. 3d 550, 564 (4th Cir. 2011).
[e] *Buchanan v. Alexander*, 919 F.3d 847, 853–54 (5th Cir. 2019).
[f] *Meriwether v. Hartop*, 992 F.3d 492, 494 (6th Cir. 2021).
[g] *Wozniak v. Adesida*, 932 F.3d 1008, 1010 (7th Cir. 2019).
[h] *Piggee v. Carl Sandburg College*, 464 F. 3d at 671 (7th Cir. 2006).
[i] *Lyons v. Vaught*, 875 F.3d, n. 4 (8th Cir. 2017).
[j] *Demers v. Austin*, 746 F. 3d 402, 406 (9th Cir. 2014).
[k] *Vanderhurst v. Colorado Mountain College District*, 208 F.3d 908, 914 (10th Cir. 2000).
[l] *Heublein v. Wefald*, 784 F.Supp.2d 1186, 1198 (D. Kan. 2011).