COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT I
APPEAL CASE NO. 2017AP1240

JOHN McADAMS

Plaintiff-Appellant,

v.

MARQUETTE UNIVERSITY

Defendant-Respondent.

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

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT JOHN McADAMS

Richard M. Esenberg, WI Bar No. 1005622
Brian McGrath, WI Bar No. 1016840
Clyde Taylor, WI Bar No 1103207
WISCONSIN INSTITUTE FOR LAW & LIBERTY
1139 E. Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385
Attorneys for Plaintiff-Appellant

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INTRODUCTION

Marquette promises not to discipline tenured professors for exercising "legitimate personal or academic freedom of expression." It further promises them that dismissal will not be used to "restrain rights guaranteed by the United States Constitution." These extraordinary commitments are at the heart of academic freedom. John McAdams has been promised that he can say what is unpopular. He can say things that are critical of the university and things that its administration does not approve.

As with all protections of free expression, the right of academic freedom is not limited by the will of the majority or the sensibilities of one's "peers." The First Amendment is not needed to protect popular speech. Virtually every case in which a university attempts to limit academic freedom will involve speech that a substantial number of people – usually a majority – find objectionable.

In this case, Marquette seeks to terminate Professor McAdams for writing a blog post on a matter of public and institutional interest – the ability of college instructors to restrain student speech based on point of view. In the post, McAdams discussed what was said in an exchange between a student and an instructor, and expressed his own view – one that

goes against the accepted orthodoxy at Marquette – that it is wrong to restrict student speech because it might "come off" – to quote the instructor – as offensive. The blog post eventually led to a firestorm of controversy, and Marquette's administration decided to discipline and eventually fire McAdams for writing it.

Marquette's Faculty Hearing Committee ("FHC") went along. While conceding that no particular thing McAdams said or did was prohibited, it applied a highly subjective multi-part "balancing" test (invented by the FHC) to conclude that McAdams should have done things differently and should be suspended but not fired. Marquette's President doubled down on their post hoc exercise in second guessing by adding his own demand that McAdams engage in compelled speech. The President ruled that if McAdams wants to be reinstated, he must apologize and agree that what he did was wrong. In other words, McAdams must not only accept Marquette's open-ended restraint of his speech, he must say that he agrees with it.

The Circuit Court decided that it should defer to the judgment of the FHC and Marquette's President Michael Lovell about whether McAdams was "really" free to write what he wrote. In other words, it concluded that

one party to the contract – the University – gets to decide after the fact whether and how it will honor its guarantees of academic freedom, personal expression and First Amendment speech.

STATEMENT OF ISSUES

Issue 1: Was Professor McAdams' speech as contained in his November 9, 2014 blog post protected under the doctrine of academic freedom?

Circuit Court's Decision: The Circuit Court decided that Professor McAdams' speech was not protected by academic freedom as a matter of law.

Issue 2: Was Professor McAdams' speech as contained in his November 9, 2014 blog post protected under the provisions in his contract granting him the full and free enjoyment of personal freedoms of thought, discourse and advocacy and promising that he would not be fired for exercising rights guaranteed to him by the United States Constitution?

Circuit Court's Decision: The Circuit Court interpreted the contractual provisions to not protect Professor McAdams' speech.

Issue 3: Did the Circuit Court improperly deny Professor McAdams a trial on the question of discretionary cause by deferring to the findings of fact and conclusions of law of the FHC and by sustaining as proper the discipline imposed on him by Marquette's President?

Circuit Court's Decision: The Circuit Court decided that deference was warranted both to the FHC's findings and conclusions and to President Lovell's decision, and the Circuit Court accepted the FHC's factual determinations as true for purposes of summary judgment.

STATEMENT ON ORAL ARGUMENT

The Court should hear oral argument in this case. Each of the three issues involves questions of first impression in Wisconsin.

STATEMENT ON PUBLICATION

The Court should publish the decision in this matter under the considerations of Wis. Stat. § (Rule) 809.23(1)(a). There is virtually no published case law in Wisconsin dealing with academic freedom or the First Amendment as those doctrines apply to speech by college professors. Nor is there any published authority in Wisconsin regarding the deference issues presented in this appeal. The decision in this case will clarify the law and contribute to the legal literature. This is particularly important because

the meaning of academic freedom and the protection it provides, along with the First Amendment, is a timely subject in Wisconsin and throughout the United States. Moreover, even though Marquette is a private school, the contract Professor McAdams entered into with Marquette means that the decision in this case will apply not only to Marquette but to all the universities in the UW System and to all private colleges and universities in the State that grant their faculty academic freedom by contract.

STATEMENT OF THE CASE

Procedural History

Professor McAdams wrote his blog post on November 9, 2014. (R. 66:4-7.) He was suspended and banished from campus on December 16, 2014. (R. 1:24.) On January 30, 2015, he was informed that Marquette intended to revoke his tenure and terminate him. (R. 58:27-43.) Marquette's FHC held its hearing on September 21-24, 2015. (R. 3:14.) The FHC issued a written decision on January 18, 2016. (R. 3:2.) Marquette sent a letter to McAdams dated March 24, 2016, informing him that he was suspended without pay for two semesters and that he would be reinstated only if he issued a written statement acknowledging that he had been irresponsible and apologizing to Marquette and to the instructor he named prior to April

4, 2016. (R. 4.) McAdams informed Marquette on April 4, 2016, that he did not believe he had done anything wrong and that he would not apologize. (R. 66:20-24.) He has never been reinstated. (R. 89:10.)

McAdams filed this action on May 2, 2016. (R. 1.) The parties filed cross-motions for summary judgment. (R. 35, 52.) The Circuit Court issued its Decision and Order denying McAdams' motion, granting Marquette's motion, and dismissing McAdams' complaint on May 4, 2017 (R. 134), and entering a final judgment on June 9, 2017 (R. 136). McAdams filed his notice of appeal on June 23, 2017. (R. 137.)

Factual Background

1. Professor McAdams and his contract with Marquette.

Professor McAdams joined the Marquette faculty in 1977. (R. 66:1.) He received tenure in 1984. (*Id.*) It is undisputed that McAdams has been a productive member of the faculty, with many scholarly publications to his credit and a good record of classroom performance over his long career. (R. 66:1, 14-17.)

As a tenured member of the faculty, McAdams has a contract with Marquette. (R. 66:2, 18-19.) By its express terms, the contract incorporates

and is subject to the provisions of Marquette's Faculty Statutes ("Faculty Statutes"). (*Id.*)

According to the Faculty Statutes, McAdams cannot be suspended or fired except for absolute or discretionary cause as set forth in §§306.02 and 306.03. (R. 57:7-8.) Absolute cause is not an issue in this case; Marquette suspended and eventually terminated McAdams for discretionary cause. Discretionary cause exists when circumstances arising from a faculty member's conduct "clearly and substantially fail to meet the standard of personal and professional excellence which generally characterizes University faculties, but only if through this conduct a faculty member's value will probably be substantially impaired." Of critical importance to this case, there is an absolute exception. Sec. 306.03 provides that "**[i]n no case, however, shall discretionary cause be interpreted so as to impair the full and free enjoyment of legitimate personal or academic freedom of thought, doctrine, discourse, association, advocacy or action**" (emphasis added). (P. App. 139.)

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

(R. 57:8-10; P. App. 140 (emphasis added).) Marquette cannot suspend or fire McAdams for conduct that is protected by these contractual provisions.

2. The Marquette Warrior Blog.

McAdams is an outspoken defender of conservative values. (R. 66:2.) He publishes a blog called the Marquette Warrior. (*Id.*) In that role, McAdams has frequently called into question the prevailing orthodoxy on the Marquette campus. (*Id*.) In particular, he has been strongly critical of views described by him and others as "political correctness." (*Id.*) He has been a frequent critic of Marquette's administration, including the President, Provost, Deans and Department Chairs. (*Id.*)

McAdams believes that many at Marquette are intolerant of conservative views. And they are hostile to his position that academic freedom guarantees the right to express opinions that some members of the community say are hurtful to them and violate their right to a "safe space." (*Id.*) He is not a popular figure on campus among those who disagree. (*Id.*) For example, the Chair of Marquette's Philosophy Department referred to him in writing as Marquette's "resident right wing lunatic." (R. 57:12.)

3. Cheryl Abbate, her student, and the events of October 28, 2014.

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

On the morning of October 28, 2014, Abbate was discussing the philosophy of John Rawls in class. (R. 57:15-16.) The discussion included various issues and how they might be resolved under Rawls' theory of justice. The issue of same sex marriage came up, but there was no discussion allowed because Abbate said that there could be no genuine disagreement about it. (*Id.*)

After class, one of her students, referred to in briefing as "JD," approached Abbate.[1] JD recorded their after-class discussion. (R. 57:19-21.) JD told Abbate that he opposed same sex marriage and thought that it had been wrong for her to cut the class discussion short. (*Id.*) Abbate told him that "there are some opinions that are not appropriate that are harmful, such as racist opinions, sexist opinions, and quite honestly, do you know whether anyone in the class is homosexual...And don't you think that that

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

would be offensive to them if you were to raise your hand and challenge this?" (*Id.*) Abbate then told JD, "You don't have a right in this class…to make homophobic comments." She said, "You can have whatever opinions you want but I can tell you right now, in this class homophobic comments…will not be tolerated. If you don't like that you are more than free to drop this class." (*Id.*) Shortly thereafter Abbate became aware that JD was recording their conversation on his phone, and broke off the discussion. (*Id.*)

JD complained about his treatment by Abbate to Suzanne Foster, the Associate Dean for Academic Affairs for the College of Arts & Sciences. (R. 57:23.) Foster directed JD to take his complaint to the Philosophy Department. (*Id.*) She never otherwise attempted to deal with his concerns in any way. (*Id.*)

JD met later that same morning with Nancy Snow and Sebastian Luft, the Chair and Assistant Chair of the Philosophy Department. (R. 57:27-29.) There was no discussion of Abbate's behavior. Instead, Snow told JD that "he needs to change his attitude so he comes across as less insolent and disrespectful." (R. 57:30.) In her comments about the meeting Snow called JD an "insulin (sic) little twerp." (R. 57:9.) She later called

him a "little twit" and a "jackass." (R. 57:12.) The Philosophy Department did nothing further to address JD's concerns. Abbate wrote to Snow thanking her for putting JD in his place, writing "Hopefully this experience has informed him that oppressive discourse is not acceptable."[2] (R. 57:30.)

4. The November 9, 2014 Blog Post.

Thereafter, JD met with McAdams and gave him the recording of the Abbate conversation. He agreed that McAdams could blog about it. (R. 66:2.)

On the morning of November 9, 2014, McAdams wrote an email to Abbate stating that he was working on a story about her confrontation with JD and asking for her version of the events. (R. 55:11.) Within half an hour, Abbate forwarded McAdams' email to Snow, Foster, and Assistant Dean James South, telling them that she did not intend to respond. (*Id.*) Snow and Foster agreed that Abbate should not respond. (R. 55:12-13.) That same day, without talking to McAdams and without waiting to see what he would write, Abbate told Foster that "I really don't care what some uncritical, creepy homophobic person with bad argumentation skills has to say about me." (R. 55:14.) She told an acquaintance that "I don't want to waste my

[2] As noted below, not all of these facts were known to McAdams at the time of the proceedings before the Faculty Hearing Committee due to Marquette's withholding of evidence. *See* Section II, *infra*.

energy worrying about some uncritical, hateful homophobic group." (R. 56:9.)

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

All of these comments were made before McAdams' published his blog post – before anyone knew what he would say. On the evening of November 9, he published the blog post. The full text of the post is at R. 66:4-7 and P. App. 134-137. It does not take a position on same-sex marriage, but argues that the topic is appropriate for debate and that differences of opinion should be discussed and not censored. The blog post named and criticized Abbate and criticized Marquette for not responding to JD's complaint. It contained no intemperate language and no ad hominem attack of any type.

5. Abbate Complains and Threatens Legal Action.

As it turned out, Abbate and her mentor did not believe that McAdams' post placed her in a bad light. Associate Dean Foster wrote Abbate on the morning after the blog post, saying she didn't believe it was harmful to Abbate: "[Y]ou come off well. That is, anyone who looks at the blog will see where sanity lies." (R. 55:19.) Abbate agreed: "When I saw the blog I was pleasantly surprised." (*Id.*)

But that did not mean that they did not see the post as a vehicle to go after McAdams. The next day, Abbate drafted a formal letter of complaint. She asked that McAdams be disciplined for his speech. (R. 57:34-35.) She sent a draft of her complaint to a confidant by email. (R. 56:7.) In her email, she described JD as one of her "right wing students." (*Id.*) She said McAdams "hates homosexuals or anyone who supports gay rights" and that she "cannot believe that this bigoted moron has a job at Marquette." (*Id.*)

By the following day (November 11), Abbate had revised her formal complaint and sent it, or had it sent, to University authorities. (R. 57:36-38.) It contained a new charge: that she had "been the target of harassing emails, sent by [McAdams'] followers." (*Id.*) However, the record discloses

that she had by this time received only *a single email* – critical of her but not distasteful. (R. 54:3; R. 58:1.)[3]

On November 24, Abbate threatened the University with a lawsuit. She wrote a letter to Marquette President Michael Lovell demanding that Marquette fire McAdams, punish JD, and pay her damages of various kinds. She said that if Marquette did not comply with her demands she would have "recourse to a lawsuit." (R. 58:3-5.)

In early December, Abbate decided to leave Marquette for the University of Colorado. (R. 58:6-7.) While Marquette has portrayed this as a consequence of McAdams' criticism, the facts show otherwise. According to Associate Dean South, Abbate's decision was based on a variety of factors other than McAdams' post. (R. 55:21.) In fact, Abbate had tried and failed to transfer to the more prestigious philosophy program at the University of Colorado the previous year. (R. 55:24-25.) This time, she succeeded and was offered "significant financial aid." (R. 55:26.) Nevertheless, on December 10, she wrote again to President Lovell seeking "reparations." She again threatened a lawsuit and bad publicity, stating that

[3] During discovery Marquette produced the emails received by Abbate. R. 54:3-5 is a spreadsheet showing the dates on which Abbate received those emails.

if her demands were not met, she would "reach out to national, academic news sources **again**." (R. 56:2-5 (emphasis added).)

6. The post goes viral.

Marquette has sought to justify its actions against McAdams by pointing to certain vile and abusive emails that Abbate eventually received as a result of the controversy, even though it is undisputed that McAdams had nothing to do with them. But by November 12, 2014, the date on which Abbate submitted the final form of her complaint against McAdams to the University, there had been no indication that it would cause some major furor. She had received only two emails that were critical of her. (R. 58:8-9; R. 54:3.)

On November 17, a website called the College Fix posted a story reporting on the incident based upon an interview with JD. *See* http://www.thecollegefix.com/post/20138/. Next, the editor of a philosophy website called the Daily Nous saw the College Fix story and wrote to Abbate about it, suggesting that he would be supportive of her position and asking her to comment. She did, sending him a lengthy memo setting out her side of the story. (R. 58:10-15.) The Daily Nous published its story on November 18, claiming that Abbate was the victim of a "smear campaign."

See http://dailynous.com/2014/11/18/philosophy-grad-student-target-of-political-smear-campaign/.

On November 20, Inside Higher Ed published an article on the incident. *See* https://www.insidehighered.com/news/2014/11/20/marquette-u-grad-student-shes-being-targeted-after-ending-class-discussion-gay. As had been the case with the Daily Nous, Abbate gave the reporter her version of events. (*Id.*) Fox News published an article on the incident on November 22. *See* http://www.foxnews.com/opinion/2014/11/22/teacher-to-student-if-dont-support-gay-marriage-drop-my-class.html. Their story was, like the College Fix story, based primarily on an interview with JD. (*Id.*)

After the story made national press, Abbate began receiving numerous emails, some in support of her conduct, some critical, and some distasteful. (R. 54:3-5.) There is no evidence that McAdams had anything to do with any of these emails. (R. 66:3.) Although McAdams thought this was an important issue, Abbate – who apparently agreed – had as much, if not more, to do with the increased attention to the blog post as McAdams did.

7. Marquette's Reaction.

On December 16, 2014, Marquette suspended McAdams from his teaching duties and banished him from campus. (R. 1:24.) Marquette declared, with absolutely no basis in fact, that McAdams' presence on the Marquette campus would pose a threat to public safety. Marquette spokesman Brian Dorrington issued a statement condemning McAdams: The University "will not stand for faculty members subjecting students to any form of abuse, putting them in harm's way. We take any situation where a student's safety is compromised extremely seriously." *See* http://archive.jsonline.com/news/education/marquette-university-professor-john-mcadams-remains-banned-from-campus-b99425150z1-288427731.html.

On January 30, 2015, Marquette formally notified McAdams that it intended to revoke his tenure and terminate his employment. (R. 58:27-43.) Section 307.03(1) of the Faculty Statutes requires that in cases of termination for discretionary cause, the University must give notice of the statute allegedly violated, the date and location of the alleged violation, and a detailed description of the facts involved. (R. 45:8.) The only violation alleged in the January 30, 2015 Notice was the publication of the

November 9 blog post. It is thus the publication and content of the blog post, and nothing else, that Marquette says is sufficient to establish that it had discretionary cause to terminate McAdams.

8. The Faculty Hearing Committee and President Lovell's Decision.

On February 6, 2015, McAdams protested his suspension and termination as allowed by the Faculty Statutes. (R. 53:21-22.) In such a case, the Statutes provide for a hearing on the issue of discretionary cause before the FHC. Section 307.07 specifies the procedures that the FHC must follow and requires them to issue their findings and conclusions, together with their recommendation. (R. 57:8-10; P. App. 140-142.) The President is not bound by the FHC's recommendation. (*Id.*)

The FHC hearing took place in September 2015. (R. 55:1.) McAdams objected on due process and procedural grounds to the way the hearing was conducted. (R. 55:2, 10; R. 53:21-22.) The FHC rejected McAdams' objections and issued a report, concluding that the charges against McAdams were insufficient to support revocation of his tenure and termination, recommending instead that he serve a one- or two-semester suspension without pay. (R. 3:110.)

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

STANDARD OF REVIEW

"Summary judgment is granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Kruschke v. City of New Richmond*, 157 Wis. 2d 167, 169, 458 N.W.2d 832 (Ct. App. 1990). "Summary judgment should not be granted unless the moving party demonstrates a right to judgment with such clarity as to leave no room for controversy." *Waters v. U.S. Fidelity & Guar. Co.*,

124 Wis. 2d 275, 279, 369 N.W.2d 755 (Ct. App. 1985). The court of appeals reviews a grant of summary judgment *de novo*. *Post v. Schwall*, 157 Wis. 2d 652, 656, 460 N.W.2d 794 (Ct. App. 1990). The Circuit Court's interpretation of the contract is a legal conclusion which this Court reviews as a matter of law. *Ehlinger v. Hauser*, 2010 WI 54, ¶47, 325 Wis. 2d 287, 785 N.W.2d 328.

ARGUMENT

It was error for the Circuit Court to defer to the FHC on questions of fact and law and resolve all factual disputes in Marquette's favor. The contract between the parties does not call for such deference, and McAdams did not waive his day in court. Even were this not so, the process before the FHC was irregular and not consistent with either the contract or elementary notions of due process. Factual disputes among the parties regarding the obligations of university professors and certain circumstances surrounding the November 9, 2014 blog post preclude summary judgment in favor of Marquette and will be discussed in Part II below.

But the questions of whether McAdams' speech was protected by academic freedom and the First Amendment were legal questions capable of being decided on summary judgment. The Circuit Court got them wrong

as a matter of law. Under no possible view of academic freedom or the First Amendment, could McAdams lawfully be suspended or terminated for his blog post. This Court can therefore resolve this case on either of those issues without addressing whether deference to the FHC's factual findings was proper.

I. DISCIPLINING MCADAMS FOR HIS SPEECH VIOLATES HIS CONTRACTUAL RIGHTS TO ACADEMIC FREEDOM AND FREE SPEECH AS A MATTER OF LAW.

Marquette's commitments to McAdams are strong and unconditional. The University may discipline him for discretionary cause, but "**[i]n no case**, however, shall discretionary cause be interpreted so as to impair the full and free enjoyment of legitimate personal or academic freedoms of thought, doctrine, discourse, association, advocacy, or action." Faculty Statutes §306.03 (P. App. 139) (emphasis added). This protection is strengthened and extended by §307.07(2), providing that "[d]ismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed them by the United States Constitution." Thus, the language in §306.03 when coupled with §307.07(2) means that discretionary cause can never include any advocacy or discourse protected by academic freedom or the First Amendment.

This is critical. The contract contemplates that conduct might rise to the level that constitutes discretionary cause – conduct that is in some way deficient and impairs a faculty member's value – and yet be protected by academic freedom and the First Amendment. Thus, if the November 9, 2014 blog post was an exercise of McAdams' legitimate personal or academic freedom of speech, it cannot be the basis for discipline under the contract.

For Marquette to prevail, it would have to point to some stated exception to the protection established by the contract for both academic freedom and the First Amendment. There would, for example, have to be an exception for McAdams' commonplace decision to identify the person whose conduct he was writing about. Or there would have to be an exception for criticism of graduate instructors. There would have to be an exception for speech that resulted in abusive criticism from unrelated and independent third parties. No such exceptions are in the contract, and they are inconsistent with any reasonable concept of academic freedom or the First Amendment.

The Circuit Court did not explain how disciplining or firing McAdams could be reconciled with the robust guarantees made in his

contract. Instead, it deferred to the FHC's prolix and ambiguous "balancing" of McAdams' right to speak against their own views as to the wisdom of his decision. In doing so, the court effectively made McAdams' freedom something that could be taken away by Marquette's administration and the prevailing sentiments on campus. As noted above and explained below, the Circuit Court was wrong to defer to the FHC. *See* Section II, *infra*. But however the FHC report is treated, McAdams' speech was contractually protected as a matter of law.

A. McAdams Blog Post Was Protected by Academic Freedom.

1. Academic freedom confers robust protection for faculty expression.

Black's Law Dictionary defines academic freedom as "the right (esp. of a university teacher) to speak freely about political or ideological issues without fear of loss of position or other reprisal."[4] The legal protection for speech covered by academic freedom has a long history in this country. Fifty years ago, the United States Supreme Court said:

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

[4] BLACK'S LAW DICTIONARY, paperback ed., 2011.

> special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

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

The American Association of University Professors ("AAUP") in its 1940 Statement, defines academic freedom as including the freedom to "speak or write as citizens . . . free from institutional censorship or discipline."[5] This includes the freedom to speak outside of the classroom, something that the AAUP refers to as "extramural utterances."

> the right of faculty members to speak as citizens—that is, "to address the larger community with regard to any matter of social, political, economic or other interest without institutional discipline or restraint"—since its inception. **Freedom of extramural utterance is a constitutive part of the American conception of academic freedom**.

AAUP Statement on Civility, *available at* https://www.aaup.org/issues/civility (emphasis added). The effect of protecting extramural utterances "is to remove from consideration any supposed rhetorical transgressions that would not be found to exceed the protections of the First Amendment." According to the AAUP then, if an extramural statement is otherwise protected by the First Amendment, it

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

cannot be grounds for discipline. AAUP Report, *Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions* 102 (2011).[6]

While Marquette's obligations are defined by contract and it must live with the unambiguous promises that it made, court decisions involving academic freedom at public universities are illustrative of the robust protection extended for academic freedom. Consistent with the AAUP position, a position that Marquette itself has adopted (R. 53:18), the Courts have regularly rejected attempts by educational institutions to discipline or terminate faculty for "extramural utterances."

Most recently, in *Salaita v. Kennedy*, 118 F. Supp. 3d 1068 (N.D. Ill. 2015), a court held that anti-Semitic Twitter statements made by Professor Salaita – statements so harsh and profanity-laden the court was reluctant to quote them – were extramural utterances for which the university could not discipline or fire him. Rescinding his job offer based on his tweets was in violation of his rights. *Id.* at 1083-84.

In *Starsky v. Williams*, 353 F. Supp. 900 (D. Ariz. 1972), a tenured professor was fired for participating in a protest and making vile remarks to

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

bystanders. In finding that the university violated his academic freedom, the court stated:

> This Court finds that the Board, in discharging Professor Starsky on the basis of narrow professional standards of accuracy, respect, and restraint applied to public statements made as a citizen, has violated its own A.A.U.P. standards not to discipline a teacher when he "speaks or writes as a citizen," and has violated Professor Starsky's rights to freedom of speech by applying constitutionally impermissible standards to speech made as a citizen.

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

All of these cases should have gone the other way according to Marquette and the Circuit Court. In each, it would be possible to say that the professors' statements in some way "illegitimate." One can conclude that they were "harmful" to students and to the mission of the university because of the message that each conveyed. It is possible to say that this expressive harm was "foreseeable" (all things that Marquette argues in this case). But none of this overcame the protection for extramural speech.

The Wisconsin Supreme Court has not yet fully addressed academic freedom under Wisconsin law. But in *State ex rel. Ball v. McPhee*, 6 Wis.

2d 190, 94 N.W.2d 711 (1959) (partially overruled on other grounds), the court reinstated a UW professor who had been discharged. One of the charges against him was that he had voiced opposition to university policies and criticism of administrators. In rejecting the charge, the Court said, "[s]urely a teacher in a state college is entitled to some academic freedom in criticizing school programs with which he is in disagreement. Such acts of criticism do not qualify as either inefficiency or bad behavior." *Id.* at 204. Thus, at bare minimum, academic freedom in Wisconsin protects professors who criticize the administration, as McAdams did here.

As noted earlier, the AAUP has long recognized a broad and robust understanding of academic freedom for professors commenting on public issues. For example, in 1956, reacting to the McCarthy era, the AAUP issued a report affirming that universities could not sanction faculty for what they write or speak, if doing so would stifle their ability to either question or defend accepted doctrine, as doing so would undermine their value to society.[7] It pointed out that there is no exception to academic freedom allowing a university to discipline a professor for speech that violates some subjective or unarticulated standard of "responsibility," as

[7] *Academic Freedom and Tenure in the Quest for National Security*, AAUP BULLETIN Vol. 42, 55 (1956). Available at: https://www.aaup.org/sites/default/files/files/Quest%20for%20National%20Security.pdf.

Marquette seeks to do in this case. To the contrary, its Report stated that "Any rule which bases dismissal upon the mere fact of exercise of constitutional rights violates the principles of both academic freedom and academic tenure."[8]

In 1964, the AAUP issued a report condemning discipline against Illinois Professor Leo Koch, who had published an article in the campus newspaper supporting a more libertine view of sexuality than was acceptable at the time.[9] In 1971 the AAUP condemned UCLA's termination of Professor Angela Davis.[10] Her protected extramural utterances included statements arguably sympathizing with and encouraging violence against the government.[11]

Although its view is somewhat more restrictive than the AAUP (less favorable for faculty), the National Association of Scholars (NAS) agrees that extramural utterances on matters of institutional concern are broadly

[8] *Id.* at 57-58.
[9] *Academic Freedom and Tenure: The University of Illinois*, AAUP BULLETIN Vol. 49 (Spring 1963), available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3757&context=fss_papers.
[10] *Academic Freedom and Tenure: The University of California at Los Angeles*, AAUP BULLETIN, Vol. 57, No. 3, 382-420 (Sep., 1971) available at: https://www.aaup.org/sites/default/files/files/UCLA.pdf.
[11] *Id.* at 410-12.

protected. Peter Wood, the president of the NAS, issued a report and testified in this matter. Under the NAS standards, academic freedom:

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

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

The contract's unequivocal language, combined with this tradition of strong protection, tells us a few things about what a faculty member in McAdams' position would understand and what the parties' agreement must mean. It does not confer unbridled discretion on a university to engage – as the FHC did here – in a post hoc evaluation of the wisdom of a professor's decision to speak. To the contrary, the contract must be read as anyone understanding academic freedom or our First Amendment traditions would understand it: ensuring that a faculty member cannot be disciplined because the administration – or even a majority of her colleagues –

disagrees with that speech or believes that it could be said differently or better.

By analogy to the First Amendment, any exceptions to academic freedom require clear and narrow rules to be set forth in McAdams' contract. *Cf. Wis. Right to Life v. Barland*, 751 F.3d 804, 835 (7th Cir. 2014) ("Regulations on speech, however, must meet a higher standard of clarity and precision. . . . Vague or overbroad speech regulations carry an unacceptable risk that speakers will self-censor, so the First Amendment requires more vigorous judicial scrutiny."). There is nothing in the contract by way of an *a priori* rule that forbids a faculty member from identifying the person he is criticizing. There is no exception that says he cannot engage in the now customary practice of linking to the public website of persons he is writing about.

We know that these things are true because the FHC *conceded them.* There is no prohibition, it says, against identifying people that a faculty member is writing about or linking to their website – even if that person is a student and one is writing something critical. (R. 3:77) There is no requirement to be accurate or civil (although McAdams was both). (*Id.* at 76-78.) Having done nothing but speak and having broken no rules,

McAdams cannot be disciplined no matter how much the administration or a collection of his colleagues might disagree with what he said.

2. Marquette gets academic freedom wrong.

Against this, the Circuit Court offered only Marquette's self-interested interpretation of academic freedom. It is not a stretch to characterize that view – to which the Circuit Court deferred – as being that something is protected by academic freedom until the university – or at least a committee of faculty members and the administration – says that it is not.

After conceding that academic freedom is an absolute defense to discretionary cause, the FHC then immediately back-tracked and said that academic freedom is not a complete defense but is riddled with exceptions and limitations. It says that speech by a professor is limited by the professor's "responsibilities" and "special obligations" which are, in turn, determined after the fact by the university. The FHC adopted an indeterminate and elastic "balancing" test that could be used to condemn anything. (R. 3:119-120.) The test offers no safe harbor for speech. It imposes a duty to avoid "harm" even if that "harm" is caused by the way *others* react to otherwise unobjectionable speech. "Harm," moreover, is not

limited to those things that have historically been thought to limit freedom of expression – thing such as fighting words, defamation, etc. – but the fact that a person who is criticized may not like it and that others may react badly. The FHC made clear that it thought the "harm" need not even be "likely" to occur. (R.3:89-90.)

There is no way that a member of Marquette's faculty could look at the FHC "test" and understand the limits of her academic freedom to be anything other than the whims of her colleagues. Indeed, the elasticity of the test is demonstrated by the FHC's acknowledgement that academic freedom forbids none of the things that McAdams did.

Recognizing the radical malleability of its "test," Marquette says that there is no reason to worry because the "faculty" itself stands as a bulwark against "abuse." (R. 3:111-12.) But, as the FHC elsewhere concedes, academic freedom must stand as a protection for faculty members against the rest of the faculty as well as the administration. (R. 3:113-14.) A "test" that promises protection for unpopular speech and then allows the administration or other faculty members to decide the measure of that protection after the fact is no protection at all. The Circuit Court apparently believed that the FHC constituted McAdams' "peers" and functioned as

some sort of a jury. Putting aside that a jury of one's peers does not normally work for the opposing party and does not consist of persons who have publicly denounced the defendant, *see* Section II, *infra*, we normally do not allow juries to vote on free speech. Protecting free expression is intrinsically counter majoritarian. *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

Marquette's indeterminate balancing test is inconsistent with the contract itself. The FHC's balancing test employs circular logic: conduct is not protected by academic freedom if it meets the definition of discretionary cause. (R.3:120.) But this is wrong as a matter of law. Under the contract, the existence of circumstances that constitute discretionary cause does not limit academic freedom. It's the other way around. To say otherwise renders the last sentence of §306.03 – "in no case, can discretionary cause be used to impair academic freedom" – meaningless. *See Wausau Joint Venture v. Redevelopment Auth. of City of Wausau*, 118 Wis. 2d 50, 58, 347 N.W.2d 604 (Ct. App. 1984) (court must select a contract construction that gives effect to each part of the contract and reject constructions resulting in surplusage or unfair or unreasonable results).

3. The November 9 blog post was a legitimate exercise of McAdams' personal and academic freedom of thought and advocacy.

McAdams' post was an extramural utterance on a matter of public and institutional concern. Although Ms. Abbate was still a graduate student, she was being paid by Marquette as an employee and was placed in a position of authority over students. The position she took as an Instructor regarding what speech could be proscribed as "oppressive discourse" was a matter of considerable significance. The blog post was not uncivil and it was not inaccurate.

Marquette has argued – and in deferring to Marquette, the Circuit Court agreed – that by including Abbate's name and linking to her public website, McAdams lost the protection of academic freedom. But Marquette has acknowledged that there is no rule that prohibits professors from identifying people or linking to their websites. (R. 3:74.) It conceded that this was so even if that person is a student and one is writing something critical. (*Id*.) According to the FHC, McAdams could nevertheless be disciplined because he "could have" written the post about an "anonymous instructor." If he had, unknown third parties would not have been able to

send Abbate abusive emails. McAdams, it concluded, could have known that given the nature of the internet this was always a possibility.

This proposition must be rejected as a matter of law. It is always possible that if a person is criticized in writing, some unknown reader may behave badly. But academic freedom cannot be held hostage to the reaction of others. The Circuit Court, following the FHC, says that there are circumstances where McAdams might have chosen not to identify someone, but that tells us nothing about whether he was *forbidden* to do so. Nothing in the contract or the doctrine of academic freedom says that he was.

It is always possible to second guess a decision to identify a person in writing – even though it is commonplace to do so save for minors and victims of crime. In this case, McAdams commented on the actions of someone the university put in a position of authority over students and how she exercised that authority in a matter of great public controversy and concern. A balancing test that can punish him for that can punish any faculty member for anything they write.

B. McAdams' Suspension and Termination Violated His Right to Free Speech Under the First Amendment as Provided in His Contract.

While the First Amendment does not generally protect an employee of a private institution, Marquette contractually bound itself to its restrictions. It promised McAdams that "[d]ismissal[12] will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed them by the United States Constitution." Faculty Statutes §307.07(2). McAdams' contractual right to free speech is coextensive with his right to freedom of expression under the First Amendment as a private citizen.

But the Circuit Court concluded as a matter of law that these contractual provisions do not mean what they say. (P. App. 27-29.) The Circuit Court cited no legal authority for its interpretation of the contract

[12] Marquette has previously asserted that McAdams has not been terminated. But that assertion is wrong as a matter of law. President Lovell placed intolerable conditions on McAdams' reinstatement to the faculty. McAdams refused to comply with those conditions. On January 12, 2017 (when his suspension would otherwise have expired), Marquette advised McAdams that he will not be reinstated and that he remains suspended without pay indefinitely. (R.88:4-5.) This is a "de facto termination" as a matter of law. *See Hedrich v. Bd. of Regents of the Univ. of Wis.*, 2000 WL 34229419, *3 (W.D. Wis. Aug, 16, 2000) (faculty member effectively terminated due to length of suspension and the fact that she was no longer teaching); *Moffitt v. Tunkhannock Area Sch. Dist.* 2013 WL 6909958 (M.D. Pa. Dec. 13, 2013) (indefinite suspension without pay is the functional equivalent of discharge); *Hammond v. Chester Upland Sch. Dist*., 2014 WL 4473726 (E.D. Pa., Sept. 9, 2014) (suspension for an extensive period of time is a de facto termination).

and, in fact, offered no support for it at all except to assert that to actually give McAdams complete First Amendment protection would "lead to absurd consequences." (P. App. 27.) However, the Circuit Court identifies no such consequences. It cites to page 117 of the FHC Report, but no such consequences are detailed there.[13]

Given the unambiguous nature of the contractual language, it does not matter what consequences follow Marquette's promises. Contracts are to be interpreted in accordance with their plain meaning. *Moherek v. Tucker*, 69 Wis. 2d 41, 45, 230 N.W.2d 148 (1975). There is nothing absurd about a university promising a professor that she will not be disciplined for extramural statements made as a private citizen, so long as they are within the domain protected by the First Amendment.

Respect for the First Amendment is hardly an "absurd consequence." Rather it protects something of "transcendent value to all of us and not merely to the teachers concerned" – free speech on college campuses. *Keyishian*, 385 U.S. at 603 (1967).

[13] The Circuit Court may have meant to refer to Marquette's argument that if that provision were read literally, faculty would have a contractual right to teach anything or nothing at all in their classes, because they would have a First Amendment right to do so. However, conduct within the classroom is governed by the provisions on absolute cause set forth in his contract, which are not subject to First Amendment protections. Faculty Statute §306.02 (P. App. 139.)

The FHC said that the contract only bars "the University from making pretextual uses of discretionary cause in order to punish protected speech sub rosa." (R. 3:121.) But that is not what the contract says, and once again, the FHC renders its protections illusory. If a claim of discretionary cause is "pretextual," then it is essentially phony and cannot be the basis for disciplining a faculty member at all. No language about protecting First Amendment rights would be necessary. But if the university terminates a person because of speech protected by the First Amendment, then dismissal would have been used to restrain the exercise of these rights in contravention of the contract. Because there is no dispute that the blog post was protected by the First Amendment, Marquette cannot terminate McAdams because of it.

II. THE CIRCUIT COURT IMPROPERLY DEFFERED TO THE FHC'S FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATIONS, AS WELL AS TO PRESIDENT LOVELL'S DECISION.

There is no statute or case law in Wisconsin justifying the Circuit Court's decision to deny McAdams a trial on any disputed facts and instead defer to the FHC's findings of fact. As explained above, McAdams' speech was protected by academic freedom and the First Amendment, legal questions entitling him to judgment as a matter of law. But if the proper

meaning of academic freedom requires the application of special expertise, he offered expert testimony explaining its scope and concluding that his speech was protected. It was legal error to resolve any conflict between McAdams' and Marquette's experts without trial.

In addition, the question of whether Marquette otherwise had discretionary cause to discipline McAdams involved numerous disputes of material fact.

These factual disputes relating to the existence of discretionary cause included but were not limited to:

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

The Circuit Court decided all such factual issues against McAdams, citing solely to the FHC report as the Court's basis for its factual determinations, even where evidence in the Court's own record contradicted those findings. But the Circuit Court cited nothing in the Wisconsin Statutes or Wisconsin case law permitting it to decide factual

issues against a party on summary judgment by deferring to an internal decision-making process by one of the parties. Doing so violated the long-standing admonition that courts are not to resolve factual disputes on summary judgment. *See Kraemer Bros. v. U.S. Fire Ins. Co.*, 89 Wis. 2d 555, 565–66, 278 N.W.2d 857 (1979) ("On summary judgment the court does not decide a genuine issue of material fact; it decides whether there is a genuine issue.").

In addition, as noted above, interpretation of the contract was a question of law. The Circuit Court was not free to defer to the FHC's (erroneous) determination of what the law is. The supreme court has repeatedly said that it is the duty of the judiciary to say what the law is. *State v. Williams*, 2012 WI 59, ¶36, n. 13, 341 Wis. 2d 191, 814 N.W.2d 460; *State v. Van Brocklin*, 194 Wis. 441, 217 N.W. 277, 277 (1927) ("'[J]udicial power' is that power which adjudicates and protects the rights and interests of individual citizens, and to that end construes and applies the laws.") (citing 2 Words and Phrases, Second Series, p. 1268). Here, the

Circuit Court forfeited that power to the FHC without citing any Wisconsin authority authorizing such an abdication.[14]

A. The FHC Was Not Comparable to an Impartial Tribunal.

Marquette implies that the FHC was an impartial tribunal by calling the FHC a jury of McAdams' peers. First, the idea that the scope of free expression should be determined by a jury is a categorical error. Academic freedom and the First Amendment cannot be limited by the prevailing attitudes of one's peers. They are protections against the views and predispositions of the majority. For example, McAdams is a *conservative* professor at a University with a very liberal faculty and administration. Academia is the current bastion of political correctness in the United States. *Groupthink in Academia,* Klein and Stern, The Independent Review, v. 13, #4, Spring 2009. The majority may not sit in judgment on the speech of the minority.

[14] In a currently pending case, *Tetra Tech EC, Inc. v. Wis. DOR*, 2015AP2019, the Wisconsin Supreme asked for briefing on whether deferring to statutory interpretations by administrative agencies comports with Article VII, Section 2 of the Wisconsin Constitution, which vests judicial power in a unified court system. Order Granting Pet. for Review, April 24, 2017. That case has not yet been decided (and there is more basis for deference to agencies than to one party to a contract), but the fact that the Supreme Court asked for briefing underscores the difficulties with deference to legal interpretations by any other body.

Moreover, a committee of obviously interested Marquette faculty is nothing like an impartial jury. The FHC was made up of Marquette faculty members who are beholden to their employer – who decides their salary, departmental budgets, teaching duties, etc. No one would suggest that a group of company executives ruling on another executive's termination would constitute an unbiased jury of peers. Peers they would be, but hardly impartial given their own interests. Finally, as a matter of legal form, the FHC is an internal committee of Marquette that simply makes a recommendation to the President of Marquette. The academic and other committees of Marquette that are staffed in whole or in part by faculty are part of and not separate from the university. The FHC is the legal agent of and an integral part of Marquette.

Thus, the FHC is no different than a committee set up by any other private company to perform the company's business. The closest analogy would be to a committee set up by a company's board to investigate wrongdoing by the company. Under the law, such committees are agents of the company. *See Hollinger International Inc. v. Hollinger Inc.*, 230 F.R.D. 508, 511 (N.D. Ill. 2005) ("Special Committee" formed to conduct an internal investigation was an agent of the company.) The FHC was an

agent of Marquette and not an independent third-party tribunal that deserves any deference by a court.

B. The Circuit Court Followed the Wrong Line of Cases.

The Circuit Court acknowledged that there are no Wisconsin cases on point but identified two lines of cases on this issue from other jurisdictions. The Circuit Court decided to rely on a decision of the Ohio intermediate appellate court in *Yackshaw v. John Carroll Univ. Bd. Of Trust*ees, 89 Ohio App. 3d 237, 624 N.E. 225 (1993), and a handful of cases that follow it. (P. App. 7.) Under *Yackshaw*, the Circuit Court concluded that the factual findings and conclusions of the FHC were dispositive. The Circuit Court rejected a competing line of cases stemming from *McConnell v. Howard University*, 818 F.2d 58 (D.C. Cir. 1987), which hold that there is no legal basis to defer to findings or conclusions made by one of the parties to a contractual dispute. (*Id*.) The *McConnell* analysis is applicable here.

First, *Yackshaw* did not involve academic freedom. Because academic freedom and the guarantee that one will not be terminated for speech protected by the First Amendment are protections against the administration and one's colleagues, this type of deference is wholly

inappropriate. In *Yackshaw*, which involved a professor who accused others of sexual misconduct and who did not assert academic freedom as a defense, the court concluded that the parties had agreed by contract to accept the decision of the faculty review board. Thus, deference was a way of "honoring the parties' contractual agreement." 89 Ohio App. at 242. This is true of the cases that followed it as well. *See, e.g., Traster v. Ohio Northern University*, 2015 WL 10739302, *1 (N.D. Oh. Dec. 18, 2015) (faculty member targeted for discharge permitted recourse provided in faculty handbook as "exclusive remedy"); *Collins v. Notre Dame*, 2012 WL 1877682, *4 (N.D. Ind. May 21, 2012) (nothing in the tenure contract indicated any of the university's judgments would be open to review by judge or jury).

In contrast to *Yackshaw* and its progeny, there is nothing in the contract here that would suggest that the court should defer to Marquette and its own FHC. In fact, nothing in McAdams' contract states that the FHC's decision is binding on anybody. Section 307.09 specifically contemplates a separate judicial action following the FHC report and nowhere states that the report is to be given deference in such a subsequent legal action. (P. App. 142.) And Marquette certainly did not consider that it

was bound by the FHC. President Lovell implemented discipline different from and more severe than that recommended by the FHC.[15]

Unlike *Yackshaw*, the decision in *McConnell* is directly applicable here. It explicitly discusses judicial review of decisions by private universities. On this issue, *McConnell* is very clear. It noted that while "Howard University attempts to argue from higher education cases involving *public* universities, usually involving due process claims, that courts should view the decisions of private universities as if they were made by government agencies, there is no basis for this conceptual leap." 818 F.2d at 68. Recognizing that "[i]n a private institution, any right to tenure is contractual rather than statutory," *id.* at 68-69 (quoting Rosenblum, Legal Dimensions of Tenure, in FACULTY TENURE 161), it went on to note:

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

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

> were a state or federal administrative agency is simply unsupported where a contract claim is involved.

Id. at 69.

McConnell has been followed widely across fourteen jurisdictions and circuits. *See e.g.*, *Craine v. Trinity College*, 791 A.2d 518, 536 (Conn. 2002) ("The principle of academic freedom does not preclude us from vindicating the contractual rights of a plaintiff who has been denied tenure in breach of an employment contract."); *New Castle County Vocational Technical Educ. Ass'n v. Bd. of Education of New Castle Cty*, 1988 WL 97840, *3 (Del. Ct. of Chancery Sept. 22, 1988) (to adopt a view "limiting judicial review" over the university's decision would be to allow "one of the parties of the contract to determine whether the contract had been breached," making a "sham of the parties' contractual tenure arrangement"); *Kyriakopoulos v. George Washington University*, 866 F.2d 438, 446 (D.C. Cir. 1989) ("[C]ontractual rights are to be enforced as diligently (and are valued as highly) in a university setting as in any other."); *Breiner-Sanders v. Georgetown University*, 118 F. Supp. 2d 1, 7 (D.D.C. 1999) (collateral estoppel principles did not require the "court to give preclusive effect to a private university's grievance panel").

McConnell is also directly applicable to the facts here. Like Howard's Faculty Handbook, Marquette's Faculty Statutes grant no deference to the FHC. Neither the Board of Trustees (at Howard) nor the President (at Marquette) were bound by any recommendation they received. They were free to follow the committee's recommendations or not. With that in mind, the *McConnell* court stated:

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

818 F.2d at 68.

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

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

Id. at 69. Universities are not special when it comes to contract interpretation. "[E]ven if there are issues on which courts are ill equipped to rule, the interpretation of a contract is not one of them." *Id.*

C. Procedural Flaws Preclude Deference to Marquette's Decisions.

Moreover, the *Yackshaw* line of cases consistently involved situations where the process to be followed by the university was, in fact, followed. *See, e.g.*, *Haegert v. University of Evansville*, 977 N.E.2d 924, 950 (Ind. 2012) ("[W]e find that the University complied with the provisions of Haegert's employment contract."); *Motzkin v. Trustees of Boston Univ.*, 938 F. Supp. 983, 999 (D. Mass. 1996) ("Even if [plaintiff's] charges were material, there was no breach of contract because BU's procedures were fundamentally fair and in substantial compliance with those prescribed in the Handbook."); *Traster*, 2015 WL 10739302, *10 ("[Ohio Northern University] did not breach Traster's employment contract by affording him only those procedures set forth in the Handbook."). In McAdams' case, Marquette engaged in wholesale violations of the procedures required under the contract.

Marquette violated procedural provisions of its contract with McAdams in at least four ways during the FHC process: (1) it failed to

provide him with documentary evidence; (2) it failed to provide him with the right to confront witnesses; (3) it did not limit its evidence to the facts and issues disclosed in the Notice of Termination; and (4) it failed to ensure an unbiased panel on the FHC.

First, Section 307.07 of the Faculty Statutes sets forth the procedures for FHC hearings. Under subsection (10), Marquette must cooperate with the faculty member in providing evidence with which the faculty member may defend herself and the "subject faculty member will be afforded an opportunity to obtain necessary witnesses and documentation or other evidence." (P. App. 141.) Marquette deliberately abused the FHC process to give itself strategic and tactical advantages at the hearing by withholding exculpatory documentary evidence.

To prepare for his defense, counsel for McAdams requested necessary documents from Marquette. Marquette refused to provide the requested documents, except for those that Marquette had decided it would use in support of its own case. (R. 55:2.) Only after McAdams filed suit and Marquette was forced to produce relevant documents did McAdams discover that Marquette possessed and failed to disclose documents that would have materially assisted the preparation of his case before the FHC.

Many of those documents either call into question or directly conflict with positions taken by Marquette before the FHC and conclusions reached by the FHC. The newly discovered documents are described in the McGrath Affidavit. (R. 55:2-9; R. 56.) They show that:

- Marquette portrayed Ms. Abbate as the victim of publicity in this case, but Marquette failed to produce documents showing that she encouraged that publicity and even threatened to cause more national publicity if Marquette did not pay her "reparations."

- Marquette told the FHC that Abbate left Marquette because of adverse publicity and the distasteful emails that she received. But Marquette refused to produce emails that showed that a year before she left Marquette, Abbate applied to a more prestigious institution, the University of Colorado. Colorado turned her down. In the wake of the McAdams controversy, Colorado not only admitted her to their program but offered her significant financial aid. And Marquette failed to produce an email from Assistant Dean South which stated that Abbate's departure was as much about the misconduct of Dr. Snow (the chair of Abbate's department) as it was about McAdams.

- Marquette told the FHC that Abbate had received some very distasteful emails and gave them copies of the bad ones. But it did not produce all, or even most, of the emails Abbate had received. All of the emails have now been produced, and are catalogued in the Luehrs Affidavit. (R. 54.) Abbate received a total of 135 emails and letters commenting on her interaction with JD. Of the 135, 49 were supportive of her, 85 criticized her, and one was neutral. Of the 85 criticizing her conduct, only 18 were distasteful, and the remainder consisted of communications from members of the public saying that they thought her statements to her undergraduate student were either inconsistent with Catholic doctrine, inconsistent with the free speech rights of the student, and or inconsistent with the open dialogue that should be permitted in a university.

There are additional examples, all more fully described in the McGrath Affidavit. Marquette decided to game the system before the FHC. It combed through its files and cherry-picked the helpful documents. Everything else – including numerous documents that would have supported McAdams – was withheld. This kind of behavior is fundamentally unfair, and undercuts the notion that the FHC process should be given any level of deference.

Second, Marquette violated Section 307.07(15), which provides that "[a]t the hearing, the subject faculty member and the University Administration will have the right to confront and ask questions of all witnesses." (P. App. 142.) Marquette submitted written statements and other documents authored by witnesses whom McAdams was never able to confront or cross-examine. (R. 53:21-22; R. 55:10.) These included emails setting forth facts in dispute from individuals who never testified. (*See* e.g., R: 61:44-45; R. 63:9-13, 15-16.) McAdams timely objected to all this but his objections were denied. (R. 55:2, 4, 9, 10.)

Third, Section 307.03(1) of the Faculty Statutes required that the Administration notify McAdams of "the statute violated; the date of the alleged violation; the location of the alleged violation." By letter dated

January 30, 2015, Dean Holz provided McAdams with the required Notice. (R. 58:27-43.) That Notice refers to a single violation – the November 9, 2014 blog post. No other wrongdoing on the part of McAdams is specified in the Notice. (R. 58:42.)

The hearing before the FHC should have been limited to the single violation that Marquette specified in the Notice – the blog post. It was not. McAdams was forced to respond to numerous allegations that were not the subject of the Notice. These included events relating to a 1995 controversy over the Kennedy assassination, a 2007 complaint regarding a blog post relating to a professor named Theresa Tobin, a 2010 visit to Marquette by a speaker named Ronnie Sanlo, and an interaction with a group called Students for Justice in Palestine. The FHC accepted substantial testimony on these incidents and others that had nothing to do with the blog post. (R. 55:10.) The FHC's findings of fact and conclusions of law are based on allegations of past misconduct that have nothing to do with the violation claimed in the Termination and none of which should have been considered by the FHC.

Finally, Section 307.07(7) of the Faculty Statutes sets forth the following provision related to bias: "Members of the FHC who deem

themselves disqualified for bias or interest will remove themselves from the case." (P. App. 141.)

One of the FHC members, Dr. Lynn Turner, signed an open letter critical of McAdams and supportive of Ms. Abbate *prior to* the FHC hearing. (R. 53:23-24.) The letter made the following statements:

> We support Ms. Abbate and deeply regret that she has experienced harassment and intimidation as a direct result of McAdams's actions. McAdams's actions—which have been reported in local and national media outlets—have harmed the personal reputation of a young scholar as well as the academic reputation of Marquette University.
>
> ***
>
> This is clearly in violation of . . . the Academic Freedom section of Marquette's Faculty Handbook[.]

The letter Turner signed took a position on the precise issue that was before the FHC. It concluded, *prior to the FHC hearing*, that McAdams' actions "violat[ed] . . . the Academic Freedom section of Marquette's Faculty Handbook." Turner's signature on this letter demonstrates that she had already made up her mind about McAdams and should have been disqualified from serving on the FHC. McAdams requested her recusal and was denied.

Because Marquette did not comply with the proper procedures prior to and during the FHC hearing, even if Wisconsin law permitted the Circuit

Court to defer to the FHC (which it does not), deference would be inappropriate in this case.

CONCLUSION

The Circuit Court committed error when it granted summary judgment to Marquette. It was wrong when it held that McAdams' speech was not protected by academic freedom; wrong when it said that the contract did not grant McAdams' protection for free speech; and wrong when it deferred to the findings and conclusions of the FHC. McAdams requests that this Court reverse the Circuit Court and grant summary judgment to him or remand for a trial.

Dated this 11th of September, 2017

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiffs-Appellants

Electronically signed by Richard M. Esenberg
Richard M. Esenberg, WBN 1005622
(414) 727-6367
rick@will-law.org
Thomas C. Kamenick, WBN 1063682
(414) 727-6368
tom@will-law.org
1139 E. Knapp St.
Milwaukee, WI 53202

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 10,668 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: September 11, 2017

Electronically signed by Richard M. Esenberg
RICHARD M. ESENBERG

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, and appendix, which complies with the requirements of Section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: September 11, 2017

Electronically signed by Richard M. Esenberg
RICHARD M. ESENBERG