STATE OF WISCONSIN COURT OF APPEALS
DISTRICT I

JOHN MCADAMS,

Plaintiff-Appellant,

v.

Appeal No. 2017AP1240
Circuit Court Case No. 16-CV-3396

MARQUETTE UNIVERSITY,

Defendant-Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF MILWAUKEE COUNTY, CIRCUIT COURT CASE NO. 16-CV-3396 THE HONORABLE DAVID A. HANSHER

BRIEF OF DEFENDANT-RESPONDENT MARQUETTE UNIVERSITY

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Introduction

A Marquette faculty member put a female Marquette graduate student's name and contact information on the internet. He did so "in order to expose her to negative comments from readers of his blog." (R.3:59). He then sent links far and wide to his friends at talk radio and elsewhere. (R.3:60; R.77:1, 8-18). Soon his handiwork was picked up by Fox News. (R.3:63). He enjoyed the attention he received as he appeared on television and radio to promote his story, testifying later "no one who writes anything particularly enjoys writing [in] obscurity." (R.93:12).

The faculty member's "calculated [goal] to direct a negative response at Ms. Abbate" (R.3:58) was quickly realized as vile and threatening messages began flowing into her Facebook page, email and mail box. (R.3:63-65). Unlike the enjoyment the faculty member experienced, the student feared for her safety as her mental and physical health deteriorated and she lost a noticeable amount of weight. (Id.). Campus security was posted outside her classes for her protection. (Id.). Worn down by the onslaught, she cancelled her dissertation proposal defense and transferred to another university despite the substantial negative impact on her academic progress.

(Id.). She eventually abandoned her dissertation topic because it triggered painful memories. (Id.).

Marquette expects its faculty members not to engage in unprofessional, reckless and intentionally destructive conduct aimed at its students, as occurred here. Marquette thus initiated the discipline process incorporated in its faculty contract.

In accord with his contract, seven tenured faculty members selected by their peers from across the University formed a Faculty Hearing Committee ("FHC" or "Committee"). The FHC, chaired by a distinguished law professor, conducted a four-day hearing with 866 pages of testimony and over 700 pages of exhibits. Counsel and the FHC members examined and cross-examined multiple witnesses. After the hearing, the FHC met and deliberated seven times over a period of months. The FHC then issued a 123-page Report containing over 300 Findings of Fact (using the clear and convincing burden of proof standard).

The FHC concluded, in part:

> that the University has demonstrated by clear and convincing evidence that Dr. McAdams' conduct was seriously irresponsible, and his demonstrated failure to recognize his essential obligations to fellow members of the Marquette community, and to conform his behavior accordingly, will substantially impair his fitness to fulfill his responsibilities as a professor.

(R.3:124-125).

In accord Dr. McAdams' contract, Marquette's President Michael Lovell reviewed and adopted the FHC Findings and Conclusions. Because the FHC had emphasized Dr. McAdams' refusal to acknowledge or accept his professional duties, and thus was likely to repeat his misconduct, President Lovell added a condition that Dr. McAdams send a private letter with several conditions. *See infra* at 22-25.

Refusing to accept the conditions for his return, the faculty member sued. After eight months of discovery and 178 pages of briefing, the trial court, Honorable David Hansher, Presiding, granted Marquette summary judgment. Judge Hansher explained his rationale in a 33–page, single-spaced Opinion.

Now having received all the process he was due under his contract, Dr. McAdams wants to avoid the Findings and Conclusions issued by his peers, adopted by President Lovell, and reviewed by Judge Hansher. That is not what his Contract allows or what the law permits. Judge Hansher's careful decision reviewing with due deference and upholding the FHC's work should be affirmed.

Statement of the Issues

Issue 1: What standards should courts use to review an agreed-upon faculty disciplinary process at a private university?

Circuit Court: Judge Hansher determined that because the parties' contract defines the procedure to be used, the court should review (1) whether there was substantial evidence in the record to support the discipline, and (2) whether there was any action that was fraudulent, taken in bad faith, an abuse of discretion, or infringing on constitutional rights.

Issue 2: Does academic freedom prevent a private university from enforcing professional standards?

Circuit Court: Judge Hansher determined that academic freedom does not prevent a private university from enforcing professional standards.

Issue 3: Does the First Amendment prevent a private university from enforcing professional standards?

Circuit Court: Judge Hansher determined that the First Amendment does not prevent a private university from enforcing professional standards.

Statement On Oral Argument

Given the extensive record in this case, including a 123-page decision from the Faculty Hearing Committee and a 33-page decision from the trial court, oral argument may not be necessary.

Statement on Publication

Publishing the decision will contribute to the legal literature on the standard to be applied when reviewing the results of an academic disciplinary decision at a private university.

Statement of the Case

The Marquette-McAdams' Contract

Marquette's "Statutes on Faculty Appointment, Promotion and Tenure," and the Faculty Handbook provide the agreed faculty discipline process. (R.1:6, 22). Discipline is proper when a faculty member engages in conduct that (1) "clearly and substantially fails to meet the standard of personal and professional excellence which generally characterizes University faculties"; and (2) this conduct substantially impairs the faculty member's value. (R.45:6).

Under the Contract, contested terminations or suspensions of tenured faculty members are brought to a Faculty Hearing Committee, which is an

independent subcommittee of the Faculty Council. (R.45:9-11, 17-19). The Faculty Council is a standing committee of the University Academic Senate, which acts on behalf of Marquette's faculty and through which they participate in shared governance. (R.45:13-21).[1]

The faculty elects the Faculty Hearing Committee through the Academic Senate election procedures. (Id.; R.45:9-10). It is charged with determining the existence of cause and making Findings of Fact and Conclusions. (R.45:9). Its findings, conclusions, and recommendations are transmitted to Marquette's President. (R.45:11).

Dr. McAdams' Faculty Hearing Committee was chaired by Professor Bruce Boyden, a distinguished law professor who graduated from Yale Law School and worked in litigation before moving to academia. (R.3:144). See: https://law.marquette.edu/faculty-and-staff-directory/detail/5359379. Also serving with Professor Boyden were long-tenured faculty from the Colleges of Arts and Sciences, Engineering, Education, Communication, and the School of Dentistry. (R.3:13-14, 144).

[1] See R.78:16-20 for a discussion on shared governance.

Faculty Hearing Committee Process

Marquette initiated the disciplinary process on January 30, 2015. (R.3:69; R.45:8-11). Following preliminary steps, the University issued a "Notice of Pending Dispute" on June 30, 2015, triggering the FHC's involvement. (R.45:9).

During summer 2015 the FHC requested additional documents and statements from the parties, lists of witnesses, and arranged for the attendance of an American Association of University Professors ("AAUP") observer at the hearing. (R.3:13, 143-159). The FHC resolved several disputed process issues, rejecting in a written decision Dr. McAdams' challenge to Dr. Lynn Turner's service on the FHC and his request for documents outside the scope of the faculty statutes. (R.3:21-23, 147-159).

Hearings were held over four days in September 2015. (R.3:14). Dr. McAdams testified and called Dr. Donald Downs from U.W. Madison as his expert witness. (R.3:148). Marquette called former graduate student Ms. Abbate, the Arts & Sciences Dean, the Political Science Chairperson, and two Associate Deans. (R.3:148). The FHC called former Provost John Pauly. (R.64:28). The FHC also asked the student who recorded Ms. Abbate ("JD") to appear, but he declined. (R.3:148).

The parties were represented during the hearing by the counsel appearing here. Counsel and the FHC questioned each witness. A court reporter was present and generated 866 pages of testimony. Sixty exhibits containing 734 pages of material and two audio recordings were received. (R.3:14).[2]

The FHC met and deliberated seven times before issuing a unanimous 123-page Final Report. (R.3:14). Their Report contains over 300 Findings of Fact (using the clear and convincing burden of proof standard), together with the FHC's analysis and conclusions. The FHC found—unanimously—that Dr. McAdams violated his professional obligations and should be suspended for up to two semesters. In particular, the FHC explained why Dr. McAdams' claim that his misconduct was shielded from discipline by principles of academic freedom or free speech was plainly wrong.

In accordance with the contract, President Lovell adopted the FHC's recommendation and suspended Dr. McAdams without pay for two semesters. (R.45:37-47). Given the FHC's findings about the likelihood Dr. McAdams would once again engage in similar unprofessional conduct,

[2] The transcripts from the hearings are included in the Record at entries 32-34 and 64. The majority of the exhibits submitted to the FHC are included in the Record at entries 59-63, 67, 77-78, and 93.

however, President Lovell also required Dr. McAdams *privately* to (1) acknowledge and accept the unanimous judgment of his peers, (2) affirm his commitment that his future actions would adhere to the standards of higher education, (3) acknowledge that this blog post was reckless and incompatible with the mission and values of Marquette University and (4) express regret for the harm caused Ms. Abbate. (Id.). *See infra* at 22-25.

Findings of Fact

The Committee made over 300 findings of fact. (R.3:36-36). Marquette urges this Court to review those findings and the documents in support that are contained in the Record. (Records 32-34, 59-64, 67, 77-78).

For example, the FHC found that Dr. McAdams knew his blog could harm people and he used it accordingly: "Dr. McAdams *has on at least* three occasions used the prospect of mention on his blog as a threat." (R.3:44-45) (emphasis supplied). The FHC discusses previous disputes involving Dr. McAdams' unsubstantiated *ad hominem* attacks on others and identifying students in his internet posts. (R.3:39-42; R.33:20, 41-42; R.62:2-30). Dr. McAdams was specifically made aware that mentioning students by name on the internet was cause for concern. (R.3:37-45; R.62:32-33).

The FHC details what occurred during and after the October 28, 2014 Philosophy of Ethics Class, led by graduate student Ms. Abbate. (R.3:46-55). This includes the context of the in-class discussion, and how "Ms. Abbate was likely taken aback by JD's aggressive challenge to her authority" which "is clear to any observer listening to the recording." (R.3:46, 48; R.63:5; R.64:7-9).[3]

Dr. McAdams' brief ignores—but the FHC explains—how the student's complaint was addressed by the University. First, "JD" was instructed to raise the issue at the department level and then return to the College of Arts & Sciences if his complaint was not handled to his expectations. (R.3:51). He did not return. (R.34:47). Second, JD thanked the Chair of the Philosophy Department after he met with her and stated he would heed her advice regarding the class. (R.3:54; R.77:5). Thus, there was no reason for the University to believe the matter was not resolved to the student's satisfaction as his last communication to anyone at the University prior to Dr. McAdams' internet post was his "thank you" email.

[3] In preparing this brief Marquette noticed that the recording does not appear to be included in the Record despite its filing with the Circuit Court (R.63:2) and its playback during the summary judgment hearing. (R.140:3). Marquette will prepare a motion to supplement the Record to include the recording.

Although Dr. McAdams portrays himself as JD's (his student advisee) defender it was clear to the Committee that "[t]here is no indication that Dr. McAdams, in his role as JD's adviser, proposed the blog post as being in the best interest of JD." (R.3:56-57). Instead, it was "***drafted in a way calculated to direct a negative response at Ms. Abbate."*** (R.3:58-59) (emphasis supplied). He did this knowing "that identifying Ms. Abbate on his blog with a link to her contact information could lead to negative communications" and he ***"intentionally used Ms. Abbate's name and linked to her contact information in order to expose her to negative comments from readers of his blog."*** (R.3:59-60) (emphasis supplied). Finally, he immediately forwarded internet links to local and national news organizations and actively promoted the story.[4] (R.3:60).

In response to the internet post, disgusting and threatening comments streamed in to Ms. Abbate via Facebook, email and regular mail. These included suggestions of rape. (R.3:63-64; R.60:15).[5] Ms. Abbate feared for

[4] The breadth of his sustained efforts to promote the story were revealed during this litigation, as well as his delight from the attention he received. (R.77:1, 8-18; R.93:12, 14) ("[N]o one who writes anything particularly enjoys writing [in] obscurity.").

[5] Dr. McAdams' once again tries to minimize these attacks by calling them simply "distasteful." (McAdams Br. at 16). A sample of these horrible attacks can be found at R.76:29-30.

her safety and campus security was posted outside her classroom (which was moved in an effort to protect her). (R.3:64-65; R.32:12). Her mental and physical health deteriorated and she lost a noticeable amount of weight. (R.3:64). Worn down by the onslaught, Ms. Abbate withdrew from her dissertation proposal defense and transferred when another university reached out, despite the substantial negative impact on her academic progress. (R.3:65).

STANDARD OF REVIEW

While the Court of Appeals reviews the trial court de novo, due deference is appropriate to the review of the underlying action at Marquette University. See *infra* at 13-29.

ARGUMENT

Dr. McAdams argues that his Marquette contract does not require him to comply with the professional standards applicable to university faculty. He is wrong. As the FHC and trial court held, Dr. McAdams violated his professional obligations and duties as a Marquette faculty member and was rightfully disciplined.

I. Deference on Review to the FHC and President Lovell is Fully Appropriate.

Dr. McAdams urges the Court not to review with any deference the result reached by the process he agreed to in his contract. Judge Hansher rejected these arguments on pages 7-20 of his Opinion. (R.134:7-20).

First, Dr. McAdams argues that because the long-tenured members of the FHC were employed by Marquette the courts should not give due weight to their Findings and Conclusions. (McAdams Br. at 41-43). Judge Hansher correctly analyzed and rejected this argument because, "[m]ost importantly, Dr. McAdams expressly agreed as a condition of his employment to abide by the disciplinary procedure set forth" in his contract. (R.134:11). This disciplinary process designed by the AAUP makes sense because it assigns tenured peers the task of assessing professional conduct. The contract includes a specialized standard for cause that focuses on issues that "are difficult if not impossible" for a jury to assess, requiring that professional peers make those judgments. (Id.). Review by one's tenured peers adds protections, because the peers' own tenure gives them an exceptional level of independence.

Dr. McAdams then asserts that the circuit court followed the wrong cases on deference to academic decision making. (McAdams Br. at 43-48).

Judge Hansher thoroughly distinguished the decisions Dr. McAdams raises. (R.134:7-14). Based on this careful analysis, Judge Hansher held that the caselaw relied upon by Marquette—which defers to academic decision making when there is substantial evidence in the record to support the decision, absent fraud or similar situations—is the authoritative and correct position. (R.134:8).

Finally, Dr. McAdams claims that factual disputes and procedural errors prevent deference. (McAdams Br. at 48-54). But Judge Hansher found that Marquette complied with the contractual process and any factual disputes were not material. (R.134:11-14, 16-20). We urge the court to adopt Judge Hansher's well-reasoned analysis on each of these issues.

A. The Unanimous Judgment of Dr. McAdams' Peers is Entitled To Deference on Review.

Relevant standards from the academic profession and caselaw from the across the country fully support Judge Hansher's decision to review with deference Dr. McAdams' peers and President Lovell. As Judge Hansher notes, model standards from the AAUP assign judgments on professionalism and fitness to the professor's peers, with oversight by the university's executive officer or governing board. (R.134:11). These Recommended Institutional Regulations on Academic Freedom and Tenure were formulated

in 1957 to enable institutions to "protect academic freedom and tenure and to ensure academic due process," and provide the framework for most of Marquette's faculty statutes on dismissal procedures. (R.42:2, 16).

Since at least 1940 the AAUP has recommended that a faculty committee consider actions for dismissal for cause. (R.41:28). Faculty involvement is especially important for disputes involving extramural utterances, as here, because in such disputes the professional standards "take into account the faculty member's entire record as a teacher and scholar." (R.42:19). Faculty involvement provides “the experience needed for assessing whether an instance of faculty speech constitutes a breach of a central principle of academic morality, and ... the expertise to form judgments of faculty competence or incompetence." (R.42:22).

As Judge Hansher explained, there are multiple reasons for applying deferential review here, as do courts in multiple jurisdictions. First, the parties' contract incorporates a specialized standard for cause that focuses on issues of professional duties and fitness as a professor. (R.134:11). Persons with years of professional experience in academia are better positioned than courts and juries to evaluate and enforce standards of academic excellence, professionalism and fitness. Second, when the parties' contract incorporates

specialized and extensive procedures to be followed in reaching a disciplinary determination, courts should respect the parties' choice to use a non-judicial forum for such issues and then apply the appropriate limited review standards to test validity. (Id.).

The value of having Dr. McAdams' tenured peers evaluate the relevant standards is demonstrated by their comprehensive 123-page report, which addresses issues best explored by those who have spent their career in University life. Neither courts nor jurors are comparably positioned to weigh matters of academic freedom, professional fitness and departure from academic standards, which is why the parties agreed to the process followed here.

As Judge Hansher held, the principle of deferential review of university decision making is explained well in *Yackshaw v. John Carroll University Board of Trustees.* (R.134:7-8, 14). Professor Yackshaw was dismissed by his board of trustees following a faculty committee hearing. 624 N.E.2d 225, 227 (Ohio App. 1993). In the lawsuit that followed, the professor argued that he was entitled to a trial *de novo* on his contract claim arising from his dismissal. *Id.* at 226. The court rejected *de novo* review, and instead adopted the faculty committee's Findings of Fact and held it was

sufficient that the trial court had reviewed the record and "determined that there was substantial evidence to support Yackshaw's termination." *Id.* at 227.

As Judge Hansher notes, the court in *Yackshaw* found "rationale and guidance from the standard of review adopted by administrative agencies, especially when the involved parties have bound themselves contractually." *Id.* at 228. "[I]t is sufficient to determine if the termination is contractually and constitutionally permissible and if there is substantial evidence in the record to support the university's decision to terminate." *Id.* Doing so "seeks to preserve the contractual intent of the parties," including the "finality of the factfinding process" at the university level. *Id.* Barring action that was fraudulent, taken in bad faith, an abuse of discretion, or infringing on constitutional rights, it was not the court's place to substitute its judgment for that reached in the university process. *Id.*

Both Judge Hansher and the *Yackshaw* court distinguished *McConnell v. Howard University,* 818 F.2d 58 (D.C. Cir. 1987), the decision on which Dr. McAdams relies. When properly understood, however, *McConnell* did not reject "a limited review when there are no facts in dispute." *Yackshaw,* 624 N.E.2d at 229. Instead, *McConnell* creates "an exception to the

traditional rule of deference" because in that case "the university failed to honor its contract and the evidence did not substantially support the facts concluded by the university's review board." *Id.* at 228-29.

Judge Hansher carefully detailed why *McConnell* did not apply here. (R.134:8-10). Of particular import was evidence that McConnell "was clearly not given a fair hearing by the perfunctory procedure that was used and the overruling of the Grievance Committee's recommendation based on a two-page summary." (R.134:10). Thus, Judge Hansher—like the *Yackshaw* court—found *McConnell* limited to its particular facts.

Later decisions have followed *Yackshaw's* deferential review. In *Traster v. Ohio Northern University*, a tenured law professor was terminated based upon a faculty committee's report after a hearing, which the Board of Trustees relied upon in terminating the professor. 2015 WL 10739302 (N.D. Oh. Dec. 18, 2015). The court upheld the university's decision, stating that because the contract defined the procedures to be used, the standard of review was whether there was substantial evidence to support the termination, which was limited to the record assembled by the university. *Id.* at *10.

Similarly, in *Collins v. Notre Dame*, the court granted partial summary judgment to the university that followed a procedure similar to Marquette's

and involved a written report from a committee of tenured faculty members. 2012 WL 1877682 (N.D. Ind. May 21, 2012). The court stated that, "[i]n reviewing the universities' actions regarding tenured professors, the courts are reluctant to second-guess the administrative decisions." *Id.* at *5.[6] *See also Grant v. Trustees of Ind. Univ.*, 2016 WL 1222344, at *9 (S.D. Ind. Mar. 28, 2016) (courts review with deference "the administrative decisions regarding professional misconduct at universities.").

A recent Seventh Circuit case that in part followed *McConnell* further supports Marquette's position. In *Roberts v. Columbia College Chicago*, the Seventh Circuit relied on *McConnell* in finding the parties' contract did not prevent judicial review of a detenuring decision. 821 F.3d 855, 862-63 (7th Cir. 2016). (Marquette of course does not argue against judicial review). But in the review itself the Seventh Circuit then used a deferential standard. The Seventh Circuit thus inquired into whether the University had exercised its discretion reasonably, but not into whether the decisions themselves were correct (as *de novo* review would entail). *Id.* at 864-65. Judge Hansher

[6] While *Collins* held in part that Notre Dame erred by appointing a faculty member to the Hearing Committee that the applicable rules categorically excluded from participation, 2016 WL 1222344, at *6, that issue is different from Dr. McAdams' challenge to Dr. Turner. Unlike Notre Dame's categorical exclusion, the Marquette Faculty Statutes state that "[r]emoval of a member for bias or interest is at the discretion of the FHC," which discretion was exercised and explained in a written decision. (R.45:10). *See infra* at 29.

recognized the Seventh Circuit "actually gave deference to the university by limiting its review to an evaluation of whether the university acted in good faith and whether it reasonably exercised its discretion." (R.134:10).

Numerous other decisions have applied similarly deferential standards when addressing termination or discipline of tenured faculty members. Judge Hansher correctly analyzed a number of leading cases. (R.134:10-11). In addition, these additional cases also support deference to academic decision making:

- *Haegert v. University of Evansville*, 977 N.E.2d 924 (Ind. 2012): Clear and convincing evidence in the record supported findings of university bodies and compliance with termination procedures. *Id.* at 943-950. For educational institutions "as ***long as the process is reasonably transparent and fair and affords the subject an opportunity to respond. … the ultimate issue focuses less on the particular process and more on the recognition of the institution's interest in assuring a proper educational environment***." *Id.* at 951 (emphasis supplied).

- *Gutkin v. University of S. Cal.*, 101 Cal. App. 4th 967, 978 (Cal. App. 2002): Tenured professor was limited to administrative mandamus action challenging dismissal on limited grounds. Determinations regarding membership in the academic community **"requires an assessment of whether the professor's conduct is consistent with or contrary to academic norms, which only academic peers, not lay jurors, are qualified to determine."** *Id.* at 978 (emphasis supplied).

- *Motzkin v. Trustees of Boston Univ.*, 938 F. Supp. 983, 998-99 (D. Mass. 1996): Granting summary judgment for university where ***procedures for termination were fundamentally fair and in substantial compliance with those prescribed in handbook.***[7]

[7] Courts addressing claims resulting from tenure denial also note the deference applied to university decisions and processes. *See Feldman v. Ho*, 171 F.3d 494, 497 (7th Cir. 1999) ("the only way to preserve academic freedom is to keep claims of academic error out of

Judge Hansher also found that Marquette's and Dr. McAdams' contractual agreement to have a nonjudicial panel consider their dispute is similar in substance and effect to an arbitration agreement. (R.134:13-14). Courts do not substitute their judgment for an arbitrator's when the parties contract for nonjudicial factfinding and decision. *Madison* v. *Madison Prof'l Police Officers Ass'n,* 144 Wis. 2d 576, 585, 425 N.W.2d 8 (1988). Overturning an arbitration decision will not occur absent "perverse misconstruction or positive misconduct," "manifest disregard of the law, or if the award itself is illegal or violates strong public policy." *Id.* at 586, quoting *Milwaukee Bd. of School Dirs.* v. *Milwaukee Teachers' Educ. Ass'n,* 93 Wis. 2d 415, 422, 287N.W.2d 131 (1980).

Judge Hansher ultimately held that deference was warranted for a number of reasons related to the standards that govern the academic profession and the terms of Dr. McAdams' contract with Marquette. (R.134:11).[8] The standard of deference that should be applied "is identical to

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the legal maw"); *Vanasco v. National-Louis Univ.,* 137 F.3d 962, 968 (7th Cir. 1998) ("we must not second-guess the expert decisions of faculty committees in the absence of evidence that those decisions mask actual but unarticulated reasons for the University's actions.").

[8] These considerations of specialized standards and contractual processes support the deference given in other similar situations (e.g., reviews of administrative agency

that applied by the *Yackshaw* court," which is akin to "due weight deference" under Wisconsin law. (R.134:12-14). Applying this standard, there is substantial evidence to support the discipline imposed on Dr. McAdams, and no evidence that Marquette's actions were fraudulent, taken in bad faith, an abuse of discretion, or infringed any constitutional rights.

B. President Lovell's Implementation of the FHC's Report is Entitled to Deference on Review.

Judge Hansher found that President Lovell's letter adopting the FHC Report and conditioning Dr. McAdams' return on his agreement to change his behavior and abide by the terms of his contract likewise was entitled to deference. (R.134:14-16). The parties agreed that President Lovell would make the decision implementing the FHC's report and findings. (R.45:9, 11). Vesting the final decision in the hands of President Lovell is consistent with the Marquette Faculty Statutes. (See R.45:13 ("Faculty members acknowledge that the ultimate responsibility for the operation of the University resides with the Board of Trustees and the President."); R.45:18 (FHC reports directly to the University President)). In addition,

decisions and hospital staff privilege terminations). *See e.g., Shahaway v. Harrison*, 875 F.2d 1529, 1533 (11th Cir. 1989).

recommendations and statements from the AAUP consistently refer to transmitting the findings of a faculty committee to another decision maker:

- AAUP 1940 Statement: dismissal for cause "should, if possible, be considered by both a faculty committee and the governing board of the institution." (R.41:28).

- AAUP's Recommended Institutional Regulations: refers to transmittal of the faculty report to the President and governing board, and the options each entity has regarding the report. (R.42:7-8).

- AAUP Committee A Statement on Extramural Utterances: notes the importance of faculty involvement in dismissal proceedings, and that "it will view with particular gravity an administrative or board reversal of a favorable faculty committee hearing judgment in a case involving extramural utterances." (R.42:19).

- AAUP Statements on Government of Colleges and Universities and On the Relationship of Faculty Governance to Academic Freedom: on issues of faculty status,"[d]eterminations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and president should, on questions of faculty status ... concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail." (R.42:21; R.78:19).

In light of his institutional authority and the parties' agreement, it was incumbent upon President Lovell to implement the FHC's decision (and its frank condemnation of Dr. McAdams' lack of professional standards) with appropriate consideration for Marquette as an institution and its obligations

to members of the community. In addition to summarizing the unanimous conclusion of Dr. McAdams' peers, President Lovell's March 24, 2016 letter noted: (1) Dr. McAdams' demonstrated refusal to embrace the values of the university, (2) his unwillingness "to recognize and follow obligations inherent in the academic profession in general and at Marquette in particular" and (3) his lack of regret for his actions. (R.45:37-47).

Dr. McAdams' own expert witness before the FHC—distinguished U.W. Madison Professor Dr. Donald Downs—testified in his deposition following the FHC decision that if one accepts the FHC's findings (as President Lovell did), *then it would make no sense to invite Dr. McAdams back without getting a commitment from him to change*. Dr. Downs further testified that in such a case *he would advise the University to ask for just such assurance*. (R.42:57).

The need for assurances from Dr. McAdams is borne out by his continuing conduct. Even after his peers explained how his conduct violated the standards of academia and Marquette's core values, Dr. McAdams continued to put Ms. Abbate's name out in the internet. (R.43:2-24). He even volunteered the name of her new university where she now could be found! (R.62:50).

As Judge Hansher found, there was no effort to ridicule or embarrass Dr. McAdams as the letter was to be confidential. (R.134:14). Instead, President Lovell's reinstatement conditions were consistent with the FHC's findings that Dr. McAdams does not view himself as bound by University norms. (R.134:15). President Lovell sought to enforce the contract with Dr. McAdams and his terms were consistent with the FHC Report. Deference was appropriate. (R.134:16).[9]

C. There Were No Academic Process Violations.

Dr. McAdams' additional arguments about why deference is inappropriate were likewise considered and correctly rejected.

First, Dr. McAdams argues that the FHC was not comparable to an impartial tribunal and that speech issues cannot be determined by a jury. (McAdams Br. at 41-43). But he explicitly agreed in his contract that the FHC would hear and determine his compliance with professional standards. Faculty participation in disciplinary decisions through committees like the

[9] Dr. McAdams argues in a footnote (McAdams Br. at 36) that his continued suspension is a de facto termination. But the conditions for his return were appropriate according to his own expert and Judge Hansher, and his refusal to do what is appropriate does not constitute a termination by Marquette. (R.134:15). The cases he relies on do not support him, as they involved (1) a continuing denial of tenure where the applicable procedures were not followed, (2) whether a suspension with intent to terminate triggered pretermination procedures, and (3) an indefinite suspension with no criteria for reinstatement.

FHC makes use of faculty experience, expertise and self-interest. (R.41:28; R.42:19, 22). His allegations ignore that only tenured faculty are eligible to sit on the Committee, and that it is composed of elected members of the Academic Senate, a body that acts on behalf of Marquette faculty members. (R.134:2, 11).

Next, Dr. McAdams argues that issues of material fact supposedly were resolved by Judge Hansher. (McAdams Br. at 39). Most of his alleged disputes actually relate to conclusions, not facts (i.e., was the contractual process followed, was the discipline appropriate, was there anything false). The rest relate to issues that Judge Hansher found were "not material and not dispositive of the case." (R.134:18-19). Dr. McAdams fails to address why—to the extent any of the issues he lists are disputed—those issues are material to this case. Alleged disputes on facts that are of no consequence to the merits of the litigation "will not defeat an otherwise properly supported motion for summary judgment." *City of Elkhorn v. 211 Centralia St. Corp.*, 2004 WI App 139, ¶ 18, 275 Wis. 2d 584, 685 N.W.2d 874); *Milwaukee Area Tech. Coll. v. Frontier Adjusters of Milwaukee,* 2008 WI App 76, ¶ *6*, 312 Wis. 2d 360, 752 N.W.2d 396. Further, undeveloped arguments are not considered on appeal. *Riley v. Town of Hamilton*, 153 Wis. 2d 582, 587-88, 451 N.W.2d

454 (Ct. App. 1989). Stating an issue is material to the case, without developing or presenting an argument why it is material, is not sufficient. *Id.*[10]

Finally, Dr. McAdams argues that the *Yackshaw* line of cases should not be followed because of alleged process violations by Marquette, each of which was rejected by Judge Hansher. (McAdams Br. at 48-54). Judge Hansher instead agreed with the AAUP (whose representative attended the entire hearing), which told Dr. McAdams afterwards that he had received academic due process. (R.134:19; R.43:26)

Judge Hansher found there is no evidence to support the claim that Marquette failed to provide him with documentary evidence to which he was entitled before the FHC hearings, or that Marquette "gamed the system" to cherry pick documents to give itself an advantage. (R.134:16). Instead, both Judge Hansher and the FHC found that Marquette complied with the provision in his contract addressing the exchange of documents, and that this provision does "not set forth a right of pre-hearing discovery akin to that provided in civil litigation." (R.134:18; R.3:152-153).

[10] Dr. McAdams also makes the curious argument that interpreting a contract is the same as saying "what the law is." (McAdams Br. at 40-41). He fails to cite any support for this proposition, relying instead on cases addressing the power to interpret statutes.

Dr. McAdams states he was not permitted to confront and ask questions of witnesses because Marquette submitted written statements and documents by individuals who were not called to testify. (McAdams Br. at 51). Judge Hansher correctly rejected this argument because (1) the Faculty Statutes allow for the admission of hearsay; (2) Dr. McAdams received the documents ahead of time; and (3) he was free to call additional witnesses if he wanted to cross-examine them. (R.134:19).

Dr. McAdams next alleges Marquette went beyond what evidence was permitted to be presented to the FHC because it included evidence regarding prior incidents in which he was warned about his behavior. (McAdams Br. at 51-52). But the Faculty Statutes' notice provision does not delineate the scope of evidence before the FHC, and interpreting it in this way renders other provisions meaningless. (R.45:8-11, comparing 307.03(2)-(3) with 307.07 ¶¶ 4, 11). Further, the past incidents before the FHC were important for assessing Dr. McAdams' "fitness" (which requires looking at his entire record as a teacher and scholar (R.42:19)), and revealed what he knew and should have known as he put Ms. Abbate's name and contact information on the internet.

Finally, Dr. McAdams complains that Dr. Lynn Turner was allowed to serve as one of the seven FHC members. (McAdams Br. at 52-53). But, as Judge Hansher noted, his contract explicitly states that "[r]emoval of a member for bias or interest is at the discretion of the FHC." (R.134:17). The FHC exercised its discretion and explained in a written decision why Dr. Turner was not required to recuse herself. (R.3:149-151). The FHC properly exercised its allowed discretion.[11]

II. Academic Freedom and Free Speech Do Not Override Professional Obligations.

In light of professional standards and Dr. McAdams' contract, disciplining him did not violate either academic freedom or any First Amendment protections. Dr. McAdams views academic freedom and freedom of speech as if they were rights bestowed upon him without corresponding responsibilities. But as both the FHC and Judge Hansher articulated, the privileges of a university faculty position come along with critical responsibilities towards students.

[11] The Faculty Statutes in any event allow for a decision by majority vote (i.e., 4 of 7 FHC members). Here, all seven members agreed.

A. The FHC Extensively Analyzed the Terms of Dr. McAdams' Contract in the Relevant Context.

Dr. McAdams' first raised his academic freedom and free speech arguments before the FHC. As detailed below, his arguments fell flat based on the terms of his contract and the context of his employment as a faculty member with duties to students.

1. Academic Freedom Balances Rights and Responsibilities.

Dr. McAdams' expert witness, Dr. Donald Downs, testified before the FHC and agreed with Marquette on cross-examination that neither academic freedom nor free speech prevent a University from disciplining faculty misconduct:

> Q. {Mr. Weber} Now, turning to teachers and publicly expressing opinions.
>
> A. Right.
>
> Q. You would agree that when the institution can provide evidence of demonstrable harm, then even within academic freedom and free speech, the Supreme Court will allow the teacher to be disciplined, true?
>
> A. Depending on the nature of the harm. **If it's demonstrable harm that is contrary to the academic mission of the university, then I would have to say yes.**

(R.64:43) (emphasis supplied).[12] Dr. McAdams' expert witness in the current lawsuit, Dr. Peter Wood, likewise conceded in his deposition what Dr. McAdams continues to deny; namely that universities ***must balance academic freedom with other values core to their mission***. (R.42:17). Therefore, as former Yale Law School Dean Robert Post[13] describes, academic freedom "is not the freedom to speak or teach just as one wishes. It is the freedom to pursue the scholarly profession, inside and outside the classroom, **according to the norms and standards of that profession**." (Matthew W. Finkin & Robert C. Post, *For the Common Good, Principles of Academic Freedom* 149 (2009)) (emphasis supplied).

The FHC emphasized this balance between freedoms and responsibilities in its analysis of Dr. McAdams' conduct and his contract with Marquette. (R.3:72-75, 112-121). As it notes, there are competing interests at stake and resolving them requires the expertise offered by members of the faculty. (R.3:72). The norms of academic freedom developed over time, but central to that development has been the recognition that

[12] Dr. Downs article "Academic Freedom in America Is and Is Not," is included in Marquette's appendix. (R.76:42-65). That article (which Marquette presented to the FHC) states, academic freedom is a professional concept, whose "freedoms also depend on fulfilling certain fiduciary responsibilities." (R.76:47).

[13] Dean Post was named as an expert witness for Marquette.

"[a]cademic freedom ... carries with it duties correlative with rights." (R.3:72-73, quoting R.41:26). For at least a century it has been universally recognized in academia that certain obligations accompany membership in the profession. (R.3:79; R.41:16). Judgments regarding academic freedom as a result hinge upon the background conditions of the individual case, and faculty peers are essential in evaluating the balance between these rights and responsibilities. (R.3:73-74).

As the FHC discusses, the Marquette Faculty Handbook's definition of academic freedom is taken directly from the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure. (R.3:114, R.41:25-30; R.53:18).[14] The definition of academic freedom for extramural comments (the one at issue in this case) is the most limited form of academic freedom and its protection is heavily qualified. (R.3:114-115). As the definition notes, the special position of professors in the community "imposes special obligations." (Id.). Punishment for extramural comments is expressly

[14] The introduction to Academic Freedom in the Marquette University Handbook explicitly notes that it "is that proper to the scholar-teacher, whose profession is to increase knowledge in himself/herself and in others. As proper to the scholar-teacher, academic freedom is grounded on competence and integrity." (R.53:18). Integrity requires respect for the objectives of the institution. (Id.). Marquette's objectives of course include the development of students, including graduate students like Ms. Abbate.

authorized when they demonstrate the teacher's unfitness for their position. (R.3:116).

The meaning of these special obligations was explained in official comments to the 1940 Statement and additional AAUP statements. For example, in 1964 the AAUP emphasized that extramural utterances in violation of a professor's obligations constitute discretionary cause when, as here, they clearly demonstrate the faculty member's unfitnesss for their position considering their entire record as a teacher and scholar. (R.3:116-117; R.41:27). In 1970 the AAUP adopted a set of comments to the 1940 Statement, and explained that the "special obligations" that limit a faculty member's freedom to make extramural comments are those identified in a 1966 Statement on Professional Ethics, "responsibilities to their subject, to their students, to their profession, and to their institution," as well as obligations to be clear they are not speaking for the institution, and to promote conditions of free inquiry and further public understanding of academic freedom. (R.3:117-118; R.41:27; R.42:25-26).

The FHC applied this definition of academic freedom for extramural comments because (1) Marquette's definition was taken essentially verbatim from the AAUP, (2) Marquette was a member of an organization that

approved the interpretation, and (3) it was the understanding that generally applied in American higher education. (R.3:118). Under that definition, failing to abide by the special obligations identified in the definition of academic freedom abrogates the protection for extramural comments. (R.3:119).

As the FHC explains, this understanding of academic freedom means that professors must respect duties to their institution and colleagues. (R.3:79). This includes the obligation to "take care not to cause harm, directly or indirectly, to members of the university community." (Id.). "Membership in that community imposes obligations to 'respect the dignity of others' and 'to acknowledge their right to express differing opinions.'" (R.3:80, quoting R.44:2-3). At a minimum, this requires safeguarding the conditions for the community to exist, ensuring colleagues feel free to explore undeveloped ideas, and the right to expect colleagues "will not be engaging in a search for unguarded private moments with which to humiliate them" as that is "directly incompatible with the functioning of the University." (R.3:80).

These obligations "apply with particular force with respect to surreptitious recordings." (R.3:81). The FHC discussed that for decades the AAUP has been concerned with the use of secret recordings of teachers, and

that sharing "gotcha" moments out of context can necessarily limit the discussions of faculty members and students "for fear of being willfully misinterpreted and held up to public ridicule or derision." (Id.). The university community cannot thrive if faculty fear their peers "are seeking to exploit unguarded moments" for "mass public shaming," as happened here. (R.3:84). Such actions fall within a universally recognized limitation on academic freedom necessary to the functioning of the university. (Id.). Instead of ambushing their colleagues, faculty members must foster and defend the conditions necessary for academic freedom, and call attention to grievances in a way that does not impede the functions of the institution. (R.3:85, quoting R.44:2-3).

The FHC noted these professional obligations play a special role at Marquette, a Jesuit institution that incorporates as a foundational value the concept of *cura personalis.* (R.3:880). Often translated as "care for the whole person," this core value holds that persons exist as integrated beings, and all members of a Jesuit institution are to work and care for all aspects of the lives of the members of the institution. (R.3:80; R.44:7).[15]

[15] Dr. McAdams' expert Dr. Wood agrees that universities must balance academic freedom with other values core to their mission. (R.42:17).

Marquette describes this "focus on others" in its Mission Statement, which emphasizes the community formed at Marquette and the responsibility each member has "to offer personal attention and care" to the rest of the Marquette community. (R.3:80-81; R.44:14). The foundational principle is reinforced in Marquette's Guiding Values, stating that it "[p]ledge[s] personal and holistic development of students as our primary institutional vocation," and to "[n]urture an inclusive, diverse community that fosters new opportunities, partnerships, collaboration and vigorous yet respectful debate." (R.3:81; R.44:16). The FHC recognized that these core values are woven into the fabric of Marquette. (R.3:81).

The findings and analysis of the FHC were once again confirmed by the testimony of Dr. McAdams' expert witness, Dr. Downs. In his FHC testimony, Dr. Downs agreed with Marquette on cross-examination that academic freedom involves a balancing of professional obligations and responsibilities:

> (1) academic freedom is balanced against responsibilities (R.64:41),
>
> (2) there is a balance of duties and responsibilities for extramural speech (R.64:43),
>
> (3) demonstrable harm contrary to the academic mission of the university removes speech from the protections afforded by academic freedom and free speech (Id.),

(4) faculty members can properly be fired for extramural comments that seriously disrupt or harm the institution (R.64:45), and

(5) private institutions have the right to pursue a particular normative vision (R.64:47).

Extramural utterances in violation of these obligations constitute discretionary cause when, as here, they clearly demonstrate the faculty member's unfitness for their position considering their entire record as a teacher and scholar. (R.3:120; R.41:25-30). Fitness in academia is "based on an assessment of the faculty member's 'capacity or willingness' to meet the obligations required by the position," including to students, colleagues, the discipline, or the functions of the institution. (R.3:105-107). The FHC made this very assessment, and Dr. McAdams fell short.

2. The FHC Proceedings Were Not Used Pretextually.

Section 307.07 ¶ 2 provides that "*dismissal will not be used to restrain* faculty members in their exercise of academic freedom or other rights guaranteed them by the United States Constitution." (R.45:9) (emphasis supplied). As differentiated from the protection for academic freedom provided in Section 306.03, the FHC reasoned (and Judge Hansher agreed) that this provision imposes a restriction against the pretextual or "misuse" use of discretionary cause proceedings. (R.3:121). The Committee did not interpret this provision to import "the full panoply of First Amendment

rights," as doing so would lead to absurd consequences. (R.3:122). A professor's free speech rights are thus limited by duties to the University, such as the duty to teach the assigned material in lieu of exercising First Amendment rights. *See infra* at 45-46 (giving examples).

Dr. McAdams argued before the FHC that Section 307.07 ¶ 2 imports to Marquette faculty the protections afforded government employees. (R.3:122). But this went too far, as the FHC found it would add considerable legal complexity to a process governed by faculty members drawn from across the University about an area of law in constant flux. (R.3:122-123). Such applications represent "a stark departure from the other determinations that the FHC must make—the nature of professional obligations, the extent of academic freedom, the resolution of factual disputes involving academic activities—that are within the ken of every university professor." (Id. at 119). *Chapman* v. *B.C. Ziegler & Co.,* 2013 WI App 127, fn. 2, 351 Wis. 2d 123, 839 N.W.2d 425 ("we must interpret contracts to avoid absurd results.").

The FHC concluded instead that interpreting Section 307.07 ¶ 2 as preventing the pretextual use of disciplinary proceedings is consistent with the role of the FHC. (R.3:122-123). As the entity charged with reviewing all of the evidence supporting disciplinary proceedings, and reviewing the

faculty member's record as a whole, the FHC is in the best position to determine whether the proceedings are being misused. As it described, this provision gives it the power to prevent situations like that of Ward Churchill, where plagiarism proceedings were used to punish a professor for protected extramural speech. (R.3:121-122).

B. The FHC Correctly Concluded that Dr. McAdams' Conduct Was Not Protected by Academic Freedom or Free Speech.

The record before the FHC contained clear and convincing evidence that Dr. McAdams' attack on Ms. Abbate both violated his obligations as a professor and demonstrated his unfitness, warranting the discipline imposed. These findings were discussed extensively in the FHC Report. (R.3:85-99, 105-109). Dr. McAdams' arguments to the contrary (that his attack on Ms. Abbate was protected by academic freedom) collapse in light of the FHC's findings and the actions he took. Dr. McAdams ignores that it was his reckless use of improperly obtained information in an internet post that named Ms. Abbate, linked to her contact information, and was drafted in a way to hold her up for public contempt that led to his discipline. Marquette had no issue with him discussing the administration's response to his

advisee's complaint, or with his discussion of other sometimes-controversial topics over the years. These more general discussions are not at issue here.

As the FHC found, Dr. McAdams post "was reckless and seriously irresponsible" as he "rushed over a weekend to post the sensational details publicly" despite the fact that the only newsworthy aspect had occurred over a week earlier. (R.3:88). His primary urgency, the FHC found, was to reveal embarrassing details about a member of a department he had tangled with frequently before, and hold "her up to public opprobrium" while maximizing the impact of the post on Ms. Abbate through numerous measures. (R.3:88-89). All of this was done without considering any consequences to Ms. Abbate, instead treating her as casualty in a wider battle with the Philosophy Department. (R.3:90). He then exacerbated the harm by continuing to post about Ms. Abbate. (R.3:90-91).

Further, Dr. McAdams' conduct caused substantial harm to Ms. Abbate. (R.3:91). She was flooded with communications that attacked her as Dr. McAdams continued to write multiple posts including Ms. Abbate's name, leading her to fear for her safety and then to transfer to another university. (R.3:91-93). Despite this, Dr. McAdams makes the

"exceptionable" suggestion that she somehow benefitted by "becoming kind of a martyr." (R.3:93).

As the evidence shows, the harm from Dr. McAdams' blog post was foreseeable. (R.3:93-96). Over the course of his career Dr. McAdams had first-hand experience that putting someone in his blog could lead to hostile communications directed at the subjects of his posts, and indeed he had used his blog as a threat. (R.3:94-96). As the FHC held, "Dr. McAdams thus was not only aware that his blog could have negative consequences for those mentioned on it, he had relied on that fact in the past." (R.3:44-45, 96).

Moreover, the FHC found that the harm to Ms. Abbate was both easily avoidable and not justified. (R.3:96-99). Ms. Abbate's name and contact information were irrelevant to his story, and he could have avoided the harm to her in multiple ways. (Id.). There was no competing value that offset the harm he caused by attaching her name and contact information. (Id.). His reliance on journalistic norms (as he uniquely and superficially understands them), was irrelevant to his responsibilities as a professor. (R.3:98). Even there, he ignored journalism ethical rules that would have protected Ms. Abbate, and his obligations as a professor must yield to any alleged self-described role as a journalist. (R.3:98-99). Finally, identifying Ms. Abbate

did not serve the interests of JD. (R.3:99). Instead, it benefitted Dr. McAdams, “by serving as fodder for his blog.” (Id.).

As the FHC found, Dr. McAdams’ lack of fitness substantially impaired his value to Marquette. (R.3:105-109). The record “clearly demonstrates that Dr. McAdams does not view himself as bound by the fundamental norms of the university, or of the academic profession, or indeed by any consistently applicable body of norms. He has instead assembled his own moral code "cobbled together" from various sources, to be applied as he sees fit.” (R.3:107-108).

On his blog and before the FHC, Dr. McAdams repeatedly emphasized that the only bounds he sees are his superficial understanding of journalistic norms and the law, while recognizing only those constraints as a faculty member that he chooses to. (R.3:62, 108). Examples of this included his (1) arbitrary line between attacking students in his own class and department ("not o.k.") and the rest of Marquette ("fine"); (2) exploiting the intimidation caused by his blog; and (3) use of a misleading signature line when gathering information for his Marquette Warrior blog, thereby encouraging responses by using his status as a Marquette professor, but relying on the reference to his blog to claim protected status as a "journalist"

so as to shield him of any faculty responsibilities." (R.3:57, 62, 108). Dr. McAdams' externalizes his decisions to blog about individuals at Marquette and takes no responsibility for his blogging decisions. (R.3:108).

The FHC agreed that Marquette has the right to insist that Dr. McAdams follow the professional standards and obligations of a faculty member instead of his own idiosyncratic norms. (R.3:109). His "repeated refusal to recognize or conform his conduct" to the obligations of a faculty member, indicates that "without corrective action, such conduct is likely to continue in the future," setting Dr. McAdams on a course likely to produce such incidents, and demonstrating his lack of fitness. (Id.).

C. The Trial Court Reviewed and Approved the FHC's Analysis of the Terms of Dr. McAdams' Contract.

Judge Hansher built on the FHC's analysis and explained in detail why disciplining Dr. McAdams' did not violate his academic freedom or other rights. Limits on academic freedom for extramural speech are apparent from the documents incorporated into Dr. McAdams' contract and the AAUP Statements on which academic freedom in America is based. (R.134:24). Academic freedom protects intellectual debate and scholarship, and the right to express views without sanction unless doing so substantially impairs the rights of others. (Id.). It "does not mean that a faculty member can harass,

threaten, intimidate, ridicule, or impose his or her views on students. Neither does academic freedom protect faculty members from disciplinary action or sanctions for professional misconduct, when there has been due process." (Id.).

As Judge Hansher pointed out, Dr. McAdams concedes that "there are some limits that really are professional obligations." (R.134:25). Dr. McAdams also "conceded that he had a professional obligation not to name Ms. Abbate if she had been a graduate student in his department." (Id.). His arbitrary line drawing at the edge of his department, however, was rejected by both the FHC and Judge Hansher (R.3:108-109; R.134:25). This position also runs contrary to Marquette and AAUP principles. (R.44:14; R.93:6-7). Even his own expert "Dr. Peter Wood, stated, that 'all members of the university' have a responsibility to graduate students 'whether they are in that person's department or not.'" (R.134:25).

On free speech, Judge Hansher agreed with the FHC that "rights have corresponding duties and that freedom of speech and expression is not absolute." (R.134:27). In addition, as the FHC found, interpreting the provision to import the full panoply of First Amendment rights would lead

to absurd results. (R.134:27). Finally, Dr. McAdams had agreed to be subject to peer disciplinary review. (R.134:28).

Like the FHC, Judge Hansher determined there was nothing to suggest that Marquette was misusing the proceedings against Dr. McAdams for pretextual purposes. (R.3:124; R.134:28). To the contrary, over Dr. McAdams' long history at Marquette (including at least six controversies involving his internet or campus speech over the last twenty years), the University had gone out of its way to avoid formally reprimanding him. (R.134:28). Nothing in the proceedings suggested a lack of genuine concern about his post and its effect on Ms. Abbate. (R.3:124; R.134:28). In light of the findings of the FHC and Judge Hansher, the correct way to interpret the contract and avoid rendering any provision meaningless is to adopt the FHC's interpretation that Section 307.07 ¶ 2 addresses the pretextual or misuse of disciplinary proceedings.

III. Dr. McAdams' Free Speech Arguments Lead to Absurd Results and Render Significant Portions of His Contract Meaningless.

As discussed by both the FHC and Judge Hansher, Dr. McAdams' argument that his contractual right to speech is coextensive with that of a private citizen, even though he is an employee, leads to absurd results. If as Dr. McAdams claims Marquette cannot discipline a faculty member for

exercising the First Amendment rights of a citizen, then it could not prevent a math professor from using class time to promote his personal religious beliefs or respond if a professor refused to teach his classes as a way to protest Donald Trump's election. (See R.45:6, 9). Both professors would claim they were exempt from discipline by Section 307.07 ¶ 2 because they were exercising legitimate free speech rights as a citizen. This of course is wrong, as Marquette's institutional interest in having its curriculum taught outweighs the teachers' First Amendment rights as citizens to discuss religion or politics. As a Marquette employee, Dr. McAdams has professional duties along with rights and it is nonsensical to assert there is no balancing of interests. *See also Piggee*, 464 F.3d at 671 (colleges and universities are not required to allow chemistry professors to teach James Joyce, nor permit a math professor to fill class time with torts law, despite both issues deserving full public discussion).

Under Dr. McAdams' reading of the Faculty Statutes, however, such actions by professors would be protected by "free speech" and Marquette would be powerless to respond. Dr. McAdams' insists—contrary to long-established law and common expectation—that no matter what harm he does to vital Marquette interests in protecting its students, Marquette can

discipline him only when his words fit into one of the few narrow exceptions for speech by private citizens (e.g., fighting words, inciting violence, etc.). Such an absurd reading of the Faculty Statutes cannot be (and was not) what the parties intended. *Chapman*, 2013 WI App 127 at ¶ 2 ("we must interpret contracts to avoid absurd results."); *Isermann v. MBL Life Assurance Corp.*, 231 Wis. 2d 136, 153, 605 N.W.2d 210 (Ct. App. 1999) ("Courts must read contracts to give a reasonable meaning to each provision").

To avoid the clear problem of his prior arguments, Dr. McAdams now argues that the standards for absolute cause govern conduct within the classroom, and that conduct in the classroom is not subject to First Amendment protection. (McAdams Br. at 37, n.13). But this new argument fails because it ignores the contract terms. Section 307.07 ¶ 2, the provision he argues binds Marquette to allow his First Amendment rights as a citizen without regard to his duties as an employee, applies to both "absolute or discretionary cause." (R.45:9). His attempt to carve out classroom speech to avoid absurd results makes no sense given the contract language.

In addition, Dr. McAdams' argument would render significant sections of his contract entirely meaningless. *Crandall ex rel. Johnson v. Society Ins.*, 2004 WI App 34, ¶ 10, 269 Wis. 2d 765, 676 N.W.2d 174

(rejecting interpretation of contract that would render provision meaningless); *Wilke v. First Fed. Sav. Loan Assoc. of Eau Claire*, 108 Wis. 2d 650, 657, 323 N.W.2d 179 (Ct. App. 1982) (rejecting interpretation of contract that would render a clause unenforceable under all circumstances). As discussed above, academic freedom's protections live in concert with and are balanced by other values central to academia and Marquette. But Dr. McAdams' interpretation of the supposed "First Amendment rights as a citizen" in his contract would render these balancing tests for academic freedom and other academic duties meaningless surplusage if the only speech for which a Marquette professor can be disciplined is speech that transgresses one of the narrow exceptions to a citizen's First Amendment rights. In short, you do not need a balancing test if there is nothing to balance. Speech that clearly violates the professional norms of academia, and a professor's obligations to their university and students, would be unassailable in Dr. McAdams' world so long as it did not violate the First Amendment protections. Contrary to decades of academic practices and judicial precedents, Dr. McAdams' interpretation would transfer academic decisions at the core of how universities regulate themselves from the hands of academics and into the courts. Similarly, his interpretation would render

Marquette's standards for absolute and discretionary cause in Section 306.02-.03 meaningless. Under the McAdams' misreading of the contract, so long as any speech was conceivably involved, a professor could not be punished despite clearly failing the tests for absolute or discretionary cause. This is not what the contract or law provide.

Dr. McAdams' arguments to this court that Section 307.07 ¶ 2 imports the full panoply of First Amendment rights as a citizen also ignores the significant caselaw recognizing the need to balance the rights (and duties) of employees and employers in the context of First Amendment claims. The Supreme Court has long recognized that the interests of employers and employees differs significantly from that of the citizenry in general. Thus, when addressing speech claims in the employment context one must not only determine that the speech is on a matter of public concern, but also balance the interests of the speaker with the interests of the employer. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). Common sense dictates that employers cannot function "if every employment decision became a constitutional matter." *Connick v. Myers*, 461 U.S. 138, 143 (1983). Courts therefore take into account both the context of the speech and its effect on the operations of the employer, with due regard for the legitimate countervailing institutional

interests. *Pickering*, 391 U.S. at 569-573; *Connick*, 461 U.S. at 146-154; *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d 454, 470-73 (3d Cir. 2015) (upholding discipline of high school teacher who mocked her students on the internet); *Piggee v. Carl Sandburg College*, 464 F.3d 667, 672 (7th Cir. 2006). Dr. McAdams' First Amendment argument contradicts his contract, a century of academic history, Supreme Court precedent and common expectations.

IV. Dr. McAdams' Justifications and Excuses for Attacking Ms. Abbate Ignore His Responsibilities As a Marquette Faculty Member.

Although Dr. McAdams claims he did not know publicly attacking a graduate student could lead to discipline, both the FHC and Judge Hansher rejected his claim because "no faculty member should need a specific warning not to recklessly take actions that indirectly cause substantial harm to others." (R.134:26 (quoting R.3:104). Dr. McAdams' expert, Dr. Wood, admitted in his testimony that "'all members of the university' have a responsibility to graduate students 'whether they are in that person's department or not.'" (R.134:25 (citing Dr. Wood's deposition)). Dr. McAdams was concededly on notice of his obligations to graduate students at Marquette, and specifically on notice about the problems of mentioning

student's names on his blog. (R.134:26; R.3:39-44). Dr. McAdams recognizes that appearing on his blog can lead to unwanted "blowback for students that aren't out front with highly visible political activity," but ignores that Ms. Abbate was not involved in any sort of public activity. (R.134:26). She was talking to a student after class about a classroom discussion, the secret recording of which Dr. McAdams exploited for personal gain. (Id.).[16]

Throughout his brief Dr. McAdams claims that his speech must be protected because he was allegedly discussing issues of public importance, including criticizing universities and questioning accepted doctrine. (McAdams Br. at 23-29). But, as the FHC found, the discipline is due to putting Ms. Abbate's name and contact information on the internet, and *not* any criticism of the University or doctrine. Dr. McAdams misleads about the reason for his discipline.

[16] As Dr. Nancy Busch Rossnagel explained on behalf of Marquette, the Jesuit commitment to a campus culture of responsibility, respect, and compassion, and the foundational role of *cura personalis* "leads Jesuit universities to insist that all members of the community are entitled to respect and freedom from alienation." (R.44:7). Furthermore, the AAUP emphasizes the unique circumstances of graduate students and stresses that "[t]he responsibility to secure and respect general conditions conducive to a graduate student's freedom to learn and teach is **shared by all** members of a university's graduate community." (R.93:6) (emphasis supplied).

Dr. McAdams easily could have complied with his professional duties. As the FHC found, he could have effectively made his points about both the during class and after-class conversations without linking the story to Ms. Abbate. *(*R.3:96). In direct contradiction of Dr. McAdams' attempt to cast himself as a victim for his views, ***both of Dr. McAdams' expert witnesses agree that Marquette "would have completely and utterly ignored what [Dr. McAdams] wrote" if he had not named Ms. Abbate, linked to her contact information, and written his blog post in a way that directly attacked her***. (R.77:39, 43) (emphasis supplied). Accordingly, *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 94 N.W.2d 711 (1959) has no relevance here.

Dr. McAdams conceded that the only newsworthy aspect of the post was the handling of JD's complaint by the University, but his blog post barely addressed that point. (R.3:58-59, 88, 100-101; R.59:8; R.61:59). Instead the vast majority of the blog post was drafted to direct negative attention towards Ms. Abbate personally, and "the primary urgency in publishing the blog post thus appears to be its revelation of embarrassing details about a member of the Philosophy Department—a department Dr. McAdams has tangled with frequently before-and holding her up to public opprobrium." (R.3:88-89).

Dr. McAdams' discussion of caselaw addressing academic freedom is similarly off the mark. (McAdams Br. at 23-26). The freedom the Supreme Court has been concerned with is that of the University to be free from outside influence, not of a professor to have carte blanche while attacking a fellow member of the University. He cites the Supreme Court decision in *Keyishian v. Board of Regents of University of State of New York* for the longstanding protection of academic freedom in America. (McAdams Br. at 23-24). But that decision dealt with outside authorities interfering with universities. To the extent the Supreme Court "has constitutionalized a right of academic freedom at all, [it] appears to have recognized only an institutional right of self-governance in academic affairs." *Urofsky v. Gilmore*, 216 F. 3d 401, 412-415 (4th Cir. 2000) (en banc). In instances such as the dispute with Dr. McAdams, courts recognize "[i]f a college or university has the 'essential freedom' to determine for itself 'who may teach'—as both this court and the United States Supreme Court have held—that necessarily includes the determination whether a faculty member who has tenure should be dismissed." *Gutkin v. University of S. Cal.*, 101 Cal. App. 4th 967, 977 (Cal. Ct. App. 2002) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)).

Dr. McAdams claims *Salaita v. Kennedy*, 118 F. Supp. 3d 1068 (N.D. Ill. 2015) held that a professor could not be punished for certain extramural utterances. But the *Salaita* decision addressed a motion to dismiss and whether Professor Salaita had stated a possible claim, not whether his speech was in fact protected. Whether his twitter posts were sufficient to withdraw his job offer would have to wait until the *Pickering* balancing test was applied at a later date. *Salaita,* 118 F. Supp. 3d at 1082-84.

Adamian v. Jacobsen dealt with vagueness and overbreadth challenges to the definition of academic freedom for extramural utterances, and specifically what "appropriate restraint" meant. 523 F.3d 929 (9th Cir. 1975). The court remanded the case to the district court to determine whether the board of regents' construction of the handbook section was similar to that of the AAUP, eliminating any overbreadth as the court had found it. *Id.* at 934-35.

In *Starsky v. Williams,* the three public utterances at issue concerned (1) a press release characterizing the board of regents as hypocritical and questioning their motives; (2) a television speech questioning the moral propriety of the board of regents; and (3) a speech sharply criticizing society in general and universities in particular. 353 F. Supp. 900, 925 (D. Ariz.

1972). These statements cannot be equated with Dr. McAdams needlessly putting a graduate student's name and contact information on the internet in order to cause her harm.

Finally, Dr. McAdams argues that absent a clear and unequivocal prohibition in his contract, he cannot be punished for attacking Ms. Abbate. He asserts that the principles used to justify his punishment are nothing more than an elastic balancing test that can be used to justify punishing anyone. But this argument asks the Court to ignore the well-developed record and process before it. Dr. McAdams agreed in his contract to have a group of his peers apply professional standards to determine whether he should be disciplined for his conduct. They applied longstanding interpretations of those principles to what Dr. McAdams knew and did in relation to his November 9, 2014 blog post. Application of principles to the facts of a case are what decision makers do on a daily basis in resolving disputes. Imagined slippery slope arguments untethered to the facts of a case do not override this Record's detailed findings and analysis.

CONCLUSION

For the reasons discussed above, Marquette respectfully requests that this Court affirm the decision and order from Judge Hansher dismissing Dr. McAdams' claims against Marquette.

Dated: October 20, 2017

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Section 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form filed on 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 this 20th day of October, 2017.

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CERTIFICATE AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 10,981 words, calculated using the Word Count function in Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I filed with the Court via hand delivery and served copies of the Brief of Defendant-Respondent Marquette University upon counsel for the parties by first class mail:

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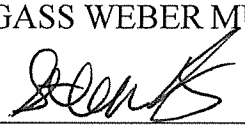

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