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

REPLY BRIEF OF PLAINTIFF-APPELLANT JOHN MCADAMS

Richard M. Esenberg, WI Bar No. 1005622
Thomas C. Kamenick, WI Bar No. 1063682
WISCONSIN INSTITUTE FOR LAW & LIBERTY
1139 E. Knapp Street
Milwaukee, WI 53202
414-727-9455
FAX: 414-727-6385
Attorneys for Plaintiff-Appellant

Table of Contents

Table of Authorities

CASES

CONSTITUTIONS, STATUTES, AND REGULATIONS

OTHER AUTHORITIES

I. MCADAMS' SPEECH IS PROTECTED UNDER HIS CONTRACTUAL RIGHT TO ACADEMIC FREEDOM

Marquette's response studiously ignores two things. Its contract (which promised McAdams the right to speak), and what McAdams actually did (speak on a matter of great public and institutional concern). Let's begin with the contract. Marquette cites the definition of discretionary cause under the Faculty Statutes and then stops as if that was all this case involves. Discretionary cause exists 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) substantially impairs the faculty member's value. Faculty Statute § 306.03. (R. 57:7; P. App. 139.)

The problem for Marquette is that the Faculty Statutes have more to say. The very next sentence 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." *Id.* Marquette has it backwards. Discretionary cause is not a limit on academic freedom. Academic freedom (and, as we shall see, the First Amendment) are limits on discretionary cause.

In Marquette's view, academic freedom does not protect speech that it thinks meets the standard for discretionary cause. But that interpretation makes the last sentence of § 306.03 meaningless. If there is no discretionary cause, then there is nothing for academic freedom to protect. Under Marquette's construction, the protection of academic freedom adds nothing. But Wisconsin law does not permit contracts to be construed that way. *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 construction that gives effect to each part of the contract).

Second, whatever the limits on academic freedom may be, they cannot consist of a post hoc and ad hoc determination of whether speech meets some undefined standard of "excellence." Academic freedom is made of sterner stuff. In the interest of attracting faculty and giving a wide berth for discourse and the expression of even unpopular ideas, academic freedom confers a rather robust protection on the ability of faculty to express themselves. As the UW Regents said over a hundred years ago, "Whatever may be the limitations which trammel inquiry elsewhere we believe the great state University of Wisconsin should ever encourage the

continual and fearless sifting and winnowing by which alone the truth can be found."[1]

That brings us to another thing that Marquette did not discuss in its brief: just what McAdams said and why he said it. One could read its entire 52 pages and not know what actually happened here. One might surmise that McAdams launched a cruel and ad hominem attack on a student for a casual after class discussion with another student and for no other reason than to cause her harm.

But that is not what happened. McAdams criticized an instructor who was exercising the authority that she had been given by the university to take a position on the scope of academic discourse. McAdams did not obtain this information improperly – the student that she attempted to silence told him what happened.[2] Abbate's actions were not something private and unimportant. They reflect a debate currently roiling academia.

[1] *See* Ray Cross, Remarks to the Board of Regents Regarding Academic Freedom of Expression, Dec. 11, 2015, *available at* https://www.wisconsin.edu/news/download/Freedom-of-Expression-Remarks-to-the-Board-12112015.pdf.

[2] Marquette makes much of the fact that the undergraduate student recorded his conversation. This violated no law or university rule; more importantly, McAdams had nothing to do with it and he did not learn of what happened from the recording. The recording merely corroborated what the student told him. Even had it not existed, McAdams could have written his post.

He did not "post" her private "contact information." He linked to her publicly-available blog.

As noted in our opening brief (McAdams Br. 30-31), even the FHC said that there was no obligation not to identify the person he wrote about – even if that person could be characterized as a student. The FHC conceded that there is no obligation to be civil (although he was) or accurate (although he was), or to not publicly name students or even link to a page that contains a student's contact information. (R. 3:76-78.) Any test for academic freedom with an alchemy that permits the whole to so greatly exceed the sum of its parts or any notion of prior notice offers no protection for speech. Not surprisingly, Marquette cannot find a case in which any court held that a university can properly discipline a professor protected by academic freedom because it did not like the substance of her speech.

Marquette cites to several different AAUP documents at pages 32-35 of its brief. But, just like its cherry picking of the statements of McAdams' experts and Dr. Downs (all of whom condemn the university's actions without reservation), they do not support its cramped view of academic freedom. First, Marquette points to no instance where the AAUP has approved discipline of a faculty member for an extramural utterance. There

are none. To the contrary, the AAUP has censured institutions for attempting to do so. (*See* McAdams' Brief 26-29.)

Second, Marquette's statement that extramural utterances are the most limited form of academic freedom (Marquette Br. 32) is directly contradicted by the AAUP statements, including its most recent statement on extramural utterances noting that "the administration should remember that faculty members are citizens and should be accorded the freedom of citizens." The statement continues, "[t]he effect of this qualification is to remove from consideration any supposed rhetorical transgressions that would not be found to exceed the protections of the First Amendment."[3] (*Id.*) According to the AAUP, then, if an extramural statement is protected by the First Amendment, it cannot be grounds for discipline.

Although Marquette relies heavily on the AAUP's Statement on Professional Ethics,[4] nothing in that document purports to override or qualify the protections of academic freedom or provides that it can be used to control what a professor can say in an extramural utterance. Moreover, McAdams' exercise of academic freedom was in defense of the least

[3] AAUP, *Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions*, Aug. 2011, *available at*: https://www.aaup.org/NR/rdonlyres/895B2C30-29F6-4A88-80B9-FCC4D23CF28B/0/ PoliticallyControversialDecisionsreport.pdf.
[4] *Available at*: https://www.aaup.org/report/statement-professional-ethics.

powerful person in this entire affair – an undergraduate student who was told his opinions were beyond the pale and whose complaint was dismissed.

This is not to say that academic freedom protects everything. But Marquette's view is that it ultimately protects nothing. That is inconsistent with the contractual language and any plausible concept of academic freedom.

II. MCADAMS' SUSPENSION AND TERMINATION VIOLATED HIS CONTRACTUAL RIGHT TO FREE SPEECH

McAdams' academic freedom is not the limit of his contractual protection. Marquette promised McAdams 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." Faculty Statute § 307.07(2). (R. 57:8; P. App. 140.) McAdams explained in his opening brief that this provision gives rise to a contractual right to free speech coextensive with his right to freedom of expression under the First Amendment as a private citizen.

But Marquette argues – again – that this clear and unambiguous language does not mean what it says. (Marquette Br. 45-50.) The first reason is ironic. Having said that courts cannot possibly say what academic freedom means (because only college professors could know), Marquette

says that the contract cannot be read to really protect First Amendment rights because college professors cannot know what that means. But just as courts can construe academic freedom just like any other contractual term such as discharge for cause, or decide what is or is not negligence or professional malpractice, courts are able to say what free speech is.

Marquette asserts that to actually give McAdams First Amendment protection would "lead to absurd consequences" (Marquette Br. 38), like the university being unable to discipline professors who refuse to teach the subject matter of their classes. But, as McAdams argued at page 37, fn. 13 of his opening brief, performance of classroom duties is governed by the provisions on absolute cause set forth at § 306.02, which are not subject to the protections for academic freedom and free expression contained in § 306.03. Absolute cause under § 306.02 includes "an intentional failure or refusal to perform a substantial part of any assigned duties." Thus, Marquette could discipline a professor who refused to teach his class as a protest against President Trump. But Marquette has never taken the position that it had absolute cause to terminate McAdams or suggested that he failed to perform a substantial part of his assigned duties.

Marquette argues that McAdams' First Amendment rights are not as broad as the contract says, but rather is covered by the same rules as applied to public employees, citing *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983). (Marquette Br. 49-50.) It is not clear that line of cases has any application in the university context. The United States Supreme Court has said that these cases may not apply in the university context because of the importance of academic freedom. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). But even under *Pickering*, there is still broad protection for speech on matters of public concern.[5] 391 U.S at 574 ("In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."). McAdams' post, although written about Marquette, was on a matter of public interest.

In any event, McAdams' contract says that *in no case* can discretionary cause be interpreted to impair the full enjoyment for all personal or academic freedoms of discourse and advocacy and that

[5] Pickering actually won his case, despite writing a letter much more critical of his school and written in much harsher language than the McAdams' blog. 391 U.S. at 575-78.

discipline cannot be used to restrain *any* right guaranteed by the United States Constitution. Marquette could have limited its contractual commitment to some type of more limited balancing test. It might even have made clear that it or some internal agency like the FHC would conclusively resolve the balance, but it didn't. It decided that its institutional interest in recruitment and facilitating academic discourse required a broad and unqualified guarantee of free discourse.

III. THE CIRCUIT COURT IMPROPERLY DEFFERED TO THE FHC'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Even if McAdams was not entitled to summary judgment, it was error for the Circuit Court to defer to the FHC and resolve all factual and legal disputes in Marquette's favor. There is no Wisconsin law that justified the Circuit Court's decision. Instead, the Circuit Court relied on the *Yackshaw* line of cases, which McAdams dealt with at pages 43-45 and 48 of his opening brief. We will not repeat that discussion here. None of these cases deal with academic freedom. Each found an agreement to use the hearing process as an exclusive remedy.

But nothing in the contract or Faculty Statutes provides that the FHC report is binding on anyone. The FHC is simply an advisory committee of Marquette that makes a non-binding report and recommendation to the

President. Indeed, President Lovell imposed sanctions on McAdams that the FHC did not call for. The report, then, is nothing more than an internal Marquette document setting forth the beliefs of its authors. **Marquette never explains how a process that is not binding on Marquette can reasonably be construed as binding McAdams or the courts.**

Yet the Circuit Court concluded it was bound. But there was no legal basis to defer to the FHC's findings of fact or even to consider them as admissible evidence (the standard for summary judgment under Wis. Stat. §802.08). **The authors of the report had no personal knowledge of the facts.** Their report is an out-of-court statement interpreting the contract, resolving disputed issues of fact, and making conclusions of law. It is one gigantic out-of-court statement offered for the truth of the matter asserted. It could not be cross-examined. Indeed, as we will see, there was never even an opportunity to test whether it was actually supported by the record.

Marquette asserts that deference is appropriate because the FHC report is extensive and detailed. (Marquette Br. 8-9.) This confuses

quantity with quality.[6] It does not matter if the FHC report is one page or one hundred pages, nothing in Wisconsin law requires, much less permits, the Circuit Court to defer to it and accept it as evidence.

The Circuit Court drew an analogy – found nowhere in Wisconsin law – between a private party's internal decision-making process and an independent administrative agency. But even were we dealing with an agency, the Circuit Court misapplied what it called "due weight deference."

Even if its analogy to administrative cases is apt (which McAdams disputes), due weight deference is only appropriate when the agency through its experience is "in a better position than a court to make judgments regarding the interpretation of the statute." *M.M. Schranz Roofing, Inc. v. First Choice Temporary*, 2012 WI App 9, ¶7, 338 Wis. 2d 420, 809 N.W.2d 880. Marquette argues that only college professors can know what is excellent and protected by academic freedom (although they cannot know what the Constitution protects). The first observation means that McAdams can't have his day in court on the academic freedom claim and the second means that he has no claim under the contractual guarantee

[6] The Roman philosopher Seneca is the earliest person remembered for noting that "[i]t is quality rather than quantity that matters." Seneca, *Moral Letters to Lucilius, Letter XLV: On Sophistical Argumentation*, line 1.

of First Amendment rights. But if college professors cannot understand the First Amendment, how can they understand the comparable protections of academic freedom? Marquette's argument illustrates – again – the principal weakness of its deference argument. Academic freedom and free speech are the rights to speak without fear of punishment by the prevailing views of one's peers.

In any event, this case is the first time that a Faculty Hearing Committee has met in the history of Marquette to consider the suspension and termination of a faculty member (R.53:33), and the members of the FHC have no expertise in deciding matters of Academic Freedom or contract law.

Further, the "due weight deference" standard **does not** apply to findings of fact, which courts must review under a substantial evidence test. *Operton v. Labor and Industry Review Commission*, 2017 WI 46, ¶¶18-19, 375 Wis. 2d 1, 894 N.W.2d 426; *Hilton ex rel. Pages Homeowners' Ass'n v. DNR*, 2006 WI 84, ¶16, 293 Wis. 2d 1, 717 N.W.2d 166. It was thus incumbent on the Circuit Court to review the entire record – not just the FHC report – to determine if there was substantial evidence to support the FHC's findings. *Hilton*, 2006 WI 84, ¶16. But there is no indication that

the Circuit Court even looked at the underlying record evidence, and in fact the complete record was never filed with the Circuit Court.[7]

In fact, McAdams requested that if the Circuit Court decided that deference was appropriate, it give him the opportunity to supplement the FHC record with evidence that Marquette had deliberately withheld in the FHC proceeding (R. 74:35-36), and he asked that the Circuit Court give him the opportunity to brief the question of whether the 300 factual findings in the FHC Decision were supported by substantial evidence.[8] (*Id*.) That is what would happen in judicial review of an agency decision. But the Circuit Court completely ignored these requests.

It was also error for the Circuit Court to defer to the FHC's conclusions of law. Even when a court grants due weight deference to a state agency, it cannot abdicate its authority and responsibility to interpret statutes and decide questions of law. *Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals*, 2006 WI 86, ¶14, 292 Wis. 2d 549, 717 N.W.2d 184. In fact, "there is little difference between due weight deference and no deference," since both situations require courts to

[7] Marquette concedes that only "the majority of the exhibits submitted to the FHC are included in the Record." (Marquette Br. 8.)

[8] As noted in our opening brief, there are many disputed facts. (McAdams Br. 38-39.) For example, Marquette opens its brief by suggesting that McAdams intended to harm Ms. Abbate. (Marquette Br. 1.) That is hotly disputed.

construe the law themselves, and in so doing, employ judicial expertise to "embrace a major responsibility of the judicial branch of government." *Operton*, 2017 WI 46, ¶22.

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. In this case, that means deciding what the contractual protections of academic freedom and constitutional rights mean. But the Circuit Court conducted no independent analysis, simply repeating the FHC's conclusions on the matter. The Circuit Court did not determine what the law is – it let the FHC do so.

Finally, it is inappropriate to defer to a proceeding that was fraught with irregularity. (*See* McAdams Br. 48-54.) Marquette's claim that McAdams "agreed" to be bound by a process in which relevant information could be withheld from him cannot be taken seriously.

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 6th of November, 2017.

Respectfully submitted,
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorneys for Plaintiff-Appellant

/S/ 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
414-727-9455
FAX: 414-727-6385

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 produced with proportional serif font. This brief is 2,996 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: November 6, 2017

/S/ 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 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: November 6, 2017

/S/ RICHARD M. ESENBERG
RICHARD M. ESENBERG