STATE SUPREME COURT
STATE OF WISCONSIN

Appeal No. 2017AP001240

JOHN McADAMS,

Plaintiff-Appellant,

v.

MARQUETTE UNIVERSITY,

Defendant-Respondent.

Appeal from a Final Judgment of the Circuit Court of
Milwaukee County, the Honorable David A. Hansher Presiding,
Circuit Court Case No. 2016CV003396
Affirmed in Part and Reversed in Part by the Court of Appeals

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BRIEF OF AMICUS CURIAE METROPOLITAN MILWAUKEE ASSOCIATION OF COMMERCE

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INTEREST OF AMICUS CURIAE

Metropolitan Milwaukee Association of Commerce ("MMAC"), is a 157 year old private, not-for-profit organization representing approximately 2,000 member businesses located primarily in Milwaukee, Waukesha, Washington and Ozaukee Counties. Its mission is to improve metro Milwaukee as a place to grow businesses, invest capital, and create jobs.

MMAC is the leading business organization in the Greater Milwaukee Area. MMAC's members collectively employ approximately 300,000 persons in the region in a wide variety of businesses, including manufacturing, service, wholesale, and transportation. It represents the viewpoint of a significant segment of the Wisconsin business community.

MMAC files this brief not only to support the position of Marquette University, but to explore certain factors and distinctions that may not be noted by other parties or *amici*.

INTRODUCTION

This is not a case about the First Amendment or its limits on the government's right and ability to regulate speech. It is a case about contract law—specifically, an employment contract between two private parties.

As will be explored in greater detail below, any analysis must begin with the proposition that the First Amendment does not of its own terms apply to private employers. The substantive rights of the employees of private organizations, the manner for resolving disputes over those rights, and the consequences of refusing to accept that resolution are all matters to be determined by contract law and (where applicable) the specific statutes and judicial doctrines that govern the employer/employee relationship. Those rights, procedures, and consequences must be determined on a case-by-case basis, accounting for differences in, among other things, the terms of the employment contract, the nature, goals, and purposes of the employer, and the effect of the employee's conduct on them. And, where the contract provides a process for resolving disputes, the results of that process should be respected.

ARGUMENT

I. In General, A Private Employer Is Free To Discipline An Employee For Speech That Adversely Affects The Enterprise Or Its Various Constituents.

It is fundamental that the First Amendment does not of its own force apply to a private employment relationship. As Justice Stevens once explained in a case dealing with the rights of a government employee:

> This is a free country. Every American has the *right* to express an opinion on issues of public significance. In the private sector, of course, the exercise of that right may entail unpleasant consequences. Absent some contractual or statutory provision limiting its prerogatives, a private-sector employer may discipline or fire employees for speaking their minds.

Waters v. Churchill, 511 U.S. 661, 694-95 (1994) (Stevens, J., dissenting) (emphasis in original).

Moreover, *even in the public sector* (where the First Amendment does apply of its own force), the government has "far broader powers" to regulate speech when it is acting as an employer than it does when acting as a sovereign. *Id.* at 671 (lead opinion). "[W]here the government is employing someone for the very purpose of effectively achieving its goals, such restrictions [on speech] may well be appropriate." *Id.* at 675. For this reason, the

U.S. Supreme Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Id.* at 673. This includes the employer's anticipation of disruption resulting from that speech—in *Waters*, "unkind and inappropriate" comments about a co-worker that "threatened to undermine management's authority." *Id.* at 680-81. "As a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had," whether or not the subject matter of the speech was a matter of public concern. *Id.* at 680-81.

If a public employer directly subject to the limitations of the First Amendment has this latitude to protect its interests, surely a private employer has no less latitude. Indeed, as this Court has recognized, in the absence of a contract or statute circumscribing its rights, an employer may not only hire and fire at will, but may impose additional or different obligations after the employment relationship has begun for any reason or no reason at all as long as it acts consistent with general principles of contract law. *See, e.g.*,

Runzheimer Int'l, Inc. v. Friedlen, 2015 WI 45, 362 Wis. 2d 100, 862 N.W.2d 879.

Moreover, private enterprises have organic purposes that arise from different sources than government institutions and that may tolerate different levels or types of disruption. Private institutions have an interest in ensuring that their employees do not disrupt the organization's purpose, undermine its authority, or subject it or its employees to public ridicule.

In short, a private employer is and should remain free to discipline an employee for conduct or speech that disrupts or adversely affects the particular purpose of the enterprise or its constituents. First Amendment principles are implicated only if and to the extent that the employment contract incorporates them (here, by promising academic freedom) and, even then, must be read in light of other provisions of the contract and the overall purpose to which the enterprise is dedicated.

II. The Results Of A Contractually-Specified Grievance Procedure Should Be Respected And Judicial Review Kept To A Minimum.

While contractually-specified grievance procedures will vary from enterprise to enterprise, for most enterprises, "[m]anagement can spend only so much of their time on any one employment decision." *Waters*, 511 U.S. at 680. This is all the more so in the world of commerce where, unlike government employers, the enterprise is under the incessant pressure of economic competition.

For this reason, most authorities recognize that *some* degree of deference is due where the employer has materially complied with whatever review procedures are provided for in the employment contract. *See, e.g.*, Brief of Defendant-Respondent Marquette University at 16-22.

Where an integral part of the disciplinary process consists of the interpretation and weighing of factors within the special province of the decision maker specified in the contract, deference is particularly appropriate. Thus, for example, decisions about hospital staff privileges are subject to minimal review, precisely because they involve assessments of professional standards. *See, e.g.*, *Seitzinger*

v. Cmty. Health Network, 2004 WI 28, ¶ 22, 270 Wis. 2d 1, 676 N.W.2d 426 (hospital's application of bylaws is "reviewed under a deferential standard of review" and "should stand if reasonable"); *see also Shahawy v. Harrison*, 875 F.2d 1529, 1533 (11th Cir. 1989); *Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 810 n.12 (7th Cir. 1999). Similarly, where issues of organizational governance are "specialized and sensitive . . . courts are well advised to defer to those with the duty to govern." *Nanavati v. Burdette Tomlin Mem'l Hosp.*, 526 A.2d 697, 702-03 (N.J. 1987).

Disciplinary proceedings do not need to involve the practice of medicine to present principles and values within the special provinces of the decision maker. Each commercial enterprise has its own "mission." Each has a particular niche it fills, a customer base it must satisfy, a particular ethos, a particular mix of individual employees, a particular tolerance for discord. These are not matters that are susceptible to any established yardstick save what is provided in the employment agreement itself, read as a whole and against the background of the enterprise's mission. If the contract

consigns the resolution of such matters to a specific person, committee, or board, it does so for a reason.

Thus, where the employment contract establishes a process to resolve disciplinary disputes, judicial review should be limited to whether the procedures promised were substantially followed. Any greater review would involve an evaluation of the organization's mission, values, and priorities—not an inquiry into which courts should delve. *Cf. Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 569, 335 N.W.2d 834 (1983) (declining to impose a duty to terminate in good faith because "[t]o do so would 'subject each discharge to judicial incursions into the amorphous concept of bad faith'") (citation omitted).

III. In Crafting A Rule, This Court Must Take Into Consideration Not Only The Similarities, But The Dissimilarities, Between A University And An Ordinary Commercial Employer.

As the foregoing discussion suggests, this Court should exercise great care and substantial restraint in crafting a rule, taking into consideration the effect it could have on other, non-academic employers.

Certainly, there are similarities between a private university and other employers. Like Marquette, commercial enterprises are private institutions, with the essentially absolute right to determine their individual mission, purpose and values. Similarly, since disciplinary decisions must be measured in large part on the basis of the alleged infraction's effect on its mission, purpose, and values, it follows that the enterprise must be given great latitude in determining what response is appropriate. Likewise, like a private university, commercial enterprises have a critical need to protect all constituencies of the institution. And, like a private university, commercial institutions need to know that the grievance procedures set forth in the employment agreement will be honored and sanctions enforced against employees who refuse to acknowledge that their actions have violated fundamental institutional norms.

At the same time, any rule must take into consideration certain respects in which the university setting is dissimilar to commercial enterprises. For example, although many working for commercial enterprises have some expectation of continued employment, few if any have rights resembling faculty tenure. Few

commercial enterprises, if any, incorporate principles of "academic freedom" into their employment agreements. Few provide for peer review of disciplinary actions. As a result, few employees of commercial enterprises have any justifiable expectation of lifetime employment, academic freedom, or the sort of peer review and "clear and convincing" standard to which Marquette faculty members are entitled.

Another difference is that, unlike a university (in which the faculty is, almost by definition, engaged in the public exchange of ideas), most employees in a private setting believe, and are entitled to believe, that their statements made to fellow workers will not be publicized outside the workplace. A private enterprise is just that—private—and both the enterprise itself and its employees should have at least some ability to conduct their lawful internal business relatively free from public critique.

And, while we do not mean to suggest that a private university is free from economic concerns, commercial enterprises are driven by them. As the U.S. Supreme Court observed, "[m]anagement can spend only so much of their time on any one

employment decision." *Waters*, 511 U.S. at 680. If that is true of government employers, it is all the more true of private ones. Efficiency and finality in the grievance process are important, indeed, vital.

Finally, any perceived need to expand the protection of employee speech has to at least some extent been mitigated by various statutes and judicial doctrines developed over the last several decades that circumscribe the rights of employers. For example, Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, has been interpreted to prohibit an employer from regulating speech to the extent it will impinge on its employees right to concerted action concerning the terms and conditions of employment. *See, e.g., Vic Tanny Int'l v. N.L.R.B.*, 622 F.2d 237, 241 (6th Cir. 1980). (Note, however, that this does not prevent employers from requiring that its employees maintain a working environment free of harassment. *See, e.g., NMC Finishing v. N.L.R.B.*, 101 F.3d 528, 529 (1996) (upholding discharge of picketing employee who made sign

specifically targeting a co-worker by name).[1] Moreover, both Congress and our State legislature have long provided that an employer may not base disciplinary decisions on the basis of certain invidious classifications; 42 U.S.C. § 2000e, *et seq.*; WIS. STAT. § 111.31, *et seq*. And this court has already carefully defined the circumstances under which an employee may and may not sue in tort for "wrongful termination." *See, e.g., Brockmeyer, supra*, 113 Wis. 2d at 569-576.

All of this strongly suggests that any rule announced in this case should be carefully framed as a matter of contract law, governed by the provisions of the particular employment contract and, ultimately, resolved by deference to the process prescribed by that contract for resolving disputes.

CONCLUSION

This Court should make clear that where, as here, a private employment contract provides a reasonable process for resolving disputes about an employee's rights and responsibilities, a court's

[1] Recently, the Trump administration rescinded two NLRB memos issued during the Obama administration that gave guidance on an employer's right to regulate workplace speech. *See* N.L.R.B., Gen. Counsel Memo. 18-02 (Dec. 1, 2017). The current uncertainty in NLRB standards is further reason to pause before wading too deeply into this field.

review should be limited to whether the process was substantially fulfilled consistent with the contract. Deeper review or the creation of any extraordinary speech right that supersedes the provisions of the private employer-employee contract would interfere with the employer's right to define its mission, sets its priorities, and assess the impact of the alleged infraction on the overall health of the enterprise.

Dated this 2nd day of March, 2018.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief (exclusive of cover, tables of contents and authorities, signature block and certifications) is 2,155 words.

I further certify that, pursuant to WIS. STAT. § 809.19(12)(f), I have caused to be submitted an electronic copy of this brief which complies with the requirements of § 809.19(12), and that this electronic brief is identical to the printed form of the document being 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.

By:_____
Michael B. Apfeld

CERTIFICATION OF SERVICE

I certify that I filed the Brief of Amicus Curiae Metropolitan Milwaukee Association of Commerce in the above-captioned appeal with the Clerk of the Supreme Court and served three copies on counsel of record this 2nd day of March, 2018 by U.S. Mail as designated below:

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