

Higher Education Legal Update

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I. What Impact Will the Obama Administration Have on Employee Rights?

A. The NLRB

The National Labor Relations Board (NLRB) often leads the way in making labor policy decisions. Not only does the Board have a significant case load, but the private sector is often where the parties push the envelope and through the case law method create new law. While NLRB rulings are not binding on state labor boards, these decisions are commonly followed at the state level. President Obama is entitled to name three of the five members of the NLRB. Currently there are two members. He has already named the one democratic appointee on the Board, Wilma Liebman, as chair. A package of two democratic and one republican appointees is expected to be nominated and approved in the near future.

In the past, a change in administrations has meant that the board will revisit precedent. This time there is an interest in using rule-making to overcome some of the unfavorable decisions by the Bush Board. Rule-making would limit the oscillation or flip flopping that tends to occur when there is a change in Board control due to a Presidential election.

Possible rule-making subjects:

- Posting in workplaces of Section 7 rights
- Limiting conditions for withdrawal of voluntary recognition
- Clarifying the uncertainty over the supervisory language in Section 2(11)

Reconsideration of other precedent would result from the Board hearing an actual case before it. It is unlikely that the NLRB will reverse unfavorable ruling, such as the Brown University decision, sua sponte.

B. The Courts

The federal Courts of Appeals are often the decision makers of last resort for plaintiffs. Each year the Appellate Courts decide approximately 20,000 cases whereas the U.S. Supreme Court issues only 75-100 decisions. The federal courts not only review the decisions of the federal agencies, but they are

traditionally the forum where constitutional actions, concerning for example First Amendment rights, are brought. When President Bush assumed office in 2001, there were 77 democratic and 74 republican appointees on the Courts of Appeals.

In 2008, there are 66 democratic and 102 republican appointees on the Appellate Courts with 11 vacancies. The filling of these vacancies by the Obama administration will tip the balance to democratic control on several Courts of Appeals. For example, there are four vacancies on the Fourth Circuit¹ and openings on the Second,² Third³ and D.C. Circuits that would restore those courts to democratic control. By the end of Obama's first term, a majority of the Appellate Court Judges should be democratic appointees.

Research reveals that democratic and republican appointees vote differently on labor, civil rights, environmental, and social issues including capital punishment. In fact, this trend has accelerated over the last decade. The AFL-CIO's General Counsel's office looked back at eight years of judicial decisions during the Bush administration (2001-2008) where the union or individual workers prevailed before the NLRB and the federal Appeals Court overturned or vacated the Board's decision. Of the 109 cases that fell into this category, seventy-five were decided by a majority of republican appointees. Looking at the issue at the Circuit level, the lowest rates for affirming NLRB decisions were in the republican controlled appellate courts which ranged from 61-66%. Conversely, the three circuits that remained in democratic control during this period enforced NLRB decisions 80% of the time.

The background that judges bring with them to the bench is also important in addition to who appointed them. The Obama administration has indicated that it wants to look beyond the traditional pool of nominees who work for major law firms and have been regular contributors to the party.

¹ The Fourth Circuit includes:

North Carolina
South Carolina
Virginia
West Virginia
Maryland

² The Second Circuit includes:

New York
Vermont
Connecticut

³ The Third Circuit includes:

Pennsylvania
New Jersey
Delaware

The Obama team is looking to fill judicial vacancies with persons who have worked for the legal services corporation, not-for-profit organizations, public interest groups and the labor movement. They also are looking for candidates who are younger, with the hope that they will serve a full career on the judiciary. Additionally, there are the prospects for several Supreme Court nominees by the Obama team. By the end of Obama's first term, it is likely that we will have a judiciary that is substantially more receptive to cases where our members and the union's interests are at stake.

II. First Amendment Protections for Speech by Higher Education Faculty

A. General Framework

In the landmark case of Pickering v. Board of Ed. Of Township High School Dist. 205, 391 U.S. 563 (1968), the Supreme Court affirmed the principle that public employees do not surrender their First Amendment right to free speech by mere virtue of their employment for the government. In cases in which a public employee contends that her free speech rights have been violated, a court must first determine, as a threshold matter, whether the speech at issue implicates a matter of "public concern." Connick v. Myers, 461 U.S. 138 (1983). If it does, then the court must engage in the "Pickering balancing test": Public employee speech is protected if the interests of the employee, "as a citizen, in commenting upon matters of public concern" outweigh "the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees." Pickering, 391 U.S. at 568. If the speech does not involve a matter of public concern, the speech is unprotected, no Pickering balancing is required and the government employer prevails.

B. The Supreme Court Narrows First Amendment Protections for Public Employees

In Garcetti v. Ceballos, 126 S.Ct. 1951 (2006), the Supreme Court established an additional threshold test. A public employee invoking her First Amendment rights must now establish not only that the statement pertained to a matter of public concern, but also that it was *not* made pursuant to her official duties. *Id.* at 1960. If the statement was made pursuant to the employee's official duties, then the speech is not entitled to constitutional protection and the government employer prevails, without the need for any Pickering balancing.

The plaintiff in the case, Richard Ceballos, was a deputy district attorney. His review and investigation of a case led him to conclude that the affidavit prepared by a deputy sheriff to support a critical search warrant contained serious misrepresentations. He prepared a memo for his supervisors relaying his findings, setting forth his concerns, and recommending that

the case be dismissed. A “heated” meeting ensued with officials from the district attorney’s and sheriff’s offices. *Id.* at 1956. Ceballos’ supervisor ultimately decided to proceed with the prosecution. Ceballos contended that, thereafter, he was subjected to various retaliatory actions, including reassignment, transfer, and denial of a promotion.

The Court concluded that Ceballos’ speech was constitutionally unprotected because as a threshold matter “his expressions were made pursuant to his duties as a calendar deputy.” *Id.* In the Court’s view, “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.” *Id.* at 1960. The First Amendment, stated the Court, “does not invest [public employees] with a right to perform their jobs however they see fit.” *Id.* At the same time, under the Court’s holding, “employees retain the prospect of constitutional protection for their contributions to the civic discourse.” *Id.*

On the subject of how the ruling intersects with the principles of *academic freedom*, the Court reserved judgment.

It stated:

“There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.” 547 U.S. at 425

In sum, Garcetti is part of a chain of Supreme Court decisions that have sought to narrow the scope of public employee free speech claims. It appears the Court is concerned about public employee “personnel issues” being introduced into the Courts as well as in the court’s words, providing “governmental employers sufficient discretion to manager their operations.”

C. Recent Higher Education Decisions That Follow Garcetti

Despite the caution by the Supreme Court in Garcetti to “not decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching,” the lower

courts have relied upon Garcetti in several decisions involving higher education professors.

1. **Hong v. Grant**, 516 F.Supp.2d 1158 (C.D. Cal. 2007). Dr. Hong had, while participating in faculty governance, allegedly angered university administrators by opposing certain faculty hiring and promotion decisions and by his opposition to the university's use of lecturers in place of professors. After Dr. Hong was denied a merit salary increase, he filed suit against the University for violating his First Amendment right to free speech. The U.S. District Court for the Central District of California rejected Dr. Hong's claim, finding in favor of the university. The judge reviewed the Supreme Court's decision in Garcetti v. Ceballos, and concluded that because Dr. Hong was purportedly acting "pursuant to his official duties," which included participation in faculty governance, he could not avail himself of First Amendment protection if his employer retaliated against him based on his expression of opposition to the university's policy. According to the court, the University of California-Irvine "'commissioned' Mr. Hong's involvement in the peer review process and his participation is therefore part of his official duties as a faculty member. The University is free to regulate statements made in the course of that process without judicial interference."

The decision has been appealed and on March 17, 2008, the AAUP and the Thomas Jefferson Center for the Protection of Free Expression filed a jointly-authored amicus brief with the court supporting the appeal of Dr. Hong. The amicus brief argues that the court failed to acknowledge the fact that courts treat the speech of professors in an academic context differently than the speech of employees of public agencies in other contexts, and that the Garcetti decision explicitly set aside the question of academic speech. The amicus brief focuses on the unique status granted to academic speech, including involvement in shared governance, and notes that faculty participation in shared university governance has been accorded special First Amendment protection by the Supreme Court, starting with Sweezy v. State of New Hampshire, 354 U.S. 234 (1957) (Frankfurter, J. concurring) through Keyishian v. Board of Regents, 385 U.S. 589 (1967) and Grutter v. Bollinger, 539 U.S. 306 (2003). The hallmark of such cases, the brief notes, is the recognition that academic freedom merits distinctive First Amendment protection against repressive action from within or outside the campus community. The brief also notes that the district court mistakenly characterized Dr. Hong's participation in faculty governance as an "official duty." Instead of a "duty", the brief argues, participation in faculty governance is part and parcel of professors' First Amendment-protected right of academic freedom to speak without fear of retaliation. Briefing is completed and a decision is

expected shortly.

2. **Renken v. Gregory**, 541 F.3d 769 (7th Cir. 2008).

In Renken an associate professor of mechanical engineering at the University of Milwaukee had put together, with several colleagues, a proposal for a grant from the National Science Foundation (NSF). The university approved the proposal which was submitted to NSF and a grant was awarded. When Renken learned about how the grant was going to be administered, he protested to the Dean and argued that the university's implementation plans violated NSF regulations. Renken filed complaints first with the Chair of the University Committee and subsequently with the Secretary of the University's Board of Regents. Among his complaints were that the Dean had not provided the lab space or matching funds for the project, including the course release funds for Renken's additional compensation related to the project. When Renken refused to agree to the University's proposal, the institution decided to return the grant to the NSF.

Renken filed suit in federal court and alleged that the University had reduced his pay and terminated the NSF grant in retaliation for his exercise of his First Amendment rights when he criticized and complained about the University's proposed use of the grant funds. The University prevailed at the trial court level. Relying on Garcetti, the Court concluded that Renken's complaints about the use of the grant funds were made as part of his official duties, rather than as a citizen, and therefore were not protected by the First Amendment. The Court also stated that even if this speech was not part of his official duties, it was still not protected because it related to a matter of private interest -- Renken's teaching and research -- and not a matter of public concern.

The Court of Appeals upheld the trial Court's decision, again relying on Garcetti for its analysis. Renken had argued that it was not a requirement of his job to complain about the University's administration of grant funds.

The Appellate Court concluded, however, that as part of Renken's status as a full professor he was expected to administer grants and it was in the course of that administration that Renken made his complaints about funding improprieties. Therefore, the Court continued, Renken's complaints about the use of the NSF funds were made "pursuant to his official duties as a University professor" and his speech was not protected by the First Amendment.

3. Gorum v. Sessions and Board of Trustees of Delaware State University, 2008 WL 399641 (D. Del. 2008)

Wendell Gorum was a tenured professor and chair of the Mass Communications Department at Delaware State University. He alleged that the University President's decision to override a recommended disciplinary decision from the faculty's Ad Hoc Disciplinary Committee was retaliation for his assertions of protected speech. Specifically, Gorum had voiced opposition to the finalists during the selection process for new university president. He also had revoked an invitation to the University President to speak at a prayer breakfast because the invitation was improperly issued. Finally, in his role as a student advisor, he had encouraged and assisted financially one of his students in challenging a suspension decision that was imposed by the University President.

Gorum was subject to discipline for altering a substantial number of students' grades for the better. The University President commenced dismissal proceedings and the charges were referred to the Ad Hoc Disciplinary Committee (AHDC). The AHDC found that responsibility for the grade change violations was not limited to Gorum and, consequently, recommended that Gorum be placed on probation for two years. The University President disagreed with the AHDC's suggested sanctions and recommended, successfully, to the Board that Gorum be terminated.

Turning to Gorum's claim of protected activities the Court first considered his role in the faculty search for President. The Court found that as Chair of the Mass Communications Department and a member of the faculty senate, Gorum was "both privileged and required, as part of his official duties, to participate in the search for a new President." Consequently, he was speaking as "a public employee pursuant to his official duties when he voiced opposition to the three candidates, and voted to reopen the search." In like fashion, the Court reviewed the allegations concerning the cancelled speech invitation and Gorum's role as a student advisor and concluded that Garcetti dictated the dismissal of the claims.

Summary

These decisions demonstrate that the lower courts have not followed the caution of the Supreme Court in applying the Garcetti analysis to the higher education setting. There are multiple possible reasons for this result, including the fact that the litigants in these cases may not have used the law on Academic Freedom to their best advantage. A related issue is that the types of activities that academic freedom covers are not well defined by the courts. Additionally, the courts have not clearly developed

a body of law that establishes that academic freedom rights may be greater than those of other public employees. Facing these uncertainties, the lower Courts have used Garcetti to analyze higher education retaliation claims not by looking at the content or form of the speech by the professor but, instead, at his role when the speech was uttered. In the face of this legal landscape, it is well worth looking to the collective bargaining agreement or even University policy to develop strong protections for faculty speech.

III. Financial Exigency⁴

Background

During economic downturns, it sometimes becomes necessary for higher education institutions to reduce the size of their operations due to lack of sufficient funding. An economically driven funding crisis is commonly referred to as a financial exigency. When financial exigency is declared, it becomes possible to close university programs and lay off staff, including tenured academic staff. It is important to know what is a genuine financial exigency so that faculty may know how to challenge their dismissal at a tenure hearing.

A. Legal Framework for Financial Exigency

1. Exigency at the School Level – Constitutional Basis

A leading case that set forth the framework for addressing the issue of termination of public university faculty due to financial exigency was Johnson v. Board of Regents of the University of Wisconsin System.⁵ In that case, thirty-eight tenured faculty and several non-tenured faculty were laid off because of a five percent reduction in state funds allocated under the 1973-1975 biennial budget. The university administration decided to allocate the reduced funding to each campus on the basis of a percentage decrease in the base budget as well as on the basis of enrollment decreases. The faculty filed suit in federal court charging a violation of their procedural due process rights under the U.S. Constitution.

The first due process issues addressed by the court were who would make the termination decisions and what procedures would be used to select the faculty to be terminated. The court held that the U.S. Constitution is silent

⁴ I would like to gratefully acknowledge the substantial contribution made to this section of the outline by my colleague, Sam Lieberman.

⁵ 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd without op.*, 510 F.2d 975 (7th Cir. 1975).

on these questions and that the identity of the decision maker and the choice of a basis for selection lie within the discretion of state government.⁶ Substantive due process required only that the procedures used in the determination of faculty layoffs not be wholly arbitrary or unreasonable.⁷ The court also held that involvement by tenured faculty in the financial decision making process was not required by the Fourteenth Amendment.⁸ It stated that the Constitution did not guarantee faculty the opportunity to persuade their administration that the burden of the financial exigency should be borne by other areas or that more money should be allocated by the state.⁹

The court in Johnson found, however, certain *minimum procedures* to be required under the Fourteenth Amendment in the event of layoff due to financial exigency. These were:

- furnishing each plaintiff with a reasonably adequate written statement of the basis for the initial decision to lay-off;
- furnishing each plaintiff with a reasonably adequate description of the manner in which the initial decision had been arrived at;
- making a reasonably adequate disclosure to each plaintiff of the information and data upon which the decision makers had relied; and
- providing each plaintiff the opportunity to respond.¹⁰ (The forum for the response is not specified. Typically, a university will have an internal grievance procedure in which a management representative conducts a hearing and issues a decision. Where possible, it may be advantageous to insist upon the use of the contractual grievance procedure so that the final decision is issued by an impartial arbitrator).

The court concluded that because the university had followed all of these procedures, faculty rights had been protected and the motion for preliminary injunction was denied.¹¹

The court's decision in Johnson was upheld by the 7th Circuit and is often cited in financial exigency cases from around the country. It stands for the proposition that the declaration of financial exigency is basically a state or local management decision that requires no faculty input. Furthermore, it establishes certain safeguards for tenured faculty in terms of notice and an

⁶ Id. at 238.

⁷ Id. at 239.

⁸ Id. at 237.

⁹ Id. at 239-40.

¹⁰ Id. at 240.

¹¹ Id. at 242.

opportunity for a hearing that apply when a faculty member's position is eliminated due to financial exigency.

Exigency Policies

States and educational institutions have taken different paths in dealing with financial exigency. Some states, such as Washington, have enacted legislation that specifically sets forth the criteria for financial exigency and the rights of affected employees. Where such legislation affords employees greater rights than they are entitled to under the Fourteenth Amendment, the employees may be able to avail themselves of additional safeguards. More commonly, state law is silent on the subject of financial exigency. In such situations, the authority to declare financial exigency is left entirely in the hands of the board of a higher education institution. Furthermore, the American Association of University Professors has published Recommended Institutional Regulations on Academic Freedom and Tenure, which contains suggested institutional regulations to deal with financial exigency. As will be shown below, these AAUP regulations have become the "industry standard" and are often referred to or followed by courts where there are no university regulations concerning financial exigency.

In Krotkoff v. Goucher College¹² the college administration created a faculty committee to review curricular changes which ultimately recommended the elimination of its Classics Department, of which the plaintiff was a tenured faculty member.¹³ Financial exigency was not mentioned in the plaintiff's contract, appointment letter, or in the college's by-laws. Regardless, the college used the 1940 AAUP "Statement of Principles" provision allowing for the dismissal of tenured faculty in the event of financial exigency.¹⁴ In upholding the college's dismissal of tenured faculty, the court stated:

The national academic community's understanding of the concept of tenure incorporates the notion that a college may refuse to renew a tenured teacher's contract because of financial exigency so long as its action is demonstrably bona fide. The reported cases support the conclusion that tenure is not generally understood to preclude demonstrably bona fide dismissal for financial reasons ... No case indicates that tenure creates a right to exemption from dismissal for financial reasons.¹⁵

Just as a court may follow the AAUP principles where there are no financial exigency procedures, it may overrule a tenured faculty member's dismissal where an institution adopts financial exigency guidelines but fails to adhere

¹² 585 F.2d 675 (4th Cir. 1978).

¹³ Id. at 677.

¹⁴ Id. at 679.

¹⁵ Id. at 678.

to them. This was the case in Linn v. Andover-Newton Theological School.¹⁶ In that case, although a tenured faculty member was dismissed because of financial exigency, the court found the institution breached the tenure contract because it failed to follow its own internal procedures. In the contract, the parties stipulated that it was subject to AAUP guidelines, including the right to a hearing before a faculty group and a college governing board. The college's failure to provide the plaintiff with a hearing breached the contract and the court therefore overturned the dismissal.

2. Exigency at the Program Level

As we have seen from the above cases, a declaration of financial exigency must be bona fide and it must have a verifiable basis that is explained to the party being laid off with appropriate notice and opportunity for a hearing. It is also important to note one additional matter, which is that institutions may also declare financial exigency in just one program, even if the rest of the institution remains viable. This position has been adopted by the courts, even though it has never been a part of the AAUP's regulations. In Scheuer v. Creighton University, the plaintiff, a tenured pharmacy professor at private Creighton University, lost his job due to a decrease in government support to its pharmacy program.¹⁷ The university cut four full-time faculty positions, including that of the plaintiff, who taught a course in medicinal chemistry.¹⁸ The faculty handbook contained a statement allowing for the dismissal of faculty members in situations that included financial exigency.¹⁹ The second controlling document was the 1940 AAUP statement. The issue was whether the School of Pharmacy could undergo financial exigency, even if the whole college was not in contravention of the 1940 AAUP document. The court was required to decide which prevailed: the college guidelines or the 1940 AAUP Principles. It found the college's own internal guidelines controlling. "We specifically hold the term 'financial exigency' as used in the contract of employment herein may be limited to a financial exigency in a department or college. It is not restricted to one existing in the institution as a whole."²⁰

¹⁶ 638 F. Supp. 1114 (D. Mass. 1986).

¹⁷ [260 N.W.2d 595 \(Neb. 1977\)](#).

¹⁸ Id. at 596.

¹⁹ Id. at 597.

²⁰ Id. at 601.

B. Challenging Financial Exigency

1. Legal Challenges to Financial Exigency

It is difficult for faculty to successfully challenge a bona fide declaration of financial exigency. We have only found one successful case. In that decision, a private college in New Jersey declared financial exigency only to have that declaration reversed by the courts and the faculty reinstated to their positions at the college. In AAUP v. Bloomfield College, the administration notified fourteen faculty members that they were to be laid off, and informed the rest of the faculty that they were going on one year contracts that may or may not be renewed.²¹ In order to evaluate the fairness of the college's actions, the court made two inquiries. First, "whether the action ... was 'demonstrably bona fide' as having been taken 'under extraordinary circumstances' because of the financial exigency of the institution," and second, "whether the circumstances were further 'extraordinary' so as to allow at the same time for the hiring of twelve new teachers."²² In both inquiries the court answered in the negative. It overruled the actions of the Board of Trustees and reinstated the faculty members to their positions. The court was moved, in part, by the fact that the college's justification for releasing faculty centered around program changes that never took place or were proposed well after the release of the faculty.²³

AAUP v. Bloomfield College provides a useful checklist of factors that courts may consider to determine whether a college's actions in dismissing tenured faculty are warranted, such as proof that dismissal has positive financial benefit for the college. The court stated, in relevant part,

The test best suited to effectuate the intent of the parties on judicial review of the college's action, therefore, is whether the action taken followed from the board's demonstrably bona fide belief, under honestly formulated standards, in the existence of a financial exigency and extraordinary attendant circumstances, and in the necessity for terminating tenured faculty members as a means of relieving the exigent condition. Interrelated therewith is the question of whether sufficient credible evidence of 'exigency' and 'extraordinary circumstances' exists as to provide a basis for the conclusions reached in the exercise of a reasonable and prudent judgment.

²¹ 322 A.2d 846 (N.J. Super. 1974).

²² Id. at 849

²³ See id.

This case also demonstrates the degree to which the court will examine financial records of the institution to determine if it is undergoing financial crisis. After scrutinizing the books, the Bloomfield College court determined the college was in fact financially viable. However this case is unusual based on the facts and the potentially dubious basis for the university's assertion of a financial emergency. It appears well settled in both the public and private sector, that a bona fide declaration of "financial exigency" in either part of a program or the entire institution will allow the institution to dismiss whatever faculty it deems necessary to regain financial viability subject to following due process notice and hearing procedures.

2. Contractual Challenges to Financial Exigency

Where due process has been satisfied, legal challenges to financial exigency declarations face significant hurdles. Nonetheless, it may be advisable to use the contractual grievance process to mount a challenge. The likelihood of success may not be particularly high, but it may be useful to a local to utilize the grievance process to get an employer to produce documentation that sheds light on the reasons behind the declaration of financial exigency. Such an information request could then be useful in attempting to get the employer to engage in impact bargaining over the financial exigency decision.