

JOHN McADAMS

Plaintiff,

v.

Unclassified

Case Code: 30303

Case No. 16-CV-3396

MARQUETTE UNIVERSITY

Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

In the course of discussing the application of certain arguments associated with the philosopher John Rawls, the issue of same sex marriage comes up in a Marquette University Theory of Ethics class. A student believes that the Instructor has said that “everyone” should support same-sex marriage and approaches the Instructor after class. During this conversation, she tells the student precisely that. She says – repeatedly – that she will not permit him to discuss his opposition to same sex marriage in any future classes. She tells him that the expression of his view would be offensive and homophobic and that his perspective simply will not be tolerated in her class. And she invites him to drop the course if he isn’t willing to shut up.

The student complains to the University administration. He is treated with contempt. No one in authority questions the Instructor’s diktat or defends the student’s right to express his opinion – an opinion that comports with the teachings of the Catholic Church and that one would otherwise suppose ought to be “tolerated” at a Catholic university. However one feels about same-sex marriage, it would certainly seem to be an issue of public importance on which debate is still permitted. The student takes his story to his advisor, Professor John McAdams.

Professor John McAdams is a vocal critic of political bias and “correctness” on the Marquette campus. For over 12 years, he has written and published a blog called the “Marquette Warrior.” After offering the Instructor an opportunity to confirm or deny the student’s account, he writes a post recounting this incident. He states his own view that a student ought to be able to express a viewpoint contrary to that held by an Instructor and to have the merits of his argument discussed rather than suppressed by the Instructor as somehow outside the bounds of polite discourse. He writes that such things happen far too often at Marquette and universities across the country. He does not use insulting or intemperate language and does not ask anyone to take any action against the Instructor or anyone else. He does nothing more than accurately report the conversation and express his opinion.

It was his right to do so. His contract with Marquette says that a tenured professor cannot be suspended without due process and cannot be fired for the exercise of academic freedom or the right of free expression under the Constitution. But Marquette summarily suspends him from teaching, bans him from campus, and eventually revokes his tenure and terminates his employment.

There is no dispute as to these material facts. There is no way that what was done to John McAdams can be reconciled with any concept of academic freedom or free expression.

STATEMENT OF FACTS

1. Professor McAdams and his contract with Marquette.

Professor John McAdams joined the Political Science Department of Marquette University in 1977. (McAdams Aff. ¶3.) He has been a tenured member of the Marquette faculty since 1984. (*Id.* at ¶4.) It is undisputed that Professor McAdams has been a productive

member of the faculty, with many scholarly publications to his credit and a good record of classroom performance over his long career. (Ex. A2, A3.)¹

As a tenured member of the faculty, Professor McAdams has a contract with Marquette. (Ex. A5.) By its express terms, the contract incorporates and is subject to the provisions of Marquette’s Faculty Statutes on Appointment, Promotion and Tenure (“Faculty Statutes”). (*Id.*) The contract provides that tenure is not a reward for services performed, but a “contract and property right” granted in accordance with the Faculty Statutes. Faculty Statutes §304.02. (Ex. T1.)

According to the Faculty Statutes, and therefore according to his contract with Marquette, Professor McAdams cannot be suspended or fired except for absolute or discretionary cause as set forth in §§306.02 and 306.03. (*Id.*) Absolute cause is not an issue in this case. Marquette suspended and eventually terminated Professor McAdams for discretionary cause under §306.03 – alleging he committed conduct which clearly and substantially fail[s] to meet the standard of personal and professional excellence which generally characterizes University faculties. But, and of critical importance to this case, §306.03 also provides that “[i]n no case, however, shall discretionary cause be interpreted so as to impair the full and free enjoyment of legitimate personal or academic freedom of thought, doctrine, discourse, association, advocacy or action” (emphasis added). Section 307.07 of the Statutes, which also governs here, further provides that “dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed by the United States Constitution.” (*Id.*)

¹ For ease of reference, exhibits to the McAdams Affidavit are labeled Exhibit A1 through A6. Exhibits to the McGrath Affidavit are labeled Exhibit M1 through M37. Exhibits to the Taylor Affidavit are labeled Exhibit T1 through T32. The single exhibit to the Luehrs-Groblewski (“Luehrs”) Affidavit is labeled Exhibit L1.

(emphasis added). The University cannot fire Professor McAdams for conduct that is protected by these contractual provisions.

2. The Marquette Warrior Blog.

Professor McAdams is an outspoken defender of conservative values. (McAdams Aff. ¶10.) He has for the past twelve years published a blog called the Marquette Warrior. (*Id.*) In that role, Professor McAdams has frequently called into question majority sentiment among faculty and administrators on the Marquette campus. (*Id.* at ¶11.) In particular, he has been strongly critical of views described by him and others as “political correctness.” (*Id.* at ¶10.) As a result, he often opposes the prevailing views on campus, including those held by persons in positions of authority. (*Id.* at ¶11.) He has been a frequent critic of Marquette’s administration, including the President, Provost, Deans and Department Chairs. (*Id.*)

Professor McAdams believes that many of his colleagues on the Marquette faculty and in its administration are intolerant of conservative views. They are hostile to his position that academic freedom guarantees his right to express opinions that some members of the community say are hurtful to them and violate their right to a “safe space.” (*Id.* at ¶12.) He is not a popular figure on campus among the many politically correct members of the faculty and the administration. (*Id.* at ¶13.) For example, the Chair of Marquette’s Philosophy Department referred to him in writing as Marquette’s “resident right wing lunatic.” (Ex. T2.)

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

Cheryl Abbate was a graduate student in Marquette’s Philosophy Department. During the Fall Semester of 2014, Ms. Abbate was teaching the Theory of Ethics, a philosophy course for Marquette undergraduates. (Ex. T3.) She had taught the same ethics course several times before. (*Id.*) She was the Instructor for the course, responsible for delivering the course and

grading the students. (*Id.*) As far as students were concerned, she was just as much “the Professor” as anyone else offering a course at Marquette.

On the morning of October 28, 2014, Ms. Abbate was discussing the philosophy of John Rawls. (*Id.*) The discussion included various issues and how they might be resolved under Rawls’ theory of justice. The issue of same sex marriage was mentioned but not discussed in detail, as Ms. Abbate said that there could be no real disagreement on this question. (*Id.*)

After class, one of her students, who we shall refer to in the brief as “JD,” approached Ms. Abbate.² Their after-class discussion was recorded by JD. (Transcript, Ex. T4.) JD told Ms. Abbate that he was against same sex marriage and thought that it had been wrong for her to cut the class discussion short. (*Id.*) Ms. Abbate and JD then briefly discussed the issue. After a brief exchange on the merits, Ms. Abbate told him that “there are some opinions that are not appropriate and that are harmful, such as racist opinions, sexist opinion and quite honestly do you know whether anyone in the class is homosexual...And don’t you think it would be harmful to them if you were to raise your hand in class and challenge this?” (*Id.*) Ms. Abbate then told JD, in no uncertain terms, that “you don’t have a right in this class...to make homophobic comments.” She said “You can have whatever opinions you want but I can tell you right now, in this class homophobic comments...will not be tolerated. If you don’t like that you are more than free to drop the class.” (*Id.*) Shortly thereafter Ms. Abbate became aware that JD was recording their conversation on his phone, and broke off the discussion. (*Id.*)

JD was troubled by this confrontation and almost immediately brought his concerns to Dr. Suzanne Foster, the Associate Dean for Academic Affairs. (Ex. T5.) JD did not know at the time but Foster was Ms. Abbate’s mentor at Marquette. (*Id.*) Foster directed JD to take his

² Throughout these proceeding the student has requested anonymity and his identity is protected by FERPA.

complaint to the Philosophy Department. (*Id.*) She never attempted to follow up with JD or otherwise deal with his concerns in any way. (*Id.*)

JD met later that same morning with Drs. Nancy Snow and Sebastian Luft, the Chair and Assistant Chair of the Philosophy Dept. (Ex. T6.) Their meeting lasted about two minutes, and there was no discussion of JD's concerns with Ms. Abbate's behavior. In fact, Abbate had already told Luft that she was concerned that a student had taped her conversation. (Ex. T31.) They asked about the taping issue, and JD initially claimed that he had not recorded the conversation. (Ex. T6.)

Snow did not believe him and communicated with the University's General Counsel Office about the taping issue and then asked JD to meet with her later that day. She told him that it was inappropriate for him to have recorded his conversation with Ms Abbate. (Ex. T6.) Again, there was no discussion of JD's concern that he had been accused of intolerance and told to shut up. To the contrary, Snow said that she told JD that "he needs to change his attitude so he comes across as less insolent and disrespectful." (Ex. T7.) In her comments about the meeting Snow called JD an "insulin (sic) little twerp." (Ex. T6.) She later called him a "little twit" and a "jackass." (Ex. T2.) The Philosophy Department did nothing further to address JD's concerns. Abbate wrote to Snow thanking her for putting JD in his place, writing "Hopefully this experience has informed him that oppressive discourse is not acceptable." (Ex. T7.)

4. The November 9, 2014 Blog Post.

JD remained disturbed about the incident and met to discuss it with one of his advisors, Professor William Donaldson, the next day. (Ex. T8.) JD recounted his experiences with Ms. Abbate, Foster, Luft, and Snow. Donaldson asked him if had discussed the matter with Professor McAdams, his advisor in the Political Science Department. (*Id.*) After discussing the matter

with Donaldson, JD decided to discuss the matter with Professor McAdams. A few days later JD met with McAdams and played him the tape of the Abbate conversation. He agreed that Professor McAdams could blog about it. (McAdams Aff. ¶14.) At 8:58 am on November 9, 2014, Professor McAdams wrote an email to Ms. Abbate. He indicated he was working on a story about her confrontation with JD and asked her for her version of the events. He suggested that she write him or that they talk later in the day. (Ex. M1.)

Within half an hour, Ms. Abbate forwarded Professor McAdams' email to Drs. Snow, Foster, and James South (Assistant Chair of the Philosophy Department), telling them that she did not intend to respond. (*Id.*) Snow and Foster both replied, agreeing that Ms. Abbate should not respond to Professor McAdams' email or to any calls from him. (Ex. M2.) That same day, without talking to Professor McAdams and without waiting to see what he would write, Ms. Abbate told Foster that "I really don't care what some uncritical, creepy homophobic person with bad argumentation skills has to say about me." (Ex. M3.) She told an acquaintance (name unknown) that "I don't want to waste my energy worrying about some uncritical, hateful homophobic group." (Ex. M19.)

Ms. Abbate believed that "there is a whole group at Marquette who are extreme white wing (sic), hateful people and McAdams is the ring leader." (*Id.*) She called Professor McAdams "a flaming bigot, sexist and homophobic idiot." (Ex. M4.) She accused Professor McAdams of wanting to use academic free speech to "insert his ugly face into my class business to try to scare me into silence." (*Id.*) And she considered Professor McAdams' request for comment "harassment." (Ex. T32.)

All of these comments were made before Professor McAdams' published his blog post – before anyone knew what he would say. Ms. Abbate did not respond to McAdams' request for

her version of the events in question. At 6:06 p.m. on November 9, he published the blog post. The full text of the post as it appeared is attached to the McAdams Affidavit as Exhibit A1. The primary question before the Court is whether this post, *as written*, is speech protected by the first amendment and the doctrine of academic freedom. If it is, Marquette breached its contract with McAdams by suspending and terminating him.

5. Ms. Abbate Complains and Threatens Legal Action.

As it turned out, Ms. Abbate and her allies did not believe that the McAdams post placed her in a bad light, although they disagreed with what he said. Dr. Foster wrote Ms. Abbate on the morning after the blog post, saying she had read it and didn't believe it was harmful to Ms. Abbate: "[Y]ou come off well. That is, anyone who looks at the blog will see where sanity lies." (Ex. M5.) Ms. Abbate agreed: "When I saw the blog I was pleasantly surprised." (*Id.*)

But that did not mean that they did not see the post as a vehicle to go after Professor McAdams. Ms. Abbate quickly drafted a formal letter of complaint. She claimed that "to be the subject of the angry rantings of a tenured professor is emotionally damaging for anyone, especially a vulnerable graduate student." She asked that Professor McAdams be reprimanded for his misconduct. (Ex. T9.) She sent a draft of her complaint to a confidant by email. (Ex. M18.) In her email, she described JD as one of her "right wing students." (*Id.*) She said Professor McAdams "hates homosexuals or anyone who supports gay rights" and that she "cannot believe that this bigoted moron has a job at Marquette." *Id.*

By the following day (November 11, 2014), Ms. Abbate had revised her formal complaint and sent it, or had it sent, to University authorities. (Ex. T10.) Her revised complaint contained a new charge – that she had "been the target of harassing emails, sent by [McAdams'] followers." (*Id.*) This was, at best, a gross exaggeration and, at worst, a lie. The record

discloses that she had by this time in fact received *a single email* – critical but not distasteful. (Ex. T11; Luehrs Aff. ¶5; Ex. L1.)³ She met that same day with South and Dr. Lowell Barrington, Chair of the Political Science Department, to press her complaint, accusing Marquette of creating a “hostile environment.” (Ex. T15.)

By November 24, and well before Marquette had completed its investigation of the matter, Ms. Abbate had threatened the University with a lawsuit. She wrote a letter to Marquette President Michael R. Lovell demanding that Marquette fire Professor McAdams, punish JD, and pay her damages of various kinds. She said that if Marquette did not comply with her demands she would have “recourse to a lawsuit.” (Ex. T13.)

In early December, Ms. Abbate decided to leave Marquette for the University of Colorado. (Ex. T14.) While Marquette has portrayed this as a tragic consequence of Professor McAdams’ public criticism, the facts say otherwise. According to Asst. Dean South, Abbate’s decision was based on a variety of factors, including “because she did not feel comfortable in the department--for several reasons, not least because of how Nancy [Snow] treated her, her research area, and her mentor, Susanne [Foster].” (Ex. M6.) In fact, she had applied to transfer to the more prestigious philosophy program at the University of Colorado the previous year – well before any of this had happened. There was no room for her at that time. But her confrontation with McAdams generated support from a sympathetic Colorado Philosophy Department, changing the calculus. (Ex. M7.) According to one of her advisors (South), Colorado was a “reputationally superior” program and Ms. Abbate was offered “significant financial aid.” (Ex. M8.) Nevertheless, on December 10, she wrote again to President Lovell seeking “reparations.”

³ During discovery Marquette produced the emails received by Ms. Abbate. Exhibit L1 is a spreadsheet showing the dates on which Ms. Abbate received those emails.

She again threatened a lawsuit and said that, if her demands were not met, she would “reach out to national, academic news sources **again**.” (Ex. M16, emphasis added)

6. Publicity.

Although Professor McAdams made some effort to call attention to his blog post by sending a link to a few news organizations (something that commentators typically do), he did not have much success at the outset. (McAdams Aff. ¶15.) The Foundation for Individual Rights in Education wrote a short story on the matter on its own blog on November 11, 2014. FIRE was generally supportive of McAdams. See <https://www.thefire.org/marquette-u-prohibits-disagreeing-classmates-oppose-sex-marriage/>. The Cardinal Newman Society posted an article on the same day. See <https://cardinalnewmansociety.org/marquette-professor-raises-concerns-over-universitys-version-of-social-justice/>.

By November 12, 2014, the date on which she submitted the final form of her complaint against Professor McAdams to the University, there had been no indication that the McAdams blog post had or would cause many people to criticize Ms. Abbate. She had received only two emails that were critical of her position. (Ex. T15; Ex. L1.)

On November 17, a website called the College Fix posted a story reporting on the incident based upon an interview with JD. See <http://www.thecollegefix.com/post/20138/>. A reporter at the College Fix had apparently read something about the controversy, and asked McAdams to put him in touch with JD. McAdams did not, but he did forward the College Fix inquiry to JD who apparently decided to make himself available to the writer. (McAdams Aff. ¶16.)

The editor of a philosophy website called the Daily Nous saw the College Fix story and wrote to Ms. Abbate about it, suggesting that he would be supportive of her position and asking

her to comment. She did, sending him a lengthy memo setting out her side of the story. (Ex. T16.) The Daily Nous published its own story on November 18, claiming that Abbate was the victim of a “smear campaign.” See <http://dailynous.com/2014/11/18/philosophy-grad-student-target-of-political-smear-campaign/>.

On November 20, Inside Higher Ed published an article on the incident. See <https://www.insidehighered.com/news/2014/11/20/marquette-u-grad-student-shes-being-targeted-after-ending-class-discussion-gay>. Their interest in the matter was sparked by the Daily Nous article. (Ex. M14.) As had been the case with the Daily Nous, Ms. Abbate cooperated with the reporter and gave the reporter her version of events. (*Id.*) Fox News published an article on the incident on November 22. See <http://www.foxnews.com/opinion/2014/11/22/teacher-to-student-if-dont-support-gay-marriage-drop-my-class.html>. Their story was, like the College Fix Story, based primarily on an interview with JD. (*Id.*)

After the story became national (based upon publication by the College Fix, the Daily Nous, Inside Higher Ed and Fox), Ms. Abbate began receiving numerous emails, some in support of her conduct, some critical, and some distasteful. (Luehrs Aff. ¶3, Ex. L1.) There is no evidence that Professor McAdams knew or had anything to do with any of these emails. (McAdams Aff. ¶17.) But Marquette “blames” Professor McAdams for them, advancing the chilling proposition that a writer who is not distasteful or intemperate can be held responsible for unknown persons who respond badly to what he or she or even others have written. But even if there was some acceptable form of this “reverse hecklers” veto, McAdams was only one of a number of commentators who wrote about this incident, some based upon interviews with JD and some based upon statements from Ms. Abbate. Prior to the Daily Nous story on November 18th – a story that Abbate encouraged – she had only received three emails regarding the

incident. (Ex. L1.) It was the Daily Nous article that led to the article in the widely read Inside Higher Ed – another story that Abbate encouraged. And it was this increasing publicity that eventually led to the Fox News story. The number of comments and emails directed to Abbate increased as the story went national. It seems unlikely that the vast majority of those who wrote to her – in criticism or support – did so based on reading what Professor McAdams had written on the Marquette Warrior blog.

7. Marquette Reacts.

Ms. Abbate formally complained to the administration almost immediately after the November 9, 2014 blog post. Subsequently, Richard Holz, Dean of the College of Arts and Sciences, asked Assistant Dean South to undertake an investigation of the matter. (Ex. T17.)

South had made up his mind even before he had completed his investigation. In fact, he had helped Ms. Abbate prepare and file her formal complaint in early November. (Ex. T18.) A week after he was appointed as a supposedly impartial investigator, South exchanged emails with Holz and Barrington, attaching a public and widely publicized open letter condemning McAdams. (Ex. T19.) South stated that he hadn't signed onto the letter because he didn't know if Dean Holz would want him to do so. (*Id.*)

South was also extremely hostile to JD. He met with JD to discuss the matter on November 17, 2014 and secretly recorded the meeting. (Ex. T20.) He did not disclose his previous relationship with Ms. Abbate to JD and admitted that he lied to JD during the interview. (Ex. T20, T21.) To avoid discussing the matter with JD, he told him that he had not listened to the audio tape of JD's conversation with Abbate, when in fact he had. (Ex. T21.)

On December 11, the day after Ms. Abbate had again threatened Marquette with a lawsuit, the University decided that it would suspend Professor McAdams from his teaching

duties and from all other faculty activities that “would involve [his] interaction with Marquette students, faculty and staff.” (Ex. T22.) The University went so far as to ban McAdams from the Marquette campus. (*Id.*) On December 16, after waiting for Professor McAdams to submit his first semester grades, Marquette notified Professor McAdams of that decision. (Ex. T23.)

Marquette later went so far as to declare, with absolutely no basis in fact, that Professor McAdams’ presence on the Marquette campus would pose a threat to public safety. In his published comments to the Milwaukee Journal-Sentinel, Marquette spokesman Brian Dorrington stated that the University “will not stand for faculty members subjecting students to any form of abuse, putting them in harm’s way. We take any situation where a student’s safety is compromised extremely seriously.” See <http://archive.jsonline.com/news/education/marquette-university-professor-john-mcadams-remains-banned-from-campus-b99425150z1-288427731.html>. Even assuming that presence of a 68-year-old professor on the Marquette campus could pose some danger to Ms. Abbate, by the time this statement was made she had left Marquette for the University of Colorado.

On January 30, 2015, Marquette formally notified Professor McAdams that it was taking the necessary steps to revoke his tenure and terminate his employment. (Ex. M24.) Only once before in Marquette’s 135-year history has a faculty member been terminated for cause.⁴

Section 307.03(1) of the Faculty Statutes requires that in cases of termination for discretionary cause, the University must give notice of the statute allegedly violated, the date and location of the alleged violation, and a detailed description of the facts involved. (Ex. T1.) The only violation alleged in the January 30, 2015 Notice is the publication of the November 9 blog

⁴ In its response to Plaintiff’s Interrogatory #1, Marquette stated that another faculty member received a notice of termination for cause in the 1990s. It did not disclose whether that member had tenure. She did not request a hearing under the Faculty Statutes or otherwise contest the termination. (Ex. T33.)

post. It is thus the publication and content of the blog post, and nothing more, that the University says is sufficient to establish that it has discretionary cause to terminate a tenured professor.

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

Under the terms of the Faculty Statutes, Professor McAdams was entitled to protest his suspension and termination. He did. (Ex. T29.) In such a case, the Faculty Statutes provide for a hearing on the issue of cause before the Faculty Hearing Committee ("FHC"). Section 307.07 specifies the procedures that the FHC must follow in hearing the matter and requires them to issue their findings and conclusions, together with their recommendation for any disciplinary action, to the President of the University. (Ex. T1.) The President is not bound by the FHC's recommendation.

The FHC hearing took place in September 2015. (McGrath Aff. ¶1.) Professor McAdams objected on procedural grounds to the manner in which the hearing was conducted as well as to the refusal of the University to provide him and the Committee with all of the information pertinent to his defense. *See* Section III, *infra*. The FHC issued a report, concluding that the charges against McAdams were insufficient to support the revocation of his tenure and termination and recommending instead that he serve a two semester suspension without pay. On March 24, 2016, President Lovell advised McAdams that he was to be suspended without pay for two semesters, as the FHC had recommended. (McAdams Aff. ¶18.) He went beyond their recommendation, however, by demanding that as a condition of his reinstatement to the faculty, McAdams provide him (and Ms. Abbate) with a written statement expressing "deep regret" and admitting that his blog post was "reckless and incompatible with the mission and values of Marquette University." (*Id.*) By letter dated April 4, 2016, McAdams advised President Lovell that he would not say what he did not believe to be true, and that Lovell was exceeding his

authority under the Faculty Statutes by demanding that he do so. (Ex. A6.) As a result, McAdams will be not be reinstated to the faculty at the end of his two semester suspension and has effectively been fired.

9. This Lawsuit

Professor McAdams filed suit on May 2, 2016, asserting that Marquette breached his contract by suspending and terminating him in violation of his procedural and substantive rights. McAdams seeks summary judgment on the following claims: (1) that Marquette breached his contract by summarily suspending him on December 16, 2014 without notice or hearing as required by the contract itself; (2) that Marquette breached his contract by terminating him for conduct that the contract itself says cannot be grounds for termination – conduct that is protected by the doctrine of academic freedom and by the First Amendment; and (3) that Marquette breached his contract by failing to provide him with due process in connection with the Faculty Hearing Committee, in particular by withholding information essential to his defense from him and from the Committee itself.

ARGUMENT

I. Marquette Breached its Contract by Suspending Professor McAdams and Banishing Him from Campus.

By letter dated December 16, 2014, Marquette suspended McAdams from his faculty duties and banished him from campus. (Ex. T23.) It did so in clear violation of his contract. Section 306.01 of the Faculty Statutes provides that the University may suspend or terminate the appointment of a faculty member **only** for cause, as defined in Sections 306.02 and 306.03. Section 307.03 further provides that in **all** cases of suspension or termination, the University shall provide a notice to the faculty member that states what section of the Faculty Statutes the faculty member has allegedly violated, the date of the alleged violation, and a detailed

description of the facts constituting the violation. Marquette did not even attempt to comply with these contractual requirements prior to his suspension and banishment.

The December 16 letter did not reference any facts, much less the section of the Faculty Statutes allegedly violated or the conduct involved. It merely stated that Professor McAdams was being investigated for some unspecified “conduct” that the University intended to “review” under one or more unidentified requirements to be found somewhere in Marquette’s guiding values, mission statement, faculty handbook, or harassment policies. It then stated that:

-McAdams was “relieved of all teaching duties and all other faculty activities, including, but not limited to, advising, committee work, faculty meetings and any activity that would involve your interaction with Marquette students, faculty and staff.:

-McAdams was ordered to “remain off campus during this time, and should you need to come to campus, you are to contact [Dean Holz] in writing beforehand to explain the purpose of your visit, to obtain my consent and to make appropriate arrangements for that visit.” (Ex. T23.)

So not only was Professor McAdams suspended from his duties, he was banned from campus, and told that he dare not engage in “activity” that would involve interaction with anyone in the Marquette community. The University later explained that his banishment was justified because the presence on campus of a 68-year-old political science professor who had been on the Marquette faculty for almost 40 years posed a threat to public safety. *See* <http://archive.jsonline.com/news/education/marquette-university-professor-john-mcadams-remains-banned-from-campus-b99425150z1-288427731.html>.

Since 1915, the American Association of University Professors (AAUP) has been a leading organization in the fight for academic freedom at American universities.⁵ According to the AAUP, “to deny a faculty member the opportunity to teach, without cause and without due

⁵ The AAUP was founded in the wake of Leland Stanford’s decision to fire Stanford University Professor Edward Ross because he didn’t approve of his views on immigration and railroad monopolies. *See* www.aaup.org/about/history-aaup. The more things change, the more they remain the same.

process, regardless of monetary compensation, is to deny him his basic professional rights. Taking a good teacher out of the classroom is a serious harm in itself.” *The Use and Abuse of Faculty Suspensions*, <https://www.aaup.org/report/use-and-abuse-faculty-suspensions>. Suspension and banishment can be a particularly “devastating indictment of a faculty member” when “the reason alleged for suspension is the best interest of the students.” *Id.* (quoting *Academic Freedom and Tenure: University of Southern California*, ACADEME 81 (November–December 1995), 47–48). Such actions risk creating “a prejudicial atmosphere totally out of proportion to the alleged offense and undeserved in the light of the professor’s previous record.” *Id.* The AAUP has expressed concern about the growing use of suspension by universities as a means of disciplining faculty, a severe sanction that the AAUP has long regarded as “second only to dismissal.” *Id.* Presumably for all of these reasons the Marquette Faculty Statutes prohibit both suspension and termination without “cause” and without due process. But Marquette chose to ignore its own rules – and its contract with McAdams.

Marquette’s defense has been that McAdams was not actually “suspended” by the Holz letter because the University did not stop his pay. (Marquette Answer and Aff. Defs.; <http://archive.jsonline.com/news/education/marquette-says-it-hasnt-suspended-professor-john-mcadams-b99411727z1-286304231.html>.) According to Marquette, the word “suspension” means “suspension without pay.” (*Id.*) But the Faculty Statutes say otherwise. Pursuant to Section 307.02, “in all cases of ... suspension ... a faculty member’s entitlement to salary and fringe benefits shall continue, irrespective of any suspension from duties.” Whatever distinguishes “suspension” from some other status, it is not the absence of pay. And Wisconsin courts have repeatedly recognized and referred to the status of “suspension with pay.” *See, e.g., Arneson v. Jezwinski*, 225 Wis. 2d 371, 399, 592 N.W.2d 606, 618 (1999); *City of Kenosha v.*

LIRC, 2000 WI App 131, ¶3, 237 Wis. 2d 304, 614 N.W.2d 508; *State ex rel. Bliss v. Wis. Ret. Bd.*, 216 Wis. 2d 223, 231, 576 N.W.2d 76, 79 (Ct. App. 1998); *State ex rel. Reedy v. Law Enft Disciplinary Comm.*, 156 Wis. 2d 600, 604, 457 N.W.2d 505, 507 (Ct. App. 1990).

The Oxford English dictionary defines “suspension” as “[t]he official prohibition of someone from holding their usual post or carrying out their usual role for a particular length of time.” A faculty member who has been barred from teaching, has been forbidden to have contact with his colleagues, and has been banned from campus, has unquestionably been “suspended” under any plain meaning of the word.

Marquette’s position has also been specifically and emphatically rejected by the AAUP. “[S]uspending [faculty members] from teaching is suspending them, and the committee believes that the term is so understood by faculty members across the country, whether at research universities or at institutions engaged primarily in teaching.” *The Use and Abuse of Faculty Suspensions*, <https://www.aaup.org/report/use-and-abuse-faculty-suspensions>. According to the AAUP, whether or not the faculty member continues to be paid during the period of their suspension from teaching duties is immaterial. *See* 2008 Report by Committee A on Academic Freedom and Tenure, <https://www.aaup.org/NR/rdonlyres/545009CF-BFCF-4108-B320-DA6156984CD2/0/CommitteeAREport.pdf>; *see also* Lawrence C. Poston, *The Use and Abuse of Faculty Suspension*, *ACADEME* 94, no. 6 (2008).

McAdams was suspended and banished from campus on December 16, 2014. This was done in clear violation of the notice and procedural requirements of his contract with Marquette.

II. Marquette’s Termination of McAdams Constitutes a Breach of Contract.

Marquette claims that it has the right to terminate McAdams for “discretionary cause” as defined in §306.03 of the faculty statutes:

Discretionary cause shall include those circumstances, exclusive of absolute cause, which arise from a faculty member's conduct and which clearly and substantially fail to meet the standard of personal and professional excellence which generally characterizes University faculties, but only if through this conduct a faculty member's value will probably be substantially impaired. Examples of conduct that substantially impair the value or utility of a faculty member are: serious instances of illegal, immoral, dishonorable, irresponsible, or incompetent conduct. **In no case, however, shall discretionary cause be interpreted so as to impair the full and free enjoyment of legitimate personal or academic freedoms of thought, doctrine, discourse, association, advocacy, or action.** (emphasis added)

It should be clear from this that Marquette cannot claim discretionary cause to terminate McAdams for any conduct that is protected by his right to academic freedom. Section 307.07 of the Faculty Statutes expands those protections: “dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights guaranteed by the United States Constitution.” That latter section also makes it clear that, regardless of what limitations may be inherent in the concept of academic freedom, McAdams cannot be terminated for conduct that is speech or expression protected by the First Amendment. The contract thus contains broad and robust protections for freedom of expression, typical of what the market demands for university professors. Universities are not like other businesses. They hold themselves out to be in the business of free inquiry and open exchange. To attract faculty, they must promise freedom of expression that would not be found at private institutions like Foley & Lardner, Northwestern Mutual or even, to some extent, in government offices. Marquette promised Professor McAdams that he would not be fired for what he says even if what he says is critical of the University or unpopular with those who run it. If what he says would be protected by the First Amendment or by academic freedom, he is free to say it. Period.

According to the January 30, 2015 Termination Notice, the **only** conduct that provides Marquette with discretionary cause to fire him was his publication of the November 9 blog post. (See Ex. T24.) Under Wisconsin law, the interpretation and application of a contract to

undisputed facts presents a question of law. *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶¶21-23, 326 Wis. 2d 300, 786 N.W.2d 15. Thus, whether what McAdams wrote is protected by academic freedom or the broader right of free expression under the Constitution is a question of law to be decided by this Court. If what he wrote is protected as free speech, then Marquette has breached its contract with McAdams and he is entitled to summary judgment.⁶

Fortunately, freedom of expression is something that courts are familiar with. Courts understand that whether someone should have been permitted to say what she said is generally not a question for a jury. Freedom of speech is a counter-majoritarian concept – something that by its very nature cannot be subject to popular sentiment. Speech that can be punished by some after the fact assessment of whether it should have been said, and in the absence of clear and narrow standards rooted in the relatively few justifications for limiting speech, is not free at all. Marquette is seeking to fire a professor who wrote an accurate post about a matter of public and institutional concern. It is doing so notwithstanding that the blog post did not urge unlawful action and was not phrased in obscene or even intemperate language. It is doing so because of the reaction of approximately eighteen unknown persons who read something, somewhere, about the controversy and who, unknown to John McAdams, sent Ms. Abbate distasteful emails. (Luehrs Aff. ¶5.) This is not a close question. If the state were attempting to punish McAdams for what he wrote, it would be laughed out of court. If this is the measure of academic freedom, then Marquette's promises to its faculty – and those of every other university – are not worth the paper they are written on.

⁶ The question whether the blog post could constitute discretionary cause if it is not protected by the Constitution or academic freedom involves disputed questions of fact and cannot be resolved on summary judgment.

A. *The First Amendment Guarantees a Broad Right to Speak on Matters of Public and Institutional Interest.*

While the First Amendment does not generally protect an employee of a private institution, Marquette contractually bound itself to its restrictions. “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.” Faculty Statutes §307.07(2). McAdams thus has a contractual right to free speech that is coextensive with his right to freedom of expression under the First Amendment as a private citizen.

Marquette has by contract given McAdams rights that are even broader than the rights he would have as a non-academic employee of a public institution. Non-academic public employees may not be dismissed for exercising their First Amendment rights, but they are subject to the balancing test announced in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Under *Pickering*, courts balance the interests of the employee as a citizen commenting upon matters of public concern with the interests of the employer as an employer. *Id.* at 568.

There is no balancing test in Marquette’s contract with McAdams, because Marquette – in keeping with what the market for faculty members demands – has chosen to stand in a different relationship with its employees. Marquette could have written the contract to permit it to balance the faculty member’s right of free expression with its institutional interests. But it did not. It used broad and unqualified language to assure its faculty members – to promise them – that they would not be fired for what they say. As we shall see, commonly accepted principles governing free expression absolutely preclude what Marquette is attempting to do here.

B. Academic Freedom Guarantees a Broad Right to Speak on Matters of Public and Institutional Interest.

The Court must first determine what the contract means when it says that discretionary cause cannot include conduct that is protected by “academic freedom of thought, doctrine, discourse, association, advocacy, or action.” This is an important question and one that should not be difficult for the Court to answer.

The United States Supreme Court has recognized that the doctrine of academic freedom has a constitutional dimension and is closely associated with, or similar to, the rights of free expression guaranteed by the Constitution.

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

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

It is important to note that academic freedom includes a right of expression that is not subject to the control of those who run a university. In *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), the Court explained that the “essentiality of freedom in the community of American universities is almost self-evident.” Thus, “[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.” *Id.*

Black’s Law Dictionary defines academic freedom as “the right (esp. of a university teacher) to speak freely about political or ideological issues without fear of loss of position or other reprisal.”⁷ This broad freedom is reflected in the statements of organizations particularly concerned with the subject. For example, the AAUP, in concert with the Association of

⁷ BLACK’S LAW DICTIONARY, paperback ed., 2011.

American Colleges and Universities, defines academic freedom as including “full freedom in research and in publication,” “freedom in the classroom discussing their subject,” and the freedom to “speak or write as citizens . . . free from institutional censorship or discipline.” *See* 1940 Statement of Principles on Academic Freedom and Tenure, *available at* <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>. This is so even when professors speak outside of class or of their academic discipline – speech which the AAUP refers to as “extramural utterances.” With respect to such speech the AAUP has stated:

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

AAUP Statement on Civility, *available at* <https://www.aaup.org/issues/civility>.

Dr. Peter Wood, President of the National Association of Scholars (NAS), has agreed to appear and offer expert testimony in support of Professor McAdams in this case. His statement is attached as Exhibit T25. Dr. Wood’s statement provides further illumination as to the broad nature of academic freedom, and in particular to the protection that it affords to academics who comment on conditions at their own university. Under the NAS standards, academic freedom:

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

(Ex. T25 at 2, emphasis added.)⁸

⁸ As Dr. Wood points out in his report, the major difference between the AAUP and NAS on the contours of academic freedom has to do with the level of protection for extramural utterances. AAUP takes the stronger position: it says that academic freedom always applies to and protects extramural utterances. The NAS view is more restrictive, as explained by Dr. Wood in his report. He makes it clear, however, that even under the narrower view

Marquette itself adopted the AAUP's 1940 Statement on extramural utterances almost verbatim in the "Rights and Responsibilities" section of the faculty handbook:

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

(Ex. T26.)

Marquette has said that the idea that faculty members should strive for accuracy, respect and restraint is dispositive here. But that idea does not provide the University with carte blanche to punish speech that it considers to have been unadvisable or inaccurate in some respect. Such an interpretation would be inconsistent with the broad and virtually absolute protections of §306.03 ("In no case, may "discretionary cause be interpreted so as to impair the full and free enjoyment of legitimate personal or academic freedoms of thought, doctrine, discourse, association, advocacy, or action") and §307.07(2) ("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") (emphasis added).

Applying the protection of academic freedom, courts have regularly rejected attempts by educational institutions to discipline or terminate faculty for their extramural utterances. Most recently, in *Salaita v. Kennedy*, 118 F. Supp. 3d 1068 (N.D. Ill. 2015), the court held that anti-Semitic Twitter statements made by Professor Salaita – statements that the court was reluctant to

of extramural utterances taken by the NAS, the doctrine of academic freedom applies to and protects McAdams' blog post. "[T]hese differences have no bearing on the case at hand. Supporters of academic freedom across the spectrum of philosophical differences about what it means agree that Marquette University's treatment of Professor McAdams is an instance in which the university has violated his academic freedom." (Ex. T25 at 12.)

quote verbatim but characterized as harsh and profanity-laden – were protected as extramural utterances. Rescinding his job offer based on his Tweets was in violation of his First Amendment rights. *Id.* at 1083-84. Although Salaita was employed by a State university and alleged only a First Amendment claim, the case stands for the proposition that disparaging and disruptive “extramural utterances” cannot be grounds for dismissal simply because they are disparaging and disruptive. The University of Illinois eventually settled with Salaita by paying him \$600,000 and his attorney fees. See <http://www.chicagotribune.com/news/local/breaking/ct-steven-salaita-settlement-met-20151112-story.html>.

Starsky v. Williams, 353 F. Supp. 900 (D. Ariz. 1972), involved a tenured professor who participated in a protest during which he both encouraged and discouraged student behavior and made vile remarks to bystanders. Judging the professor according to the entire period of his employment by the university, the Court held that the Board of Regents violated his academic freedom. The court stated,

This Court finds that the Board, in discharging Professor Starsky on the basis of narrow professional standards of accuracy, respect, and restraint applied to public statements made as a citizen, has violated its own A.A.U.P. standards not to discipline a teacher when he “speaks or writes as a citizen,” and has violated Professor Starsky's rights to freedom of speech by applying constitutionally impermissible standards to speech made as a citizen. *Id.* at 922.

Adamian v. Jacobsen, 523 F.2d 929 (9th Cir. 1975), involved a tenured professor’s involvement in Vietnam-related protests. The professor both participated in these protests and made vulgar comments in an attempt to block a motorcade and incite fellow protestors to storm the field of the campus stadium. The university dismissed the professor for “cause” based on a faculty statute identical to the AAUP’s 1940 Statement on Extramural Utterances. See *supra* p. 24. The circuit court held that the university violated the professor’s academic freedom:

Self-restraint and respect for all shades of opinions, however desirable and necessary in strictly scholarly writing and discussion, cannot be demanded on pain of dismissal once the professor crosses the concededly fine line from academic instruction as a teacher to political agitation as a citizen even on the campus itself. *Id.* at 934.

In all of these cases, it is possible to argue that the professors' statements were inaccurate or that they were "harmful" to students and to the mission of the university. But firing a tenured member of the faculty for speaking is and should be a very tall order. Indeed, as the AAUP has recognized, speech outside of the classroom can rarely fall outside the protection of academic freedom. In its 1960 defense of a professor who was fired for writing a letter to a student newspaper urging students to reject "Victorian" sexual morality and extolling the sexual freedom of the day, the AAUP said:

The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it **clearly demonstrates** the faculty member's unfitness to serve. **Extramural utterances rarely bear upon the faculty member's fitness for continuing service.** Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar.

John K. Wilson, *Academic Freedom and Extramural Utterances: The Leo Koch and Steven Salaita cases at the University of Illinois*, *AAUP Journal of Academic Freedom* (2015), available at <https://www.aaup.org/sites/default/files/Wilson.pdf> (quoting the 1964 "Committee A Statement on Extramural Utterances") (emphasis added). If Marquette is to satisfy this standard, it must clearly show that the blog post itself – the **only** offense for which Marquette has said McAdams is charged – was so far beyond the pale that it demonstrates that he is unfit to serve on the Marquette faculty.

C. There are Few Exceptions to the First Amendment and Academic Freedom. None of Them Apply Here.

In assessing the protection of Professor McAdams' blog post, the court can draw upon well-established and time-honored principles regarding freedom of expression. Marquette has offered a number of explanations for why it can punish a professor for speaking. It has said that

the blog post was misleading and inaccurate. It was not. Comparing the transcript of the conversation to what McAdams wrote makes that clear. And even if that were not the case, the protection afforded by academic freedom is not lost by inaccuracy. Nor is accuracy a requirement of First Amendment protection.

Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

United States v. Alvarez, 132 S. Ct. 2537, 2547-48 (2012) (Kennedy, J., joined by Roberts, C.J. and Ginsburg and Sotomayor, JJ). “Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny.” *Id.* at 2552 (Breyer, J., concurring, joined by Kagan, J). Certainly a writing cannot lose its protection because someone else would have emphasized or added additional facts or qualified statements of opinion in some way.

Marquette has also said that McAdams’ blog post was dishonorable – an attack of some kind on the Instructor involved. (Ex. T24 at 1.) But as the AAUP has recognized, academic freedom is not limited to “civil” communication. “Principles to Guide Decision Making regarding Politically Controversial Academic Personnel Decisions” at 100, *available at* <https://www.aaup.org/NR/rdonlyres/895B2C30-29F6-4A88-80B9-FCC4D23CF28B/0/PoliticallyControversialDecisionsreport.pdf> (“Politically controversial academics are frequently found to be abrasive individuals who are difficult to work with. Consequently, lack of collegiality or incivility may easily become a pretext for the adverse evaluation of politically controversial academics.”).

Marquette has also emphasized the reaction of others – particularly the eighteen emails received by Ms. Abbate that were offensive and distasteful. But free expression does not become unfree because of the reaction of others. In the few exceptions where the Supreme Court has allowed restrictions on free speech due to the reaction of others, the room for such restrictions has been exceedingly narrow. The “fighting words” exception is quite limited, proscribing only those words that incite immediate violence or inflict injury by their mere utterance. *See, e.g., Chaplinsky v. N.H.*, 315 U.S. 568, 571-72 (1942). That exception cannot possibly apply to the McAdams post. Indeed, even speech that expressly calls for unlawful action is not unprotected unless it calls for “imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Marquette has said that Professor McAdams could have written the blog post without identifying Ms. Abbate. But there is no exception to the First Amendment for speech that identifies persons engaged in conduct that the writer wishes to call into question. Even in those instances in which journalists decide to protect the identity of persons being written about they do so voluntarily – they would have a First Amendment right to do otherwise – and the persons involved are in need of special protection such as minors and crime victims. That is a far cry from an Instructor who has been empowered by the University to exercise authority over its students. Indeed, even defamation laws concerning private citizens require that a communication be false and defamatory and, where addressing a matter of public concern, require at least a showing of negligence. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Welch*, 418 U.S. 323 (1974). None of that is present here.

And finally, even in those few instances where speech can be restricted, courts have emphasized the need for clear and narrow rules announced before the fact. As Judge Diane Sykes recently noted:

Regulations on speech, however, must meet a higher standard of clarity and precision. In the First Amendment context, “rigorous adherence to [these] requirements is necessary to ensure that ambiguity does not chill protected speech.” *Id.* Vague or overbroad speech regulations carry an unacceptable risk that speakers will self-censor, so the First Amendment requires more vigorous judicial scrutiny. *See Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (explaining that where a law reaches protected expression, “the doctrine demands a greater degree of specificity than in other contexts”).

Wis. Right to Life v. Barland, 751 F.3d 804, 835 (7th Cir. 2014). There was nothing like that here.

D McAdams’ Termination Violates Free Speech and Academic Freedom.

Marquette appears to believe that the whole here is greater than the sum of its parts. Although Professor McAdams was promised “the full and free enjoyment of legitimate personal or academic freedoms of thought, doctrine, discourse, association, advocacy, or action” and was assured that Marquette would not use dismissal to punish him for speech that would be protected by the United States Constitution, he is being fired for an accurate and civil (if firm) blog post about a matter of great institutional and public interest, *i.e.*, the ability of students to engage in free and open discourse – and even disagree with – their instructors. He is being disciplined for discussing the actions of a University Instructor and identifying who he was talking about in the absence of any rule or even principle making it clear that he should not do so.

The University says that it has found McAdams to be unfit to serve on its faculty, thus satisfying the requirement of discretionary cause under the contract. But although McAdams may be cantankerous, nothing in the actual blog post in question here suggests that he is unfit. And his “entire record as a teacher and a scholar” suggest precisely the opposite. Marquette faculty members are evaluated based upon their teaching, scholarship and service to the

University. (Ex. T27.) Dr. Barrington conceded during his deposition that he had never given McAdams a poor review. (Ex. T28.)

The record shows that McAdams' student evaluations have consistently been average or above average. (McAdams Aff. ¶7, Ex. A3, A4.) Some students have called him the best professor at Marquette. (Ex. A4.) McAdams had published two scholarly books within the two years prior to his suspension and termination; no other member of the political science faculty has done as well. And McAdams has regularly served on various University committees, an important way for faculty members to be of service to the University. (Ex. A2.) Nothing in his 35-year record suggests that he is unfit.

McAdams has done nothing even remotely approaching the kind of egregious misconduct that might support dismissal. All that he did was publish a blog post – critical but civil in tone – about an Instructor and the University administration. He did not lie. He did not use foul language. He did not call anyone names. He did not ask anyone to do anything, much less call for riots or demonstrations. He simply made a point about political correctness and his opposition to it. As Dr. Wood pointed out:

Professor McAdams acted as a whistleblower by bringing to public attention a deplorable situation that campus authorities up to that point had declined to take seriously. As often happens when whistleblowers go public, the institution responded with indignation; denied the existence of the deplorable situation; claimed that, deplorable or not, proper steps had already been taken, and then proceeded to invent rules that, after the fact, could be used to punish the whistleblower.

(Ex. T25 at 26.) McAdams' blog post is protected by the doctrine of academic freedom and the First Amendment.

III. Marquette Breached Its Contract with Professor McAdams by Failing to Provide Him with the Procedural Protections to which He Was Entitled Under his Contract.

The Faculty Statutes permit McAdams to contest the University's decision to fire him, and provide that if he does so it will hold a hearing on the contested termination before the Faculty Hearing Committee ("FHC"). That hearing did take place. But Marquette violated procedural provisions of its contract in three ways during the FHC process: (A) it failed to provide him with documentary evidence and access to witnesses that he requested; (B) it did not limit its evidence to the facts and issues disclosed in the Notice of Termination; and (C) it failed to ensure an unbiased panel on the FHC.

A. *Marquette Failed to Provide Professor McAdams with Documents and Access to Witnesses.*

Section 307.07 of the Faculty Statutes sets forth the procedures for FHC hearings.

Subsection 10 states:

The subject faculty member will be afforded an opportunity to obtain necessary witnesses and documentation or other evidence and is entitled to examine the evidence submitted to the FHC by the University Administration. The Administration also will cooperate with the FHC in securing witnesses from the University and making available documentary or other evidence. Likewise, the Administration will be entitled to examine documentary or other evidence submitted to the FHC by the subject faculty member. (Emphasis added.)

Marquette thus had a duty to cooperate in securing witnesses from the University and to make "documentary or other evidence" available to Professor McAdams. It refused to do so. To the contrary, Marquette deliberately abused the FHC process to give itself strategic and tactical advantages at the hearing by withholding documentary evidence and access to witnesses.

In order to prepare for his defense, counsel for McAdams requested necessary documents from Marquette. Marquette refused to provide the requested documents, except for those that Marquette had apparently decided it would use in support of its own case. (McGrath Aff. ¶7.)

Only after McAdams filed suit and Marquette was forced to produce relevant documents has McAdams discovered that Marquette had and failed to disclose documents that would have been essential to the preparation of his case before the FHC. Many of those documents either call into question or directly conflict with positions taken by Marquette before the FHC. The newly discovered documents are described in and attached as exhibits to the McGrath Affidavit. They show that Marquette deliberately withheld “documentary or other evidence” necessary for McAdams to defend himself before the FHC. As shown in the McGrath Affidavit:

- Marquette portrayed Ms. Abbate as the victim of publicity in this case, but Marquette failed to produce documents showing that she encouraged some of that publicity and even threatened to cause more national publicity if Marquette did not pay her “reparations.”
- Marquette told the FHC that Ms. Abbate left Marquette because of adverse publicity and the distasteful emails that she received. It produced witnesses who said that McAdams caused her to leave the University. But Marquette refused to produce emails that showed that a year before she left Marquette, Ms. Abbate applied to a more prestigious institution, the University of Colorado. Colorado turned her down. In the wake of the McAdams controversy, Colorado not only admitted her to their program but offered her significant financial aid. If anything, the McAdams controversy allowed her to do what she had tried to do and failed the year before. And Marquette failed to produce an email from Assistant Dean South which showed why she wanted to leave. It was as much about the misconduct of Dr. Snow (the chair of Ms. Abbate’s department) as it was about McAdams.
- Marquette told the FHC that Ms. Abbate had received some very distasteful emails and gave them copies of the bad ones. But did not produce all, or even most, of the emails that Ms. Abbate had received. All of the emails have now been produced, and are catalogued in the Luehrs Affidavit, submitted herewith. Ms. Abbate received a total of 135 emails and letters commenting on her interaction with JD. Of the 135, 49 were supportive of her, 85 criticized her, and one was neutral. Of the 85 criticizing her conduct, only 18 were distasteful, and the remainder consisted of communications from members of the public saying that they thought her statements to her undergraduate student were either inconsistent with Catholic doctrine, inconsistent with the free speech rights of the student, and/or inconsistent with the open dialogue that should be permitted in a university.

There are additional examples, all more fully described in the McGrath Affidavit.

McAdams could and would have used the documents that Marquette decided to hide in his

defense before the FHC if he had been aware of their existence. Many of them came from the files of witnesses who testified for Marquette at the hearing and could and would have been used to cross-examine them. Discovery in this lawsuit has thus made it clear that Marquette decided to “game the system” before the FHC. It combed through its files and cherry-picked the helpful documents. Everything else – including numerous documents that would have supported McAdams – was withheld, despite McAdams’ request. This kind of behavior is fundamentally unfair, and inconsistent with Marquette’s duty to permit McAdams an opportunity to obtain “documentation and other evidence” from the University.

Marquette also failed to make the witnesses against him available to McAdams as required by Section 307.07(10). On February 6, 2015, counsel for McAdams requested that the individuals Marquette had listed as prospective witnesses – witnesses Marquette had obviously interviewed – be made available for an interview by McAdams. (Ex. T29.) The University allowed McAdams to interview a few of them, but not Ms. Abbate herself, Professors Luft, Snow, and Donaldson, or the other students from Ms. Abbate’s class identified in the Notice of Termination. (McGrath Aff. ¶25.)

Marquette called Ms. Abbate as a witness before the FHC. It submitted cherry-picked documents and written statements from the other witnesses whom McAdams was not allowed to interview. Section 307.07(15) provides that “[a]t the hearing, the subject faculty member and the University Administration will have the right to confront and ask questions of all witnesses.” In violation of this provision, Marquette submitted testimonial statements and other documents authored by witnesses whom McAdams was never able to confront or cross-examine.

Marquette had, and probably took, the opportunity to interview all of these witnesses and learn everything they knew about the relevant events; McAdams did not. Marquette had the

opportunity to learn which of these witnesses would be effective and which might not and then picked the ones they would call to support its case; McAdams did not.

McAdams raised these due process issues regarding documents and witnesses during the FHC process but his concerns were given short shrift. (McGrath Aff. ¶¶8, 15, 23, 25.) Section 307.07(17) of the Faculty Statutes provides:

If either the University Administration or the subject faculty member willfully fails or refuses to give relevant evidence that is exclusively within its control, the issue shall be resolved against the party who so fails or refuses to give evidence.

Here, Marquette willfully failed and refused to turn over evidence that was relevant to this dispute. McAdams asked the FHC to draw an inference that the documents that Marquette refused to turn over would demonstrate his innocence. The FHC refused. (McGrath Aff. ¶8.) The FHC also had the authority to order the proceedings adjourned until Marquette complied with its obligations under the Faculty Statutes. *See* §307.07(10). McAdams also asked for that. The FHC refused. (McGrath Aff. ¶25.)

B. Marquette Submitted Evidence that Went Well Beyond the Charges Raised and the Facts Disclosed in the Notice Required by the Faculty Statutes.

Section 307.03(1) of the Faculty Statutes required that the Administration notify Professor McAdams of “the statute violated; the date of the alleged violation; the location of the alleged violation” together with a description of the pertinent facts and the names of the witnesses against him. By letter dated January 30, 2015, Dean Holz provided Professor McAdams with the required Notice. (Ex. T24.)

That Notice refers to a single violation of Section 306.03 of the Statutes – the November 9, 2014 blog post on Professor McAdams’ Marquette Warrior Blog. No other wrongdoing on the part of Professor McAdams is specified in the Notice. *See* Exhibit A to the January 30, 2015

letter (Ex. T24.) If Marquette intended to assert that any misconduct other than the blog post provided a basis for termination, it was required by the Statutes to specify what it was. It did not.

The hearing before the FHC should have been limited to the single violation that Marquette specified in the Notice – the blog post and nothing but the blog post. It was not. Professor McAdams was forced to respond to numerous allegations that were not the subject of the Notice. These included events relating to a 1995 controversy over the Kennedy assassination, a 2007 complaint regarding a blog post relating to a professor named Theresa Tobin, a 2010 visit to Marquette by a speaker named Ronnie Sanlo, and an interaction with a group called Students for Justice in Palestine. The FHC also accepted substantial testimony on these incidents and others that had nothing to do with the blog post. *See McGrath Aff.* ¶26. The FHC’s findings of fact and conclusions of law are based on allegations of past misconduct that have nothing to do with the violation claimed in the Termination and none of which should have been considered by the FHC.

C. Marquette refused to ensure an unbiased panel on the FHC.

One of the FHC members, Dr. Lynn Turner, signed an open letter critical of McAdams and supportive of Ms. Abbate *prior to* the FHC hearing. (Ex. T30.) The letter made the following statements:

We support Ms. Abbate and deeply regret that she has experienced harassment and intimidation as a direct result of McAdams’s actions. McAdams’s actions—which have been reported in local and national media outlets—have harmed the personal reputation of a young scholar as well as the academic reputation of Marquette University. They have negatively affected campus climate, especially as it relates to gender and sexual orientation. And they have led members of the Marquette community to alter their behavior out of fear of becoming the subject of one of his attacks. Perhaps worst of all, **McAdams has betrayed his role as a faculty member by pitting one set of students against another, by claiming the protection of academic freedom while trying to deny it to others, and by exploiting current political issues to promote his personal agenda. This is clearly in violation of . . . the Academic Freedom section of Marquette’s Faculty Handbook[.]. . .** McAdams has ignored both the spirit and the

letter of this statement and has failed to meet the standards we aspire to as faculty, as well as the broader ethical principles that guide Marquette's mission as a Jesuit, Catholic institution. (Emphasis added.)

Section 307.07(7) of the Faculty Statutes sets forth the following provision related to bias:

Members of the FHC who deem themselves disqualified for bias or interest will remove themselves from the case. In addition, either party may petition the FHC for recusal of a particular committee member on grounds of bias or interest. Removal of a member for bias or interest is at the discretion of the FHC. Replacement member(s) to the FHC will be selected from the duly constituted list of alternates maintained by the FC.

Relying on this provision, McAdams requested Dr. Turner's recusal from the FHC. She refused. Marquette and the FHC supported her decision to remain on the Panel.

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

IV. MU breached its obligations of good faith and fair dealing

Wisconsin courts recognize an implied obligation of "good faith and fair dealing" in all Contracts, and in employment contracts in particular. In *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, 291 Wis. 2d 393, 717 N.W.2d 58, the Wisconsin Supreme Court noted that "[p]arties to a contract have a duty of good faith to each other," "[e]very contract implies good faith and fair dealing between the parties to it, and a duty of co-operation on the part of both parties," and "[a] party may be liable for breach of the implied contractual covenant of good

faith even though all the terms of the written agreement may have been fulfilled.” *Id.*, ¶35 (internal citations omitted). The court also noted,

it may be said that contracts impose on the parties thereto a duty to do everything necessary to carry them out.... Moreover, there is an implied undertaking in every contract on the part of each party that he [or she] will not intentionally and purposely do anything to prevent the other party from carrying out his [or her] part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Ordinarily if one exacts a promise from another to perform an act, the law implies a counter-promise against arbitrary or unreasonable conduct on the part of the promise . . . The duty of good faith arises because parties to a contract, once executed, have entered into a *cooperative relationship* and have abandoned the wariness that accompanied their contract negotiations, adopting some measure of trust of the other party.

Id., ¶¶35-36 (internal citations and quotations omitted).

Marquette failed to meet this standard in numerous ways. First, Marquette conducted a biased investigation. The Administration’s lead investigator, Dr. South, had made up his mind before his investigation even got underway. He was a friend and mentor of Ms. Abbate, and the day after the blog post appeared he was helping her draft her complaint demanding that McAdams be sanctioned for his misconduct. (Ex. T18.)

Second, Marquette made public statements that falsely implied that Professor McAdams was a physical danger to students necessitating his banishment from campus. There was, and is, no evidence or reason to believe that McAdams was a physical threat to anyone. In doing so, Marquette unfairly tarnished McAdams’ reputation in the community before the committee hearing.

Third, Marquette allowed a biased member of the FHC, Dr. Turner, to remain on the Committee. If her failure to recuse was not a breach of any express provision of the contract, it demonstrates Marquette did not intend to provide fair proceedings for Professor McAdams. The obligation of good faith and fair dealing required Marquette to be equally concerned about the

fairness of the proceedings. *Metropolitan Ventures*, 2006 WI 71, ¶36 (“The duty of good faith arises because parties to a contract, once executed, have entered into a *cooperative relationship* and have abandoned the wariness that accompanied their contract negotiations, adopting some measure of trust of the other party.”).

Fourth, Marquette refused to produce key documents within its control and make its own witnesses available so that McAdams could prepare his defense. Even if such misconduct was not a breach of any express provision of the contract, it demonstrates Marquette never intended to give McAdams a fair hearing.

V. Neither the FHC Recommendation nor President Lovell’s Decision Warrant any Deference from this Court.

Marquette will undoubtedly argue that this Court should defer to the findings and conclusions made by the FHC. That would be wrong. The FHC’s report has no evidentiary value and is entitled to no deference, particularly given its lack of a complete record. This Court must reach its own conclusions of fact and law without regard to the FHC’s findings.

McConnell v. Howard University, 818 F.2d 58 (D.C. Cir. 1987), is directly on point. *McConnell* involved a dispute between a tenured professor and a private university that terminated him for “neglect of professional responsibilities.” On appeal, the circuit court rejected both the district court and university’s assertion that the court “ought to take a more deferential stance toward [the] University’s decision to terminate” the professor. *Id.* at 67. Rejecting a plea for deference based on “the special nature of the university,” the court stated:

The appellee urges us to adopt the view of the District Court that “a federal court should hesitate before significantly intruding in the administration of university affairs, particularly in a three-cornered dispute between a professor, a student and a university.” 621 F. Supp. at 330 n. 13. We find no support for this argument in this case. This is not a “three-cornered dispute;” rather, what is at stake are the contractual rights of Dr. McConnell. However, taking the point more broadly, we do not understand why university affairs are more deserving of judicial deference than the affairs of any other

business or profession. . . . **[E]ven if there are issues on which courts are ill equipped to rule, the interpretation of a contract is not one of them.**

Id. at 69-70 (emphasis added).

After reviewing and rejecting the university's pleas for deference, the court concluded, "We find no reason not to do here what courts traditionally do in adjudicating breach of contract claims: interpret the terms of the contract and determine whether the contract has been breached." *Id.* at 70.

Earlier this year, the Seventh Circuit applied *McConnell* to a contested dismissal involving a private college, similarly concluding that the decision and recommendations of the college deserved no deference by the court. *See Roberts v. Columbia College Chicago*, 821 F.3d 855 (7th Cir. 2016). Rejecting the college's plea for deferential judicial review, the 7th Circuit stated:

As in *McConnell*, the provision here merely clarifies the internal review procedures for professors seeking to challenge the termination decision *within Columbia itself*. It does not prevent terminated tenured professors from bringing their claims to court. Further, tenure would be an illusory benefit if we interpreted the Statement of Policy as preventing Roberts from filing suit to challenge the merits of Columbia's decision to terminate his employment.

Id. at 862-63 (emphasis in original).

The Marquette Faculty Statutes accord no weight to the FHC analysis or recommendations. The "recommendation" of the FHC is only that, a recommendation. It is not binding on Marquette, on Professor McAdams, or on this court.

CONCLUSION

The material facts are not in dispute and the law is clear. McAdams is entitled to: (1) a declaration that Marquette breached its contract with him by summarily suspending him from his faculty position and banning him from campus on December 16, 2014 without following the due

process procedures set forth in the Faculty Statutes; (2) a declaration that Marquette breached his contract by seeking to revoke his tenure and terminate his employment because of conduct protected by the doctrine of academic freedom and the First Amendment to the United States Constitution; (3) a declaration that Marquette breached his contract by failing to provide him with the procedural protections that his contract guarantees in connection with the proceedings of its Faculty Hearing Committee; (4) a declaration that Marquette's conduct was in breach of the covenant of good faith and fair dealing in its contract with him; (5) a declaration that McAdams is entitled to immediate reinstatement as a member of the Marquette faculty in good standing; and (6) a declaration that McAdams is entitled to recover damages to be proved at trial as the result of Marquette's breaches of his contract.

Dated this 9th day of December, 2016.

Respectfully submitted,
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