

SUPREME COURT
OF WISCONSIN
Appeal Case No. 2017AP1240

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OF WISCONSIN

JOHN McADAMS,
Plaintiff-Appellant

-vs.-

MARQUETTE UNIVERSITY,
Defendant-Respondent

**AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS IN SUPPORT OF PLAINTIFF—APPELLANT
JOHN McADAMS' PETITION TO BYPASS**

Respectfully submitted by:

Counsel of Record:

Frederick Perillo
The Previant Law Firm, S.C.
310 West Wisconsin Avenue, Suite 100 MW
Milwaukee, WI 53203
(414) 223-0434
fp@previant.com

Counsel for Amicus Curiae:

Risa L. Lieberwitz
General Counsel
American Association of
University Professors
Professor of Labor and
Employment Law
School of Industrial and
Labor Relations
Cornell University
361 Ives Hall
Ithaca, NY 14853
(607) 255-3289

Counsel for Amicus Curiae:

Aaron M. Nisenson
Senior Counsel
Nancy A. Long
Associate Counsel
American Association of
University Professors
1133 19th Street N.W., Suite 200
Washington, D.C. 20036
(202) 737-5900
legal.dept@aaup.org

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Association of University Professors (AAUP), founded in 1915, is a non-profit organization representing the interests of over 40,000 faculty, librarians, graduate students, and academic professionals at institutions of higher education across the country. The AAUP is committed to advancing academic freedom, the free exchange of ideas, and higher education's contribution to the common good. AAUP frequently submits amicus briefs in cases that implicate its policies or otherwise raise issues important to higher education or faculty members. *See, e.g. Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016); Demers v. Austin, 746 F.3d 402 (9th Cir. 2014).*

I. Summary of Argument

The AAUP is participating in this case to highlight AAUP's policy documents and standards that guarantee faculty rights of academic freedom and due process. This Court's decision on this crucial issue can serve to protect those who express controversial views from discipline and the silencing of their voices, thereby advancing the cause of academic freedom.

The case arose from a blog post written by Marquette University professor Dr. John McAdams, a frequent critic of the University. The post criticized the University, other University faculty, and the actions of a graduate student/instructor. The administration proposed terminating Dr. McAdams. The Faculty Hearing Committee ("FHC") found that the opinions expressed by Dr. McAdams were protected by academic freedom, but that parts of the blog post, such as naming the graduate student/instructor, warranted a one to

two-semester suspension, but not termination. Marquette University President Michael Lovell imposed an additional penalty as a condition of Dr. Adams's reinstatement, requiring Dr. McAdams to write a statement of apology and admission of wrongdoing. Dr. McAdams's reasonable refusal to do so resulted in his *de facto* termination without due process or opportunity to contest the administration's action.

AAUP policy documents and standards on academic freedom and due process have been adopted by Marquette and were relied upon by the Circuit Court, the parties, and the FHC. As the FHC explained, "all [Marquette University] faculty members are guaranteed academic freedom, defined in the *Faculty Handbook* using language taken directly from [AAUP's] groundbreaking 1940 *Statement of Principles on Academic Freedom and Tenure*...." Faculty Hearing Committee, *In the Matter of the Contested Dismissal of Dr. John C. McAdams, Final Report 70* (Jan. 18, 2016) (FHC Report).

AAUP policies have also formulated standards for "academic due process," consisting of procedural protections to be followed by an administration prior to dismissing or imposing severe sanctions on faculty members.¹ These standards have served as the basis for the due process policies at Marquette and many other colleges and universities, including notice of charges and a hearing before an elected faculty committee in which the administration has the burden of proving adequate cause for discipline. *See*, Marquette Faculty Statutes (FS), Chapter 307.

¹ AAUP, *Statement on Procedural Standards in Faculty Dismissal Proceedings*, AAUP POLICY DOCUMENTS & REPORTS 91 (11th ed. 2015) ("AAUP Policy Documents"); AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure*, AAUP Policy Documents at 79.

This *amicus* brief explains AAUP policies defining the broad scope of academic freedom in extramural speech. See *Gray v. Bd. of Higher Educ., City of New York*, 692 F.2d 901, 907 (2d Cir. 1982) ("Certain AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies, such as off-campus speech by professors."). Specifically, under that standard, which the FHC applied in the instant case, a college or university administration cannot discipline a faculty member unless it proves that the extramural speech "clearly demonstrates the faculty member's unfitness to serve," taking into account the faculty member's entire record as a teacher and scholar. *Committee A Statement on Extramural Utterances*.² Amicus AAUP urges this Court to adopt this standard in interpreting university academic freedom policies such as those provided in Marquette's Faculty Handbook and Faculty Statutes.

This *amicus* brief also argues that Marquette violated Dr. McAdams's due process rights by unilaterally imposing a new penalty that required Dr. McAdams to write a statement of apology/admission as a condition of reinstatement. This severe sanction would compel Dr. McAdams to renounce his opinions, a fundamental violation of his academic freedom. It also amounted to a *de facto* termination that was imposed in contravention of the FHC's recommended lesser penalty.

² AAUP Policy Documents at 31.

II. AAUP Policies Require Broad Academic Freedom for Extramural Speech, Particularly for Controversial or Political Speech

Marquette has adopted AAUP policies regarding academic freedom, most importantly the 1940 *Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments* (1940 *Statement of Principles*).³ Further, the Circuit Court and the parties agree that Dr. McAdams's blog post addressed topics within the category of academic freedom protecting extramural speech.

The AAUP's 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*⁴ defines academic freedom as comprising three elements: teaching, research, and extramural speech. The inclusion of extramural speech reflects the problems at that time of dismissals by universities of outspoken social scientists. The 1940 *Statement of Principles*, jointly formulated by the AAUP and the Association of American Colleges (of which Marquette is a member), describes "freedom of teaching and research and extramural activities" and contains the following provision on academic freedom for extramural speech: "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." AAUP Policy Documents at 14; *See* FHC Report at 10-11, *quoting* Marquette University Handbook for Full-Time Faculty. Extramural speech is

³ AAUP Policy Documents at 13; *See*, FHC Report at 11, *quoting* Marquette University Handbook for Full-Time Faculty ("Faculty Handbook").

⁴ AAUP Policy Documents at 3.

addressed to “the larger community with regard to any matter of social, political, economic, or other interest” and need not relate to a faculty member’s disciplinary expertise. AAUP Committee A Report, *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos* (2009).⁵

In 1970, the AAUP added comments to the 1940 *Statement of Principles* that clarified the broad scope of faculty academic freedom to engage in extramural speech. First, for the administration to initiate the disciplinary process, the extramural speech must raise “grave doubts concerning the teacher’s fitness.” 1940 *Statement of Principles* at n.6, Fourth 1970 Comment. Moreover, the 1970 comments include the following paragraph from the *Committee A Statement on Extramural Utterances*, stating a stringent standard of proof for dismissal:

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.

Additionally, this statement reduces the significance of the provisos in the 1940 *Statement of Principles* describing faculty members’ “special obligations” to “at all times be accurate...exercise appropriate restraint,..show respect for the opinions of others, and...make every effort to indicate that they are not speaking for the institution.” As the FHC recognized, since the 1970 clarifications were added to the 1940 *Statement of*

⁵ available at, <https://www.aaup.org/report/protecting-independent-faculty-voice-academic-freedom-after-garcetti-v-ceballos>

Principles, these provisos are generally not viewed as binding obligations. FHC Report at 114. See *Adamian v. Jacobsen*, 523 F.2d 929, 932-35 (9th Cir. 1975) (Relying on AAUP clarifications to interpret similar University policy as “merely hortatory,” and to narrowly regulate extramural speech.)

The strong protection of academic freedom in extramural speech does not immunize faculty members from disciplinary charges. It does mean, however, that the administration carries a heavy burden of proving that extramural speech clearly demonstrates the faculty member’s unfitness to serve, such as “fundamental violations of professional ethics or statements that suggest disciplinary incompetence.” AAUP Report, “Academic Freedom and Tenure: The University of Illinois at Urbana-Champaign,” *AAUP Bulletin* 101 (2015) at 37, citing AAUP Report, *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*.

The FHC report explicitly applies the AAUP’s broad interpretation of academic freedom in extramural speech to Marquette’s definition of academic freedom, modeled on the 1940 *Statement of Principles*. FHC Report at 113-16. Further, the FHC accurately explains the relationship between the *Committee A Statement on Extramural Utterances*’ “fitness to serve” standard and the “special obligations” described in the AAUP 1966 *Statement on Professional Ethics*:

Failure to abide by those special obligations...does not [alone] mean that the professor could be dismissed. The conduct in question must “clearly demonstrate[] the faculty member’s unfitness for his or her position.... A mere failure, for example, to be clear that one is not speaking for the university will not suffice unless it rises to that level. FHC Report at 115.

Although the Circuit Court reiterated the FHC’s use of the “fitness to serve” standard, unlike the FHC, the court did not identify the importance of examining “special obligations” only in the context of whether the administration has carried its burden of proving a faculty member’s unfitness to serve. Instead, the court provides an imprecise summary of the scope of academic freedom that understates its protection: “In short, academic freedom gives a professor...the right to express his views in speeches, writings, and on the internet, so long as he does not infringe on the rights of others.” *Id.* at 25.⁶

Such a formulation of limiting academic freedom to “views” that do “not infringe on the rights of others” vastly undermines academic freedom. The nature of offering opinions, particularly controversial ones, is that they may prompt vigorous responses, including assertions that the rights of others have been infringed. Views and opinions should be subject to debate, not to limitations based on claims that the expression of views infringes upon the rights of others. Adding such a component will only serve to limit the openness and breadth of the views expressed in academia, compromising essential rights of academic freedom.

Amicus AAUP urges this Court to interpret academic freedom policies, including those in Marquette’s Faculty Handbook and Faculty Statutes, as protecting faculty from discipline for extramural speech unless the administration proves that this speech “clearly

⁶ In its appellate brief, Marquette University recognizes that the FHC appropriately adopted the AAUP’s standard for academic freedom of extramural speech, as clarified in the 1970 comments. Brief of Defendant-Respondent, Wisconsin Court of Appeals District 1, at 33-34. However, Marquette incorrectly omits the FHC’s emphasis on examining “special obligations” only in the context of whether the administration has carried its burden of proving unfitness to serve. *Id.* at 33.

demonstrates the faculty member’s unfitness to serve,” (which will “rarely” be the case) taking into account the faculty member’s entire record as a teacher and scholar.

III. AAUP Policies Require Academic Due Process

The AAUP *Recommended Institutional Regulations on Academic Freedom and Tenure* (RIR) set forth standards for academic due process where a faculty member faces possible dismissal or other severe sanctions. RIR Sections 5, 6, 7.⁷ Due process includes notice of charges, a full and fair hearing before an elected faculty committee, and the administration’s burden to prove, by clear and convincing evidence, adequate cause for dismissal or other severe sanction. RIR 5, 7. In a case where the faculty committee reports that it does not find adequate cause for dismissal, if the president rejects the report, the president must provide written reasons to the committee and give the committee an opportunity to respond before the case goes to the governing board. RIR 5c.(16). If the hearing committee finds adequate cause for dismissal, the committee may still recommend a less severe penalty. *Id.* These same procedures apply in cases where the administration seeks to impose a severe sanction less than dismissal. RIR 7a.

⁷ available at <https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>

IV. Marquette University Imposed a New Severe Penalty in Violation of Dr. McAdams' Rights to Due Process and Academic Freedom

A. Marquette's New Penalty Differs from the FHC's Recommendation and Was Imposed without Due Process

Following a four-day hearing,⁸ and relying on AAUP standards, the FHC concluded that the Marquette administration had proven, by clear and convincing evidence, discretionary cause to impose discipline. The FHC was precise in describing the degree of discipline warranted:

The Committee...concludes that discretionary cause under FS § 306.03 has been established, but *only to the degree necessary to support a penalty of suspension*. The Committee concludes that the University has established neither a sufficiently egregious failure to meet professional standards nor a sufficiently grave lack of fitness to justify the sanction of dismissal. Instead, the Committee concludes that only a lesser penalty than dismissal is warranted....[of a one to two-semester suspension]...[A] penalty of dismissal is too severe given the record and would strike too hard a blow in these somewhat novel circumstances. (emphasis in original). FHC Report at 121-22.

In a letter dated March 24, 2016, Marquette University's President Lovell adopted the FHC's recommendation of a two-semester unpaid suspension, but increased the penalty by requiring that Dr. McAdams write a statement of apology/admission of wrongdoing as a condition of reinstatement. The Circuit Court incorrectly found that President Lovell's condition of reinstatement "was consistent with the recommendation of the FHC." Decision and Order at 15. Rather, this new penalty went well beyond the FHC's recommendation. As discussed below, President Lovell's letter infringe on Dr. McAdams's academic freedom. Additionally, the required written statement may put Dr. McAdams in

⁸ An AAUP observer, a professor from another university, concluded that the hearing process complied with AAUP due process standards.

legal jeopardy in a potential lawsuit by graduate student/instructor Cheryl Abbate.⁹ It was reasonable, and indeed predictable, that Dr. McAdams would refuse to write a statement with these required elements. Thus, making this written statement a condition of reinstatement was tantamount to removing tenure and dismissing Dr. McAdams. It also imposed the very penalty the FHC had explicitly rejected.

By unilaterally imposing this condition of reinstatement, President Lovell deprived Dr. McAdams of due process regarding the most important aspect of the penalty, his continued employment at Marquette. The administration should have returned the case to the FHC to consider President Lovell's new penalty, including providing the parties with the opportunity to present evidence and/or make arguments about the required statement and impact of making it a condition of reinstatement.

Marquette may argue that while its Faculty Statutes are modeled on AAUP policies, they do not provide for the president to return the case to the FHC. Even without such explicit provisions, however, Marquette violated its administrative discretion by ignoring basic principles of due process. Given the severity of the new penalty, it is fundamentally unfair for the administration to exercise unfettered power to assert that it accepts the FHC's recommendation, while simultaneously acting against that recommendation. Interpreting FS §307.7 to require the president to return the case to the FHC to consider the new penalty

⁹ Dr. Adams would arguably waive defenses in a potential civil suit by submitting a statement accepting the judgment of the FHC, acknowledging his blog post was "reckless and incompatible" with Marquette's "mission and values," and expressing "deep regret for the harm suffered by...Ms. Abbate." President Lovell's plan to share the written statement "confidentially" with Ms. Abbate does not reduce Dr. McAdams's legal jeopardy.

would fulfill the principles of fairness underlying the due process provisions of the Faculty Statutes.

B. The Required Statement of Apology/Admission Violated Dr. McAdams's Academic Freedom

The required written statement raises academic freedom concerns. The required acknowledgement that “the blog post was reckless and incompatible with the mission and values of Marquette University” is not limited to the specific conduct that the FHC found to warrant discipline. The acknowledgment could reasonably be understood to extend to all the speech contained in the blog post.¹⁰ Yet, the vast majority of the speech in the blog post is on political and educational matters of public concern, including “[t]he way classes are taught and the subjects that may be discussed...” FHC Report at 96. The FHC found that this speech is clearly protected by the Faculty Handbook provisions for academic freedom in extramural speech, which are modeled on AAUP standards. In requiring Dr. McAdams to renounce his blog post as a condition of reinstatement, the administration used the threat of dismissal to force Dr. McAdams to choose between adhering to his protected political views and regaining his tenured position.

The statement also raises academic freedom concerns by requiring Dr. McAdams's “affirmation and commitment that [his] future actions and behavior will adhere to the standards of higher education as defined in the Marquette University Faculty Handbook,

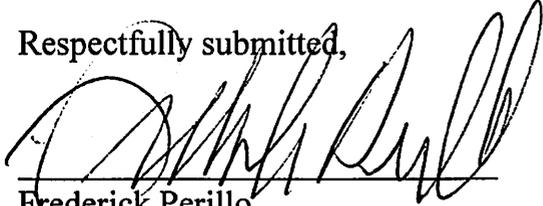
¹⁰ This is a reasonable interpretation of President Lovell's letter, as is appropriate at the summary judgment stage.

Mission Statement and Guiding Values.” This requirement exceeds the specific charge that was brought against Dr. McAdams and arguably waives his right to dissent from any provisions in these university policies.

V. Conclusion

For the reasons above, this Court should consider the AAUP’s longstanding policies and standards and find that academic freedom in college or university policies broadly protects extramural speech. This Court should find that such policies protect faculty from discipline for extramural speech unless the college or university administration proves that the extramural speech “clearly demonstrates the faculty member’s unfitness to serve,” taking into account the faculty member’s entire record as a teacher and scholar. Finally, this Court should find that Marquette’s new penalty that required a written statement of apology/admissions is a severe sanction imposed on Dr. McAdams without due process and in violation of Dr. McAdams’s academic freedom.

February 27, 2018

Respectfully submitted,

Frederick Perillo

Counsel of Record:
Frederick Perillo
The Previant Law Firm, S.C.
310 West Wisconsin Avenue, Suite 100 MW
Milwaukee, WI 53203
(414) 223-0434
fp@previant.com

Counsel for Amicus Curiae:

Risa L. Lieberwitz
General Counsel
American Association of
University Professors
Professor of Labor and
Employment Law
School of Industrial and
Labor Relations
Cornell University
361 Ives Hall
Ithaca, NY 14853
(607) 255-3289

Counsel for Amicus Curiae:

Aaron M. Nisenson
Senior Counsel
Nancy A. Long
Associate Counsel
American Association of
University Professors
1133 19th Street N.W., Suite 200
Washington, D.C. 20036
(202) 737-5900
legal.dept@aaup.org

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 12 pages and 2,915 words.



Frederick Perillo

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.



Frederick Perillo