Acad. Quest. (2019) 32:169–177
DOI 10.1007/s12129-019-09792-7

VICTORIES

Two Victories for Academic Freedom

Peter Bonilla

Published online: 29 March 2019

For this special "Victories, Advances, and Setbacks" feature of *Academic Questions*, it has come to me to write about perhaps the most hard-won of the victories you'll read about here: those accomplished through litigation. This is something that my organization, the Foundation for Individual Rights in Education (FIRE), knows a thing or two about, having supported several litigation efforts through the years and, more recently, litigated some cases directly. For all its potential, litigation is also an avenue of last resort. It isn't cheap, it's rarely expedient, and when done incautiously it runs the risk of creating bad law that can harm the prospects of litigants for years down the line.

Sometimes, though, litigation is the only option for achieving justice. Here I describe two of the most significant such cases of recent years, one from a public institution and the other from a private religious institution. I begin with the public university case, which merits a brief legal preface.

Introduction: *Garcetti*'s Shadow

The largest legal hurdle presented to faculty academic freedom in recent years is the Supreme Court's troubling ruling in the case *Garcetti v. Ceballos*.[1] In *Garcetti*, the Supreme Court considered the case of a deputy district attorney in Los Angeles County who was reassigned after authoring a memo disputing the accuracy of an affidavit used to obtain a search warrant. The deputy DA, Richard Ceballos, sued, alleging retaliation in violation of his First Amendment rights. While the First

[1] *Garcetti v. Ceballos*, 547 U.S. 410 (2006). See https://www.thefire.org/first-amendment-library/decision/gil-garcetti-et-al-v-richard-ceballos/

Peter Bonilla is vice president of programs at the Foundation for Individual Rights in Education (FIRE), 510 Walnut Street, Suite 1250, Philadelphia, PA 19106; peter@thefire.org.

Amendment rights of public employees speaking on matters of public concern had been fairly robust, *Garcetti* significantly narrowed their scope by ruling that since Ceballos had written the memo as part of his official duties as a deputy DA, his speech was not protected under the First Amendment.

Three separate dissents were written in *Garcetti*, with justice David Souter raising particular alarm at *Garcetti*'s implications for public universities "whose teachers necessarily speak and write 'pursuant to . . . official duties.'" Justice Anthony Kennedy's majority opinion attempted to soothe over this disquiet, stating "[w]e need not, and therefore do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."

The Supreme Court, thus, explicitly declined to apply its reasoning in *Garcetti* to university professors. That did not stop others from trying.

Retroactively Unfree Speech: Mike Adams and UNC Wilmington

Mike Adams joined the University of North Carolina at Wilmington (UNCW) faculty as an assistant professor of criminology in 1993, and became a tenured associate professor in 1998. In 2004, Adams applied for a promotion to full professor. Between 1998 and 2004, Adams converted to Christianity, and gained a profile as an outspoken critic of campus leftism, political correctness, and discrimination against conservative and religious students on campus. Many of these critiques were leveled in his columns at Townhall.com. Throughout, Adams received positive teaching reviews from students and positive feedback from fellow faculty.

Candidates for full professor were evaluated in the areas of teaching, research, service, and academic and professional development, and in preparing his portfolio for review, Adams cited some of his external writings and appearances in his capacity as a conservative critic of academe, as well as his experience advising campus Christian groups and defending them against viewpoint discrimination. Combined with his teaching and publication record, Adams believed he had made a credible case for his promotion, as he explained in a *post facto* article appearing in *Academic Questions,*.[2] A faculty review committee voted against him 7-2, however, and he was not recommended for promotion.

Adams could not get straight or consistent answers as to the reason for his denial. Believing that he had been the victim of retaliation and discrimination on

[2]Mike Adams, "Academic Freedom on Trial: Adams v. UNCW and the Welcome Erosion of *Garcetti,*" *Academic Questions* 28, no. 1 (March 2015): 54–65.

the basis of his conservative Christian beliefs and his writings, Adams sued UNCW in 2007.[3] In 2010, a federal district court ruled summarily against Adams, and in doing so made a deeply troubling assertion about faculty members' First Amendment rights. Out of whole cloth the district court fabricated the argument that since Adams had cited his outside writings as part of his overall promotion package, those writings were thus "made pursuant to his official duties" as a professor, and were thus accorded no First Amendment protection under *Garcetti*. In other words, Adams's writings retroactively became unprotected speech the minute they were used or referenced in any way in the cause of professional advancement.

This was a breathtaking line of argument for the district court to take, with drastic implications for faculty academic freedom rights, and one with no basis whatsoever in the Supreme Court's *Garcetti* ruling, which, after all, made a point not to extend its reasoning to the speech of public university faculty. The district court's groundless expansion of *Garcetti* would be central to Adams's case when it proceeded to the U.S. Court of Appeals for the Fourth Circuit, and organizations around the country were well aware of its implications.

FIRE, the American Association of University Professors, and the Thomas Jefferson Center for the Protection of Free Expression submitted an *amici* brief warning that the district court's decision, "if allowed to stand, would render the *entire* corpus of an application package unprotected under the First Amendment and faculty members at public universities vulnerable to retaliation for the content of their speech, to the ultimate detriment of the public's interest in debate, discovery, and innovation."[4] The brief further warned that the district court's floating concept of First Amendment protection "has the potential to curb academic development by setting a precedent that protection for expression—whether spoken in an official capacity or in an unofficial capacity on matters of public concern—shifts depending upon the circumstances under which it is later read."

The Fourth Circuit got the message, rapping UNCW for its determination that "Adams's speech . . . somehow transformed into unprotected speech because . . . others read the same items from a different perspective long after Adams's speech was uttered" with no precedent whatsoever. More fundamentally, it held that even if *Garcetti* could be theoretically found to apply to some cases involving speech by faculty, the particulars of Adams's case made clear that it should *not* apply, given Adams's speech "was intended for and directed at a

[3]Commentary and case materials are available on FIRE's website at https://www.thefire.org/cases/university-of-north-carolina-wilmington-professor-files-lawsuit-alleging-retaliation-for-political-columns/.

[4]"Amici Curiae Brief of FIRE, et al., in Adams v. Trustees of the University of North Carolina-Wilmington," Foundation for Individual Rights in Education, https://www.thefire.org/fire-amici-curiae-adams-v-wilmington/.

national or international audience on issues of public importance unrelated to any of Adams's assigned teaching duties at UNCW." The Fourth Circuit rightly found that applying *Garcetti* to Adams's speech "could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment." It also exhibited a general understanding of academic life that the district court lacked, observing that Adams's work "was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields."[5]

The case was remanded to the district court in light of its wrongful application of *Garcetti*. In 2014, seven years after Adams filed his initial lawsuit, his case finally went to trial, and a jury ruled in his favor, finding that UNCW had deviated from its tenure review policies in his case and shared misleading information in an attempt to stymie his appeals. The court awarded Adams $50,000 in back pay, and ordered UNCW to promote Adams to full professor. Shortly after, the court ordered UNCW to pay Adams an additional $700,000 in attorneys' fees. Finally, in July 2014, UNCW settled the case for good. Factoring in the university's own legal fees, the total bill to North Carolina taxpayers likely crossed $1 million.

Losing Tenure for a Blog Post: John McAdams and Marquette

While Mike Adams fought for the professional status he felt his overall record merited, John McAdams, a longtime professor of political science at Marquette University, was forced to litigate to keep his position from being taken away. Adams and McAdams have some similarities. Both are conservatives outnumbered on their campuses, and both are outspoken in their conservatism and in their critiques of liberal academia, Adams through his Townhall.com columns, and McAdams through his personal blog, "Marquette Warrior."

McAdams, who has been at Marquette since 1977 and tenured since 1989, had lobbed his critiques through his blog since 2002, generally without incident, and he didn't figure that the entry he posted on November 9, 2014, was likely to be much different. The entry described an incident that took place in a "Theory of Ethics" course, taught by a then-doctoral student, Cheryl Abbate. During a course lecture, as McAdams wrote, Abbate at one point "listed some issues on

[5] *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011). See https://www.thefire.org/united-states-court-of-appeals-for-the-fourth-circuit-decision-in-adams-v-trustees-of-the-university-of-north-carolina-wilmington-et-al-april-6-2011/.

the board, and came to 'gay rights.' She then airily said that 'everybody agrees on this, and there is no need to discuss it.'"[6]

A conservative student approached Abbate after class and, recording their conversation, told her he did not think all discussion of the subject should be preemptively walled off. McAdams's entry continued, "Abbate explained that 'some opinions are not appropriate, such as racist opinions, sexist opinions' and then went on to ask 'do you know if anyone in your class is homosexual?' And further 'don't you think it would be offensive to them' if some student raised his hand and challenged gay marriage?" Finally, she made clear that "[i]n this class, homophobic comments, racist comments, will not be tolerated." This was troublesome pedagogy, seemingly opposed to the general spirit of fostering civil discussion and debate in the classroom, as well as Marquette's principles on freedom of expression and the university's Catholic philosophy. (The student in the end dropped Abbate's course.)

McAdams had every reason to believe that the impact of his November 9 entry, if any, would be relatively minor, and local. As the National Association of Scholars took pains to point out in the *amicus* brief it filed in support of McAdams in the Wisconsin Supreme Court, "Dr. McAdams merely blogged about statements made by one student to a second student."[7] Nevertheless, McAdams's post was widely circulated and commented on, and Abbate received heavy criticism, including a number of harassing and threatening messages. The disruption the negative attention created for Abbate ultimately led her to transfer out of Marquette and continue her studies elsewhere. It was a most unfortunate result.

McAdams, meanwhile, came in for heavy criticism by many of his colleagues, who thought that he had crossed a line with his post. McAdams publicly defended his publication and his criticisms of Abbate. But he was now a marked man at Marquette. On December 14 his dean, Richard C. Holz, suspended him from teaching and ordered him off the campus.[8] Marquette took this action despite not alleging any policy violations or explaining to McAdams precisely what grounds it found for his suspension. The public spin Marquette would put on the suspension was rife with dishonesty. While Marquette would publicly insinuate multiple times that McAdams had violated its harassment policy, it never charged McAdams with

[6]John McAdams, "Marquette Philosophy Instructor: 'Gay Rights' Can't Be Discussed in Class Since Any Disagreement Would Offend Gay Students," Marquette Warrior, November 9, 2014, http://mu-warrior.blogspot.com/2014/11/marquette-philosophy-instructor-gay.html.

[7]Brief of the National Association of Scholars, Edward J. Erler, Duke Pesta, and Mark Zunac, as Amici Curiae in Support of Plaintiff-Appellant John McAdams, Supreme Court State of Wisconsin, Appeal No. 2017-AP-1240.

[8]Case documents and collected letters and commentary from FIRE in McAdams's cases are available at https://www.thefire.org/cases/marquette-university-faculty-member-facing-loss-of-tenure-for-opinions-on-blog/.

harassment of any kind. Marquette also took care not to refer to his suspension as a suspension, referring to his status as simply "under review," a nonexistent provision in Marquette policy, and saying "[o]ur definition of suspension is without pay," a blatant falsehood.

This was all, it seems, a way for Marquette to buy time while it prepared to go nuclear against McAdams: In January 2015, Holz informed him that Marquette planned to initiate dismissal proceedings that would strip him of his tenure and permanently remove him from the faculty. Again, Marquette cited no actual policy violations, saying instead that his action amounted to "serious instances of . . . dishonorable, irresponsible, or incompetent conduct." Marquette also made clear that it held McAdams directly responsible for the harassment Abbate had received from others who had read his blog, telling him that he "knew or should have known that [his] Internet story would result in vulgar, vile, and threatening communications."

Marquette, of course, is private and not bound by the First Amendment, but nonetheless makes robust promises of free speech and academic freedom. Indeed, the university promises faculty "the full and free enjoyment of legitimate personal or academic freedoms of thought, doctrine, discourse, association, advocacy, or action," and backs that promise up by stating 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." Yet one of the central claims of Marquette's case against McAdams, that he was responsible for what other people around the country did after taking in his expression, is with very limited exception (such as unlawful incitement to violence) wholly rejected by our free speech traditions. As I wrote for FIRE at the time, if Marquette's view held sway, "free speech as we know it ceases to exist, and industries like journalism immediately collapse under the weight of their collective liability."[9] *The Atlantic*'s Conor Friedersdorf wrote, "[o]nly myopia can account for failure to see the threat to academic freedom."[10]

The last straw for McAdams came in March 2016, following the completion of a review by Marquette's Faculty Hearing Committee. The process was flawed and prejudiced; notably, the committee refused to remove a member who had signed an open letter condemning McAdams, published in the *Milwaukee Journal*

[9]Peter Bonilla, "Marquette's Dangerous Subversion of Free Speech," FIRE Newsdesk, February 16, 2015, https://www.thefire.org/marquettes-dangerous-subversion-free-speech/.

[10]Conor Friedersdorf, "Stripping a Professor of Tenure Over a Blog Post," *The Atlantic*, February 9, 2015, https://www.theatlantic.com/education/archive/2015/02/stripping-a-professor-of-tenure-over-a-blog-post/385280/.

Sentinel. The hearing committee recommended that McAdams be suspended for two semesters without pay. For all its flaws it was, nonetheless, a penalty less than termination, and one which would preserve his tenure. Marquette president Michael R. Lovell accepted the committee's recommendation, with one added condition: McAdams would be required to write an apology and admit fault as a condition for his reinstatement. McAdams refused, and Lovell suspended him indefinitely without pay. McAdams filed his lawsuit against Marquette two months later.

Being a professor at a private university, McAdams's lawsuit was premised on breaches of contract, of which he documented several, including due process violations for being suspended without being informed of specific charges, as well as violations of his contractually guaranteed right of academic freedom, both for punishing him for the content of his blog and attempting to coerce his apology. Marquette argued that McAdams had no standing to challenge his punishment in court, and that it should be the only arbiter of whether it had actually lived up to its contractual obligations. The Milwaukee County district court, to its discredit, granted Marquette's request for summary judgment in May 2017, deferring entirely to the findings of the Faculty Hearing Committee. The Wisconsin Institute for Law and Liberty (WILL), which represented McAdams throughout his case, made the unusual move of petitioning to bypass the appeals court and appeal the case directly to the Supreme Court of Wisconsin.[11]

The stakes were enormously high, and communicating to the court that McAdams's case was more than a simple dispute between a private employer and its employee was urgent. FIRE submitted an *amicus* brief supporting the bypass motion, writing: "Around the country, the free speech and academic freedom rights of faculty are being eroded by students, administrators, and members of the general public demanding censorship and by administrations caving to those demands. This capitulation is to the serious detriment of American higher education and ultimately the health of our democracy."[12]

To make our case we cited several examples of cases in which FIRE fought for the rights of tenured and tenure-track faculty. These included an Appalachian State University professor removed from teaching for criticizing sexual assault in college sports and showing a graphic documentary critical of the adult film industry;[13] a University of Kansas professor put on leave and investigated after

[11]Wisconsin Institute for Law and Liberty, https://www.will-law.org/. For WILL's commentary and court documents for McAdams's case, see https://www.will-law.org/our-cases/free-speech/mcadams-v-marquette-2.

[12]"FIRE's Amicus Brief in McAdams v. Marquette, November 29, 2017," Foundation for Individual Rights in Education, https://www.thefire.org/fires-amicus-brief-in-mcadams-v-marquette-november-29-2017/.

[13]See https://www.thefire.org/cases/appalachian-state-university-professor-suspended-for-classroom-speech/.

students accused her of racial harassment for her attempt to lead an in-class discussion on racial issues;[14] and a Rowan College at Gloucester County professor terminated for her use of "indecent language" in the classroom.[15] While McAdams's case against Marquette was an ostensibly private dispute, it was one of national significance, whose outcome, if it turned against McAdams, would be used against vulnerable faculty by universities for years to come.

The Supreme Court of Wisconsin not only took the case—it comprehensively and decisively ruled in McAdams's favor, finding that the simple act of McAdams posting on his blog was unambiguously protected by Marquette's contractual academic freedom promises, and that his suspension on the basis of the blog marked a clear violation of his academic freedom. Further, the Supreme Court harshly faulted the lower court for deferring so completely to Marquette's internal process, effectively treating the Faculty Hearing Committee's recommendation as akin to binding arbitration when it was anything but. The court's opinion also discussed at length the procedural failures and bias that tarnished Marquette's proceedings, expressing wonderment that the court would declare it had no grounds to review such a demonstrably flawed process.

The lower court was ordered to enter a verdict in McAdams's favor, and to direct Marquette to promptly reinstate McAdams. Marquette settled the case for just under $230,000, inclusive of McAdams's back pay. After losing seven semesters of teaching during his suspension and subsequent litigation, John McAdams returned to the classroom in fall 2018.

Conclusion: For the Common Good

The AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* declares, "Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole." At first blush these two cases would seem merely to be the pitting of these interests against each other. In the end, though, it is that common good that emerged victorious, as the cases acquired far greater proportions than the individual faculty members who brought them.

When Mike Adams first applied for promotion to full professor in 2004, *Garcetti* had not been decided yet. By the time his case reached the Fourth

[14]See https://www.thefire.org/cases/university-of-kansas-professor-reinstated-after-four-month-investigation-into-classroom-speech/.

[15]Peter Bonilla, "Fired for Trying to Teach Sociology, Former Professor Takes Rowan College at Gloucester County to Court," FIRE Newsdesk, August 12, 2015, https://www.thefire.org/fired-for-trying-to-teach-sociology-former-professor-takes-rowan-college-at-gloucester-county-to-court/.

Circuit, it was clear the implications of *Garcetti* for faculty were severe, and that it was imperative that courts stand in to protect faculty from universities determined to use *Garcetti* as another tool for undermining academic freedom and punishing dissenting professors. The Fourth Circuit's repudiation of *Garcetti* will have to be reckoned with even in courts outside its jurisdiction, and will figure significantly should the question of *Garcetti*'s application to faculty be taken up by the Supreme Court.

McAdams's case, meanwhile, took place against a backdrop of emboldened administrators, weakened tenure and governance protections, and increasingly intolerant students that had tilted the academic playing field sharply against faculty. The Supreme Court of Wisconsin not only recognized McAdams's contractual right of academic freedom; it defended academic freedom as a good in itself, and rejected the culture that threatened to erode it.

In each case, the common good emerged as the long term victor. That shouldn't be taken to mean that it inevitably always does. All the more reason, then, to give our appreciation to those who put their careers on the line so that it might.