

1 THE COURT: Good morning. This is 18 --

2 MS. SIMWANZA-JOHNSON: Hi. Good morning.

3 MR. CUETO: Good morning.

4 THE COURT: Good morning. This is 18 CV
5 218, Sabina Burton versus the Board of Review for the
6 UW. Appearances.

7 MR. CUETO: Attorney Bernardo Cueto appears
8 on behalf of the petitioner, Sabina Burton.

9 MS. SIMWANZA-JOHNSON: Good morning, Your
10 Honor. This is Assistant Attorney General Mpoli
11 Simwanza-Johnson, S-i-m-w-a-n-z-a hyphen Johnson, on
12 behalf of the university.

13 THE COURT: The parties have filed their
14 briefs. This is the time set for an oral argument, and
15 while I don't want to, you know, have counsel revisit
16 everything that was stated in the briefs, I guess, Mr.
17 Cueto, I did have a couple questions for you and then
18 for Ms. Simwanza-Johnson. If I understand it, you
19 allege that because the board allegedly violated the
20 open meetings law, that mandates a remand or a reversal
21 under the Section 227.57(8); is that -- did I read that
22 correctly?

23 MR. CUETO: There were many procedural
24 errors, so we would prefer a reversal under another
25 ground, but that was one of the issues that did come up.

1 THE COURT: Okay. And what hearings were
2 held in violation of the open meetings laws?

3 MR. CUETO: I believe it was the evidentiary
4 hearings. I'd have to look at which specific ones.

5 THE COURT: The evidentiary hearing for the
6 termination decision?

7 MR. CUETO: Yes.

8 THE COURT: Okay. All right. And I know
9 you did notice some different procedural violations, and
10 the statute, you know, does indicate that that would be
11 a grounds to afford action. Does it matter if the
12 errors could be deemed harmless that the -- really the
13 due process interests were not offended?

14 MR. CUETO: I believe that harmless error is
15 something that would -- you know, that's part of all
16 appeals. I'm sure -- I mean I would like it otherwise,
17 but I don't think I can argue otherwise. I think
18 harmless error -- the Court has to find that these
19 violations were not harmless.

20 THE COURT: Okay. Ms. Simwanza-Johnson,
21 you've had an opportunity to review Mr. Cueto's reply
22 brief. Is there anything you would like to say in
23 response to that?

24 MS. SIMWANZA-JOHNSON: No, Your Honor.
25 Basically, our position is he does assert a whole bunch

1 of procedural arguments, but ultimately he can't prove
2 to how they harmed his client here. The standard of
3 review with respect to factual findings is a pretty low
4 burden. Ultimately, his client disclosed confidential
5 information about her colleagues, and the university
6 determined that that was not conduct that was
7 appropriate for a tenured professor, and they fired her
8 for it. So even if it's an open meetings violation, as
9 he claims, if they redo the hearing, it's not going to
10 change the evidence. The evidence is what it is. The
11 outcome will still be the same.

12 THE COURT: Okay. And I guess, Mr. Cueto,
13 I'll give you the last chance. Anything else you would
14 like to say?

15 MR. CUETO: Sure. Well, every one of the
16 issues we did show that it was not harmless. I mean we
17 did go into why every one of these were prejudicial.
18 For instance, if they were to redo the hearings -- well,
19 there were some hearing -- at least one hearing that she
20 wasn't even present for, that she wasn't allowed to --
21 she wasn't able necessarily to cross-examine witnesses.
22 I mean obviously that would provide a lot more evidence,
23 but, you know, Your Honor, you've got our briefs. I
24 mean I don't want to relitigate everything that I
25 already had in my brief. Already long enough as it is.

1 THE COURT: Okay. And there is a lot of
2 information. It was my intent to always do a written
3 decision because of the importance of this to both
4 parties.

5 MS. SIMWANZA-JOHNSON: I'm sorry, Your
6 Honor, I'm struggling to hear the Court.

7 THE COURT: Okay.

8 MS. SIMWANZA-JOHNSON: That's much better.
9 Thank you.

10 THE COURT: Please let me know if there is
11 something else that you can't hear. My intent had been
12 to do a written decision because of the importance to
13 this -- to the parties and had started one, but as I got
14 into it, there are just so many separate issues that are
15 raised and the review by the court of appeals is of the
16 respondent's decision and not necessarily mine, so I am
17 going to give an oral decision. I will address the
18 issues in the order that they are -- that they occur in
19 the decision and order that was actually issued by the
20 Board of Regents and then will pick up, I think, some of
21 the other main issues.

22 I think the big issues have to do with the
23 academic freedom and also the issue that the university
24 took with the secret recordings and the subsequent
25 posting of those on the web. And I will hopefully touch

1 upon all of those issues, but the decision does set
2 forth the correct procedural posture of this case, and
3 there are other proceedings that occur that have
4 affected this. They're set forth in the record. We
5 have the federal lawsuit, we have the referrals to the
6 EEOC and the subsequent ability to sue, the permission
7 to sue. We have numerous complaints raised by Dr.
8 Burton and grievances that were filed or complaints made
9 against her or which she made against others, some of
10 which were resolved in her favor, some of which were
11 apparently ignored.

12 This is a situation, not unusual, where
13 there are two sides. On one side Dr. Burton appears to
14 be a beloved teacher with amazing credentials who can
15 speak German and has a chemistry background and has a
16 lot of great ideas concerning how the program can be
17 improved.

18 On the other hand, there is Dr. Burton who
19 not only made things unnecessarily difficult but made
20 things impossible for the other members of her
21 department and particularly her supervisors, and as in
22 all lawsuits there is support for both positions.

23 So the issue comes down to the Court's
24 requirement to give deference to factual findings and to
25 look at the legal issues in a more de novo type fashion.

1 So when I go to Page 3 of the decision, it starts off
2 with, you know, Dr. Burton, you know, was a tendered
3 professor, that in the fall UW Hospital -- or
4 UW-Platteville was faced with this issue of Dr. Gibson
5 handing a note with the words, "Call me." The doctor's
6 position is that basically that was swept under the rug,
7 there was a coverup. UW-Platteville thinks that they
8 addressed it appropriately by, one, immediately stopping
9 the experiment, as they call it, the breach experiment
10 to make sure that it didn't happen again, and, secondly,
11 not renewing Dr. Gibson.

12 There is information in the record about --
13 through e-mails that Dr. Gibson at one time had been
14 voted chair of the department and that the Dean overrode
15 that vote because he was untendered -- untenured and a
16 second year employee, and Dr., I believe, Dalecki is the
17 way you pronounce that remained as the chair.

18 The point that's brought out later is that
19 Dr. Gibson was addressed, had some explanation which Dr.
20 Burton questioned and which, frankly, I think most
21 people would question, but apparently whatever was going
22 on ended, and he was released in 2014.

23 The respondent looks at that, as did the
24 Seventh Circuit in its decision, I think, as support for
25 a proposition that Dr. Burton was not engaging in

1 academic freedom by continuing to raise this particular
2 episode and continuing to claim that the university did
3 not protect students against sexual harassment in 2016
4 and 2017.

5 The issue of protecting students from sexual
6 harassment and having an opinion as to whether Dr.
7 Gibson should have been fired on the spot or more should
8 have been done, that, I think, is probably a fair -- you
9 know, a fair application of the *McAdams* case up to a
10 point. In *McAdams*, we're dealing with a professor who
11 basically told a student that we're not going to
12 tolerate a discussion of any opinions that the gay
13 community should not enjoy the same rights as the
14 heterosexual community. Dr. McAdams took exception to
15 that and indicated that you -- you, meaning a
16 university, has to be more tolerant to the views of
17 people who you maybe disagree with, but the university's
18 decision to fire him -- I guess first to suspend him and
19 then make his reinstatement contingent upon an apology
20 was, you know, an illegal activity because it did punish
21 him for exercising academic freedom, the right of free
22 speech, and underlying, I think, was making a valid
23 point about the need to allow for a discussion of
24 contrary views.

25 At some point the respondent obviously felt

1 that that argument did not work for Dr. Burton's
2 continued expressions of dissatisfaction with everyone
3 she had worked with, and in policy that's maybe a slight
4 overstatement, but the Seventh District Court of Appeals
5 looked at this issue and whether the concept of academic
6 freedom protected Dr. Burton from these many, many
7 e-mails, it also looked at whether Dr. Burton was being
8 discriminated against and retaliated against for filing
9 a lawsuit against the UW-Platteville, and the -- I think
10 the briefs note the coincidence or lack thereof of the
11 time between filing the lawsuit and the letter of
12 direction.

13 The Seventh Circuit found and the regents
14 found that, "The record demonstrates that Throop had a
15 factual basis for each of the allegations she leveled
16 against Burton in the letter of direction, and Burton
17 failed to provide evidence that the allegations were
18 pretextual. Indeed, the district court stated that
19 Burton did not dispute the truth of the allegations,
20 only how Throop perceived and characterized those events
21 and whether Throop" - I'm not sure if I'm pronouncing
22 that correctly - "should have accepted Burton's
23 explanation for each of them." This is at the bottom of
24 Page 4.

25 Top of Page 5, "There is no evidence in the

1 record that Throop's complaint against Burton was
2 retaliation for her protected activity, but there is
3 evidence that Burton decided not to heed any of the
4 direction contained in the letter."

5 At the bottom of that paragraph, "No
6 reasonable jury could find that either the letter of
7 direction or the subsequent complaint were caused by
8 Burton's protected activities rather than legitimate
9 disagreements between Burton and Throop."

10 And that's a part factual determination, I
11 think a part legal determination, and while the Seventh
12 Circuit Court is not binding authority, it can be
13 persuasive authority and I think something the regents
14 could rely upon, and the point is made, and I think a
15 legitimate point in both the petitioner's brief and
16 reply brief, that point out exactly what is protected
17 and what was not protected and what is inaccurate and
18 what is accurate. And the finding that was made
19 basically was that, "The course of conduct" - and this
20 is on Page 7 - "that she was engaging in disrespectful,
21 harassing, intimidating behavior directed at her
22 colleagues in an attempt to undermine them
23 professionally and damage their reputations and
24 careers."

25 There really isn't one particular e-mail

1 that jumps out because all of the -- or I should say the
2 majority of the e-mails are couched in terms of, "I want
3 you to follow policy. I want to work together to make
4 this a better department. I want to, you know,
5 basically make this a better place for the students.
6 All I'm doing is I want to let the students know what a
7 train wreck this department has become." And there is
8 information in the -- in the federal lawsuit where Dr.
9 Burton, you know, acknowledges that this was basically a
10 hostile work environment. In her brief she indicates
11 that there was no disruption, the department worked
12 fine, which I think is inconsistent with her prior
13 statements and inconsistent with the record. The record
14 is that this department was not functioning and that the
15 reason for that had to do with Dr. Burton pursuing not
16 legitimate complaints for the most part, but, as I think
17 Dr. Shields said, unreasonable and unfounded allegations
18 of unethical conduct by other faculty members. And when
19 I started off by saying this is a case that involves a
20 story of two different individuals, I don't need to make
21 a determination of who's correct. I just need to decide
22 if the regents had substantial evidence in the record to
23 reach the conclusion they did. And one thing that they
24 mentioned is striking, and maybe this was the Seventh
25 District who said that, "There was not one faculty

1 member who spoke in Dr. Burton's favor that she should
2 be retained; instead, Dr. Burton has to rely upon some
3 letters from students," which I think should be
4 considered. But the regents indicated that they didn't
5 give a whole lot of weight to that, and the letter of
6 a -- I think it was the Solar letter about how she was a
7 dynamic teacher and did a good job, and it's mentioned
8 in the record a couple of times that she had received a
9 couple raises and she had gotten tenure since this whole
10 Gibson episode, but even the person who wrote that
11 letter changed her mind and quickly -- I think rather
12 quickly ended up not being able to work with Dr. Burton.

13 So the factual finding that the continued
14 complaints and grievances and conduct met the criteria
15 for being disrespectful, harassing, intimidating and met
16 the standards for termination is supported by the
17 record. Dr. Burton has other evidence. I think the --
18 the one issue that comes to mind is whether Dr. Solar, I
19 believe is the name, that she had to quit as department
20 chair because she spent all her time dealing with Dr.
21 Burton, and it was such an unpleasant situation that she
22 had to resign.

23 Dr. Burton brings up the fact, "Well, that's
24 not the stated reason, and, in fact, this is what she
25 said why she said she was leaving." Those are the kind

1 of discrepancies that the finder of fact sorts out, and
2 the regents quite clearly were entitled to accept the
3 position that Dr. Burton, because of her activities,
4 non-protected activities had made it an impossible place
5 to work, and that conclusion is supported by the
6 opinions of other people who worked in the department.
7 And while the finder of fact could accept or reject
8 those -- that testimony, once they accept it, this Court
9 isn't in a position to overturn that. There are --
10 excuse me, there is counter evidence, and the briefs
11 bring it out about Dr. Dalecki, you know, pointing a
12 finger in the form of a gun, some doctor hitting her at
13 a meeting that was being recorded, some of the
14 transcripts or the editor -- they were editorialized,
15 her transcripts, would indicate that at these meetings
16 Dr. Burton was being disrespected and being shut down
17 and those sorts of things.

18 But there is another side, which is that
19 everyone -- I should say no one spoke on her behalf, and
20 you can't open one of the attachments in the record
21 without seeing either another complaint or grievance or
22 dispute that was going on with another faculty member.
23 I was trying to go through the record again, and all of
24 a sudden I see this thing about Dr. Rice. I have no
25 idea who Dr. Rice is. I just know that, you know, there

1 was another grievance filed against her. And while Dr.
2 Burton may have felt that it was her job to pursue this
3 aggressive and hostile stance when it came to
4 essentially everybody she had contact with, the regents
5 were within their right to conclude that she was being
6 unreasonable and things were unfounded.

7 I would continue with the -- with some of
8 the findings. The finding about Dr. Strobl - I think I
9 said Dr. Solar - that was corrected. "No. 11, that
10 departmental problems related to Dr. Burton's behavior
11 persisted, and as a result Dr. Strobl resigned as the
12 department chair in 2016." No. 9 is, "Almost
13 immediately Dr. Strobl was consumed with issues
14 surrounding Burton, and it took up most of her time."
15 The findings are supported.

16 There is an issue about the Roter report. I
17 think the regents made it clear they only considered the
18 testimony and not the hearsay contained in the Roter
19 report. There was a complaint that it wasn't signed
20 because it was e-mailed. I don't think that's a
21 procedural error that would affect the outcome of this
22 decision.

23 There is a finding at the bottom of Page 6,
24 Paragraph 15 that Chancellor Shields did offer to meet
25 with Dr. Burton as required by U.W.S. 4.02(1). She did

1 not attend because she objected to the inclusion, and
2 that at least that was -- the administrative code
3 provision was complied with.

4 The finding on 16(a) is something which we
5 did discuss or that was discussed in the briefs of,
6 "Publicly disclosing public confidential personnel
7 information of colleagues which constituted a breach of
8 trust and violated the reasonable expectations of
9 UW-Platteville for its faculty."

10 Again, this is part factual, part legal.
11 The respondent concedes that there was no law broken,
12 that the recording of these conversations primarily
13 dealing with promotion of junior colleagues was a breach
14 of trust and violated the reasonable expectations of
15 UW-Platteville for its faculty.

16 Now, this is different than *McAdams* in that
17 *McAdams* was expressing an opinion about what he
18 conceived -- what he perceived was some intolerance of
19 opposing opinions by another professor. This is a
20 situation where the members of the department would get
21 together and discuss what they thought of colleagues,
22 who was on track, what kind of points were being
23 obtained or received, the scoring. I mean you can read
24 the transcripts. Some of it is foreign to me. As a
25 matter of common sense, if you're discussing those types

1 of sensitive employment issues with personnel and you're
2 talking about who's going to get tenure, who's going to
3 get promoted, what's going to go on, there is some kind
4 of expectation that you're going to discuss it and then
5 you're going to come out with a decision as a committee,
6 but that's not what -- that's not what makes me
7 determine that the respondent is correct in this matter.

8 What matters is that there was evidence in
9 the record. I believe it was Chancellor Shields who
10 indicated just how important the confidentiality of
11 these discussions is and how a university personnel
12 would know that, and that evidence was something that
13 the finder of fact decided to accept that, in fact,
14 there is, you know, an understanding that when you're
15 talking about the confidential information of under --
16 particularly underlings and the fact that they may be
17 promoted or not, it's not something that should be
18 posted on the web, and so there was evidence in the
19 record it wasn't illegal, but I think the respondent was
20 entitled to accept that and to find that she knew by
21 turning this over to her husband that it would be put on
22 the web.

23 I know there was some issue in the reply
24 brief, I think, about how there is no information in the
25 record that she told her husband to post this, that she

1 even knew her husband had done this, but the finding
2 that the regents made is supported by a reasonable
3 inference that she was recording, and the fact those
4 recordings ended up on the web is something that she
5 would have been partly responsible for.

6 I would accept that the finding that, "She
7 knowingly violated reasonable expectations of privacy
8 associated with sensitive personal discussions held at
9 department meetings" - that's at the bottom of Paragraph
10 8 - "might be something they should put in the manual so
11 that people understand that and it's explicit." But the
12 evidence was that Dr. Burton did know that as someone
13 who was on the faculty and should have understood that
14 those actions were harmful to the university.

15 They did mention on Page 10 about that there
16 weren't any other individuals who spoke on behalf of Dr.
17 Burton that she should still be retained; although there
18 were numerous letters in the file from students, and
19 there was one letter that the author eventually ended up
20 changing her opinion on Dr. Burton.

21 I guess I'm on Page 12. This is now
22 basically a legal issue, that the testimony concerning
23 this ongoing conduct exceeded the *Safransky* test in that
24 it was something that continued, that was serious, that
25 basically disrupted the entire workplace. The lack of

1 the department to function was something that Dr.
2 Burton, I think herself, had mentioned in prior
3 pleadings.

4 The decision goes on to talk about missing
5 documents. I don't think that was brought up.

6 The Roter investigation they handled.

7 The selection of the faculty hearing panel,
8 there was a note that it was actually changed by one
9 person at the request of Dr. Burton, that one person did
10 resign and they appointed someone else. Other than this
11 conspiracy theory or collusion which Dr. Burton has
12 raised at every level and has been rejected at every
13 level, there's no reason to question the impartiality of
14 the panel that heard this case.

15 The open meetings law, we talked about that
16 a little bit. Apparently, there is another procedure,
17 19.97, that would handle that.

18 The alleged violation of 4.02, that's where
19 the regents found that she chose not to participate.

20 The inability to call and cross-examine
21 witnesses, and this, I think, goes to the heart of the
22 reason we're here. I note that she had made all of
23 these conspiracy and collusion type arguments and that
24 they had been rejected. There really was no evidence
25 for it. That's the type of unfounded and unreasonable

1 allegations that she was making throughout this for
2 whatever reason.

3 You know, to the extent that she thought it
4 was protected because she was attempting to have
5 policies enforced or to get bad people removed or to get
6 investigations by the attorney general or anything else,
7 it just goes toward the unreasonableness of her
8 positions, her unwillingness to take correction and to
9 cease and desist filing these matters.

10 And when I look at the inability to call
11 witnesses, this is also an example. She indicates well,
12 they -- her husband showed up, said she was sick, and
13 they went on with the hearing anyway. The record
14 indicates that there was -- the panel talked about that,
15 and were advised, one, that there is no medical excuse;
16 two, that Dr. Burton had attempted to get it continued
17 numerous times. The opinion was expressed by the
18 attorney that, you know, she'll never show up, you know,
19 if she had her way or words to that effect. She had the
20 right to be there, but I don't think it's reasonable for
21 a litigant at any level to expect that you can try to
22 delay and delay and delay and then at the last second
23 claim illness without so much as a medical excuse.
24 There was a report that was issued, I think, a month or
25 two later, but in court if this were to happen, if it's

1 a civil matter, the person would be defaulted; if it's a
2 criminal matter, there would be a warrant. The common
3 experience that people who are facing, you know,
4 possible consequences, whether it be, you know,
5 defendants in small claims actions or defendants in
6 criminal actions, they tend to either have car trouble
7 or sickness, and we don't hear about it until a couple
8 minutes before matter has been scheduled. So I don't
9 fault the panel for proceeding. I think if they hadn't,
10 it's doubtful whether, you know, Dr. Burton ever would
11 have shown up because it was -- it's not in her interest
12 to facilitate this, and she made it as difficult as
13 possible and -- or intended to.

14 The other issue came up about the
15 cross-examining witnesses. It was repeatedly brought up
16 that the panel has no ability to subpoena witnesses. If
17 they want to show up, fine. The list that Dr. Burton
18 proposed consisted of some 30 individuals. You know,
19 again, who's ever running the hearing, if it were a
20 matter of a court thing, we would not allow somebody to
21 run out the clock and call needless and unnecessary
22 witnesses who, you know, would prolong beyond any
23 reasonable period of time a hearing.

24 The burden of proof, the panel found clear
25 and convincing. The regents say it's the preponderance

1 and cites a case. I don't know. I think the evidence
2 is sufficient under either standard that the panel used
3 or that the board used.

4 There are many procedural issues, but I
5 don't think they really affect the outcome in this
6 particular case, and I don't know that remanding is
7 going to do any good.

8 The issue is whether the toxic environment
9 that existed in the department from approximately 2012
10 to 2017 was due to Dr. Burton being the subject of
11 retaliation and discrimination or whether it was due to
12 her unreasonable and abusive actions, and the decision
13 by the regents is supported. And, Mr. Cueto, I guess if
14 there's any other point that you want me to
15 address specifically?

16 MR. CUETO: May I just have one minute, Your
17 Honor? There was one issue that I don't think you
18 touched on, which was -- it was with regards to -- it's
19 kind of a strange academic issue which I guess in
20 academia they can issue a complaint, and then if it gets
21 resolved you can't be in jeopardy from it any further.
22 I did -- we did go through that in both briefs, but I
23 don't know if the Court's addressed that specific issue.

24 THE COURT: Is that the Chapter 6 complaint
25 that was --

1 MR. CUETO: Yes, Your Honor.

2 THE COURT: -- that was dismissed? And I
3 was unclear. It sounded like that -- part of that
4 Chapter 6 complaint was filled out the same day as that
5 October 28th Letter of Direction, but then it wasn't
6 served until December or January, and it, you know,
7 included information after October 28th. Am I thinking
8 of the right thing?

9 MR. CUETO: All right. Well, Dr. Burton
10 never received it. So we know it was filed. We don't
11 receive it. It was filed the same -- you're right, it
12 was filed around the same day as the letter of
13 direction, so it was kind of what could be in it? I
14 mean I understand some of this it speculative, but on
15 the other hand she had asked for it, she made a record
16 of asking for it, and it hadn't been disclosed. Other
17 than that, this one issue, I think you have touched on
18 the others.

19 THE COURT: All right. And, Ms.
20 Simwanza-Johnson, do you have any help here on what
21 happened to that Chapter 6 complaint or --

22 MS. SIMWANZA-JOHNSON: No, Your Honor,
23 because again it all boils down to I don't know how this
24 is outcome determinative, and if there was a procedure
25 that he feels was violated, then he should have pursued

1 that procedure. So, reading his briefs, I did not see
2 anywhere in there where he indicated that that would
3 mean that she could not get terminated here. He
4 speculates as to what it means, but there's no actual
5 concrete proof. He has to show by a preponderance of
6 the evidence that it would be outcome determinative, and
7 he hasn't done that.

8 THE COURT: Yeah. It wasn't brought up in
9 the decision by the Board of Regents, I guess, so it
10 didn't factor into their decision. The point being made
11 is that had it been filed and had it been dismissed,
12 maybe it would be a bar to relitigating any issue that
13 would have been contained in that letter or that Chapter
14 6 petition, and I guess I don't see that it has any
15 particular relevance. The record doesn't indicate what
16 happened to it, what it said, and if she was never
17 served with it, I don't think it could have any either
18 prejudicial effect or it could be of any, you know, res
19 judicata effect either. So that's the best I can do.
20 All right, anything else?

21 MR. CUETO: Could there be a written order?
22 It doesn't have to go through all the details but just
23 something in writing from the Court for appeal
24 purposes?

25 THE COURT: Okay. Yeah. I'll just do a

1 basic order for the reasons set forth in the record.

2 MR. CUETO: Yeah, that's it. That's fine.

3 THE COURT: Okay. All right. Thank you,
4 folks.

5 MS. SIMWANZA-JOHNSON: Thank you, Your
6 Honor.

7 MR. CUETO: Thank you.

8 (This concludes the proceedings in this case
9 at 10:50 a.m.)

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