IN THE CIRCUIT COURT OF BOONE COUNTY
STATE OF MISSOURI

COALITION OF GRADUATE WORKERS, ERIC SCOTT, DAVID L. ELLIOTT, JOSEPH DEAN MOORE and DOUG VALENTINE,	)	
Plaintiffs,	)	
v.	)	**No. 16BA-CV01634**
	)	**DIVISION 2**
THE CURATORS OF THE UNIVERSITY OF MISSOURI	)	
Defendant.	)	

JUDGMENT

This action is before the Court on the summary judgment motion of plaintiffs and the summary judgment motion of defendant. After reviewing the pleadings and exhibits and after hearing oral argument, the Court grants plaintiffs' motion and denies defendant's motion and enters judgment in favor of plaintiffs.

BACKGROUND

This is a case of first impression in the State of Missouri.

Defendant the Curators of the University of Missouri (the "University") is a public institution of higher learning that offers graduate student programs in a variety of subjects to students pursuing advanced degrees. *First Amended Joint Stipulation of Facts ("Stipulation")*, Paras. 6 and 8. Plaintiffs are the Coalition of Graduate Workers (the "Coalition"), an unincorporated labor organization, and individuals enrolled in graduate studies at the University of Missouri-Columbia who receive various forms of payment from the University for teaching, lab work, proctoring and grading exams and

assisting faculty with research and writing, among other job duties. *Stipulation*, Paras. 1 – 5, 9, 19, 23 and 30 – 35.

On December 21, 2015 and January 6, 2016, the Coalition asked the University to hold an election for graduate workers on its Columbia campus to determine whether they wanted the Coalition to be their exclusive bargaining representative in collective bargaining with the University. *Stipulation*, Paras. 10 and 13. On February 10, 2016, the University denied the request. *Stipulation*, Para. 11. Despite the denial, the Coalition held a representation election with the assistance of the League of Women Voters on April 18 and 19, 2016. *Stipulation*, Para. 12. Approximately thirty percent of roughly 2,600 eligible graduate workers voted, and eighty-four percent (84%) of those voting voted in favor of the Coalition to be the exclusive bargaining representative. *Stipulation*, Para. 14. Two days after the vote, the Coalition reached out to the University for recognition and commencement of collective bargaining. *Stipulation,* Para. 15 and Exh. D (plaintiffs wanted to "open up a clearer line of communication" and "work together" with the University). On May 6, 2016, the University communicated that the request was denied. *Stipulation*, Para. 16.

Plaintiffs subsequently filed this action seeking a declaratory judgment that graduate workers are "employees" within the meaning of Article I, Section 29 of the Missouri Constitution and asking the Court to order the University to recognize and bargain with the Coalition as the exclusive bargaining representative for graduate workers. In the alternative, plaintiffs seek a declaration that the University violated plaintiffs' rights under Article 1, Section 29 by refusing to hold an election, and order the University to hold such an election. In addition, plaintiffs seek reasonable attorneys' fees

and costs. The University asks the Court to find that plaintiffs are not employees under Article I, Section 29.

SUMMARY JUDGMENT STANDARD

Under Missouri law, summary judgment may be granted when the moving party establishes that there are no genuine issues of material fact that would preclude the entry of judgment as a matter of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 377 (Mo. 1993). The Court also notes the distinctions between a plaintiff's summary judgment motion and a defendant's summary judgment motion. *English ex rel. Davis v. Hershewe*, 312 S.W.3d 402, 404 (Mo. App. 2010). In this case, the parties agreed that the Court would decide the case on cross motions for summary judgment based on a set of stipulated facts. *See Stipulation.*

DISCUSSION

A. Plaintiffs Are Employees Who Have the Right to Collectively Bargain Under Article I, Section 29

The primary issue before the Court is whether graduate workers are "employees" within the meaning of Article I, Section 29, which provides that "employees shall have the right to organize and bargain collectively through representatives of their own choosing." Mo. Const., Article I, Section 29. The Court finds that the graduate workers are employees, based on the plain language of Article I, Section 29; the plain and ordinary meaning of the word "employees;" the common law master-servant test; and the University's categorization of the graduate workers as "employees" through its practices and procedures.

First, it is worth noting that the plain language of Article I, Section 29 is not limited to certain categories of employees. In *Independence NEA v. Independence School*

District, 223 S.W.3d 131 (Mo. 2007), which held that Article I, Section 29 applied to public as well as private employees, the Court pointed out that:

> '[e]mployees' plainly means employees. There is no adjective; there are no words that limit 'employees' to private sector employees. The meaning of section 29 is clear and there is accordingly, no authority for this Court to read into the Constitution words that are not there. *Independence NEA,* 223 S.W.3d at 137.

Here, similarly, there are no words in Article I, Section 29 limiting the meaning of "employees" to employees who are not graduate students. Article I, Section 29 is clear and unambiguous: it says, without limitation, "employees." Grafting an exception onto this provision – which is implicitly what the University is asking the Court to do – and excluding a category of workers from its scope would arguably require the Court to "read into the Constitution words that are not there." *Id.* Instead of engaging in judicial activism, the Court will let the plain language of Article I, Section 29 speak for itself. If the graduate workers are "employees," there is nothing in Article I, Section 29 excluding them from its scope.

Second, graduate workers are, in fact, "employees" under the plain and ordinary meaning of the word. No extraordinary or tortuous analysis is necessary to reach this conclusion. The primary rule in construing statutes and constitutional provisions is to "consider words in their plain and ordinary meaning." *StopAquila.org v. City of Peculiar,* 208 S.W.3d 895, 902 (Mo. 2006). *See also Johnson v. State*, 366 S.W.3d 11 (Mo. banc 2012). As the Missouri Supreme Court noted in holding that a municipal judge was an "employee" for purposes of the Missouri Human Rights Act in *Howard v. City of Kansas City*, 332 S.W.3d 772 (Mo. 2011), an "employee" is "commonly defined as 'one employed by another, usually in a position below the executive level and usually for wages,'" or "'any worker who is under wages or salary to an employer and who is not

excluded by agreement from consideration as such a worker.'" *Howard,* 332 S.W.3d at 780, *quoting* Webster's Third New International Dictionary 743 (1993). Put simply, the Missouri Supreme Court has recognized that the plain and ordinary meaning of the word "employee" is someone who is "employed by another for wages." Likewise, the *Restatement of Employment Law,* Section 1.02 (cited in *Columbia University*, 364 NLRB No. 90, n. 52 (2016) (Exh. U in this case)), reflecting the plain and ordinary meaning of the word "employee" in contrast to a "volunteer," states that "[a]n individual is a volunteer and not an employee if the individual renders uncoerced services to a principal without being offered a material inducement." *Id.* The *Restatement* specifically addresses the employment status of graduate workers, explaining that "where an educational institution compensates student assistants for performing services that benefit the institution . . . such compensation encourages the students to do the work for more than educational benefits and thereby establishes an employment as well as an educational relationship." *Id.*, Comment g. Though not binding on the Court, the *Restatment* embodies the plain and ordinary meaning or the word "employee."

The undisputed facts in this case demonstrate that graduate workers are "employees" as that term is plainly and ordinarily used. It is undisputed that graduate workers are paid to:

- Teach three-hour classes;
- Teach five-hour classes;
- Lead discussions or lab sections of a course;
- Proctor large lecture exams;
- Grade large lecture exams;

- Prepare lab exams;
- Grade lab exams;
- Assist faculty with research and writing;
- Teach lab sections;
- Supervise teaching;
- Staff the library (Graduate Library Assistants only);
- Keep the library open (Graduate Library Assistants only); and
- Catalog new library acquisitions (Graduate Library Assistants only).

Stipulation, Paras. 30, 31, 33 and 35.

In return for this work, the University pays graduate workers a fixed amount of money or an hourly wage. *Stipulation,* Para. 23 and Exh. J. The University pays doctoral level graduate assistants a minimum stipend of $20,197.50 per year, and pays a master's/specialist level graduate assistant a minimum stipend of $18,361.25 per year. *Stipulation,* Para. 23 and Exh. J. The minimum hourly rate for doctoral level graduate workers is $19.80 per hour and for master's level workers the minimum hourly rate is $18 per hour. *Id.* The University's own regulations require that any "assignment of responsibilities, such as teaching a course, must be associated with fair and reasonable compensation." Exh. Q.

Based on these undisputed facts, it is relatively easy to conclude that the graduate workers are "employees" under the plain and ordinary meaning of the word. They are "employed by another for wages." *See Howard, supra.* They perform work for

the University, and the University pays them for that work. Simply put, they have jobs that pay wages. They are "employees."[1]

In its supplemental reply brief, the University argues – for the first time in this case – that the "understanding of the term 'employee' by Missouri voters in 1945 is the only relevant definition" and that voters in 1945 were "intent on protecting private industry" and not graduate workers when Article I, Section 29 was adopted. *See Defendant's Supplemental Reply* at 4 and 6. Although this is a creative argument, it does not yield a different result. The switchboard operators and milkmen of 1945 may not have foreseen a future in which graduate workers would teach computer engineering for $20,000 a year, but they would have certainly understood the basic concept of work in exchange for wages. The means of employment have changed since 1945, but the basics of the employment relationship have not. Moreover, the University's argument that voters in 1945 intended to limit Article I, Section 29 to "private" employers was decided to the contrary in *Independence NEA.* The University's argument is unpersuasive.

Third, the common law master-servant test, which is another way of determining whether an employment relationship exists, also supports a finding that the graduate workers are "employees." *See, e.g., Rider v. Julian*, 282 S.W.2d 484 (Mo. 1955). A master is "a principal who employs another to perform service in his affairs and who

[1] The University's reference to federal Department of Labor guidance and Missouri minimum wage law is a non-sequitur. The Missouri minimum wage law, for example, excludes individuals who are employees under the plain and ordinary meaning of the term, such as persons employed in "executive, administrative, or professional" capacities and individuals employed by retail or service employers with gross revenues of less than $500,000. RSMo Section 290.500. In fact, as plaintiffs point out in their supplemental brief, even categories of employees that are statutorily excluded from the Missouri Public Sector Labor Law, RSMo Section 105.510, such as teachers and police officers, are still considered "employees" for purposes of Article I, Section 29. *See, e.g., Independence NEA,* 223 S.W.3d at 139.

controls or who has the right to control the physical conduct of the other in the performance of the service." *Rider,* 282 S.W.2d at 493. *See also Restatement of the Law of Agency*, Section 2.

Here, it is undisputed that the University controls the work of the graduate workers in the following ways:

- The University, through its departments, holds expectations for graduate workers' teaching duties and operation of experiments;
- The University, through professors, directors or mentors, supervises graduate workers who teach classes and assist with laboratory work and research;
- The University, through supervisors, controls and defines the nature and scope of graduate workers' teaching and instruction activities;
- The University, through supervisors, controls the extent to which graduate workers may introduce additional materials into their instruction;
- The University, through faculty, supervises and controls the research and grant proposal development of graduate workers;
- The University controls the duration of graduate workers' employment; and
- The University can terminate a graduate worker if the evaluation of the graduate worker's job performance by the supervising faculty member is unsatisfactory. *Stipulation,* Paras. 28, 30, 31, 33, 34, 35, 36 and 38 and Exh. N, R and S.

Based on these undisputed facts, it is abundantly clear that the graduate workers are employees. They work under the authority and control of the faculty members who supervise their work and evaluate their performance on behalf of the University. This is "employment." Under the common-law master servant test, there is an employer-employee relationship between the University and the graduate workers.

Fourth, the Court finds that the graduate workers are "employees" because the University, through its policies and practices, treats them like "employees." *See Howard v. City of Kansas City,* 332 S.W.3d 772, 782 (Mo. 2011). The Collected Rules and Regulations of the University classify graduate workers as employees with specific job titles. *Stipulation*, Paras. 17 and 18 and Exh. A and F. The University ties job duties to compensation by requiring that any "assignment of responsibilities, such as teaching a course, must be associated with fair and reasonable compensation." *Stipulation,* Para. 32 and Exh. Q. The University includes graduate workers in its workers' compensation coverage, providing that "[a]ll academic and non-academic employees of the University, both full-time and part-time, (including student employees) are extended coverage." *Stipulation,* Para. 29 and Exh. P. And, the University requires graduate workers, as employees, to complete employee training on discrimination prevention and the Family Educational Rights and Privacy Act. *Stipulation*, Para. 40 and Exh. T. Through these policies and regulations, which are obviously at odds with the University's stance in this case, the University defines these graduate workers as "employees."

In addition to the reasons already set forth above, the Court also notes that the decisions of the National Labor Relations Board in *Columbia University*, 364 NLRB No. 90 (2016) (Exh. U in this case) and *New York University ("NYU")*, 332 NLRB 1205

(2000) are consistent with the conclusion reached in this Judgment. Although not binding on the Court, in both decisions the NLRB emphasized the economic relationship between students and their university employers in concluding that the graduate students were "employees" under the National Labor Relations Act. In *NYU*, the NLRB found that the graduate students "perform[ed] services under the control and direction of the employer," such as teaching and research, and were "compensated for these services by the employer," which placed the students squarely within the common law master-servant relationship and within the NLRA definition of "employee." *NYU* at 1206. In *Columbia University*, the NLRB noted the "payment of compensation, in conjunction with the employer's control;" noted that graduate workers "frequently take on a role akin to that of faculty;" and noted, among other indicia of employment, that the university directed the work and performance of graduate workers. *Columbia University* at 6, 16 and 18 of opinion (Exh. U). A graduate student, in the view of the *Columbia University* panel, "may be both a student *and* an employee; a university may be both the student's educator *and* employer." *Id.* at 7 (emphasis in original) (Exh. U). Neither decision is binding on this Court, but both are consistent with the conclusion reached here.

Before moving on from the question of whether the graduate workers are "employees," the Court addresses the University's argument that graduate workers are different than other workers. In the University's view, plaintiffs have a primarily educational relationship with the University that is "inextricably linked" with their academic standing which would be "industrialized" (as counsel stated at oral argument) by collective bargaining. Relying on *Brown University,* 342 NLRB 483 (2004) (overruled by *Columbia University*) which found that collective bargaining would "improperly intrude

into the educational process," *Brown* at 493, the University contends that collective bargaining would "cripple the educational relationship" that students have with the University. *Defendant's Memo of Law* at 10. The University asks the Court to consider what it deems the "potentially adverse policy impacts" of collective bargaining. *Id.*

To reach the result desired by the University, the Court would have to reject the plain and ordinary meaning of the word "employee" and instead give primacy to the *place* of employment. According to the University, it is irrelevant that graduate workers are paid for the work they perform for the University; all that should matter to the Court, in the University's view, is that the work takes place in the halls of academia.[2] This is a policy argument, however, that offers no legal basis for departing from the plain and ordinary meaning of the word "employee." The question before the Court is not a question of policy but a question of law. While the Court's decision may have policy implications, the legal conclusion that graduate workers are employees is grounded as a matter of law in the plain language of the Missouri Constitution, the ordinary and common law meaning of the word "employee" and the University's own categorization of the graduate workers.

For all of the foregoing reasons, the Court finds that plaintiffs are employees who have the right to collectively bargain under Article I, Section 29.

B. The University Shall Recognize and Bargain with the Coalition of Graduate Workers As the Exclusive Bargaining Agent of Graduate Workers

Having determined that plaintiffs are employees under Article I, Section 29, the Court further finds that plaintiff Coalition of Graduate Workers has been chosen as the

[2] By analogy, as plaintiffs point out, apprentices who are enrolled in education programs and participate in on-the-job training are union members with the right to collectively bargain, even though their education is a mandatory part of their employment. *See Plaintiffs' Reply* at 7.

exclusive bargaining representative of graduate workers on the University of Missouri-Columbia campus and orders the University to recognize and bargain with the Coalition of Graduate Workers as the exclusive bargaining agent of graduate workers on the University of Missouri-Columbia campus.

The issue here is the legitimacy of the April 18 and 19, 2016 election conducted by the League of Women Voters in which eighty-four percent (84%) of those graduate workers voting voted to be represented by the Coalition. On December 21, 2015 and January 6, 2016, the Coalition requested that the University hold an election to determine if graduate workers wanted the Coalition to be their exclusive bargaining representative. *Stipulation*, Para. 10. After the University rejected the request, the Coalition and the League of Women Voters held the election.

Notably, the University did not challenge or even address the election framework or election results in any of the three briefs it originally submitted to the Court in support of its motion. Not until oral argument (followed by its post-argument supplemental briefing) did the University seek for the first time to invalidate the election on the basis that the University was not involved in setting the framework of the election, emphasizing as well that roughly thirty percent of all eligible graduate workers voted to recognize the Coalition.

Even assuming for the sake of argument that the University did not in the course of this lawsuit waive a challenge to the election by failing to raise the issue until oral argument, the Court finds that the graduate workers chose the Coalition to be their exclusive bargaining agent. While a public employer may "set the framework" for collective bargaining, *W. Cent. Mo. Region Lodge #50 of the FOP v. City of Grandview,*

460 S.W.3d 425, 433 (Mo. App. 2015), *citing Independence NEA*, 223 S.W.3d at 136, there is no specific authority for the proposition that a public employer can deny a request for an election and make no effort to set the framework for an election, and then later argue that the election should be invalidated because the public body took no role in the election framework. Twice, the graduate workers asked the University for an election – the University refused. *Stipulation*, Paras. 10 and 11. The Coalition then conducted the election using an analogous election procedure under RSMo Section 105.500 for certain public sector employees. The University could have helped set the framework and could have jointly conducted an election, and then challenged plaintiffs' right to collectively bargain, as plaintiffs point out. Instead, the University rebuffed plaintiffs' request to "set the framework" for an election, and the Coalition held an election, the specific details and framework of which have not been challenged in this action. Under the doctrines of waiver and estoppel, the University forfeited its right to participate in setting the framework of an election. *See, e.g., Ehrle v. Bank Bldg. & Eqiupment Corp.*, 530 S.W.2d 482, 489 (Mo. App. 1975); *State ex rel. Shartel v. Mo Util. Co.*, 53 S.W.2d 394 (Mo. 1932). As in *Eastern Mo. Coalition of Police v. City of Chesterfield*, 386 S.W.3d 755 (Mo. 2012), involving similar though not identical facts, it is unnecessary to order the parties to go back to the proverbial drawing board and jointly establish the framework for a new election – an election was held, the election procedure itself has not been challenged, and a supermajority of those voting voted in favor of the union. *See also Degraffenreid v. State Bd. of Mediation*, 379 S.W.3d 171 (Mo. App. 2012) (upholding certification of representation election based on simple majority of persons voting). Indeed, allowing the University to benefit from its refusal to

set the election framework over two years ago would frustrate the very purpose of Article I, Section 29 and unnecessarily protract the meet and confer process to which plaintiffs are entitled under the Missouri Constitution.

CONCLUSION

To summarize, the Court grants plaintiffs' summary judgment motion and denies defendant's summary judgment motion. The Court finds that graduate workers are "employees" under Article I, Section 29 of the Missouri Constitution. The Court finds that the Coalition of Graduate Workers is the duly elected exclusive bargaining representative of graduate workers at the University of Missouri-Columbia. The Court orders the University to recognize and collectively bargain with the Coalition of Graduate Workers as the exclusive bargaining representative of graduate workers at the University of Missouri-Columbia. The Court denies plaintiffs' request for attorneys' fees. Parties to bear own costs. Judgment for plaintiffs entered accordingly.

6-21-18

Judge Jeff Harris
Circuit Judge
Division 2
13th Circuit

COURT SEAL OF

BOONE COUNTY