

MEMORANDUM

To: Deans, Unit Directors and Supervisors
From: Office of Human Resources; Office of General Counsel
Date: August 2, 2010
Re: Guidance regarding employee misconduct and disciplinary actions

I. INTRODUCTION

From time-to-time deans, unit directors and supervisors are faced with employee misconduct issues and disciplinary actions. Given that there are a number of individuals in leadership and supervisory positions who may be new to their roles, this memorandum will serve as a basic reference guide when considering rules and standards applicable to employees and standards of conduct. As the University employs various categories of employees, classified, non-classified and faculty, each category is addressed separately. There may be some overlap among categories, and those areas will be noted. Special rules may apply to temporary and student employees. Consultation with the Office of Human Resources is strongly recommended if significant employee disciplinary issues arise.

In addition to the specific rules or policies applicable to the various categories of employees discussed below, it is advisable, to the extent reasonably possible, to document employee misconduct thoroughly and to use what is commonly referred to as “progressive discipline.” Although the progressive discipline concept is not specifically spelled out or mandated by statute, Personnel Commission or State Board of Education (hereinafter “Board”) rule or policy, it is a concept that courts, reviewing boards and even juries tend to apply *de facto* as a measure of the “fairness” of employee discipline in a given case. However, employee misconduct which is sufficiently egregious will not necessarily demand a documented pattern of behavior prior to employer-imposed disciplinary action.

II. CLASSIFIED EMPLOYEES

Rules pertaining to classified employees are primarily found in the Idaho Code and the Idaho Division of Human Resources rules. The grounds for classified employee disciplinary dismissal, demotion, suspension or other discipline include but are not limited to the following:

1. Failure to perform the duties and carry out the obligations imposed by the state constitution, state statutes and rules of the employee’s department, or the rules of the administrator or the division [of Human Resources].
2. Inefficiency, incompetency, or negligence in the performance of duties, or job performance that fails to meet established performance standards.
3. Physical or mental incapability for performing assigned duties.
4. Refusal to accept a reasonable and proper assignment from an authorized supervisor.
5. Insubordination or conduct unbecoming a state employee or conduct detrimental to the good order and discipline in the employee’s department.
6. Intoxication on duty.
7. Careless, negligent, or improper use or unlawful conversion of state property, equipment or funds.

8. Use of any influence which violates the principles of the merit system in an attempt to secure a promotion or privileges for individual advantage.
9. Conviction of official misconduct in office, or conviction of any felony, or conviction of any other crime involving moral turpitude.
10. Acceptance of gifts in exchange for influence or favors given in the employee's official capacity.
11. Habitual pattern of failure to report for duty at the assigned place and time.
12. Habitual improper use of sick leave privileges.
13. Unauthorized disclosure of confidential information from official records.
14. Absence without leave.
15. Misstatement or deception in the application for the position.
16. Failure to obtain or maintain a current license or certificate lawfully required as a condition for performing the duties of the job.
17. Prohibited participation in political activities.

(Idaho Code § 67-5309; Division of Human Resources Rule, IDAPA 15.04.01.190; Idaho State University *Faculty-Staff Handbook* (hereafter "ISU Policy"), 4.IV.F). Procedures applicable to disciplinary actions may be found at the ISU Human Resources web-page at <http://www.isu.edu/humanr/Policy/>. Classified employees are also subject to additional State Board of Education rules for discipline. (See below).

Generally, most categories of disciplinary action should be based upon a well-documented pattern of misconduct. However, in some instances, such as insubordination, discipline of classified employees will be upheld "if there is substantial, competent evidence supporting a single incident of misconduct by [the employee]." *Horne v. Idaho State University*, 69 P.3d 120, 125 (Idaho 2003) (employee properly dismissed for insubordination where the employee became upset during a meeting with a supervisor, slammed a pad of paper on the supervisor's desk and left the meeting without permission); *Whittier v. Department of Health and Welfare*, 44 P.3d 1130 (Idaho 2002).

III. NON-CLASSIFIED EMPLOYEES

Rules pertaining to non-classified employees are primarily created by Board rule. That is, except to the extent a particular statute applies, such as the Ethics in Government Act, Idaho Code § 59-701 *et seq.* or the Bribery and Corrupt Practices Act, Idaho Code § 18-1351 *et seq.*, the State Board of Education which acts as the Board of Trustees for ISU, is the primary source for the rules of conduct applicable to non-classified University employees.

Idaho State Board of Education *Governing Policies and Procedures*, (hereafter "Board Policy"), II.L., states, in part:

I. Classified Employees

Classified employees are subject to discipline, up to and including dismissal, as provided for in Chapter 53, Title 67, Idaho Code and the rules of the State Division of Human Resources.

2. Non-classified Employees

All . . . non-classified employees (*including all faculty employees*) of the Board or of any Board governed agency or institution are subject to discipline, up to and including dismissal, for *adequate cause*.

3. Definition

“*Adequate cause*” means one (1) or more acts or omissions which, singly or in the aggregate, have directly and substantially affected or impaired an employee’s performance of his professional or assigned duties or the interests of the Board, institution or agency. In addition, any conduct seriously prejudicial to the Board, an institution or agency may constitute cause for discipline, up to and including dismissal. Examples include, but are not limited to, one or more instances of sexual harassment or other form of harassment prohibited by law; immorality; criminality; dishonesty; unprofessional conduct; actions in violation of policies, directives, or orders of the Board, an institution or agency; unsatisfactory or inadequate performance of duties, or failure to perform duties.

This Board policy further directs that discipline occurring “before the expiration of the stated period of appointment or employment contract will be only for adequate cause,” and that “[e]ach institution . . . shall have a process that provides employees with written notice of contemplated discipline and an opportunity to be heard.” ISU Policy 4.IV.E. adopts the identical definition of “adequate cause” and sets forth the specific procedures to be followed in instances of discipline under this policy. It should be kept in mind that a variety of actions may fall within the general category, “unprofessional conduct,” that there may be violations of other University policies, such as research misconduct (e.g., falsifying or misrepresenting data in research publications or grants), and that there are a myriad of crimes, such as embezzlement, fraud, etc., which would fall within the general category, “criminality.” Each potential violation must be evaluated on a case-by-case basis.

In addition, Board Policy, II.Q., sets forth in a “Conflict of Interest and Ethical Conduct” policy a set of “general principles of ethical conduct” applicable to all employees:

All employees of the institutions, agencies and school:

- a. shall not hold financial interests that are in conflict with the conscientious performance of their official duties and responsibilities;
- b. shall not engage in any financial transaction in order to further any private interest using nonpublic information of the Board, institution, school or agency;
- c. shall put forth honest effort in the performance of their duties;
- d. shall make no unauthorized commitments or promises of any kind purporting to bind the Board or any Board-governed entity;
- e. shall not use their public offices for private gain;
- f. shall act impartially and not give preferential treatment to any private or public organization or individual;
- g. shall protect and conserve public property and shall not use it for other than authorized activities;
- h. shall not engage in outside employment or activities, including seeking or negotiation for employment, that conflicts with official duties and responsibilities;

- i. shall promptly disclose to their chief executive officer waste, fraud, abuse, or corruption in accordance with applicable law and police;
- j. shall endeavor to avoid any actions that would create the appearance they are violating the law or the ethical standards of the Board or the relevant Board-governed entity;
- k. shall disclose potential conflicts of interest to the Chief Executive Officer, or designee, of the institution or agency, and avoid conflicts of interest, potential conflicts of interest, and circumstances giving rise to the appearance of a conflict of interest.

(Also incorporated by reference into ISU Policy, 4.I.B.3.). The policy also sets forth a definition of “conflict of interest,” which states, “[a] conflict of interest occurs when a person’s private interests compete with his or her professional obligations to the Board-governed entity to a degree that an independent observer might reasonably question whether the person’s professional actions or decisions are materially affected by personal considerations, including but not limited to personal gain, financial or otherwise.” The policy continues with specific procedures related to disclosure and participation when a financial conflict of interest is at issue.

IV. FACULTY

Faculty discipline and dismissal, prior to the expiration of a contract or of tenured faculty, must comport with the “adequate cause” standard set forth in the non-classified section above. In addition, faculty must not be disciplined in violation of the Board’s “Academic Freedom and Responsibility” policy, (Board Policy III.B.). That policy states:

In adopting the following policy statement concerning academic freedom and responsibility, the State Board of Education . . . affirms its belief that academic freedom should not be abridged or abused.

Institutions of higher education are operated for the common good and not to further the interests of individual faculty members or the institution as a whole. Academic freedom is essential to protect the rights of the faculty member in teaching and the student in learning. Freedom in research and teaching is fundamental to the advancement of truth. Academic freedom carries with it responsibilities as well as rights.

I. Teaching

The faculty member is entitled to freedom in the classroom in discussing the subject material but should not introduce matters not germane to the subject.

2. Research

The faculty member is entitled to freedom in research and the publication of the results. However, research for pecuniary return, when that research is part of the faculty member’s assigned duties or when the research involves use of institutional facilities or resources not usually available to the general public may be undertaken only with the prior written approval by the chief executive officer or his or her designee.

3. Responsibilities

Membership in the academic community imposes on administrators, faculty members, other institutional employees, and students an obligation to respect the dignity of others, to acknowledge the right of others to express differing opinions, and to foster and defend intellectual honesty, freedom of inquiry and instructions, and free expression on and off the campus of an institution.

Each faculty member of the institution is a citizen, a member of a learned profession, and a representative of the institution. When speaking or writing as a citizen, the faculty member should be free from institutional censorship or discipline. However, as a member of the academic community and a representative of the institution, the faculty member should at all times be accurate, exercise appropriate restraint, show respect for the opinions of others, and make every effort to indicate that he or she is not an official spokesperson for the institution. Furthermore, each faculty member must refrain from using institutional resources to further his or her activities which are not a part of the assigned responsibilities to the institution.

ISU Policy adopts nearly identical language, and includes a “Statement on Faculty Ethics.” (See, ISU Policy, 4.I.B.).

Although the Supreme Court has been criticized for leaving the interpretation of the concept of academic freedom somewhat open to interpretation, (L. White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 814-815, 2010), it appears reasonably clear that faculty speech related to *teaching* and *scholarship* will most likely enjoy legal protection by the courts under the rubric of academic freedom.

In general . . . courts appear more willing to sustain claims of academic freedom when they arise in the context of nuclear academic speech—what one commentator has called the expression of ‘profession-specific privileges’—than when the subject matter of a faculty member’s lawsuit relates only distantly (or not at all) to the *classroom* or the *laboratory*. When the institution interferes with a faculty member’s freedom to select topics for classroom discussion, assemble a syllabus, assign grades, or conduct scholarly research and publish the results thereof, faculty members more often than not prevail when they claim that academic freedom protects their prerogatives in those areas.

(*Id.* at 828). On the other hand, when faculty step outside the traditional areas of teaching and scholarship, and speak on other areas related to their official duties, it is less likely they will enjoy First Amendment protection.

In a case that has generated considerable discussion in academic circles, the U. S. Supreme Court was called upon to decide the issue of whether the First Amendment protects a government employee from discipline for speech uttered pursuant to the employee’s official duties. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” (*Id.* at 421). The Court indicated it was not articulating a “comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate,” (*id.* at 424), and therefore, an individualized analysis is required in any given situation. Although *Garcetti* was not an education case, Justice Kennedy, in dictum, indicated “[t]here is some argument that *expression related to academic scholarship or classroom instruction* implicates

additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason 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*." (*Id.* at 425, emphasis added).

While it may be too early to determine whether the possible academic scholarship or classroom instruction qualification to the *Garcetti* rule will become widely accepted, a few higher education cases decided by lower courts do serve to provide some guidance.

Hong v. Grant, 516 F.Supp.2d 1158 (C.D. Cal. 2007), is a case in which a professor argued that a University's decision to deny him a salary increase resulted from his criticism of his dean and department chair. The University filed a motion for summary judgment, which was awarded. The Court held that comments were made as part of the professor's institutional governance responsibilities, and thus, were "made pursuant to his official duties as a faculty member and therefore do not deserve First Amendment protection. [The University] is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities." (*Id.* at 1168). This case is currently on appeal to the Ninth Circuit Court of Appeals.

Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008), is a case involving a dispute between a University and a tenured professor over a National Science Foundation grant application. The professor accused the dean of allocating a portion of the grant for improper purposes in contravention of NSF regulations, and refused to execute the University's internal document apportioning the funds. After the University returned the grant funds to NSF, the professor sued claiming his pay was effectively reduced and his reputation damaged by the University's actions—all in retaliation for exercising his First Amendment rights when he complained about the alleged misuse of funds. The Court awarded summary judgment to the University, holding that when Renken complained to various University officials, he "was speaking as a faculty employee, and not as a private citizen, because administering the grant as a PI fell within the teaching and service duties that he was employed to perform." (*Id.* at 774).

In *Savage v. Gee*, ___F.3d___ (S.D. Ohio, June 7, 2010), the Court stated that, "*Garcetti* added the corollary that the speech, although it might be of public concern, is not protected by the First Amendment if it is made pursuant to the public employee's job duties," even if the law contains a type of academic freedom exception, it would only apply if the speech in question were considered part of scholarship or teaching. The Court found the speech in question, a controversial reading-assignment recommendation, involved neither.

Sheldon v. Dhillon, ___F.3d___ (N.D. Cal. 2009) is an example of a case in which the professor prevailed as the speech in question was related to classroom teaching. During the course of a human genetics class, Professor Sheldon answered a student's questions about heredity and homosexuality. She was later terminated after an anonymous complaint was received by the dean's office. The Court found in favor of the faculty member, noting that, "teachers have First Amendment rights regarding their classroom speech. . . .If the [institution] acted in retaliation for her *instructional speech*, those rights will have been violated unless the defendants' conduct was reasonably related to legitimate pedagogical concerns."

In summary, accepting the premise, at least until the Supreme Court clarifies the issue, that *Garcetti* does contain an academic exception, while that exception does protect a faculty member's speech related to scholarship and teaching (absent a legitimate pedagogical concern), a faculty member may be

disciplined for other offensive or unprofessional speech made pursuant to their official duties. Of course, nothing in *Garcetti* mandates particular disciplinary action in any given case. A dean, unit director or supervisor should exercise discretion and judgment, counsel with employees as appropriate, and consider taking disciplinary action when the offending speech or conduct is severe or part of a demonstrable pattern.

V. TEMPORARY EMPLOYEES

As temporary employees may be either “at-will” or contract employees, it is always advisable to consult with the Office of Human Resources or the Office of General Counsel when confronted with a specific disciplinary issue related to a temporary employee.