

**HIGHER EDUCATION CASE LAW
IN IDAHO**

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State Board of Education

Evans v. Andrus, 124 Idaho 6, 855 P.2d 467, 84 Ed.L.Rep 522 (1993). The State Superintendent of Public Instruction petitioned the Idaho Supreme Court for an order declaring House Bill 345, which was about to go into effect, for an order declaring the bill unconstitutional. H.B. 345, the “split-Board” bill, would have created two “councils” from the membership of the Board, one for the governance of most of the institutions of higher education, and one for the governance of the K-12 system and the School for the Deaf and Blind. The Board would act as a whole in governing institutions and programs “of common access to both higher education and public school systems, including Eastern Idaho Technical College, vocational education, the State Library Board, Idaho work study program, public broadcasting system, Idaho state historical society, and other matters where required by law.”

The Court held that Article 9, §2 of the Idaho Constitution, by its plain language, vested the governance of all aspects of public education in a Board of education. It issued a writ permanently prohibiting the Governor and the Board from complying with H.B. 345.

Dreps v. Board of Regents of the University of Idaho, 65 Idaho 88, 139 P.2d 467 (1943). The Board declined to pay the salary of a University of Idaho nurse after her uncle was appointed a member of the Board, on the grounds that to do so would have been in violation of the state Nepotism Act. The district court had entered judgment in favor of the nurse and the Board appealed. The issue was whether the Act applied to the Board, and even if the Legislature intended it to apply to the Board, did it have the power to make it applicable to the Board? The

Court held: “. . . the Legislature possesses no power to place any restrictions on the Board of Regents in the matter of their employment of professors, officers, agents, or employees; nor can they tell the Board whom they may and may not appoint. We therefore conclude that it was not the intention of the legislature to extend the Nepotism Act . . . to the University of Idaho or the Board of Regents thereof.” 139 P.2d at 473. The judgment of the district court was affirmed.

State ex rel. Miller v. State Board of Education, 56 Idaho 210, 52 P.2d 141 (1935). A statute authorizing the Board of Regents of the University of Idaho to issue bonds to be amortized over a period of 30 years from bonds accruing from an infirmary to be constructed from the bond proceeds did not violate Article 8, § 3 of the Idaho Constitution. The Court also held that the statute meant that “net income” from the operation of the infirmary, as well as from the operation of a dormitory which had not been constructed with state or federal appropriation, could be used for payment of the bonds.

State ex rel. Black v. State Board of Education, 33 Idaho 415, 196 P. 201 (1921). The State, acting through the Attorney General, sought an order prohibiting the State Board, acting as the Board of Regents of the University of Idaho, from certain actions, such as refusing to pay into the state treasury funds coming into the hands of the Board’s treasurer from the sale of university lands, directing its officers to purchase items without regard to state purchasing law, demanding payment from endowment funds from the state auditor and treasurer, refusing to comply with state surplus property laws, refusing to submit claims to the state board of examiners, letting contracts without compliance with state bidding requirements, employing

professionals without authority from the state, etc. The Court ruled in favor of the Board of Regents, finding it not subject to most of the state requirements in question.

It is admitted by the Attorney General, and we think correctly so, that the proceeds of federal grants, direct federal appropriations, and private donations to the University are trust funds, and are not subject to the constitutional requirement that money must be appropriated before it is paid out of the state treasury. Claims against such funds need not be passed upon by the Board of Examiners, and the moneys in such funds may be expended by the Board of Regents, subject only to the conditions and limitations provided in the acts of Congress making such grants and appropriations, or the conditions imposed by the donors upon the donations.

* * *

That a claim against the regents is not a claim against the state

This necessarily follows for the reason that the Board of Regents is a constitutional corporation with granted powers, and while functioning within the scope of its authority is not subject to the control or supervision of any other branch, board or department of the state government, but is a separate entity, and may sue and be sued, with power to contract and discharge indebtedness, with the right to exercise its discretion within the powers granted, without authority to contract indebtedness against the state, an in no sense is a claim against the regents one against the state.

* * *

When an appropriation of public funds is made to the University, the Legislature may impose such conditions and limitations as in its wisdom it may deem proper. If accepted by the regents, it is coupled with the conditions, and can be expended only for the purposes and at the time and in the manner prescribed, and can be withdrawn from the state treasury only as provided by law.

196 P.2d 204-205. In this particular case, since there were no such conditions contained in an appropriation or otherwise raising “an implied contract on the part of the Board of Regents, there is no obligation resting upon them to pay to the State Treasurer the proceeds of the sale of the property belonging to the Univeristy.” *Id.* at 205.

Boise State University

Emery v. Boise State University, 136 Idaho 312, 32 P.3d 1112 (2001). The Idaho Supreme Court upheld a determination of the Idaho Industrial Commission that the appellant, Emery, was ineligible for unemployment insurance benefits. Emery, a part-time temporary English instructor attempted to collect unemployment benefits for the period between the end of Spring semester and the beginning of summer session and the end of summer session and the beginning of fall semester, where she had been told she was scheduled to teach three classes. The case turned on whether Emery had a “reasonable assurance” of employment in the fall, constituting a bona fide offer of employment. The Court held:

Substantial and competent evidence supports the Commission’s determination that Emery’s offer was more than a mere possibility of employment and Emery was given a bona fide offer of continued employment as defined by the IDAPA rules. Therefore, Emery had reasonable assurance a contract would be offered and is ineligible for unemployment insurance benefits under I.C. § 72-1366(17)(a). Although Emery argues the fairness of depriving part-time, temporary instructors benefits where they do not have the security of annual contracts, that is an argument better made to the legislature. We decline the request to provide protections for part-time instructors not clearly provided by the statutes.

Id., 32 P.3d at 1115.

Leon v. Boise State University, 125 Idaho 365, 870 P.2d 1324, 90 Ed.L.Rep. 456 (1994). In this action by an assistant university professor who was issued a “terminal contract,” the Idaho Supreme Court held that university officials did not breach the existing employment contract by holding a “special review” which led to the decision not to renew the professor’s contract, notwithstanding that the rules didn’t specifically provide for such review. It also held that any alleged promise by the department chair to permit the professor to defer his tenure application would have been ineffective since the Board rules do not permit promises of more than the

current term of employment without prior Board approval, and that the professor had no property interest in employment beyond the current contract.

Pounds v. Denison [I], 115 Idaho 381, 766 P.2d 1262, 51 Ed.L.Rep. 616 (Ct.App. 1988).

This case involved a classified state employee who had worked as accountant with the BSU Vocational Technical School from 1969 to 1985. Denison, hired as dean of the school in 1983, and the plaintiff, had what the Court described as an “acerbic” relationship. Pounds alleged that the dean inflicted severe mental and emotional distress upon her in an effort to coerce her resignation. Pounds took medical leave on May 15, 1985, and filed a grievance on May 20, 1985. She wanted a written job description and that all negative evaluations be removed from her file. The grievance panel, while recommending some things to reduce friction in the office, concluded that the written job description was not necessary and that the personnel file should remain intact. The university president accepted the recommendations and Pounds appealed to the Personnel Commission. The appointed hearing officer determined that Pounds had not been discharged or denied a right or benefit to which she was entitled, and therefore, the matter was not reviewable by the Commission, and dismissed the appeal.

Pounds’ medical leave expired on November 18, 1985, and since she did not return to work within the six month period required by the rules applicable to classified employees, her position was declared vacant and was filled by another employee. Instead of filing another grievance under the Personnel Commission rules, Pounds filed a lawsuit on February 22, 1986. BSU filed a motion for summary judgment based on Pounds’ failure to exhaust administrative remedies and failure to file notice in accordance with the Idaho Tort Claims Act. The Court held

that any of Pounds' claims related to her dismissal must fail because she did not first exhaust all available administrative remedies before bringing her claims in to a judicial forum.

The Court also found that Pounds' tort claim for intentional infliction of emotional distress was not precluded under the exhaustion of administrative remedies requirement and remanded the case to the trial court.

Pounds v. Denison [III], 120 Idaho 425, 816 P.2d 982, 69 Ed.L.Rep. 1175 (1991). In the second appeal arising out of the facts set forth in *Pounds v. Denison [I]*, *supra*, the Idaho Supreme Court affirmed the decision of the district court dismissing Pounds' tort claim against BSU, the university president, and the dean, for failure to provide notice as required by the Tort Claims Act, and for failure to rebut the presumption that the president and dean acted within the course and scope of their employment with respect to the plaintiff. The statute requires that a person with a claim against the state file a notice of claim within 120 days of the time the claim arose [now 180 days]. Filing a grievance with the university was not sufficient."The filing of a grievance with a state entity, such as BSU in this case, is simply not sufficient to serve as notice of tort claim; such grievances are too preliminary in nature to alert the state to a potential tort claim." *Id.*, 816 P.2d at 984.

Scholes v. Healas, 1985 WL 6687 (D.Idaho 1985). Scholes had been a tenured "related instructor" in the BSU School of Vocational Technical Education (School). After a series of fiscal holdbacks, culminating with a 9% reduction ordered by the Governor, BSU was ordered by the State Board of Education to develop a plan for implementing the reduction. Seven

positions in the School were identified for elimination, including the plaintiff's, and after the Board adopted the plan and plaintiff's appeal to the Appeals Council of BSU was rejected, she filed suit in federal district court in Idaho. After trial, Judge McNichols issued his findings of fact and conclusions of law wherein he ruled: (1) the evidence showed by a preponderance that there was a bona fide financial exigency which threatened BSU and which could not be alleviated by other means than a reduction in faculty, (2) that the plaintiff had a property interest that was terminated pursuant to due process of law, and therefore, (3) plaintiff's complaint should be dismissed.

Milbouer v. Keppler, 644 F.Supp. 201, 35 Ed.L.Rep. 422 (D.Idaho 1986). This is another case against BSU arising out of the same declaration of financial exigency addressed in *Scholes, supra*. The federal district court granted BSU's motion for summary judgment, again finding that the preponderance of the evidence showed a genuine financial exigency for fiscal year 1983. The Court also held that the tenured professor was provided adequate notice and a fair appeals hearing which comported with due process. Further, the Court held that in any event the Eleventh Amendment barred the suit against the state, BSU and BSU officials, as any remedy would necessarily affect the state treasury. "In the instant case, it is clear that while plaintiff seeks relief against named university officials, she is attacking a state and university policy and would receive any damages from the State Treasury. Applying the rationale of *Hall* [*Hall v. Hawaii*, 791 F.2d 759 (9th Cir. 1986)], the court finds that the University officials are also immune from suit under the eleventh amendment because an action against the officials is, in this case, an action against the State. This decision would also bar plaintiff's claim for injunctive

relief for reinstatement, which would also require disbursement of state funds for her salary, or at least, cause such a shortfall of non-appropriated funds that state funds would have to be used to make up for the loss.” *Id.* at 207-08.

The Court also held that BSU’s removal of the case from state to federal court did not override its eleventh amendment immunity. (Note: The U.S. Supreme Court recently held that a university’s removal of a case from state to federal court did constitute a waiver of eleventh amendment immunity. *See, Lapidus v. Board of Regents of University System of Georgia*, 122 S.Ct. 1640 (2002).

Wood v. Boise Junior College Dormitory Housing Commission, 81 Idaho 379, 342 P.2d 700 (1959). Held that the dormitory housing commission was not the alter ego of the junior college board of trustees, and therefore, it was not a violation of Article 8, § 3 of the Idaho Constitution for the commission to execute revenue bonds or other forms of security payable out of revenues obtained from student housing projects without a vote of taxpayers.

Eastern Idaho Technical College

Totman v. Eastern Idaho Technical College, 129 Idaho 714, 931 P.2d 1232, 116 Ed.L.Rep. 429 (Ct.App.1997). A first-year non-tenured instructor brought an action for breach of contract, breach of the covenant of good faith and fair dealing, intentional infliction of emotional distress, and due process and first amendment violations. Due to various difficulties with her teaching, the plaintiff was given notice on February 26, 1992, that the college would not renew

her contract when it expired in July of that year. The plaintiff contended, among other things, that the college must conduct a formal evaluation prior to issuing the notice. The Court held that her contract did not mandate that the yearly evaluation be completed before the notice of non-renewal was issued; the decision to recommend non-renewal was based on evaluations, including fall semester student evaluations, of which the instructor was aware. It also held that the notice of non-renewal was the only process to which the instructor was entitled; a statement of reasons for the non-renewal was not required. Additionally, since the college did not breach any express terms of the contract, there could be no breach of any implied covenant of good faith and fair dealing. On the First Amendment issue, the Court held that the instructor's expression of dissatisfaction with the notice of non-renewal was only speech related to a matter of personal interest rather than a matter of public concern, and therefore, was not First Amendment protected.

Idaho State University

Horne v. Idaho State University, 2003 WL 1923311, 138 Idaho 700, 69 P.3d 120, 176 Ed.L.Rep. 913 (2003). In an appeal from the district court upholding the decision of the Personnel Commission which sustained the university's decision to terminate a classified employee's employment, the Court held the evidence supported the decision for insubordination and conduct unbecoming a state employee. The evidence was that the employee became upset with supervisors during meetings, shouted, slammed hands on supervisor's desk, raised a book above her head and abruptly left meetings despite directives not to do so; made a phone call to

the university's family medicine clinic in which she stated she might "hit a point where I take everybody out with me;" and made a loud and threatening call to the Department of Transportation from her university office—overheard by several people in adjoining offices. The Court stated the standard of review: an appellate court will uphold the determination of the Personnel Commission to demote, suspend, or terminate a classified employee if there is substantial, competent evidence supporting a *single* incident of misconduct by the employee.

The Court also held that the university was not a state agency for purposes of Idaho Code § 12-121 and was not entitled to attorneys fees.

Hughes v. Idaho State University, 122 Idaho 435, 835 P.2d 670, 76 Ed.L.Rep. 1182 (Ct.App.1992). A non-tenured professor brought a breach of employment and breach of the implied covenant of good faith and fair dealing action after she was notified that she would receive a terminal one-year contract after she refused to accept a reassignment from the Boise campus to the Pocatello campus. The plaintiff argued that since she negotiated the Boise situs in her first contract, this became a limitation on ISU's ability to terminate her employment. I.e., ISU could not unilaterally assign her to the Pocatello campus and then terminate her employment for refusing the reassignment. The Court held, however, that there was no breach.

Hughes' initial contract, and each contract after the 1986-1987 contract, was subject to the rules, policies and procedures of the State Board of Education. Pursuant to the ISU Handbook, no contract of employment with a non-tenured or non-classified, salaried employee may exceed one year without prior approval of the Board. We must conclude, as did the court below, that Hughes, as a non-tenured professor, was employed under a series of one-year term contracts. Although there is no mention of the Boise situs in the contracts, the record indicates that Hughes performed her teaching duties in Boise and Twin Falls as the parties had agreed. There is no evidence that ISU failed to discharge its obligations under the contracts, that is, to provide employment in Boise during the term of each of Hughes' contracts and to

compensate Hughes in accordance with the contract in force. As was the case with the terminal 1989-1990 contract, Hughes was allowed to fully perform in Boise through the expiration of the term of the contract.

Breach of contract is defined as:

[f]ailure, without legal excuse to perform any promise which forms the whole or part of a contract. Prevention or hindrance by [a] party to [a] contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him. Unequivocal, distinct and absolute refusal to perform agreement.

BLACK'S LAW DICTIONARY 188 (6th ed. 1990). Hughes has not shown any action by ISU which could be interpreted as a breach of contract. ISU's decision not to renew Hughes' contract at the end of the 1989-1990 term is not the equivalent of a breach. "A contract of employment for a definite period terminates by its own terms at the end of such period." 56 C.J.S. *Master and Servant* § 30 (1948). Consequently, Hughes' attempt to equate the termination of her employment with a breach of the contract is untenable. Because her employment terminated due to the express terms of the contract, she was not wrongfully discharged, and there was no breach. Accordingly, Hughes is not entitled to the contract remedies of reinstatement and damages which she seeks in this action.

Id., 835 P.2d at 672. The Court also rejected Hughes' argument that the Court should enforce an implied covenant of good faith and fair dealing. Such a covenant, according to the Court, would not apply where an express contract exists, and in particular, where the employee was not an at-will employee.

Olson v. Idaho State University, 125 Idaho 177, 868 P.2d 505, 89 Ed.L.Rep. 632 (1994).

A non-tenured professor who was initially recommended for tenure by his dean, sued the university after the dean "revisited" his recommendation after the professor was reprimanded for conducting an unauthorized "evaluation" of his department chair. Ultimately the recommendation was reversed and the professor was notified by the president that he was denied

tenure and that he would receive a terminal contract. The Court held that Olson had not been denied due process, that he had no property interest beyond his individual contracts, that the university provided procedural due process, and that revisiting of the initial recommendation, although not specifically authorized in the faculty-staff handbook did not impair his right to teach during the contract term. Accordingly, the district court's grant of summary judgment was affirmed. Additionally, the Court awarded attorney fees to the university, finding that the professor presented no persuasive argument that the trial court had misapplied the law and because no legitimate attempt was made to explain or apply contrary case law.

Hale v. Walsh, 113 Idaho 759, 747 P.2d 1288, 44 Ed.L.Rep. 719 (Ct.App. 1987). A non-tenured faculty member successfully challenged at jury trial the university's termination of his employment as a violation of his First Amendment speech rights. On appeal, he challenged the trial court's denial of attorney fees as well as the denial of reinstatement as a remedy. The appellate court vacated the order denying fees and his request for reinstatement, and remanded the matter to the trial court for reconsideration of those issues.

Loebeck v. Idaho State Board of Education, 96 Idaho 459, 530 P.2d 1149 (1975). A non-tenured professor was given notice of non-renewal and that she would be given a terminal contract. She signed and returned the contract with a letter from her attorney stating that by signing she was not waiving any claim she might have to tenure. The university responded that by signing the contract she waived any claim she might have to tenure. Loebeck refused to comply and sued instead. The Court first held that the plaintiff had no property interest or liberty

interest, and that “[a] nontenured teacher has no constitutional right to a statement of reasons or a hearing on a university decision not to rehire.” *Id.* at 1151. The plaintiff, although rehired on a series of one year contracts for several years, “had nothing more than a hope of receiving tenure.” Because “no charge was made against appellant that might damage her standing or association in the community and there is not suggestion that any stigma or other disability was imposed which foreclosed freedom to take advantage of other employment opportunities,” there was no constitutionally protected liberty interest. *Id.*

The Court remanded the case for a determination by the trial court of whether certain notice provisions of the faculty handbook were part of the contract, (twelve month notice), and if they were, a determination of damages related to the university’s position that plaintiff was required to waive other claims. The court suggested that if the notice provision was part of the contract that the plaintiff would be entitled to approximately seven and one-half months’ salary as damages. *I.e.*, the amount required to provide a full twelve months’ notice, subject to any appropriate mitigation of damages—to be determined by the trial court.

Pyeatt v. Idaho State University, 98 Idaho 424, 565 P.2d 1381 (1977). Appellant, who resigned from a job at ISU to accompany her husband to Boise for a new job, was ineligible for unemployment compensation as she voluntarily left employment without good cause. The Court rejected appellant’s contention that the effect of the statute was sexually discriminatory, in that it applied to a “spouse” of either sex, and that it violated appellant’s constitutional right to travel.

Idaho State University v. Mitchell, 97 Idaho 724, 552 P.2d 776 (1976). In an action by

the university against a contractor to recover damages to artificial turf in university's sports arena caused when a water pipe failed and flooded the arena, the Court reversed a summary judgment in favor of the university, holding that: the contractual warranty limited the contractor's liability to prompt correction of the nonconforming work, and therefore, damages to the turf were not recoverable; there was a question of fact concerning the possible causes of the pipe failure, thus precluding summary judgment; and, the contractor should not have been precluded from asserting an affirmative defense that the architect's negligence was the cause of the damage. (Note: after remand all of the claims except the contractor's third party claim against a sub-contractor were settled. The district court allowed the parties ten days to amend pleadings, but the contractor, Mitchell, failed to amend for approximately three months. The trial Court refused to permit the amendment and the Supreme Court held that the order denying leave to amend was not appealable. *Mitchell v. Bingham Mechanical & Metal Products, Inc.*, 99 Idaho 516, 584 P.2d 1241 (1978).

Ferguson v. Greater Pocatello Chamber of Commerce, 647 F.Supp. 190 (D.Idaho 1985). The Chamber of Commerce, the Idaho State Journal, and ISU were sued for violations of the Sherman Anti-Trust Act, §§ 1 & 2, when the university determined to use a competitive bid process to select a single spring trade fair to be held in the university's sports arena. Plaintiff, an unsuccessful bidder who had previously conducted a trade fair in the facility, claimed ISU and the successful bidders had entered into a conspiracy in restraint of trade, and that the lease that was issued to the successful bidders constituted an unreasonable restraint of trade, among other theories. The District Court granted ISU's motion for summary judgment, holding ISU was

immune from damages under the Eleventh Amendment.

Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976, 47 L.Ed.Rep. 109 (9th Cir. 1988). On appeal, the Ninth Circuit held that the actions of the university and the other parties to the exclusive spring trade fair agreement did not violate the Sherman Act. To prevail on their Section 1 claims, the Court said, the plaintiffs must establish: “(1) a contract, combination, or conspiracy (2) between two or more separate persons or entities (3) which has an unreasonable restraint on trade activities.” *Id.* At 981. The Court held that based on the record, the defendants’ actions were completely independent and cannot amount to a conspiracy in restraint of trade. “ISU presented evidence of facially valid institutional and business reasons for its decision to limit the trade shows to one per year. ISU apparently determined that it was preferable to limit the trade shows to one each spring both from a revenue generating standpoint and in the interest of maintaining a more diversified program at the Minidome. Chamber and Journal representatives presented evidence they took no part in ISU’s decision-making process and that they were willing to accept a contract that merely ensured they would have the first trade show every other year. The defendants therefore met their ‘burden by proffering a “plausible and justifiable” alternative interpretation of their conduct that rebuts the plaintiff[s]’ allegation of conspiracy.” *Id.* Because the Court held the plaintiffs failed to present any material issues of fact, it found it unnecessary to address the Eleventh Amendment issue.

SE/Z Construction, L.L.C. v. Idaho State University, 2003 WL 21459646 (Idaho 2003).

The appellant, SE/Z, challenged the award by the State Department of Public Works (DPW), of a

contract for the renovation and expansion of the Physical Science building at ISU, to another contractor. The case involves the interpretation of specific provisions of the bid documents, which called for a base bid, prices for five alternates, and individual “unit prices” for two different classroom package audio-visual systems. SE/Z contended the unit prices should not have been considered in determining the lowest responsible bidder. DPW and ISU argued that the bid documents did permit the use of the unit prices in the determination of the lowest bid. Based on the base bid and five alternates alone, SE/Z was the lowest bidder by about \$5,000. Based on the base bid and five alternates and the classrooms actually selected by ISU after the bids were received, another company was the lowest bidder by about \$4,000. The district court denied SE/Z’s application for a preliminary injunction, and after the parties stipulated to the facts, entered judgment in favor of DPW and ISU. On appeal, the Court held that the bid documents did allow for consideration of the unit prices and that there was no violation of the competitive bidding statutes. The Court also held that SE/Z had no property interest as it was not the lowest bidder, and therefore, was not entitled to a “due process” hearing.

Aldrich v. Bowen, 130 F.3d 1364 (9th Cir. 1997). After a federal magistrate entered judgment on behalf of the defendants related to the plaintiffs’ claim that the land transaction between the State Board of Education and the LDS Church involving the ISU campus violated the First Amendment, the plaintiffs appealed to the Ninth Circuit, which held that because the record contained no written consent of the parties to have the magistrate conduct the proceedings, the magistrate acted without jurisdiction and the judgment was a nullity, and therefore, the Ninth Circuit likewise had no jurisdiction to hear the appeal.

In re Crampton, 249 B.R. 215, 144 Ed.L.Rep. 523 (Bankr.D.Idaho 2000). A debtor who had attended ISU and claimed a \$1,500 federal Hope Scholarship Credit on his income tax schedule was not entitled to a bankruptcy exemption for the amount in question. The Trustee's objection to the debtor's claim of exemption was sustained.

In re Ritchie, 254 B.R. 913, 148 Ed.L.Rep. 948 (Bankr.D.Idaho 2000). In a Chapter 13 bankruptcy proceeding, the Court held that the debtors, who had received students loans to attend ISU and other institutions, did not meet the *Brunner* "undue hardship" test for discharge of their student loans. Under the test, an undue hardship is shown if: (1) the debtor cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) the debtor has made good faith efforts to repay the loans. *See, In re Brunner*, 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd* 831 F.2d 395, 396 (2d Cir. 1987); adopted by the Ninth Circuit in *United Student Aid Funds, Inc. V. Pena (In re Pena)*, 155 F.3d 1108 (9th Cir. 1998). The debtors failed to meet the prongs of the test for several reasons, including for the reason that they inappropriately attempted to count a voluntary monthly charitable contribution as part of their budgeted expenses.

Lyman v. Swartley, 385 F.Supp. 661 (D.Idaho 1974). Lyman, a tenured ISU professor, sued the State Board of Education as a result of the Board's directive to the ISU president to

conduct an in depth evaluation of Lyman. A committee was appointed by the president to conduct the evaluation, and after Lyman wrote a strongly worded objection to the process and copied it to the Board, the president proposed that formal charges be made against Lyman and that he be issued notice of non-renewal. The Board, however, by telephone vote, unanimously decided to discharge Lyman immediately, without any hearing. Lyman appeared with counsel at a later Board meeting and objected to his discharge without a hearing to determine whether good cause for his dismissal existed. The Board refused to reconsider and Lyman filed suit. The Court agreed that Lyman was entitled to due process, which, at a minimum required: “(1) specification of charges of conduct or performance alleged to warrant deprivation of continued employment; (2) an opportunity to respond to those charges, and (3) a fair and impartial fact-finding process to determine the validity or nonvalidity of the charges.” *Id.* at 665. The Court ordered Lyman reinstated and reimbursed for monetary losses and benefits. The Court also determined the Board members acted in good faith and without malice and were entitled to qualified immunity.

Huyett v. Idaho State University, 140 Idaho 904, 104 P.3d 946, 195 Ed. L. Rep. 319 (2004). A head basketball coach who was placed on administrative leave midway through her first season and whose contract was then non-renewed sued under several theories, primarily that she was promised a three-year contract. The Court held: (1) university officials (A.D. and President), did not have apparent or actual authority to enter into multi-year agreements with coaches without prior Board approval; (2) IDAPA rules and Board policies are afforded the same effect as statutes; (3) Board policy is to be interpreted according to the rules of statutory construction, including the “plain meaning” rule: “subject to Board approval” means just that;

(4) there was no breach of the covenant of good faith and fair dealing; (5) the Coach had no property interest beyond her one-year contract; (6) there was no breach of a liberty interest—the allegation that being placed on administrative leave alone was such a breach was insufficient to show the kind of lasting stigma required to raise a liberty interest claim; (7) ISU was entitled to attorneys fees.

Lewis-Clark State College

Allen v. Lewis-Clark State College, 105 Idaho 447, 670 P.2d 854, 14 Ed L.Rep. 168 (1983). A part-time chief of campus security was dismissed after he made comments to the local newspaper that further inflamed a brewing controversy about the college president's decision not to allow student security officers to carry firearms. The comments referred to "three or four colored guys on campus from California who have been hassling the officers a little bit," and when these statements were objected to, the chief attempted to explain himself by stating that he wasn't singling out blacks and that his reference to "colored" was because he was "raised in the South, where we call the good ones colored and the bad ones niggers." 670 P.2d at 857. After reading about the comments, Allen was summoned to the president's office where the president told him his actions had created an embarrassment for the college and that Allen should make a public apology. He refused and the president gave him the option of resigning or being fired. When he refused to resign, the president fired him. Allen, who was considered an "exempt" employee by the college, later stated he wished to appeal the decision. He was granted a faculty board hearing. The faculty recommended Allen be reinstated if he would publicly express regrets

for the situation. The president rejected the faculty recommendation, finding such an expression too late and too insincere.

Allen then appealed to the State Board of Education who appointed a hearing officer to hear the case and make recommendations to it. The hearing was held and the hearing officer found that procedural due process was not followed in Allen's case and that the decision to dismiss was based, in part, "on the constitutionally impermissible ground of his exercise of his right to free speech." *Id.* at 858. He recommended that Allen be reinstated and paid the amount of lost wages due to the dismissal. The Board reviewed the hearing officer's recommendations and entered its own findings, concluding that good cause existed for Allen's dismissal and rejecting the recommendation to reinstate and compensate Allen. The district court affirmed the Board's actions and appeal was taken to the Supreme Court.

The Supreme Court first held that Allen was an "exempt" (nonclassified) employee, and then that: (1) the Board did not act arbitrarily, capriciously, or with an abuse of discretion in determining that good cause for Allen's dismissal existed; (2) the appellant's First Amendment rights were not violated; and (3) the procedures used did not violate the due process rights of the appellant. With respect to the appellant's claim that "good cause" had not been demonstrated or that the term was too vague to be applied, the Court rejected that argument, stating that, "that term, as it is commonly understood and used, means: '[s]ubstantial reason, one that affords a legal excuse. Legally sufficient ground or reason.' Black's Law Dictionary 623 (5th ed. 1979). Thus, reasons which are arbitrary, frivolous or irrelevant cannot constitute good cause as that phrase is ordinarily understood." The Court also found the examples given in Board policy were sufficient to demonstrate the type of conduct proscribed by the Board, although it did state that

“a contract employee may not be dismissed for conduct unrelated to the performance of his job or the welfare of the institution by which he is employed.” *Id.* at 863.

Applying the *Connick v. Meyers* balancing test, [103 S.Ct. 1684 (1983)], the Court found that although Allen’s speech involved a matter of public concern, the college’s interest in maintaining the efficiency and effectiveness of its security forces outweighed Allen’s interests in the matter, and accordingly, he was not discharged in violation of his speech rights.

Applying the *Arnett v. Kennedy* case, [416 U.S. 134 (1974)], the Court found that the procedures Allen received, including the post-termination hearing provided by the Board, left little risk that an erroneous deprivation of a property interest would occur, and therefore, Allen was not dismissed in violation of his due process rights. *Id.* at 871.

Davis v. Moon, 77 Idaho 146, 289 P.2d 614 (1955). The State Board of Education, acting as trustees for construction of a dormitory for Northern Idaho College of Education, the predecessor to Lewis-Clark Normal School in 1951. The Legislature made no appropriation for the college until 1955, at which time it was re-opened as Lewis-Clark Normal School, and funds were appropriated to pay interest and principal on the bonds. The State Treasurer refused to transmit the funds, asserting the payment would violate Article 8, § 2 of the Idaho Constitution, the provision prohibiting the state from lending its credit to aid and individual, corporation, municipality, etc. The Court held the payment was for a public purpose and was not intended as a payment of a “claim against the state,” and therefore, did not violate the Constitution.

Wickstrom v. North Idaho College, 111 Idaho 450, 725 P.2d 155, 34 Ed.L.Rep. 1223 (1986). A group of students who completed a Maintenance Mechanic (Millwright) course at the college sued the college when they found they were not qualified as entry level journeymen, contrary to statements in the college's bulletin. They sued for misrepresentation and asked for lost wages, fringe benefits, anticipated earnings, general and punitive damages. The trial court characterized their claim as a tort claim and dismissed it for failure to file a notice of tort claim in accordance with the Idaho Tort Claims Act. On appeal, the appellants argued that their claim was actually for breach of contract. The Court affirmed the ruling on the notice of tort claim issue, but held that a breach of contract might be shown under the facts, and granted the appellants 14 days to amend their complaint to state the facts by which they contended the college-student contract was breached.

Aside from the particular facts of the case, it does stand for the proposition that, in Idaho, "it is by now well established that the principal relationship between a college and its students is contractual." *Id.*, 725 P.2d at 157. Quoting from the *Peretti* case, the Court stated: "Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication." [*Peretti v. State of Montana*, 464 F.Supp. 784, 786 (D.Mont.1979) (rev'd on other grounds, *Montana v. Peretti*, 661 F.2d 756 (9th Cir.1981)].

Bignall v. North Idaho College, 538 F.2d 243 (9th Cir.1976). A *de facto* tenured instructor brought an action for violation of her due process rights after she was selected for

termination when the college encountered financial difficulties due to an enrollment drop. The Court began by recognizing the concept of *de facto* tenure as set forth by the Supreme Court in *Perry v Sindermann*, 408 U.S. 593 (1972), requiring that a person who had achieved tenure in this manner be provided notice and a hearing where he or she would be informed of the grounds for nonretention and an opportunity to challenge the sufficiency of the stated grounds. The Court found that although the college initially failed to comply, the trial held in the district court after the plaintiff filed her complaint, was sufficient due process since it was held while Bignall was still employed and receiving pay and benefits, and since, the plaintiff withdrew from the hearing the college attempted to conduct after ordered to do so by the court.

The Court further enunciated the principle that “a plaintiff must run the procedural gauntlet,” *i.e.*, exhaust meaningful administrative remedies. *Id.* at 246. The appellant argued that the hearing conducted by the Board was meaningless because the Board was biased and because she had inadequate notice of the alleged financial exigency that was the basis of the college’s decision. The Court rejected these arguments, first finding that “courts have often allowed Boards of Education or college boards of trustees to hold hearings about firings of faculty by administrators.” *Id.* at 247. It agreed with the appellant that the initial notice was inadequate, but that the process, taken as a whole and including the trial that the appellant received, provided “ample notice of the alleged financial exigency.” Regarding the financial exigency, the college “bore the burden of proving that there was a financial exigency and that [the president] adopted and used a uniform set of procedures for all the faculty.” *Id.* at 249. The Court held the college met its burden of proof. It demonstrated that enrollments had fallen and that Bignall was selected because “she was the least well qualified academically; that because she directed her instruction

to the most gifted among her students, she alienated the less bright so that students regularly transferred out of her classes or tried to avoid her courses.” *Id.* at 250.

Decker v. North Idaho College, 552 F.2d 872 (9th Cir.1977). Decker, a *de facto* tenured instructor had been dismissed without notice and a hearing in violation of his procedural due process rights. The issues on appeal were whether the district court erred deciding the merits of the case rather than remanding the matter for a hearing before the board, and in finding individual liability on the part of the college president and members of the board. The Court held that “while this action may not be proper under all circumstances,” given that the parties consented to allowing the district court to substitute for a board hearing, the due process violations were cured by the evidentiary hearing. The college nonetheless failed to adequately protect the instructor’s tenure under the *Sindermann* standard, and he was entitled to damages. However, since the *de facto* tenure cases had not been decided when Decker was dismissed, [May, 1972], the court reversed the award of damages against the individual defendants.

University of Idaho

Coghlan v. Beta Theta Pi Fraternity, 133 Idaho 388, 987 P.2d 300, 139 Ed.L.Rep 643 (1999). Rejena Coghlan was an eighteen year old freshman at the University of Idaho. During “Rush Week” in August, 1993, as a newly admitted member of the Alpha Phi Sorority, she attended parties held at two different fraternity houses, SAE (also jointly sponsored by PKA) and BTP. As the Court stated: “Two University of Idaho employees, both Greek advisors for the

University, were in attendance at the BTP party. Coghlan alleges that one of the employees saw Coghlan at the BTP party and congratulated her for pledging Alpha Phi Sorority.” 987 P.2d at 305. She further alleged that she was served alcohol at both parties and that she was never asked for identification. She became intoxicated and distraught and was escorted home and put to bed in the third floor sleeping area of the sorority house. Some time during the night she fell from the third floor fire escape landing and suffered permanent injuries. She sued the University, the sorority and the fraternities for negligence. The district court dismissed the claim against the Board and the University, holding they owed no duty of care to the plaintiff, and later dismissed the action against the fraternities based upon the court’s interpretation of the Dram Shop Act, and awarded summary judgment to the sorority.

On appeal the Supreme Court held that: (1) the Idaho Dram Shop Act barred the student from recovery against the fraternities and sorority which provided the alcohol; (2) the Act’s classification which allowed recovery by third parties but not by intoxicated persons was not a violation of the Equal Protection Clause; (3) the University did not initially owe a duty of care to the adult student; but (4) the allegations stated a claim against the University for breach of a voluntarily assumed duty; (5) the sorority did not have a “special relationship” with the student giving rise to a duty to protect her; but (6) there were fact issues as to whether the sorority voluntarily assumed such a duty, thus precluding summary judgment.

George v. University of Idaho, 121 Idaho 30, 822 P.2d 549, 71 Ed.L.Rep. 1162 (Ct.App.1991). George, a former UI law student, sued the University for breach of express and implied contractual terms. The case arose from an “intimate relationship” that developed

between George and a law professor, Eckhardt, during George's first semester at the law school. George eventually attempted to sever the relationship and when Eckhardt continued to pursue her, she went to law school and other University officials. The University, George and Eckhardt later entered into release agreement, whereby the two individuals agreed not to harass or contact each other and the university agreed to place Eckhardt on paid leave for 18 months, after which, his resignation would be effective. George alleged that Eckhardt continued to harass her after the release was signed and that the University did nothing to stop it. The district court granted summary judgment to the University.

The Court of Appeals held that there were fact questions precluding summary judgment on the breach of the release agreement claim, and that there were fact questions pertaining to the breach of implied contractual obligations under the University's faculty-staff handbook. According to the Court, "[t]he University had a good faith obligation to take reasonable measures to ensure that George obtained the benefits of the non-contact provision of the release agreement, and a jury, based on the facts before us, could find that the University breached that obligation by failing to take reasonable measures that George can prove were available to it." 822 P.2d at 556-557.

Citing the *Wickstrom* decision, *supra*, the Court also found that the sexual harassment and other provisions of the University faculty-staff handbook created implied contractual obligations, such as to "make every effort to provide appropriate relief for the victim." *Id.* at 557.

Banks v. University of Idaho, 118 Idaho 607, 798 P.2d 452, 63 Ed.L.Rep. 358 (1990).

Banks was injured at the UI while a minor and filed a lawsuit for damages eighteen months after

he became an adult. The Court affirmed the district court's dismissal of the action for failure to file a notice of tort claim as required by the Idaho Tort Claims Act. (Note: minors have 180 days from the date they reach the age of majority to file the notice. *See*, Idaho Code § 6-906A).

White v. University of Idaho, 118 Idaho 400, 797 P.2d 108, 62 Ed.L.Rep 1169 (1990). A university professor's non-consensual and intentional contact with the plaintiff amounted to battery as defined under Idaho law, and therefore, the university could not be held liable under the Idaho Tort Claims Act, which specifically excludes liability for certain intentional torts, including battery. (*See*, Idaho Code § 6-904(3)). The intent required for the commission of a battery for purposes of civil tort law is simply the intent to cause an unpermitted contact, and not the intent that the contact be harmful or offensive.

Mazur v. Hymas, 678 F.Supp. 1473 (D.Idaho 1988). Former physics lab technician brought a wrongful termination suit in state court. It was removed to federal court and the court ruled that the Eleventh Amendment barred the action and ordered the case remanded to state court. The court held that to the extent that *Phoenix Lumber Co. V. Regents of the University of Idaho*, 197 F. 425 (D.Idaho 1908) held that a suit against the Regents of the University of Idaho is not a suit against the state under the Eleventh Amendment, that holding is overruled.

Pace v. Hymas, 111 Idaho 581, 726 P.2d 693, 35 Ed.L.Rep. 553 (1986). A tenured faculty member was dismissed pursuant to a Board declaration of financial exigency for the University of Idaho College of Agriculture's extension service. The central issues in the case

were whether the district court properly placed the burden of proving a demonstrably bona fide financial exigency on the Board and university, which the Supreme Court held it did, and whether the Board and university had carried the burden of proof, which the district court had found it had not, and which holding was affirmed by the Supreme Court. The amount of damages and other related issues were to be decided in the second part of a “bifurcated” trial, to be held at a later date. One of the more significant facts raised in this case was that the Legislature actually increased the appropriation for the cooperative extension service for the budget year in question, and that the university’s request for a Board declaration of financial exigency resulted from the Legislature’s call for an “across-the-board” salary increase of 7%, but an insufficient appropriation to totally fund that amount for all extension service employees. The district court found that at least some of these funds, along with the uncommitted portion of a surplus later discovered, could have been used to help alleviate the alleged financial crisis. The court also found that alternatives other than a reduction in personnel were not considered by the Board when it considered its declaration.

Orwick v. State Board of Education, 338 F.Supp. 739 (D.Idaho 1972). A student brought an action to have the statute defining resident student for purposes of the payment of fees declared invalid. The statute required continuous residence in Idaho for six months prior to enrollment and prohibited gaining residence while in attendance at any state college or university. The student also sought to have his case certified as a class action. The student presented evidence that he had in fact resided in Idaho without attending a college or university prior to the fall of 1969, but that he had failed to apply for residency status. The Court found that

the plaintiff would in all likelihood qualify, if he were to apply, and therefore, he was not adversely affected by the statute and had no standing to bring the action on his own behalf or on behalf of a class.

Gentill v. University of Idaho, 91 Idaho 116, 416 P.2d 507 (1966). A physics teaching assistant, who was also enrolled in a graduate program, injured himself while “remaking a mercury manometer to be used by him in experimental work necessary for his graduate thesis.” The Industrial Commission granted the student worker’s compensation benefits, finding that one of the student’s conditions of employment was that he be enrolled in and advancing in the graduate program. “Admittedly, claimant was pursuing his graduate work at the time of injury; nevertheless, this did not remove him from his employment.” 416 P.2d at 508. The Supreme Court reversed, finding that the injury did not occur within the course and scope of the claimant’s employment. “The requirement that [the student] maintain his scholastic standing in order to continue as a teaching assistant is insufficient in law to hold claimant’s employer responsible for injuries sustained in pursuit of claimant’s personal scholastic goal.” *Id.* at 509.

In re Weil, 2003 WL 33712215 (D.Idaho Bankr. 2000). Debtors, who attended the University of Idaho and BSU, among other institutions, and who owed approximately \$152,000 in student loans, met most of the *Brunner* tests, but failed to qualify for the undue hardship discharge because one spouse failed to demonstrate that he made sufficient efforts to obtain employment outside the area of his educational degrees. “Therefore, the forces currently preventing repayment are not out of Plaintiffs’ control.”

Phoenix Lumber Co. v. Regents of the University of Idaho, 197 F. 425 (D.Idaho 1908).

The Board of Regents was not immune from suit for damages in federal court. (Note: this case was later overruled in *Mazur v. Hymas, supra*).

