7-19-2011

Sadid v. Idaho State University Agency's Record Dckt. 38549

LAW CLERK

Vol 1 of 1

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

HABID SADID, Claimant/Appellant, vs. IDAHO STATE UNIVERSITY, Employer/Respondent, and IDAHO DEPARTMENT OF LABOR, Respondent.	**SUPREME COURT NO# 38549-2011** **AGENCY'S RECORD**

BEFORE THE INDUSTRIAL COMMISSION
STATE OF IDAHO

CLAIMANT: HABID SADID
BY: R.A. COULTER
776 E. RIVERSIDE DRIVE, STE 200
EAGLE, ID 83616

DEFENDANTS: IDAHO STATE UNIVERSITY
BY: JOHN A. BAILEY, JR.
P.O. BOX 1391
POCATELLO, ID 83204-1391

RESPONDENT: IDAHO DEPARTMENT OF LABOR
BY: TRACEY K. ROLFSEN
DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
317 W. MAIN ST.
BOISE, ID 83735

38549

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

HABID SADID, Claimant/Appellant, vs. IDAHO STATE UNIVERSITY, Employer/Respondent, and IDAHO DEPARTMENT OF LABOR, Respondent.	)	**SUPREME COURT NO# 38549-2011** **AGENCY'S RECORD**

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IDAHO DEPARTMENT OF LABOR
317 W. MAIN ST.
BOISE, ID 83735

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LIST OF EXHIBITS

HEARING TRANSCRIPT
taken on JANUARY 5, 2011, will be lodged with the Supreme Court.

EXHIBITS ADMITTED into record before IDAHO DEPARTMENT OF LABOR

1. IDOL Order to Deny Re-Open mailed 1/14/10 (5pgs)
2. Employer Request to Reopen Hearing/Request for Rehearing filed 1/13/10 (4pgs)
3. Notice of Telephone Hearing mailed 12/22/09 (3pgs)
4. Important Information About Your Hearing Read Carefully (2pgs)
5. Employer Exhibits 3-10 (172pgs)
6. Exhibit 10F audio CD

IDAHO DEPARTMENT OF LABOR
APPEALS BUREAU
317 WEST MAIN STREET
BOISE, IDAHO 83735-0720
(208) 332-3572 / (800) 621-4938
FAX: (208) 334-6440

HABIB SADID,
SSN: [redacted]
Claimant

vs.

IDAHO STATE UNIVERSITY,
Employer

and

IDAHO DEPARTMENT OF LABOR.

DOCKET NUMBER 1777-2010

DECISION OF APPEALS EXAMINER

DECISION

Benefits are **ALLOWED** effective November 8, 2009. The claimant was not discharged for misconduct in connection with employment, as defined by §72-1366 (5) of the Idaho Employment Security Law.

The Eligibility Determination dated December 3, 2009, is hereby **REVERSED**.

HISTORY OF THE CASE

The above-entitled matter was heard by Janet C. Hardy, Appeals Examiner for the Idaho Department of Labor, on January 5, 2010, by telephone in the City of Boise, in accordance with §72-1368 (6) of the Idaho Employment Security Law.

The claimant was represented by John Lynn, attorney at law. The claimant testified on his own behalf.

The employer was neither present nor represented.

Exhibits #1 through #10 were entered into and made a part of the record.

ISSUE

The issue before the Appeals Examiner is whether unemployment is due to the claimant quitting voluntarily and, if so, whether with good cause connected with the employment –OR- being

discharged and, if so, whether for misconduct in connection with the employment, according to §72-1366 (5) of the Idaho Employment Security Law.

FINDINGS OF FACT

Additional facts or testimony may exist in this case. However, the Appeals Examiner outlines only those that are relevant to the decision and those based upon reliable evidence. Based on the exhibits and testimony in the record, the following facts are found:

1. The claimant worked for this employer on two occasions – from August 1987 until he quit to go to work for Boeing. His most recent date of hire was August 1991 as a full professor. His contract for the school term ended on May 15, 2009, however a new contract was signed shortly after May 15, 2009 for the new school term. He was suspended on August 4, 2009, and discharged on October 23, 2009.

2. On May 6, 2009, the claimant was served with a Notice of Contemplated Action from Dean Jacobsen based on the claimant's "continued pattern of behavior." Dean Jacobsen did not appear at the hearing.

3. On August 4, 2009, the claimant was placed on administrative leave with pay by Dr. Vailas, president of the university. On August 19, 2009, the claimant filed a grievance with the Faculty Appeals Board.

4. The Faculty Appeals Board found that sufficient evidence had not been presented to justify the claimant's termination. President Vailas was so notified on October 23, 2009.

5. The claimant was discharged on October 27, 2009 by Dr. Vailas. Dr. Vailas did not appear at the hearing.

AUTHORITY

Section 72-1366 (5) of the Idaho Employment Security Law provides that a claimant shall be eligible for benefits provided unemployment is not due to the fact that the claimant left employment voluntarily without good cause, or was discharged for misconduct in connection with employment.

An employer may discharge an employee for any reason. However, only a discharge that is found to constitute misconduct for unemployment insurance purposes makes an employee ineligible for benefits.

The employer must carry the burden of proving that the employee was discharged for employment-related misconduct. Parker vs. St. Maries Plywood, 101 Idaho 415, 614 P.2d 955 (1980).

Misconduct within the meaning of an unemployment compensation act excluding from its benefit an employee discharged for misconduct must be an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and

substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. Rasmussen vs. Employment Security Agency, 83 Idaho 198, 360 P.2d 90 (1961).

In Application of Citizen Utilities Company, 82 Idaho 208, 351 P.2d 487 (1960), the Idaho Supreme Court held that while the Commission is a fact-finding, administrative agency, and as such, is not bound by the strict rules of hearsay evidence governing courts of law, its findings must be supported by substantial and competent evidence. Id. at 213, 351 P.2d at 492. In an administrative proceeding hearsay evidence-standing alone-is not sufficient to support findings. Id. at 214, 351 P.2d at 493.

Hearsay is "[a] term applied to that species of testimony given by a witness who relates, not what he [or she] knows personally, but what others have told him [or her], or what he [or she] has heard said by others." BLACK'S LAW DICTIONARY 722 (6th ed. 1990). The testimony is "offered to prove the truth of the matter asserted." Id.

The positive, uncontradicted testimony of a credible witness must be accepted as true even if the witness is an interested party. Testimony may not be arbitrarily or capriciously disregarded, but may be disregarded if it exceeds probability or is impeached. Testimony which is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing, may be disregarded, but this is warranted only when it is physically impossible for the evidence to be true, or its falsity is apparent, without any resort to inference or deduction. Dinneen vs. Finch, 100 Idaho 620, 603 P.2d 575 (1979).

CONCLUSIONS

The employer asserts the claimant was discharged for inappropriate conduct described in several documents in the record. The entire documentary record, however, is considered as hearsay and the Idaho Supreme Court has ruled that hearsay evidence, standing alone, is not sufficient to support a finding.

The employer failed to appear and testify as to the truth and veracity of the allegations of misconduct contained in the documents. As the claimant testified, and denied the employer's allegations, it cannot be found that a preponderance of the evidence supports the employer's allegations. The claimant's sworn testimony must be given greater weight and consideration.

The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer. Where that burden is not met, benefits must be awarded to the claimant. Roll v. City of Middleton, 105 Idaho 22, 25, 665 P.2d 721, 724 (1983); Parker v. St. Maries Plywood, 101 Idaho 415, 614 P.2d 955, 959 (1980).

The Appeals Examiner concludes that the employer has not met this burden. The claimant is eligible for benefits.

Janet C. Hardy
Appeals Examiner

Date of Mailing **January 6, 2010** **Last Day To Appeal** **January 20, 2010**

APPEAL RIGHTS

You have FOURTEEN (14) DAYS FROM THE DATE OF MAILING to file a written appeal with the Idaho Industrial Commission. The appeal must be mailed to:

Idaho Industrial Commission
Judicial Division, IDOL Appeals
P.O. Box 83720
Boise, Idaho 83720-0041

Or delivered in person to:

Idaho Industrial Commission
700 S Clearwater Lane
Boise, ID 83712

Or transmitted by facsimile to:

(208) 332-7558.

If the appeal is mailed, it must be postmarked no later than the last day to appeal. An appeal filed by facsimile transmission must be received by the Commission by 5:00 p.m., Mountain Time, on the last day to appeal. A facsimile transmission received after 5:00 p.m. will be deemed received by the Commission on the next business day. A late appeal will be dismissed. Appeals filed by any means with the Appeals Bureau or a Department of Labor local office will not be accepted by the Commission. ***TO EMPLOYERS WHO ARE INCORPORATED:*** *If you file an appeal with the Idaho Industrial Commission, the appeal must be signed by a corporate officer or legal counsel licensed to practice in the State of Idaho and the signature must include the individual's title. The Commission will not consider appeals submitted by employer representatives who are not attorneys. If you request a hearing before the Commission or permission to file a legal brief, you must make these requests through legal counsel licensed to practice in the State of Idaho. Questions should be directed to the Idaho Industrial Commission, Unemployment Appeals, (208) 334-6024.*

If no appeal is filed, this decision will become final and cannot be changed. **TO CLAIMANT:** If this decision is changed, any benefits paid will be subject to repayment. If an appeal is filed, you should continue to report on your claim as long as you are unemployed.

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IDAHO DEPARTMENT OF LABOR
APPEALS BUREAU
317 WEST MAIN STREET
BOISE, IDAHO 83735-0720
(208) 332-3572 / (800) 621-4938
FAX: (208) 334-6440

CERTIFICATE OF SERVICE

I hereby certify that on **January 6, 2010**, a true and correct copy of **Decision of Appeals Examiner** was served by regular United States mail upon each of the following:

HABIB SADID
1420 ASPEN DR
POCATELLO ID 83209

JOHN LYNN
ATTORNEY AT LAW
776 E RIVERSIDE DR, STE 200
EAGLE ID 83616

JOHNSON & MONTELEONE LLP
ATTORNEYS AND COUNSELORS AT LAW
405 S 8TH ST, STE 250
BOISE ID 83702

IDAHO STATE UNIVERSITY
921 S 8TH
STOP 8107
POCATELLO ID 83209

IDAHO STATE UNIVERSITY
PO BOX 8219
POCATELLO ID 83209-0001

IDAHO
COMMERCE & LABOR [redacted]

Docket No 1777 yr 2010 **Notes**

Participant Name

SSN (like 999-99-9999-0)

Get Docket Info | Clear

Must have both Docket No and Year to enter notes.

Update

Docket	Claimant	Employer	Office	FileDate
1777-2010	HABIB SADID	IDAHO STATE UNIVERSITY	27	12/16/2009

Issues:

020-Discharge;

Hearing Schedule:

Jan 5 2010 11:30 AM Hardy

[redacted] Appellant: Claimant

Updated: 12/18/2009 By: srichter

Idaho State University / Johnson & Monteleone Llpattourneys And Counslers At Law / John Lynn,esq

Notes:

2010-01-25 13:19:17-(sr) - Got hard copy from scanning and emailed IC and Legal decision. Will be mailing an audio cd today, file is to large to email;
2010-01-25 13:19:16-(sr) - Got hard copy from scanning and emailed IC and Legal decision. Will be mailing an audio cd today, file is to large to email;
2010-01-22 10:53:50-(sr) - problems getting decision to email from AX, waiting to hear back from IT before I can send to IC and Legal;
2010-01-22 08:54:17-(sr) - Rec'd IC protest; processed as needed;
2010-01-21 12:31:24-(jh) - Received yet another request to R/O from ERs attorney (Claim for Review and Affidavit in support of motion for rehearing). DENIED. Advised ER via letter they must protest to the IC.;
2010-01-15 14:21:24-(tg) - David Alexander from Racine Law Ofcs, ER rep, called from 855-9080 to ask about the time frame for appealing to IC. I told him he has 14 days from the date of the mailing of the denial to re-open. ;
2010-01-15 08:50:57-(ms) - recv'd in mail from attny reqt to reopen.it's been denied.sent reqt to scanning;
2010-01-14 15:51:32-(ms) - Attny for ER called told him the reqt to reopen was denied.he can appeal to IC ;
2010-01-13 16:30:29-(jh) - Employer's request for R/O DENIED.;
2010-01-13 09:47:59-(ms) - printed off file from application extender gave to AE;
2010-01-13 09:32:39-(ms) - recv'd fax from Attny for ER .reqt to reopen gave to AE;
2010-01-13 09:32:22-(jh) - Employer requested R/O. Gave to AE.;
2010-01-05 12:26:48-(tc) - ckd with ae and the mailing date was 12/22, so clld emplyr and lm on phone of the mailing date;
2010-01-05 12:16:25-(tc) - emplyr clld (Shannon) said they didn't receive the nth, told her both addrs it was mailed to and that was the correct addr, wanted to know date of mailing, will ask ae aft hearing;
2010-01-05 12:00:26-(jh) - Employer did not appear.;
2010-01-04 14:36:08-(sr) - Rcvd additional docs, hand delivered, from the CL;
2010-01-04 12:40:12-(ms) - recv'd fax notice of association of counsel for CL .added to particiapnts put in file;

John A. Bailey, Jr. (ISB No. 2619)
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208) 232-6101
Fax: (208) 232-6109

Attorney for Employer

APPEALS BUREAU

IDAHO DEPARTMENT OF LABOR

HABIB SADID, an individual, SSN: [redacted]	)	Docket No. 1777-2010
Claimant,	)	**CLAIM FOR REVIEW**
vs.	)	
IDAHO STATE UNIVERSITY,	)	
Employer,	)	
and	)	
IDAHO DEPARTMENT OF LABOR.	)	

COMES NOW, the Employer, IDAHO STATE UNIVERSITY, by and through counsel of record, John A. Bailey, Jr. of Racine, Olson, Nye, Budge & Bailey, Chartered, and hereby gives notice pursuant to Idaho Code Section 72-1368(7) and IDAPA Section 09.01.06.066.01 of its claim for review of the decision of the appeals examiner in the above captioned case dated January 6, 2010, and the denial of Request for Rehearing dated on or about January 14, 2010.. The Employer further requests that it be permitted to present additional evidence, on the grounds and for the reasons that it was denied an opportunity to present evidence at the hearing before the Appeal Examiner. As set forth in the Request to Reopen Hearing or for Rehearing filed herein on January 13, 2010, and the

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Affidavit of David J. Miller filed therewith (a copy of which is filed herewith), the Employer was closed over the Christmas holiday, from the day after the Notice of Appeal Hearing was mailed until the day before the hearing. The relevant officers of Idaho State University did not receive the notice until after the hearing. The ISU Human Resources Office called the Department of Labor during the hearing and was denied an opportunity to participate or present evidence. In the interests of justice, the Employer requests that the Commission hold a hearing to receive evidence from the Employer, or that the matter be remanded back to the Appeals Examiner for an additional hearing and decision.

DATED this 5th day of January, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: _____
JOHN A. BAILEY, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of January, 2010, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Sam Johnson
JOHNSON & MONTELEONE, L.L.P.
405 South Eighth Street, Suite 250
Boise, Idaho 83702

[X] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Facsimile *(208) 947-2424*

John Lynn
Attorney at Law
776 E. Riverside Dr., Ste 200
Eagle, ID 83616

[X] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Facsimile *(208) 685-2355*

JOHN A. BAILEY, JR.

John A. Bailey, Jr. (ISB No. 2619)
RACINE, OLSON, NYE, BUDGE
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Attorney for Employer

APPEALS BUREAU

IDAHO DEPARTMENT OF LABOR

HABIB SADID, an individual, SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	Docket No. 1777-2010 **AFFIDAVIT OF DAVID MILLER IN SUPPORT OF MOTION FOR REHEARING**

STATE OF IDAHO)
: ss.
County of Bannock)

COMES NOW DAVID MILLER, Director of Human Resources for the Employer herein, IDAHO STATE UNIVERSITY, and on his oath deposes and states as follows:

1. I am the Director of the Human Resources Office for Idaho State University. The

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Human Resources Department has responsibility for matters involving unemployment benefits for former ISU employees, including the responsibility for responding to appeals pending before the Appeals Bureau of the Department of Labor.

2. My office, as is true of all administrative offices of Idaho State University, was closed from December 24, 2009 through January 3, 2010 by order of the President of the University as a cost-saving measure.

3. As of our last working hours on December 23, my office had not received notice of the scheduling of Dr. Sadid's appeal hearing.

4. My office reopened on January 4, 2010, and later that day we received almost two weeks worth of mail. Our copy of the Notice of Appeal Hearing shows that it was stamped by the Human Resources Department on January 4, 2010. It was not addressed specifically to the attention of any person, and was placed in the inbox of a person not associated with the unemployment process. It was not found until the afternoon of January 5.

5. In the afternoon of January 4, we received an email from Dr. Sadid's attorney with attached exhibits, but the email did not state a date or a time for a hearing. The same day, a person dropped off at our office a CD with no information except that it pertained to Dr. Sadid. On January 5, my staff called the local Department of Labor office to ask about the date and time for the hearing of Dr. Sadid's appeal, but the local staff was unaware of any scheduled hearing. They referred us to the Department of Labor offices in Boise.

6. At about 12:15 p.m. on January 5, my staff learned in a phone call to the Boise office that a hearing was scheduled for11:30 that morning and that there was no option for ISU to participate. I was not in the office at that time, and by the time I returned, the hearing was

over.

7. Had we been aware of the time and date of the hearing, we would have made arrangements to attend with counsel and with witnesses in support of ISU's claim that Dr. Sadid was terminated for misconduct.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 13th day of January, 2010.

DAVID J. MILLER

SUBSCRIBED AND SWORN TO before me this 13th day of January, 2010.

(SEAL)

NOTARY PUBLIC FOR IDAHO
Residing at: Bannock County
My Commission Expires: May 3, 2011

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January, 2010, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Sam Johnson JOHNSON & MONTELEONE, L.L.P. 405 South Eighth Street, Suite 250 Boise, Idaho 83702	[X]	U. S. Mail Postage Prepaid
	[ ]	Hand Delivery
	[ ]	Overnight Mail
	[X]	Facsimile *(208) 947-2424*
John Lynn Attorney at Law 776 E. Riverside Dr., Ste 200 Eagle, ID 83616	[X]	U. S. Mail Postage Prepaid
	[ ]	Hand Delivery
	[ ]	Overnight Mail
	[X]	Facsimile *(208) 429-1925*

JOHN A. BAILEY, JR.

B

LAW OFFICES OF

RACINE OLSON NYE BUDGE & BAILEY

CHARTERED

201 E. CENTER STREET

POST OFFICE BOX 1391

POCATELLO, IDAHO 83204-1391

2010 JAN 21 A 10:44

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INDUSTRIAL COMMISSION

POCATELLO ID 832

09 JAN 2010

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0004307201 JAN 18 2010

MAILED FROM ZIPCODE 83201

Idaho Industrial Commission
Judicial Division, IDOL Appeals
P.O. Box 83720
Boise, ID 83720-0041

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	**IDOL # 1777-2010** **NOTICE OF FILING OF APPEAL** FILED JAN 28 2010 INDUSTRIAL COMMISSION

PLEASE TAKE NOTICE: The Industrial Commission has received an appeal from a decision of an Appeals Examiner of the Idaho Department of Labor. A copy of the appeal is enclosed. Documents that are already part of the record or file will not be copied.

Further action will be taken by the Industrial Commission in accordance with its Rules of Appellate Practice and Procedure, a copy of which is enclosed.

PLEASE READ ALL THE RULES CAREFULLY

The Commission will make its decision in this appeal based on the record of the proceedings before the Appeals Examiner of the Idaho Department of Labor. To request a briefing schedule or hearing, refer to Rule 5(A) and 7(A,B) of the Rules of Appellate Practice and Procedure.

INDUSTRIAL COMMISSION
UNEMPLOYMENT APPEALS DIVISION
POST OFFICE BOX 83720
BOISE IDAHO 83720-0041
(208) 334-6024

15

CERTIFICATE OF SERVICE

I hereby certify that on the 28 day of January, 2010 a true and correct copy of the **Notice of Filing of Appeal and compact disc of the Hearing** was served by regular United States mail upon the following:

HABIB SADID
1420 ASPEN DR
POCATELLO ID 83209

JOHN A BAILEY JR
RACINE OLSON NYE BUDGE &
BAILY CHTRD
PO BOX 1391
POCATELLO 83204-1391

DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
STATE HOUSE MAIL
317 W MAIN STREET
BOISE ID 83735

mcs

Assistant Commission Secretary

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www.racinelaw.net

SENDER'S E-MAIL ADDRESS: dea@racinelaw.net

W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
ERIC L. OLSEN
CONRAD J. AIKEN
RICHARD A. HEARN, M.D.
LANE V. ERICKSON
FREDERICK J. HAHN, III
DAVID E. ALEXANDER
PATRICK N. GEORGE
SCOTT J. SMITH
JOSHUA D. JOHNSON
STEPHEN J. MUHONEN
CANDICE M. MCHUGH
CAROL TIPPI VOLYN
BRENT L. WHITING
JONATHON S. BYINGTON
DAVE BAGLEY
THOMAS J. BUDGE
JONATHAN M. VOLYN
MARK A. SHAFFER
JASON E. FLAIG

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477 SHOUP AVENUE
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ALL OFFICES TOLL FREE
(877) 232-6101

LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL

January 29, 2010

Idaho Industrial Commission
Judicial Division, IDOL Appeals
P.O. Box 83720
Boise, Idaho 83720-0041

Re: IDOL Docket No.: 1777-2010
Claimant: Habib Sadid
Employer: Idaho State University

To Whom it May Concern:

Attached is the Employer's Reply to Memorandum in Opposition to Employer's Claim of Review, for filing with respect to the above Claim for Review.

Very truly yours,

DAVID E. ALEXANDER

DEA:cc
Attachments
c: Sam Johnson (w/attachments)
John Lynn (w/attachments)

11

John A. Bailey, Jr. (ISB No. 2619)
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208) 232-6101
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Attorney for Employer Idaho State University

IDAHO INDUSTRIAL COMMISSION

JUDICIAL DIVISION, IDOL APPEALS

HABIB SADID, SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	IDOL Docket No. 1777-2010 **REPLY TO MEMORANDUM IN OPPOSITION TO CLAIM FOR REVIEW**

COMES NOW, the employer, IDAHO STATE UNIVERSITY (hereinafter "ISU"), by and through its counsel of record, and replies to the Brief in Opposition to Employer's Claim for Review as follows:

In its claim for review, ISU is asking the Industrial Commission for an opportunity to present evidence regarding Dr. Sadid's claim that he was fired without cause. This is a claim that was rejected by the Department of Labor in the first instance. Dr. Sadid managed to succeed before the Appeals Examiner only because of a scheduling quirk which left ISU without sufficient notice of the

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hearing, and because of the Department of Labor's refusal to permit ISU to participate in the hearing when representatives from the University called while the hearing was still in progress.

The Appeals Examiner correctly noted that notice of the hearing was mailed in a timely fashion, which is all that is required by the law. However, it is within the discretion of the Industrial Commission to hear additional evidence or remanded to the Appeals Examiner for a rehearing. Idaho code § 72-1368(7). The interests of justice require that the state of Idaho, as the employer of Dr. Sadid, be given an opportunity to demonstrate that Dr. Sadid was fired for cause before state funds are paid to him in contravention of public policy.

The affidavit of David Miller, which is part of the record, establishes that Idaho State University was closed from the day after the mailing of the notice until the day before the hearing. It was therefore impossible for anyone at Idaho State University to have had actual notice of the hearing before the fourth day of January, fewer than 24 hours before the start of the hearing. In reality, it was necessary for the notice to make its way through the mail system, and it did not make its way into the hands of a responsible person in the Human Resources Office until January 5. Likewise, although counsel for the employee sent an email to the ISU Human Resources Office in the afternoon of January 4 (Employees' Exhibit C), it did not on its face state the date and time of the hearing. Such information was only contained within an attachment. The exhibit which Employees' counsel had delivered to the Human Resources Department, the same day was an audio CD and likewise did not state the date and time of the hearing.

As was also established by the affidavit of David Miller, the ISU Human Resources Department made a reasonable attempt to determine what hearing was being held on January 5, and actually reached the appropriate persons at the Department of Labor office while the hearing was in

progress, only to be told they could not participate.

Under these facts, the failure of ISU to participate in the hearing was reasonable and excusable. Where ISU was closed for two weeks over the holidays, it was not possible during that period for responsible persons at ISU to be notified of the pending hearing. To suggest, as the claimant does in his Brief in Opposition, that ISU should have made "the proper arrangements for someone to check his mail and call to his attention an important date of hearing," is to deny the reality of how a government office operates. It would defeat the purpose of an order to close the University over the holidays (as a money saving measure) for the Department of Labor or another state agency to require that ISU keep its offices staffed to respond to hearing notices. It is quite likely that the Commission would look unfavorably on a claimant who filed an appeal and then failed to watch his mailbox for the notice of hearing. But that is not what happened here. ISU did not initiate the appeal and was not aware that a hearing was due to be scheduled.

The people of the State of Idaho deserve an opportunity for their representatives to present to the Commission the facts regarding Dr. Sadid's termination. It is public policy that people who are terminated for cause not receive unemployment insurance benefits. Public policy therefore strongly favors giving an employer an opportunity to demonstrate that cause, if it exists. Where such cause exists, as here, and the employer's failure to participate in the hearing is reasonable and excusable, as it is here, it offends justice to deny the employer an opportunity to present the evidence showing cause, especially when the public purse is doubly implicated because the employer is itself a state agency.

For these reasons, the employer respectfully requests that the Commission review the decisions of the Appeals Examiner and conduct a hearing or remand this matter to the Department

of Labor for a further hearing before an Appeals Examiner.

RESPECTFULLY SUBMITTED this 29th day of January, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: _____
JOHN A. BAILEY, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of January, 2010, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Sam Johnson
JOHNSON & MONTELEONE, L.L.P.
405 South Eighth Street, Suite 250
Boise, Idaho 83702

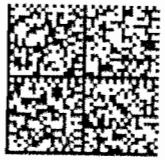
[X] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Facsimile *(208) 947-2424*

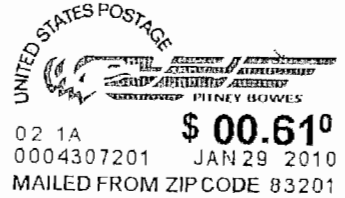
John Lynn
Attorney at Law
776 E. Riverside Dr., Ste 200
Eagle, ID 83616

[X] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[ ] Facsimile *(208) 685-2355*

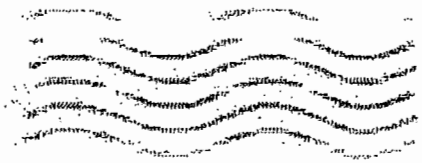
JOHN A. BAILEY, JR.

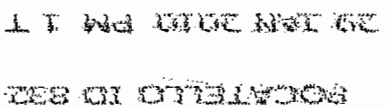
LAW OFFICES OF
RACINE OLSON NYE BUDGE & BAILEY
CHARTERED
201 E. CENTER STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83204-1391





Idaho Industrial Commission
Judicial Division, IDOL Appeals
P.O. Box 83720
Boise, ID 83720-0041





23

JOHNSON & MONTELEONE, L.L.P.
ATTORNEYS AND COUNSELORS AT LAW
405 South Eighth Street, Suite 250
Boise, Idaho 83702
Voice: (208) 331-2100
Fax: (208) 947-2424
http://www.treasurevalleylawyers.com

FACSIMILE TRANSMITTAL SHEET

To: Mary	From: Sam Johnson/Cara Rice
Company: Idaho Industrial Commission	Date: February 3, 2010
Fax number: (208) 332-7558	Total no. of pages including cover: 17
Phone number:	Sender's reference number:
Re: Habib Sadid	Your reference number:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Notes/Comments:

See* attached *Claimant's Opposition to Employer's Claim for Review.

CONFIDENTIALITY NOTE

FEB - 3 2010

24

Sam Johnson, ISB No. 4777
JOHNSON & MONTELEONE, L.L.P.
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Telephone: (208) 685-2333
Facsimile: (208) 429-1925

Attorneys for Claimant

APPEALS BUREAU
IDAHO DEPARTMENT OF LABOR

HABIB SADID, SSN: [redacted] Claimant, v. IDAHO STATE UNIVERSITY, Employer and IDAHO DEPARTMENT OF LABOR	**DOCKET NUMBER: 1777-2010** **CLAIMANT'S OPPOSITION TO EMPLOYER'S CLAIM FOR REVIEW**

COMES NOW Claimant, by and through his attorneys of record, and hereby submits his opposition to the Employer's Claim for Review.

Wherefore, we respectfully submit the Employer's Claim for Review should be denied based upon the following grounds and reasons:

25

1. The Decision of the Appeals Examiner, Janet C. Hardy, denying the Employer's request to re-open the hearing was based upon a sound application of law to the facts and therefore should not be disturbed. (*A true and correct copy of the Appeals Examiner's Order to Deny Re-Opening is appended hereto as Exhibit "A"*).

2. The Affidavit of David J. Miller, referred to in the Employer's Claim for Review, misstates the record. In his affidavit, Mr. Miller acknowledges in paragraph five (5) that on "January 4, we received an email from Dr. Sadid's attorney with attached exhibits, but the email did not state a date or a time for a hearing. (*See Affidavit of David Miller in Support of Motion for Rehearing, ¶ 5, appended hereto as Exhibit "B"*)(Emphasis added). Mr. Miller's statement is not accurate. Mr. Miller fails to disclose that the List of Supplemental Exhibits attached to the January 4, 2010, email makes express reference to the fact that Claimant plans to use the exhibits "at the telephonic hearing scheduled for January 5, 2010." (*A true and correct copy of the January 4, 2010, email together with Claimant's Supplemental Exhibit List is appended hereto as Exhibit "C"*)(Emphasis added). This email and the supplemental exhibit list, of course, supplied the factual basis for the Appeals Examiner's conclusion that, "additional documents submitted by the claimant, through his attorney, were emailed to the employer's human resource office on Monday, January 4, 2010, which specifically referenced the hearing scheduled for January 5, 2010." (*See Exhibit "A" appended hereto, p. 2 of 4*).

3. Worth noting as well is the fact that Mr. Steve Millward personally, hand-delivered a copy of Claimant's Hearing Exhibit "F" to Ms. Shannon Carr, the designated representative from the Employer's Human Resource Office, on January 4, 2010, the day before the hearing scheduled for January 5, 2010. (*A true and correct copy of Mr. Millward's Certificate of Hand-Delivery is appended hereto as Exhibit "D"*).

4. Finally, the Claimant respectfully submits that if the tables were turned and Claimant had gone on vacation for two (2) weeks without making the proper arrangements for someone to check his mail and call to his attention an important date of hearing, it is unlikely the Commission would look favorably upon a request to reopen.

For these reasons and from the record as a whole, Claimant respectfully asks that the Employer's Claim for Review be denied.

DATED: This 26 day of January, 2010.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Claimant

CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION

I CERTIFY that on January 26, 2010, I caused a true and correct copy of the foregoing document to be:

☐ mailed ☐ hand delivered ☐ CM/ECF Electronic Filing ☒ transmitted fax machine to: (208) 232-6109	John A. Bailey, Jr. Racine Olson Nye Budge & Bailey, Chtd. 201 E. Center P. O. Box 1391 Pocatello, ID 83204-1391
☐ mailed ☐ hand delivered ☒ transmitted via e-mail to: carrshan@isu.edu	Idaho State University 921 S. 8th STOP 8107 Pocatello, Idaho 83209

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorney for Claimant

28

IDAHO DEPARTMENT OF LABOR
APPEALS BUREAU
317 WEST MAIN STREET
BOISE, IDAHO 83735-0720
(208) 332-3572 / (800) 621-4938
FAX: (208) 334-6440

HABIB SADID,
SSN: [redacted]
Claimant

vs.

IDAHO STATE UNIVERSITY,
Employer

and

IDAHO DEPARTMENT OF LABOR.

DOCKET NUMBER 1777-2010

ORDER TO DENY RE-OPENING

DECISION

The employer's request to re-open the hearing that was held on Tuesday, January 5, 2010 at 11:30 a.m., is **DENIED**.

HISTORY OF THE CASE

The above-entitled matter was scheduled to be heard by Janet C. Hardy, Appeals Examiner for the Idaho Department of Labor, on Tuesday, January 5, 2010, at 11:30 a.m., Mountain Time, by telephone in the City of Boise, in accordance with §72-1368 (6) of the Idaho Employment Security Law.

The claimant appeared for the hearing and provided testimony.

The employer did not appear for the hearing.

ISSUE

The issue before the Appeals Examiner is whether the hearing should be re-opened in accordance with §72-1368 (6) of the Idaho Employment Security Law.

FINDINGS OF FACT

Based on the exhibits and testimony in the record, the following facts are found:

Exhibit A

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1. A Notice of Telephone Hearing was mailed to the parties on December 22, 2009, setting Tuesday, January 5, 2010 at 11:30 a.m., Mountain Time, as the date and time of hearing. The employer did not appear for the hearing.

2. The Notice of Telephone Hearing and accompanying exhibits were mailed to two separate addresses for the employer – one at 921 S. 8th, Stop 8107, Pocatello, Idaho 83209; and the other at P. O. Box 8219, Pocatello, Idaho 83209-0001.

3. The employer, through their attorney, filed a request to re-open the hearing stating they did not appear because the employer's mailroom was closed from December 19, 2009 until January 4, 2010 and therefore did not receive sufficient notice to permit it to be present at the hearing.

AUTHORITY

Section 72-1368 (6), Idaho Code, states in part that the appeals examiner may, either upon application for rehearing by an interested party or on his own motion, rehear, affirm, modify, set aside or reverse any prior decision on the basis of the evidence previously submitted or on the basis of additional evidence; provided, that such application or motion be made within ten (10) days after the date of service of the decision.

CONCLUSIONS

Service by mail is deemed complete on the date of mailing. Idaho Code §72-1368 (5) (2004). In Striebeck v. Employment Security Agency, 83 Idaho 531, 366 P.2d 589, (1961), the Idaho Supreme Court held "[i]t is clear that the legislature intended that for the purpose of perfecting an appeal as provided in §72-1368, service of a notice of determination or redetermination shall be regarded and adjudged complete when delivered to the person being served on the date of mailing if mailed to such person at his last known address." The Idaho Supreme Court has specifically interpreted the word "deemed" in §72-1368 (5) as creating a "conclusive presumption." Striebeck v. Employment Security Agency, 83 Idaho 531, at 536, 366 P.2d 589, 591 (1961). ... absent a defect in the notice ... the right to appeal does not extend beyond the time period provided by the statute.

The same presumptions and guidelines apply to the service of a notice of hearing. The employer asserts the Notice of Telephone Hearing was not timely received, because their post office was closed. The employer has not asserted a defect in the notice; has not asserted that the notice was improperly addressed to the employer; and has not asserted that the Notice was not timely received due to an error by the US Postal Service.

In addition, the Appeals Examiner notes that additional documents submitted by the claimant, through his attorney, were emailed to the employer's human resource officer on Monday, January 4, 2010, which specifically referenced the hearing scheduled for January 5, 2010.

Due process requires that a party be provided with an opportunity to be heard at a meaningful time and in a meaningful manner. City of Boise v. Industrial Commission, 129 Idaho 906, 910, 935 P.2d 169, 173, (1997). The employer was afforded that opportunity, but neglected to take advantage of it. As such, the employer has not provided sufficient facts to warrant a re-opening. The request to re-open is denied.

Janet C. Hardy
Appeals Examiner

Date of Mailing January 14, 2010 **Last Day To Appeal** January 28, 2010

APPEAL RIGHTS

You have FOURTEEN (14) DAYS FROM THE DATE OF MAILING to file a written appeal with the Idaho Industrial Commission. The appeal must be mailed to:

Idaho Industrial Commission
Judicial Division, IDOL Appeals
P.O. Box 83720
Boise, Idaho 83720-0041

Or delivered in person to:

Idaho Industrial Commission
700 S Clearwater Lane
Boise, ID 83712

Or transmitted by facsimile to:

(208) 332-7558.

If the appeal is mailed, it must be postmarked no later than the last day to appeal. An appeal filed by facsimile transmission must be received by the Commission by 5:00 p.m., Mountain Time, on the last day to appeal. A facsimile transmission received after 5:00 p.m. will be deemed received by the Commission on the next business day. A late appeal will be dismissed. Appeals filed by any means with the Appeals Bureau or a Department of Labor local office will not be accepted by the Commission. ***TO EMPLOYERS WHO ARE INCORPORATED:*** *If you file an appeal with the Idaho Industrial Commission, the appeal must be signed by a corporate officer or legal counsel licensed to practice in the State of Idaho and the signature must include the individual's title. The Commission will not consider appeals submitted by employer representatives who are not attorneys. If you request a hearing before the Commission or permission to file a legal brief, you must make these requests through legal counsel licensed to practice in the State of Idaho. Questions should be directed to the Idaho Industrial Commission, Unemployment Appeals, (208) 334-6024.*

If no appeal is filed, this decision will become final and cannot be changed. **TO CLAIMANT:** If this decision is changed, any benefits paid will be subject to repayment. If an appeal is filed, you should continue to report on your claim as long as you are unemployed.

IDAHO DEPARTMENT OF LABOR
APPEALS BUREAU
317 WEST MAIN STREET
BOISE, IDAHO 83735-0720
(208) 332-3572 / (800) 621-4938
FAX: (208) 334-6440

JAN 15 2010

CERTIFICATE OF SERVICE

I hereby certify that on **January 14, 2010**, a true and correct copy of **Order to Deny Re-Opening** was served by regular United States mail upon each of the following:

HABIB SADID
1420 ASPEN DR
POCATELLO ID 83209

JOHN LYNN
ATTORNEY AT LAW
776 E RIVERSIDE DR, STE 200
EAGLE ID 83616

JOHNSON & MONTELEONE LLP
ATTORNEYS AND COUNSELORS AT LAW
405 S 8TH ST, STE 250
BOISE ID 83702

IDAHO STATE UNIVERSITY
921 S 8TH
STOP 8107
POCATELLO ID 83209

IDAHO STATE UNIVERSITY
P O BOX 8219
POCATELLO ID 83209-0001

JOHN A BAILEY JR
ATTORNEY AT LAW
P O BOX 1391
POCATELLO ID 83204-1391

R. Pardue

38

John A. Bailey, Jr. (ISB No. 2619)
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208) 232-6101
Fax: (208) 232-6109

Attorney for Employer

JAN 21 2010

APPEALS BUREAU

IDAHO DEPARTMENT OF LABOR

HABIB SADID, an individual, SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	Docket No. 1777-2010 **AFFIDAVIT OF DAVID MILLER IN SUPPORT OF MOTION FOR REHEARING**

STATE OF IDAHO)
: ss.
County of Bannock)

COMES NOW DAVID MILLER, Director of Human Resources for the Employer herein, IDAHO STATE UNIVERSITY, and on his oath deposes and states as follows:

1. I am the Director of the Human Resources Office for Idaho State University. The

Exhibit B

Human Resources Department has responsibility for matters involving unemployment benefits for former ISU employees, including the responsibility for responding to appeals pending before the Appeals Bureau of the Department of Labor.

2. My office, as is true of all administrative offices of Idaho State University, was closed from December 24, 2009 through January 3, 2010 by order of the President of the University as a cost-saving measure.

3. As of our last working hours on December 23, my office had not received notice of the scheduling of Dr. Sadid's appeal hearing.

4. My office reopened on January 4, 2010, and later that day we received almost two weeks worth of mail. Our copy of the Notice of Appeal Hearing shows that it was stamped by the Human Resources Department on January 4, 2010. It was not addressed specifically to the attention of any person, and was placed in the inbox of a person not associated with the unemployment process. It was not found until the afternoon of January 5.

5. In the afternoon of January 4, we received an email from Dr. Sadid's attorney with attached exhibits, but the email did not state a date or a time for a hearing. The same day, a person dropped off at our office a CD with no information except that it pertained to Dr. Sadid. On January 5, my staff called the local Department of Labor office to ask about the date and time for the hearing of Dr. Sadid's appeal, but the local staff was unaware of any scheduled hearing. They referred us to the Department of Labor offices in Boise.

6. At about 12:15 p.m. on January 5, my staff learned in a phone call to the Boise office that a hearing was scheduled for11:30 that morning and that there was no option for ISU to participate. I was not in the office at that time, and by the time I returned, the hearing was

over.

7. Had we been aware of the time and date of the hearing, we would have made arrangements to attend with counsel and with witnesses in support of ISU's claim that Dr. Sadid was terminated for misconduct.

FURTHER AFFIANT SAITH NAUGHT.

DATED this 13th day of January, 2010.

DAVID J. MILLER

SUBSCRIBED AND SWORN TO before me this 13th day of January, 2010.

(SEAL)

NOTARY PUBLIC FOR IDAHO
Residing at: Bannock County
My Commission Expires: May 3, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January, 2010, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Sam Johnson
JOHNSON & MONTELEONE, L.L.P.
405 South Eighth Street, Suite 250
Boise, Idaho 83702

[X] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[X] Facsimile *(208) 947-2424*

John Lynn
Attorney at Law
776 E. Riverside Dr., Ste 200
Eagle, ID 83616

[X] U. S. Mail
Postage Prepaid
[ ] Hand Delivery
[ ] Overnight Mail
[X] Facsimile *(208) 429-1925*

JOHN A. BAILEY, JR.

Cara Rice

From: Cara Rice
Sent: Monday, January 04, 2010 2:15 PM
To: 'carrshan@isu.edu'
Subject: Habib Sadid v. ISU and Idaho Dept. of Labor/Docket #: 1777-2010

Attachments: 20100104144511.pdf; 20100104144632.pdf; 20100104144739.pdf; 20100104144910.pdf


20100104144511.pdf (1 MB)


20100104144632.pdf (1 MB)


20100104144739.pdf (3 MB)


20100104144910.pdf (1 MB)

Dear Ms. Carr,

Attached hereto is Claimant's Supplemental Exhibit List.

CARA

Cara D. Rice
Legal Assistant
Johnson & Monteleone, L.L.P.
405 South Eighth Street, Suite 250
Boise, Idaho 83702
Telephone: (208) 331-2100
Facsimile: (208) 947-2424
cara@treasurevalleylawyers.com
www.treasurevalleylawyers.com

Exhibit C

APPEALS BUREAU

IDAHO DEPARTMENT OF LABOR

HABIB SADID, SSN: [redacted] Claimant, v. IDAHO STATE UNIVERSITY, Employer and IDAHO DEPARTMENT OF LABOR	**DOCKET NUMBER: 1777-2010** **CLAIMANT'S SUPPLEMENTAL EXHIBIT LIST**

COMES NOW, Claimant, by and through his attorneys of record, Sam Johnson and John Lynn, and hereby submits the following supplemental exhibits to be used at the telephonic hearing scheduled for January 5, 2010.

LIST OF SUPPLEMENTAL EXHIBITS

C. Claimant's notes and documents submitted to ISU Internal Grievance.

D. Claimant's Amended Complaint against ISU filed 10/15/09 with newspaper articles.

E. Claimant's 2008 evaluation dated 4/22/09.

F. Taped grievance hearing dated October and November 2009.

G. Claimant's 2/12/06 response to 1/19/06, reprimand.

H. Claimant's 4/27/09 response to 4/6/09 reprimand.

I. Claimant's 4/27/09, response to 4/15/09 reprimand.

30

DATED: This 4 day of January, 2010.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Claimant

CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION

I CERTIFY that on January 4, 2010, I caused a true and correct copy of the foregoing document to be:

☐ mailed ☐ hand delivered ☐ transmitted via e-mail to: carrshan@isu.edu	Idaho State University 921 S. 8th STOP 8107 Pocatello, Idaho 83209

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorney for Claimant

CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION

I CERTIFY that on January 4, 2010, I caused a true and correct copy of Claimant's Exhibit F to be served to ISU as follows:

☐ mailed ☑ hand delivered ☐ transmitted fax machine to:	Idaho State University 921 S. 8th STOP 8107 Human Resources – Office of Shannon Carr Pocatello, Idaho 83209

Steve Millward

Steve Millward

CLAIMANT'S SUPPLEMENTAL EXHIBIT LIST - 1

Exhibit D

40

P.01

TRANSACTION REPORT

FEB-03-2010 WED 04:08 PM

RECEIVE

DATE START	SENDER	RX TIME	PAGES	TYPE	NOTE	M#	DP
FEB-03 04:03 PM	G3	5'38"	17	RECEIVE	OK		

41

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CRAIG G. BLEDSOE – ISB# 3431
KATHERINE TAKASUGI – ISB# 5208
TRACEY K. ROLFSEN – ISB# 4050
CHERYL GEORGE – ISB# 4213
Deputy Attorneys General
Idaho Department of Labor
317 W. Main Street
Boise, Idaho 83735
Telephone: (208) 332-3570 ext. 3148

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and STATE OF IDAHO, DEPARTMENT OF LABOR.	IDOL NO. 1777-2010 NOTICE OF APPEARANCE

TO THE ABOVE-NAMED PARTIES:

Please be advised that the undersigned Deputy Attorney General representing the Idaho Department of Labor hereby enters the appearance of said attorneys as the attorneys of record for the State of Idaho, Department of Labor, in the above-entitled proceeding. By statute, the Department of Labor is a party to all unemployment insurance appeals in Idaho.

47

DATED this 3rd day of February, 2010.

Tracey K. Rolfsen
Deputy Attorney General
Attorney for the State of Idaho,
Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF APPEARANCE, was mailed, postage prepaid, this 3rd day of February, 2010, to:

HABIB SADID
1420 ASPEN DR
POCATELLO ID 83209

JOHN A BAILEY JR
PO BOX 1391
POCATELLO ID 83204-1391

Kenna Andrus

Sam Johnson, ISB No. 4777
JOHNSON & MONTELEONE, L.L.P.
405 South Eighth Street, Ste. 250
Boise, Idaho 83702
Telephone: (208) 331-2100
Facsimile: (208) 947-2424
sam@treasurevalleylawyers.com

John C. Lynn, ISB No. 1548
776 E. Riverside Drive, Ste. 200
Eagle, Idaho 83616
Telephone: (208) 685-2333
Facsimile: (208) 429-1925

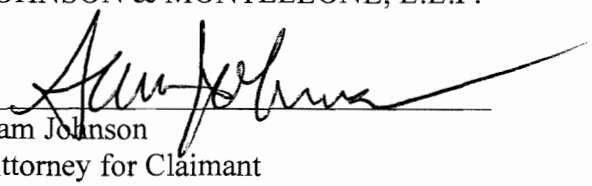
Attorneys for Claimant

IDAHO INDUSTRIAL COMMISSION
JUDICIAL DIVISION, IDOL APPEALS

HABIB SADID, SSN: [redacted] Claimant, v. IDAHO STATE UNIVERSITY, Employer and IDAHO DEPARTMENT OF LABOR	**DOCKET NUMBER: 1777-2010** **CERTIFICATE OF SERVICE**

The undersigned certifies that one the 5th day of February, 2010, a true and accurate copy of *Claimant's Opposition to Employer's Claim for Review* was served by first class mail addressed to the Office of the Attorney General, Idaho Department of Labor, 700 W. State Street, P. O. Box 83720, Boise, Idaho 83720-0010.

JOHNSON & MONTELEONE, L.L.P.



Sam Johnson
Attorney for Claimant

LAW OFFICES OF

RACINE OLSON NYE BUDGE & BAILEY
CHARTERED

201 EAST CENTER STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83204-1391

TELEPHONE (208) 232-6101
FACSIMILE (208) 232-6109

www.racinelaw.net

SENDER'S E-MAIL ADDRESS: clc@racinelaw.net

BOISE OFFICE
101 SOUTH CAPITOL
BOULEVARD, SUITE 208
BOISE, IDAHO 83702
TELEPHONE: (208) 395-0011
FACSIMILE: (208) 433-0167

IDAHO FALLS OFFICE
477 SHOUP AVENUE
SUITE 107
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IDAHO FALLS, ID 83405
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FACSIMILE: (208) 528-6109

ALL OFFICES TOLL FREE
(877) 232-6101

W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
ERIC L. OLSEN
CONRAD J. AIKEN
RICHARD A. HEARN, M.D.
LANE V. ERICKSON
FREDERICK J. HAHN, III
DAVID E. ALEXANDER
PATRICK N. GEORGE
SCOTT J. SMITH
JOSHUA D. JOHNSON
STEPHEN J. MUHONEN
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WILLIAM D. OLSON, OF COUNSEL

February 4, 2010

Industrial Commission
Judicial Division, IDOL Appeals
PO Box 8370
Boise, ID 83720-0041

Re: IDOL Docket No: 1777-2010
Claimant: Habib Sadid
Employer: Idaho State University

Dear Clerk:

Enclosed for filing please find a Certificate of Service in the above mentioned Docket No. Thank you for your attention to this matter.

Very truly yours,

Carrie L Castillo

CARRIE CASTILLO, Assistant to
David E. Alexander

Enclosure

46

John A. Bailey, Jr. (ISB No. 2619)
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Attorney for Employer Idaho State University

IDAHO INDUSTRIAL COMMISSION

JUDICIAL DIVISION, IDOL APPEALS

HABIB SADID, SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	IDOL Docket No. 1777-2010 **CERTIFICATE OF SERVICE**

The undersigned certifies that on the 2, day of February, 2010, a true and accurate copy of Idaho State University's Reply To Memorandum in Opposition to Claim For Review was served by first class mail addressed to the Office of the Attorney General, Idaho Department of Labor, 700 W. State Street, P.O. Box 83720, Boise, Idaho 83720-0010.

DATED this 2nd day of February, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: _____
JOHN A. BAILEY, JR.

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JUDICIAL DIVISION, IDOL APPEALS
PO BOX 8370
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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	**IDOL #1777-2010** **ORDER DENYING NEW HEARING AND SETTING BRIEFING SCHEDULE**

Employer, Idaho State University, appeals to the Industrial Commission a Decision issued by an Appeals Examiner with Idaho Department of Labor ("IDOL" or "Department"). In that Decision, the Appeals Examiner denied Employer's request to reopen a hearing on Claimant's eligibility for unemployment benefits. Employer did not appear at the original hearing the Appeals Examiner held on January 5, 2010, and seeks a new hearing before the Commission. In the alternative, Employer asks that the Commission remand the matter back to the Appeals Examiner. Claimant opposes Employer's request for another hearing in this case.

NEW HEARING

Idaho Code § 72-1368(6), provides that the Department's Appeals Examiner may, upon written application from an interested party, rehear a case or admit additional evidence, provided that the application is made within ten (10) days of the date of service of the original decision. Although Employer filed a timely request to re-open the hearing, the Appeals Examiner issued an Order denying Employer's request because Employer did not allege a sufficient supporting basis. Therefore, the Decision ruling Claimant eligible for unemployment benefits became final and appealable to the Commission.

Idaho Code § 72-1368(7) gives the Commission authority to "in its sole discretion, conduct a hearing to receive additional evidence or may remand the matter back to the appeals examiner for an additional hearing and decision." Unemployment insurance appeals are adjudicated under the principles and procedures of administrative law. Hearings at this level of review are not a matter of right, as in some other forums. The Commission takes the position that conducting a new hearing at this level of review is an extraordinary measure and should be reserved for those cases when due process or other interests of justice demand no less. Therefore, the threshold question underlying Employer's request for an additional hearing is whether Employer has been afforded due process.

Due process of law as guaranteed by the United States Constitution and Idaho's Constitution envision the opportunity, after reasonable notice, for a fair hearing. Prather v. Loyd, 86 Idaho 45, 49-50, 382 P.2d 910, 912 (1963). "Procedural due process is an essential requirement of the administrative process." City of Boise v. Industrial Commission, 129 Idaho 906, 910, 935 P.2d 169, 173 (1997). Under federal law, an appeals examiner as the hearing officer must provide the "opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. 503(a)(3) (2003).

The Appeals Bureau scheduled the hearing for 11:30 a.m. Mountain Time on January 5, 2010. The Appeals Bureau mailed the Notice of Hearing to Employer on December 22, 2009, informing interested parties of the date and time the hearing would take place. The Appeals Bureau mailed the Notice to Employer at its address of record. (Exhibit 1). Idaho Code § 72-1368(5) provides, "A notice shall be deemed served if delivered to the person being served or if mailed to his last known address; service by mail shall be deemed complete on the date of mailing." Once the Notice of Hearing was delivered to Employer's last known address,

Employer's entitlement to notice and an opportunity for a hearing was complete. *See* Streibeck v. Employment Security Agency, 83 Idaho 589, 366 P.2d 589 (1961). Therefore, the Appeals Examiner was clearly within her discretion in denying Employer's request to re-open the matter.

Employer asserts that its mailroom was closed for the Christmas holiday when IDOL served the Notice of Hearing and mail processing did not begin again until January 4, 2010. The delivery of the Notice was further delayed because it was not addressed to a specific individual and therefore did not find its way to a human resources representative familiar with the matter until the afternoon of January 5, 2010. Nevertheless, counsel concedes that his office received on January 4, 2010, an email from Claimant's counsel regarding the hearing. Likewise, on January 4, 2010, Claimant's counsel delivered to Employer's counsel additional evidence for the hearing. Counsel's staff contacted the Appeals Bureau on the afternoon of January 5, 2010, for information, but learned that the hearing had already concluded. (Employer's Claim for Review).

Clearly, the Notice of Hearing was delivered to the address of record for Employer in a timely manner. The Idaho Supreme Court has consistently ruled that an interested party's absence or other reasons that prevent that party from receiving and reading notices in a timely manner that were properly to the address of record is not a defect in due process. Faust v. Department of Employment, 97 Idaho 162, 540 P.2d 1341 (1975), Hacking v. Department of Employment, 98 Idaho 839, 573 P.2d 158 (1978). The U.S. District Court for the District of Idaho likewise arrived at the same conclusion in Gary v. Nichols, 447 F.Supp 320 (Idaho, 1978).

We have carefully reviewed the record and can find no evidence that Employer was deprived of due process. The Notice of Hearing and documents were sent to Employer's address of record. Employer failed to participate in the hearing because for reasons other than the error on the part of the U.S. Postal Service or the Idaho Department of Labor.

The unemployment insurance program is intended to ease the economic burdens created when a worker loses a job due to no fault of his or her own. The process for adjudicating claims for unemployment benefits is intended to provide the quickest possible disposition of these claims. Therefore, there must be compelling reasons to delay the ultimate disposition and allow an additional hearing after the Appeals Bureau initially noticed and attempted to conduct one. McNeill v. Commonwealth of Pennsylvania Unemployment Compensation Board of Review, 510 Pa. 574, 511 A.2d 167 (1986). We find no such circumstances in this case. Accordingly, Employer's request for a new hearing is DENIED. Likewise, Employer's request that this matter be remanded back to the Appeals Bureau for a new hearing is also DENIED.

However, Employer's timely appeal of the Appeals Examiner's Decision Denying Employer's Request to Re-Open also constitutes a timely appeal of the Appeals Examiner's Decision ruling Claimant eligible for unemployment benefits. Employer is clearly an interested party to that Decision. Therefore, there is no basis on which to dismiss Employer's appeal on the underlying merits of the case. The Commission will review *de novo* the evidentiary record established during the Appeals Examiner's hearing and will issue a new decision upon the completion of that review. In lieu of granting Employer another hearing, the parties may argue their positions in written briefs.

BRIEFING SCHEDULE

As provided for under Rule 5 of the Rules of Appellate Practice and Procedure under the Idaho Employment Security Law, effective, as amended, March 1, 2009, the Commission establishes the following briefing schedule:

Employer's brief will be due ten (10) days from the date of this Order

Claimant and Idaho Department of Labor may reply within seven (7) days of the receipt of Employer's brief, if they so choose.

DATED this 9 day of February, 2010.

INDUSTRIAL COMMISSION

Cheri J. Ruch, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of February, 2009, a true and correct copy of **Order Establishing Briefing Schedule** was served by regular United States mail upon each of the following:

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FAX COVER SHEET

DATE: February 9, 2010

TO:

NAME: DAVID ALEXANDER
FAX NUMBER: 208-232-6109

FROM:

NAME: MARY SCHOELER
TOTAL PAGES, INCLUDING COVER SHEET: 6

DESCRIPTION: **ORDER DENYING NEW HEARING AND SETTING BRIEFING SCHEDULE**

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DATE: February 19, 2010

TO: Industrial Commission
Sam Johnson
John Lynn

FROM: John A. Bailey, Jr.

RE: Sadid v. ISU

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2010 FEB 22 A 7 54

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COMMENTS: Attached please find the following documents in the above-captioned matter:

1. Letter to the Industrial Commission;
2. Employer's Brief on Claim for Review.

- FAX -

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February 19, 2010

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Industrial Commission
Judicial Division, IDOL Appeals
PO Box 8370
Boise, ID 83720-0041

Re: *IDOL Docket No:* *1777-2010*
Claimant: *Habib Sadid*
Employer: *Idaho State University*

Dear Clerk:

Enclosed for filing please find Employer's Brief On Claim For Review in the above mentioned IDOL docket number. Thank you for your attention to this matter.

Very truly yours,

DAVID ALEXANDER

55

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Re: *IDOL Docket No:* *1777-2010*
Claimant: *Habib Sadid*
Employer: *Idaho State University*

Dear Clerk:

Enclosed for filing please find Employer's Brief On Claim For Review in the above mentioned IDOL docket number. Thank you for your attention to this matter.

Very truly yours,

DAVID E. ALEXANDER

DEA:cc
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IDAHO INDUSTRIAL COMMISSION

JUDICIAL DIVISION, IDOL APPEALS

HABIB SADID, SSN: [redacted]	IDOL Docket No. 1777-2010
Claimant,	**EMPLOYER'S BRIEF ON CLAIM FOR REVIEW**
vs.	
IDAHO STATE UNIVERSITY,	
Employer,	
and	
IDAHO DEPARTMENT OF LABOR.	

COMES NOW the Employer, Idaho State University, by and through counsel of record, and submits the following brief in support of its claim for review of the determination by the Appeals Division of the Idaho Department of Labor granting unemployment benefits to the claimant, Dr. Habib Sadid.

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JUDICIAL DIVISION, IDOL APPEALS

HABIB SADID, SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	IDOL Docket No. 1777-2010 **EMPLOYER'S BRIEF ON CLAIM FOR REVIEW**

COMES NOW the Employer, Idaho State University, by and through counsel of record, and submits the following brief in support of its claim for review of the determination by the Appeals Division of the Idaho Department of Labor granting unemployment benefits to the claimant, Dr. Habib Sadid.

58

FACTS

Dr. Sadid was a tenured professor of engineering at Idaho State University. His employment was terminated for cause last fall based on a recommendation by the Dean of Engineering and approved by the university president. The university followed proper procedures leading to the termination. The Dean of Engineering issued a notice of contemplated action to Dr. Sadid on May 6, 2009. (Ex. 5, p.22) The notice cited a specific instance of "unprofessional, non-collegial, disruptive and insubordinate" behavior; a prior warning against such behavior; specific warnings at the time of the behavior; a long history of disruptive and defamatory behavior; and a similarly long history of refusing to comply with instructions and counseling from his superiors. The notice invited Dr. Sadid to meet with the Dean to discuss any reason, evidence or information in opposition or mitigation to the contemplated action. The requested meeting was held in July, 2009, but failed to reach any satisfactory conclusion. In the meantime, Dr. Sadid continued to engage in inappropriate behavior. In June, he informed College of Engineering staff members that the Dean had lied under oath in proceedings related to a lawsuit filed by Dr. Sadid. He then distributed to the entire College of Engineering faculty cartoons on the subject. (Ex. 3, pp. 12-15) He also engaged in unauthorized purchases in violation of University procedures, which he had twice previously been warned against. (Ex. 6, pp. 15-25) His response was to have his lawyers accuse the University of retaliating against him for attempting to enforce its purchasing policies. (Ex. 6, p 17)

On August 4, 2009, the ISU president accepted the recommendation of the dean and placed Dr. Sadid on administrative leave with pay. (Ex. 5,p. 2) Pursuant to University policy, Dr. Sadid was given a hearing in front of a panel of faculty members, which was authorized to give a nonbinding advisory opinion to the president. That hearing was held over several days in October. The panel

advised against termination. The president declined to accept the recommendation of the faculty panel, and terminated Dr. Sadid on November 8, 2009.

Dr. Sadid filed for unemployment benefits. The University submitted a response to his claim for benefits. (Ex. 7) By decision dated December 3, 2009, the Department of Labor determined that Dr. Sadid was ineligible for benefits. (Ex. 8) The department held, on the basis of the documentation and written statement provided by ISU, that Dr. Sadid violated the University's policies and was terminated for good cause. Dr. Sadid requested an appeal hearing, not disputing the facts regarding his behavior, but, rather, asserting that the real reason he was fired was retaliation for his exercise of his right to freedom of speech. (Ex. 9, p.2)

On December 18, 2009, Sixth District Judge David Nye granted summary judgment in favor of Idaho State University and the other defendants in the lawsuit filed by Dr. Sadid in September 2008. The court's opinion, a copy of which is attached, and of which the Industrial Commission is entitled to take judicial notice (Rule of Procedure 9.20), dismissed Dr. Sadid's claim that his rights to free speech were violated. The court found that it was necessary to determine whether the comments for which Dr. Sadid claimed he suffered retaliation were protected speech, or merely the kind of disruptive or insubordinate speech for which an employee may be punished or terminated. The court held that there are five questions a court must answer before it could find a valid First Amendment retaliation claim, citing *Eng v. Cooley,* 552 F.3d 1062, 1070 (9th Cir. 2009). The five questions are:

1. Whether the plaintiff spoke on a matter of public concern;
2. Whether the plaintiff spoke as a private citizen or a public employee;
3. Whether the plaintiffs protected speech was a substantial or motivating factor in the adverse employment action;
4. Whether the state had an adequate justification for treating the employee differently from other members of the general public; and

5. Whether the state would have taken the adverse employment action even absent the protected speech.

Dr. Sadid claimed in his lawsuit against ISU that he was retaliated against for a series of public statements and newspaper articles in opposition to various plans of the previous administration. The Sixth District Court considered his factual allegations and held that, as a matter of law, the issues in question were not matters of public concern, but rather matters of internal administrative dispute. Having answered the first question in the negative, the court likewise answered the second question in the negative, holding that Dr. Sadid, in making these public pronouncements, presented himself not as a private citizen but as an ISU employee. There is no First Amendment protection for University employees speaking on matters of purely internal interest. Finally, the court determined that there was no evidence that Dr. Sadid's speech, even if it were protected, was a motivating factor in the employment decision. The court did not find it necessary to answer questions 4 and 5.

Accordingly, it has already been determined in a court of law that Dr. Sadid had no "right" to make the statements for which he claims he has suffered retaliation, and that it was not a cause for the adverse employment actions, including his termination.

On December 22, 2009, the Department Of Labor mailed out a notice of the appeals hearing scheduled for January 4. As Idaho State University was closed from December 23 until January 4, ISU did not receive notice of the hearing in time to participate.

At the hearing, consistent with his notice of appeal, Dr. Sadid did not challenge the facts which ISU contends were cause for his termination. He asserted that the letters of reprimand and other complaints about his behavior were simply an attempt by ISU to lay a paper trail to cover ISU's retaliation against him. (Recorded hearing at approximately 22:00) In responding to the allegations

of disruptive and insubordinate behavior, Dr. Sadid generally acknowledged that it had occurred – he merely justified his behavior on various grounds, while continuing to assert that the real reason for his termination was retaliation for his protected speech. Essentially the only testimony directly addressing whether cause for termination existed came at the very end of his testimony, when the appeals examiner asked Dr. Sadid if he had done anything to warrant termination. Dr. Sadid answered, "no." (Recorded hearing at approximately 23:45)

The appeals examiner held in favor of Dr. Sadid on the grounds that all of the documents submitted by ISU were "hearsay," which could not support a factual finding, while Dr. Sadid's uncontroverted oral testimony, that he did not do anything to warrant termination, was sufficient to justify a finding in his favor.

ISU's request for a rehearing was denied. ISU filed a claim for review before the Industrial Commission and requested an evidentiary hearing, which was denied.

LAW AND ARGUMENT

The appeals examiner's decision was wrong for the following reasons:

1. The documentary evidence submitted by ISU is not hearsay.
2. The documentary evidence was sufficient to establish cause for termination.
3. Dr. Sadid did not challenge or deny the facts on the basis of which ISU asserted cause.
4. Dr. Sadid claimed that ISU's cause was a sham to hide a constitutional violation, but this claim has already been dismissed by the Sixth District Court in Dr. Sadid's lawsuit against ISU.
5. Accordingly, the evidence in the record is more than sufficient to establish cause for termination.

1. Documentary Evidence Submitted by ISU is Not Hearsay.

The appeals examiner disregarded all of the documentary evidence submitted by ISU (Exhibits 1 through 7) on the grounds that it was "hearsay" and, as hearsay, could not support findings of fact. This is a clear error of law: documentary evidence is not necessarily hearsay. Furthermore, the appeals examiner misstated the law when she said that hearsay could not support a finding of fact. The case she cites, *Application of Citizens Utilities Co.*, 82 Idaho 208, 214 (1960), does indeed hold that an agency's findings "must be supported by substantial and competent evidence. ... It cannot make a finding based upon hearsay." In context, the Court was saying that findings may not be based on hearsay *alone*, and, in fact, the cases cited by the Supreme Court in *Citizens Utilities* say exactly that: *Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 440, 113 NE 507, 509 (NY 1916); *Williapoint Oysters v. Ewing*, 174 F.2d 676, 691 (9th Cir. 1949); *Con.Ed.Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 217, 59 S.Ct. 206, 230 (1938). Indeed, all of these cases clearly state that hearsay documentary testimony is admissible into evidence in administrative proceedings if it is corroborated by non-hearsay testimony.

The documents submitted by ISU are not hearsay under a number of exceptions to the hearsay rule. First, a large number of the documents contained in Exhibits 1 through 7 are letters, reports and emails written by Dr. Sadid. Admissions by party opponents and prior statements by witnesses are excluded from the definition of hearsay. Idaho Rule Of Evidence 801(d). Accordingly, all of those documents among the exhibits which were authored by Dr. Sadid are not hearsay.

Second, the rules of evidence contain a number of exceptions to the hearsay rule, and thus the position of ISU is supported by competent evidence. First, a large number of the documents contained in Exhibits 1 through 7 are letters, reports and emails written by Dr. Sadid. Admissions by

party opponents and prior statements by witnesses are excluded from the definition of hearsay. Idaho Rules of Evidence 801(d). Accordingly, all of those documents among the exhibits which were authored by Dr. Sadid are not hearsay.

Second, the rules of evidence contain a number of exceptions to the hearsay rule. These include an exception for public records and reports. (I.R.E. 803(8)) Many of the documents ignored by the appeals examiner were official statements of ISU, a public agency, made pursuant to its obligations under the governing regulations. These include:

Exhibit 3, page 2;

Exhibit 4, page 7;

Exhibit 5, page 2, which is the official notice to Dr. Sadid that he was placed on an administrative leave;

Exhibit 5, page 15, which is the official memorandum from the dean of engineering recommending Dr. Sadid's termination, and listing the grounds for cause;

Exhibit 5, page 22, the official notice of contemplated termination given to Dr. Sadid on May 6, 2009, which lists grounds for cause;

Exhibit 6, page 2 and attachments, which is official correspondence from ISU to the South Dakota School of Mines apologizing for Dr. Sadid's personal attacks on the president of that school, a former ISU administrator, which Dr. Sadid circulated widely by email to faculty and media in South Dakota;

Exhibit 6, pages 15 to 25, which is documentation regarding Dr. Sadid's repeated violations of University purchasing rules.

All of these documents are excepted from the hearsay rule as public records and reports, and can be accepted by the Industrial Commission for such weight as they carry.

2. The evidence establishes cause for termination.

The evidence in the record establishes conclusively that Dr. Sadid was terminated for cause. First, there is no dispute that, for official purposes, the termination was "for cause." A tenured professor cannot be terminated except for cause, and there is simply no dispute that the documents in

the record accurately state the causes relied on by ISU during its internal proceedings and in the initial hearing before the Department of Labor (See Exhibit 7).

Further, substantial and competent evidence exists in the record that Dr. Sadid was discharged for the causes stated by ISU in the record. The stated reasons are set forth in detail in the Notice of Contemplated Action of May 6, 2009 (Exhibit 5, page 22), and the Recommendation of Dismissal of August 3, 2009 (Exhibit 5, page 15). There is no reason to go through them in detail in this brief other than to say that these documents recite a long history of unprofessional, disruptive and insubordinate behavior by Dr. Sadid. There is overwhelming evidence of this unprofessional behavior in Dr. Sadid's own writings and emails which are part of the record, and which constitute admissions by Dr. Sadid. Thus, to whatever extent that ISU's official documents might be considered merely hearsay evidence of Dr. Sadid's unprofessional behavior, they are corroborated by Dr. Sadid's admissions in his own documents and are therefore substantial and competent evidence. *See Williapoint Oysters v. Ewing,* 174 F.2d 676, 691 (9th Cir. 1949). A few examples:

- Exhibit 3, page 10: Dr. Sadid's emails accusing the Dean of unethical behavior because Dr. Sadid disagreed with an entry in the draft minutes of a faculty meeting.
- Exhibit 3, page 12: his email distributing cartoons regarding perjury after accusing the Dean of lying under oath.
- Exhibit 3, page 18: accusation that various administration officials have engaged in "misuse of authority, misjudgment ... cronyism, empire building ... "
- Exhibit 3, page 26: an email from a colleague of Dr. Sadid's to the new Provost of ISU apologizing for Dr. Sadid's embarrassing and "over-the-top offensive behavior" at a College meeting,

- Exhibit 4, page 4: Dr. Sadid's letter to the Provost responding to a letter of reprimand, in which he attempts unconvincingly to justify his unprofessional behavior. For instance, his explanation of the minutes controversy is that the minutes he reviewed were not marked "Draft," as if a 22-year veteran of faculty meetings would be unaware that meeting minutes are always draft until reviewed and approved at the subsequent meeting.
- Exhibit 4, page 30: In Dr. Sadid's response to his April 15, 2009 letter of reprimand from Dean Jacobsen, he acknowledges that the incident complained of occurred and goes on to repeat his accusations of "corruption and wrong-doings of a group of officials at Idaho State University. The individuals have been misusing their power, wasting taxpayer money, and creating an oppressive atmosphere here a campus in the United States of America."
- Exhibit 6, page 4: Dr. Sadid's email to faculty members at the South Dakota School of Mines and to members of the media in Rapid City, S.D., accusing the school's new president of unethical, unprofessional and inappropriate behavior, for which ISU's Vice President for Academic Programming had to apologize. (See Exhibit 6, page 2)
- Exhibit 6, page 12: An email Dr. Sadid sent to students in 2006 complaining inappropriately about a colleague and the then-Dean of the College, and accusing them publicly of unethical behavior.
- Exhibit 6, page 17: The response by Dr. Sadid's lawyers to his letter of reprimand for violating University purchasing procedures. The letter fails to acknowledge that the University has any right to require that Dr. Sadid follow its *purchasing* rules.

This evidence, consisting of prior statements and admissions by the claimant, provides ample corroboration of a history of unprofessional, disruptive and insubordinate behavior, and is therefore substantial and competent evidence of termination for cause.

3. Dr. Sadid Does Not Deny the Facts on Which Cause is Based.

The Commission should note that neither in his request for an appeal (Exhibit 9, page 2) nor in his testimony did Dr. Sadid deny the facts of the various incidents which formed ISU's cause for termination. Rather, Dr. Sadid has always asserted that ISU's real reason for his termination was retaliation for his exercise of his First Amendment rights. Dr. Sadid does not deny that he has a long history of publicly accusing administrators and colleagues of unethical or criminal behavior without substantiation. He does not deny that he has repeatedly disrupted meetings with complaints about matters and appropriately handled elsewhere. He does not deny that he violated purchasing and other school policies and rules repeatedly after being warned not to do so.

Accordingly, the Commission should find that the facts which form the basis for ISU's stated grounds for termination are established. There is significant evidence in the record, in the form of ISU's documents corroborated by Dr. Sadid's own documents, and Dr. Sadid has never denied the the underlying facts. The Commission should further find that the disruptive, unprofessional and insubordinate behavior shown by the evidence is adequate grounds for termination.

4. Dr. Sadid's Claim that He was Dismissed in Retaliation for Exercise of Constitutional Rights Has Been Held Groundless.

Dr. Sadid filed suit against Idaho State university and several employees in September 2008, alleging that the university of retaliating against him for his exercise of his First Amendment rights. In October 2009, he filed an amended complaint which added allegations that his termination, which

was then pending but was not complete, was also retaliation for exercise of his first amendment rights.

On December 18, 2009, the sixth district court granted summary judgment in favor of ISU and its employees. The court specifically held that Dr. Sadid had no claim for retaliation because the statements for which ISU allegedly retaliated were not a protected exercise of his First Amendment rights. The court also held that there was no evidence that Dr. Sadid's speech was a motivating factor in his termination.

According to rule 9.20 Of the Rules of Practice and Procedure adopted by the Commission, the Commission may take notice of official documents and decisions, such as court decisions.

Dr. Sadid's sole basis for claiming that he was not terminated for cause was that his termination was unlawful retaliation for his protected speech. That basis has been expressly rejected by a court of law of the state of Idaho, in litigation between the employer and the claimant. The commission should not issue a determination that is contrary to a finding made by a competent forum after a complete opportunity for both parties to discover and present facts and arguments.

5. The evidence in the record is more than sufficient to establish termination for cause.

The Commission must deny benefits if there is substantial and competent evidence in the record to support a conclusion that the employee was terminated for cause. The documents provided by ISU conclusively demonstrate that ISU terminated Dr. Sadid for cause after following all of the procedures required for terminating a tenured professor for cause. Those documents establish without dispute what the claimed cause was and that it was adequate under these rules. The evidence of Dr. Sadid's own letters and emails corroborates ISU's evidence and proves that the complained-of incidents in fact occurred.

Dr. Sadid does not even attempt to deny his behavior; rather, he complains that his long history of unprofessional and disruptive behavior is really insignificant, contrary to the findings of the ISU administration, and that the true motivation for ISU's action was retaliation for a newspaper article he wrote years ago. Ludicrous on its face, this claim has been dismissed by a court in a case brought by Dr. Sadid, on the grounds that it has no basis in law or in fact. Neither in court nor in his appeals hearing did Dr. Sadid offer any evidence to support a conclusion that his termination was a result of anything other than his own unprofessional, disruptive and insubordinate behavior.

The Commission should hold that the evidence in the record shows the claimant was terminated for cause.

CONCLUSION

Idaho State university respectfully requests that the Commission overturn the decision of the appeals examiner below.

RESPECTFULLY SUBMITTED this 19th day of February, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: John A. Bailey
JOHN A. BAILEY, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of February, 2010, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Sam Johnson JOHNSON & MONTELEONE, L.L.P. 405 South Eighth Street, Suite 250 Boise, Idaho 83702	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile *(208) 947-2424*
John Lynn Attorney at Law 776 E. Riverside Dr., Ste 200 Eagle, ID 83616	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [✓] Facsimile *(208) 685-2355*

JOHN A. BAILEY, JR.

IN THE DISTRIT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HABIB SADID, an individual,

Plaintiff,

v.

IDAHO STATE UNIVERSITY, ROBERT WHARTON, JAY KUNZE, MICHAEL JAY LINEBERRY, MANOOCHEHR ZOGHI, RICHARD JACOBSEN, GARY OLSON, AUTHUR VAILAS and JOHN/JANE DOES I through X, whose true identities are presently unknown,

Defendants.

Case No. CV-2008-3942-OC

DECISION ON MOTION FOR SUMMARY JUDGMENT

This matter came before this Court for hearing on Defendant's Motion for Summary Judgment on November 2, 2009. The Plaintiff was represented by Sam Johnson. The Defendants were represented by John Bailey. Stephanie Morse was the court reporter. The Court reviewed the documents submitted by the parties, heard oral argument from counsel, and took the matter under advisement. Now, the Court issues its decision **granting** the Defendants' Motion for Summary Judgment.

BACKGROUND AND PROCEDURAL HISTORY

The Plaintiff, Habib Sadid, was an associate professor in the Department of Civil Engineering at Idaho State University ("ISU"). He began working for the University in

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1991. In 1993, Sadid was given full tenure and he became an associate professor. In 1999, he became a full professor at ISU.

In 2001, Sadid published a letter to ISU faculty and administrators. The letter criticized the ISU administration for its plan to merge the College of Technology with the College of Engineering. The administration eventually decided not to follow through with the merger for 2001 and the plan did not arise again until 2003.

In 2003, Sadid spoke to the Idaho State Journal about the merger again. Sadid argues that the plan was designed in secret, which is deceptive to the community and to ISU faculty and staff. Some of Sadid's comments were published in the paper and some were published internally by ISU. Sadid contends that ISU retaliated against him for the comments made in 2001 and 2003.

Sadid claims that some of the acts of retaliation are that ISU did not perform its faculty evaluations of him from 2001 to 2006. Sadid alleges that more acts of retaliation came in 2006 when he was not appointed as the chair of the College of Engineering and in 2008 when Michael Lineberry wrote an e-mail which referred to Sadid as a "nut case." Sadid claimed that the Lineberry statement defamed him and that it is part of the retaliation against him. Sadid claims that the 2006 retaliation led to an economic loss suffered by Sadid in the amount of $35,000 per year. On August 24, 2006, Sadid was offered an opportunity to apply for the chair position, however, he declined. The position was eventually given to a candidate outside of ISU. Additionally, Sadid alleges that ISU has further retaliated against him by increasing his salary at the lowest percentage.

On September 29, 2008, Sadid filed a non-verified Complaint against ISU and Lineberry that contains three counts: (1) violation of constitutional rights under 42 U.S.C. §1983; (2) Breach of Employment Contract and the implied Covenant of Good Faith and Fair Dealing; and (3) Defamation of Character. The Prayer for Relief seeks monetary damages, costs, and attorney fees. On August 27, 2009, Sadid filed a Motion to Amend Complaint and attached a proposed amended complaint to the motion. The motion states that it is based upon the grounds that Sadid needed to identify and include additional Defendants and needed to include additional factual allegations based upon discovery ensued to date. The Motion to Amend Complaint was set for hearing on October 5, 2009. The Defendants, ISU and Lineberry, filed a motion for summary judgment based on the original Complaint and set it for oral argument on October 13, 2009. In response to the motion for summary judgment, Sadid filed a motion for additional time under Rule 56(f), which the Court granted. The Court also granted the motion to amend complaint and on October 15, 2009, Sadid filed his First Amended Complaint, which added six more defendants: Robert Wharton; Jay Kunze; Manoochehr Zoghi; Richard Jacobsen, Gary Olson; and Authur Vailas.[1] The amended complaint also added new factual allegations but retained the same three counts: (1) count one – claim under §1983; (2) count two – breach of employment contact and implied covenant of good faith and fair dealing; and (3) count three – defamation. Additionally, the Prayer

[1] Nothing in the record suggests that the added defendants were properly served with the Amended Complaint. However, Defendants' Reply Memorandum re: Defendants' Motion for Summary Judgment states that it is filed on behalf of all defendants. Therefore, it appears that the added defendants have at least voluntarily appeared in this matter.

for Relief in the amended complaint still sought monetary damages, costs, and attorney fees. However, it also sought injunctive relief ordering ISU to instate Sadid as Chair of the College of Civil Engineering. No other relief is sought.

After allowing Sadid the additional time he requested pursuant to IRCP 56(f), oral argument on Defendants' motion for summary judgment occurred on November 2, 2009. The Court deems the summary judgment motion to be against the Amended Complaint and against all defendants.

STANDARD OF REVIEW

Rule 56(c) of the Idaho Rules of Civil Procedure allows that summary judgment "shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (quoting I.R.C.P. 56(c)); *see also Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995); *Avila v. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995).

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Finholt v. Cresto*, 143 Idaho 894, 896-97, 155 P.3d 695, 697-98 (2007). Generally, the record is to be construed in the light most favorable to the party opposing summary judgment, with all reasonable inferences drawn in that party's favor. *Id.* If reasonable persons could reach different conclusions or inferences from the evidence, the motion must be denied. *Id.* However,

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the nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. The nonmoving party's case must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Id.*; *Tuttle v. Sudenga Industries, Inc.*, 125 Idaho 145, 868 P.2d 473 (1994).

Summary judgment is properly granted in favor of the moving party, when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994); *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126 (1988)). The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* (quoting IDAHO R. CIV. P. 56(e); *Nelson v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990)). If the nonmoving party does not come forward as provided in the rule, then summary judgment should be entered against that party. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

DISCUSSION

On or about September 14, 2007, Sadid filed a formal complaint with the Equal Employment Opportunity Commission ("EEOC") and claimed ISU discriminated against him for his national origin and/or religion and also retaliated against him since 2001.

Sadid asserts that claim was filed under Title VII of the Civil Rights Act. He acknowledges that he received a "right to sue" letter from the EEOC and he was informed that he must file a Title VII civil action for illegal discrimination within 90 days of receiving the letter. Sadid admits he abandoned any claim under Title VII and is now pursuing the claims under § 1983 and he claims that the only time barring for filing Section 1983 claim is the statute of limitation as discussed below. Therefore, this matter does not concern Title VII but concerns 42 U.S.C. § 1983, breach of contract law, and the Idaho Tort Claims Act. The Court will first address the § 1983 Claim.

I. Plaintiff's 42 U.S.C. § 1983 Claim

Sadid claims that the Defendants have violated his right to freedom of speech under the First Amendment of the United States Constitution and Article 1 Sections 9 and 10 of the Idaho Constitution along with his property rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 13 of the Idaho Constitution. Sadid seeks relief for these alleged violations under Title 42 Section 1983 of the United States Code.

Sadid alleges that in his capacity as a faculty member and full professor of ISU, he has, from time to time, openly and publicly expressed his views regarding matters of public concern relating to ISU and its standing in the academic and local community. *See, First Amended Complaint, pg. 5, para. 13.* Sadid further specifically identifies two separate incidences in which he claims he exercised his protected right to free speech. First, he alleges that in 2001 he published a letter to his fellow faculty members and to

ISU administrators criticizing ISU's decision to merge the College of Technology with the College of Engineering. *Id., at para. 14.* Second, Sadid alleges that in 2003, he publically spoke out against ISU's renewed plan, designed in secret, to merge the two colleges and that some of his comments were published in the Idaho State Journal while other of his comments were published internally at ISU. *Id., at para. 15.* Sadid claims that the University retaliated against him for the expression of protected speech.

There are five questions the court must answer to determine whether under § 1983 there is a valid First Amendment retaliation claim. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). The questions are:

1. whether the plaintiff spoke on a matter of public concern;
2. whether the plaintiff spoke as a private citizen or public employee;
3. whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
4. whether the state had an adequate justification for treating the employee differently from other members of the general public; and
5. whether the state would have taken the adverse employment action even absent the protected speech.

Id. If the plaintiff did not speak as a citizen on a matter of public concern then the plaintiff does not have a First Amendment cause of action based on his employer's reaction to the speech. *Brewster v. Bd. Of Educ.*, 149 F.3d 971 (9th Cir. 1991). The plaintiff has the burden of proof on the first three tests. That is, Plaintiff has the burden

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of showing that: (1) "the speech addressed an issue of public concern"; (2) "the speech was spoken in the capacity of a private citizen and not a public employee"; and (3) "the state took adverse employment action" and the speech "was a substantial or motivating factor in the adverse action." *Jacobson v. Schwarzenegger,* --- F.Supp.2d ----, 2009 WL 2633762 (C.D.Cal. 2009). Only if plaintiff passes these three tests does the burden shift to the defendants to show that the government's interests outweigh the plaintiff's First Amendment rights, or that it would have taken the same action even in the absence of the protected conduct. *Id.*

1. **Matter of Public Concern.** A public employee's speech is protected under the First Amendment only if it falls within the core of First Amendment protection--speech on matters of public concern. *Engquist v. Oregon Dept. of Agr.*, --- U.S. ----, 128 S.Ct. 2146, 2152, 170 L.Ed.2d 975 (2008); *Connick v. Myers*, 461 U.S. 138, 146-47, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The Supreme Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *see Connick*, 461 U.S. at 143, 103 S.Ct. 1684; *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

The question of whether the matter was a public concern is a question of law. *Berry v. Dept. of Soc. Servs.*, 447 F.3d 642, 648 (9th Cir. 2006). If the speech in question

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does not address a matter of public concern then it is unprotected. *Eng* at 1071. When the speech is a political, social or other concern to the community, then it is a matter of public concern. *Connick v. Myers*, 461 U.S. 128, 103 S.Ct. 1684 (1983). Alternatively, if the speech deals with "individual personnel disputes and grievances" and it is not related to the "relevance to the public's evaluation of the performance of governmental agencies" then it is not a matter of public concern. *McKinley v. City of Eloy*, 705, F.2d 1110, 1114 (9th Cir. 1983). Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. *Connick*, 461 U.S. at 147-148. The plaintiff bears the burden of showing the court that the speech is a matter of public concern. *Eng* citing *Connick*.

Sadid claims that he was speaking of a matter of a public concern. In two of the letters (Exhibit A, written February 9, 2003 and March 9, 2003) the Court infers that Sadid is arguing that this is a matter of public concern because it is an issue of interest to the tax paying public. However, "[t]o presume that all matters which transpire within a government office are of public concern would mean virtually every remark and certainly every criticism directed at a public official would plant the seed of a constitutional case." *Connick* at 149, 103 S.Ct. 1684. Therefore, to simply claim that all matters relating to ISU's plans of department mergers are matters of public concern is overly broad.

The Defendant directed the Court to a case that is similar to this one, *Hong v. Grant*, 516 F.Supp.2d 1158 (C.D. Cal. 2007). In *Hong*, the defendant (among several

others named) was Grant, who was the Chair of the Department of Chemical Engineering and Materials Science at the University of California-Irvine. The plaintiff was Hong, who was an engineering professor at the university. He made several critical statements about the hiring and promotion of other professors. He claimed his First Amendment rights were violated when the university retaliated against his statements by denying him a salary increase. The defendants moved for summary judgment, which the district court granted in their favor.

The district court analyzed whether Hong's statements were matters of public concern and concluded that they were not by stating: "While Hong argues that his statements are of public concern because they exposed government waste and mismanagement, they are more properly characterized as internal administrative disputes which have little or no relevance to the community as a whole." *Id.* at 1169. The court followed the rule set out in *Connick* that a statement by an employee is not the public's concern if it "cannot fairly be considered as relating to any matter of political, social or other concern to the community." *Hong* at 1169 quoting *Connick*, 461 U.S. at 146, 103 S.Ct. 1684.

The *Hong* Court also related its decision to a 7th Circuit case, *Colburn v. Trustees of Indiana University*, 973 F.2d 581 (7th Cir. 1992). In *Colburn*, two professors claimed that they were denied tenure and a promotion because the university retaliated against their claimed protected speech. In the letters that the professors wrote they claimed that the "integrity of the University was being threatened." *Id.* at 586. The court held that

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even though the public would have appreciated the knowledge of the alleged wrongdoing of the department, it noted that simply because the matter would be interesting to the public does not make it a matter of public concern. *Id.* As a result, the court granted the defendant's motion for summary judgment against the two professors.

After reviewing the argument of Sadid, the case law, and the entire content, form and context of his letters, the Court disagrees with Sadid's claim that this was a matter of public concern. The Court finds that the letters contain nothing more than personal grievances against ISU regarding matters that relate directly to Sadid's interest in his employment. The content and opinions may in fact be interesting to the public; however, the value of interest alone does not make the matter a public concern. Furthermore, simply because it involves a matter that may have occurred behind close governmental doors does not make it a public concern. Sadid's statements go more to matters of an internal administrative dispute than a matter of public concern. Here, Sadid has failed to show that the statements made were a public concern. He cannot pass the 1st test under *Eng.* As a result, Sadid does not have a valid First Amendment claim for protected speech.

2. **Speaking as a Public Employee or Private Citizen.** When a person enters the government employee workforce, by necessity, he must accept certain limitations on his freedom. *Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878 (1994). Government employers need a significant degree of control over their employees' words and actions, much like private employers do. *Connick* at 143, 103 S.Ct. at 1684. If the government

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employer did not have control "there would be little chance for the efficient provision of public services." *Id.*

> To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Arnett v. Kennedy, 416 U.S. 134, 168, 94 S.Ct. 1633, 1651, (1974). Also, governmental employees "often occupy trusted positions in society" and therefore, when they speak out in public "they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.*

Sadid asserts that he was speaking as a private citizen when he wrote the articles for the newspaper.[2] He argues that because his job description does not mention anything to the fact of a duty to write newspaper articles that critique the ISU administration is evidence that he was speaking as a citizen. The Court disagrees with Sadid's argument. Whether his job description requires him to write articles is not the determining factor of him being in the role of a citizen or a public employee. After reviewing Sadid's letters that were published, the Court finds that the tone of the letters is that of an employee of ISU. Additionally, Sadid should understand that he has limitations of his speech that he accepted when becoming a state employee. Furthermore, Sadid continuously argues in his brief and even in the published article itself that he was speaking as a private citizen,

[2] This argument is directly contrary to his assertion in the Amended Complaint that he spoke in "his capacity as a Faculty Member and Full Professor of ISU".

yet in both of the published articles he identifies himself as an ISU employee. Therefore, due to the tone and language of the letter the Court finds that Sadid was speaking as an employee and not as a private citizen. As a result, Sadid has also failed to meet the 2nd test under *Eng*.

3. **Whether the Protected Speech was a Substantial or Motivating Factor in ISU's Action.** As found in the discussion above, the Court finds in favor of the Defendants on this issue for two reasons: 1) the letters written by Sadid were not protected speech and 2) nothing in the evidence provided by the Plaintiff proves that ISU had any motivation for not hiring Sadid as the Chair. In fact, the Court finds that there is nothing in the record to suggest that Sadid even applied for the position of Chair. Without such an application, Sadid could have no reasonable expectation that he would be hired for the position. Sadid has failed to meet the 3rd test under *Eng*.

In light of the foregoing analysis, Sadid's First Amendment claim fails each of the first three questions under the *Eng* test and the Court finds that there is not a valid First Amendment claim. Therefore, Defendants are granted summary judgment on Count One.

II. Breach of Contract and Implied Warranty

Sadid alleges, in Count Two of his Amended Complaint, that ISU breached his employment contract and breached the implied warranty of good faith and fair dealing associated with that contract. Specifically, Sadid alleges that ISU and its employees failed to perform annual evaluations of Sadid for the years 2001 through 2006 and that this failure constitutes a breach of ISU policy and his employment contract. Defendants

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allege, in their motion for summary judgment, that they are entitled to summary judgment on Count Two because the contract claim is time barred, plaintiff has failed to establish a breach, plaintiff has failed to establish any damages, and because he failed to follow the grievances procedures set forth in the Faculty Handbook.

In response to defendants' summary judgment motion as to Count Two, Sadid argues that breaches occurring in 2003 through 2006 are not barred by the five year statute of limitations and breaches occurring in 2001 and 2002 are not time barred because they are "captured" by the continuing violation doctrine. Additionally, Sadid argues that he did file a grievance under the Faculty Handbook and that it was denied.

1. **Whether The Contract Claim Is Time Barred.** An action for a written contract must be brought within five years. *I.C. § 5-216.* The statutory time period does not begin to run until a cause of action has accrued. *Saddlehorn Ranch Landowner's, Inc. v. Dyer*, 146 Idaho 747, 750, 203 P.3d 677, 680 (2009); *citing Simons v. Simons*, 134 Idaho 824, 830, 11 P.3d 20, 26 (2000). Sadid is claiming that ISU had a contractual obligation to perform annual evaluations and ISU breached the contract because from 2001 until 2006 ISU did not complete his annual evaluations.

Sadid argues that because the Complaint was filed on September 29, 2008, the five year statute of limitations allows the Court to look back to September 29, 2003, for any alleged breach of contract. Sadid further argues that the "continuing violation" doctrine applies to his breach of contract claim and would allow him to attach the 2001 and 2002 alleged breaches. Sadid did not provide any law that supports the argument that

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the "continuing violation" doctrine applies to contract actions as opposed to § 1983 actions or state tort actions. The Court did not find any law that states that the doctrine relates to claims of breach of contract, similar to this situation.

In the absence of any case law on this issue, this Court finds that each incidence – each time an evaluation was not performed – constitutes a separate breach and not an ongoing breach. To find otherwise would effectively render the limitation period for any cause of action alleging failure to perform meaningless when the performance is to be done on a regular basis. The purpose of a statute of limitations is to bar stale claims and avoid problems of proof arising from stale memories. Accepting Sadid's continuing violation theory on a breach of contract claim would hinder and frustrate the ultimate aim of limitations periods. The breach of contract claim does not involve an ongoing breach but multiple separate breaches. Therefore, the statute of limitations bars any alleged breach occurring more than five years prior to the filing of the Complaint. Sadid cannot purse a breach of contract claim for any event occurring prior to September 29, 2003.

2. Whether Plaintiff Has Shown a Breach of Contract. Sadid claims that the failure of ISU to do the evaluations caused him damages because he did not receive an annual salary increase or the Chair position. Sadid directs the Court to section (B)(1) of the ISU Handbook, which states:

> Each year the chair of a department must submit to the Dean of the Chair's college an evaluation of each faculty member in that department...the evaluation, together with the opinion of higher administrators, will be used as one (1) basis for the final recommendation relative to reappointment, nonreappointment, acquisition or tenure, or as other personnel action, whichever is appropriate.

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FACULTY/STAFF HANDBOOK, Part 4, Section IV, (B)(1). The Defendants argue that (B)(7) actually applies, which states:

> It is the policy of the Board that at intervals not to exceed five (5) years following the award of tenure to faculty members, the performance of tenured faculty must be reviewed by members of the department or unit and the department chairperson or unit head. The review must be conducted in terms of the tenured faculty member's continuing performance in the following general categories: (a) teaching effectiveness, (b) research or creative activities, (c) professional related services, (d) other assigned responsibilities, and (e) overall contributions to the department.

FACULTY/STAFF HANDBOOK, Part 4, Section IV, (B)(7). Overall, after reviewing the ISU faculty handbook provisions that counsel has provided, the Court does not agree with Sadid's argument of a breach of contract by ISU by failure to conduct an annual evaluation of Sadid. The Court recognizes that Defendant Kunze acknowledged that he had a responsibility to conduct faculty evaluations and that he did not complete the performance evaluation process with Sadid on an annual basis. *Kunze's Deposition, Exhibit A to the Affidavit of Counsel, p. 46, Ll. 11-22; p. 49, Ll. 9-14; p. 56, Ll. 1-10; p. 62, Ll. 2-22.* However, Sadid received his tenure in 1993, and according to the ISU Faculty Handbook, annual evaluations of a tenured professor are not required. What matters in this case is whether Sadid received an evaluation every 5 years after receiving tenure. For the five year period immediately preceding the filing of the Complaint Sadid testified that he did not receive an evaluation in 2003, 2004, 2005, and 2006. *See, Affidavit of Plaintiff in Opposition to Defenndants' Motion for Summary Judgment, para. 5.* There is nothing in the record relating to 2007 or 2008. If Sadid received an

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evaluation in either of these years, his breach of contract claim fails. Sadid, as plaintiff, carries the burden of proof on the issue of breach of contract. His failure to provide any evidence that ISU failed to evaluate him at any time during the five years immediately preceding the filing of his Complaint warrants summary judgment against him on the breach of contract claim.

Alternatively, the Court does not need to determine whether or not the evaluations were completed at least every five years for a tenured professor because Sadid did not provide any evidence that shows he had a contract for a yearly salary increase. Additionally, at the hearing for this motion, Sadid did not rebut the Defendant's claim that he could not receive the Chair position simply because he did not apply for the position. Sadid's contract does not guarantee annual evaluations, yearly salary increases, or the Chair position. He has not shown any injury from the alleged breach of contract.

The Court grants Defendants summary judgment on Count Two of the Amended Complaint, the breach of contract claim, on the grounds that the statute of limitations has terminated any claim for breach occurring prior to September 29, 2003, and that the Plaintiff has not shown that ISU failed to evaluate him at any time within the five years immediately preceding the filing of the Complaint. Alternatively, Sadid has not shown a contractual requirement that in which the parties agreed to assign Sadid the Chair position, a yearly salary increase, or an annual evaluation. ISU did not breach the contract. Defendants are granted summary judgment on Count Two.

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III. The Defamation Claim

Sadid alleges, in Count Three of his Amended Complaint, that Lineberry and ISU defamed him. This is a tort claim under state law. Specifically, Sadid alleges that Lineberry sent an e-mail on the ISU email system on August 1, 2008, and it addressed matters regarding the operation of the College of Engineering. Also in the e-mail was a statement about Sadid that referred to him as a "nut case." Sadid alleges that the contents of the email were defamatory to his character and that the e-mail constituted retaliation. Lineberry and ISU moved for summary judgment on Count Three on the grounds that Sadid failed to file a Notice of Tort Claim prior to commencing litigation, that defendants are entitled to immunity under I.C. § 6-904(3), and that no defamation occurred.

In response to Defendants' motion for summary judgment as to Count Three, Sadid argues that his Notice of Tort Claim was timely filed because it was filed before the filing of the Amended Complaint, that Lineberry was not acting within his official capacity at ISU when he made the "nut-case" statement, and that Lineberry acted with malice such that the immunity under I.C. § 6-904(3) does not apply.

1. Whether the Plaintiff's Defamation Claim is Barred by the Idaho Tort Claim Act. Sadid filed his original Complaint on September 29, 2008. He served the Complaint and Summons on ISU and Lineberry on October 15, 2008. *See, Affidavit of Service signed by Eric Hansen and filed on October 31, 2008, and Affidavit of Service signed by Jamie Hansen and filed on October 31, 2008.* Two copies of the Summons and Complaint and Demand for Jury Trial were served on the Attorney General on October 6,

2008. *See, Affidavit of Service signed by Tri-County Process Serving and filed on October 15, 2008.* Defendants ISU and Lineberry filed a Motion to Dismiss on November 26, 2008, alleging that Plaintiff had not properly served the Secretary of State as required by the ITCA. On December 3, 2008, Plaintiff served the Summons, Complaint and Notice of Tort Claim on the Secretary of State. *See, Affidavit of Service signed by Tri-County Process Serving and filed on December 8, 2008.*[3] Sadid filed his Amended Complaint on October 15, 2009. It alleges that "A written Notice of Tort Claim has been filed in compliance with the Idaho Tort Claims Act, with the Secretary of State for the State of Idaho pursuant to Idaho Code § 6-905 and § 6-907." *See paragraph 32 of the Amended Complaint.*

Lineberry's e-mail that Sadid claims is defamatory was sent in August 2008. Whether his defamation claim is barred is an issue that "can be decided as a matter of law *via* the notice requirement of the Idaho Tort Claims act." *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987).

Idaho Code § 6-905 reads:

> All claims against the state arising under the provisions of this act and all claims against an employee of the state for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the secretary of state within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

[3] The Notice of Tort Claim is not in the Court's file. However, the Affidavit of Plaintiff in Opposition to Defendants' Motion for Summary Judgment states that "A written Notice of Tort Claim has been filed in compliance with the Idaho Tort Claims Act, with the Secretary of State for the State of Idaho pursuant to Idaho Code § 6-905 and § 6-907." *See paragraph 20 of the Affidavit.*

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I.C. §6-905. The statutory period begins to run at the occurrence of the wrongful act even if the full extent of damage is unknown. *McQuillen, 113 Idaho, at 722.* "Knowledge of facts which would put a reasonably prudent person on inquiry is the equivalent to knowledge of the wrongful act and will start the running of the 120-day period." *Id.* The ITCA states that the claim must be "presented and filed within the time limits." I.C. § 6-908. The State or its employee has 90 days to respond to the claim. I.C. § 6-909. If the claim is denied, the claimant may institute an action in the district court. I.C. § 6-910. Compliance with the Idaho Tort Claims Act's notice requirement is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate." *McQuillen* (citing *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982); I.C. § 6-908). The notice requirement is in addition to the applicable statute of limitations. *Id.*

In the original Complaint filed on September 29, 2008, the Plaintiff did not allege the he had filed a written notice in compliance with the Idaho Tort Claims Act. The Plaintiff argues that this was remedied by his Amended Complaint filed on October 15, 2009, which does note the filing of the notice with the Secretary of State. *Plaintiff's First Amended Complaint And Demand For Jury Trial, p. 9.* However, the Plaintiff's argument is misleading, whether the Amended Complaint corrects the problem is irrelevant. The focus should be that the Plaintiff filed suit ***before*** he filed the notice with the Secretary of State, which is a mandatory condition precedent to bringing the suit.

In *Euclid Ave. Trust v. City of Boise,* 146 Idaho 306, 193 P.3d 853 (2008), Euclid filed a Complaint, Petition for Judicial Review and Request for Jury Trial on December 12, 2005. The pleading sought judicial review of the City's actions, a declaration that an emergency ordinance was invalid, mandatory relief and civil damages. A few days after the complaint was filed, Euclid filed a tort claim. Euclid filed an amended complaint in January, adding a due process claim. The City filed a motion to dismiss and a motion for summary judgment. The trial court granted the City summary judgment and Euclid appealed. On appeal, the Idaho Supreme Court recognized that the trial court had granted summary judgment to the City on Euclid's claim under the ITCA because Euclid did not comply with the notice requirements of the ITCA. The Supreme Court affirmed the summary judgment without any discussion of whether the amended complaint cured the failure to file the notice before filing suit.

Plaintiff, in effect, asks the Court to ignore the filing of the original complaint and to look only to the filing of the amended complaint to determine if notice was timely given. However, plaintiff also argues that for purposes of deciding the statute of limitations issues, the filing of the amended complaint relates back to the date of filing of the original complaint. These are inconsistent positions. A plaintiff cannot "cure" a failure to give proper notice prior to filing suit by giving such notice after filing suit. To do so defeats the purpose of the notice requirement. Sadid's original Complaint alleged a claim for defamation. This claim clearly falls under the ambit of the ITCA. ISU and Lineberry had the right to receive a notice of this claim before litigation began. ISU and

Lineberry had the right to have 90 days to decide whether to accept or reject the claim before litigation began. Those rights, granted under the ITCA, were denied when Sadid served the notice of tort claim with the complaint on the Secretary of State. By then, the complaint for defamation had been filed and the purposes for the notice requirement frustrated.

The purposes of the notice of claim requirement under the ITCA are to: (1) save needless expense and litigation by providing opportunity for amicable resolution of differences among parties, (2) allow authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability, if any, and (3) allow the state to prepare defenses. *Driggers v. Grafe,* --- P.3d ----, 2009 WL 4067998 (Ct. App. 2009). Therefore, using its discretion, the Court finds that the alleged defamation claim is barred by the Idaho Tort Claim Act as to any claim against ISU or against Lineberry alleging he acted within the scope of his official capacity at ISU.[4]

In reaching this conclusion, the court is aware of *Madsen v. Idaho Dept. of Health and Welfare*, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988), in which the Court of Appeals suggested that a plaintiff could dismiss his complaint without prejudice, serve his notice under the ITCA, and then file a new complaint – if the time period for serving notice had not yet expired. However, Sadid did not dismiss his Complaint but merely filed an Amended Complaint, thus frustrating the purposes of the notice requirement. Sadid even filed a Notice of Intent to Take Default prior to the filing of the Amended

[4] These are the only two defendants against whom the defamation claim is asserted.

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Complaint and within 90 days of the time he claims the notice of tort claim was served on the Secretary of State. Obviously, Sadid had no intent to stay litigation while the State investigated his claim or the other purposes of the notice requirement were met.

2. Whether Immunity Applies. Defendants argue that even if the defamation action is not barred by the notice requirements of the ITCA, they have immunity under I.C. § 6-904(3). That statute states:

> A government entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> . . . .
>
> 3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Plaintiff's Amended Complaint asserts that Lineberry acted with malice when he sent the e-mail. Sadid further argues in opposition to summary judgment that Lineberry did not act within his course and scope of employment when he sent the e-mail. I.C. § 6-903(a) states that the State is only liable for wrongful acts of its employees if they were acting within the course and scope of employment. Therefore, Sadid cannot bring this defamation action against ISU. Lineberry, on the other hand, cannot claim the immunity afforded by I.C. § 6-904(3) for conduct falling outside the scope of his employment and done with malice.

3. Whether Defamation Occurred. If the comments do not harm the reputation of the plaintiff in the community or deter third parties from associating with him then they are not defamatory comments, even if they are derogatory. *Rubenstein v. University*

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of Wisconsin Bd. Of Regents, 422 F.Supp. 61, 64 (E.D. Wis. 1976). Additionally, if comments are not made to the general community then the community cannot "lower its estimation" of the plaintiff. *Id.* In *Rubenstein*, the plaintiff filed a claim of defamation for the defendant's comment of "old biddy" referring to the plaintiff, along with an additional opinion that the plaintiff was not suitable for the promotion at issue and also commenting that the plaintiff was "just out to make trouble." *Id.* The court dismissed the plaintiff's defamation claims because the remarks did not harm her reputation. *Id.*

The issue of defamation in this case is much like that of *Rubenstein*. Sadid claims that the comments made by Lineberry were defamatory and resulted in him not getting the Chair position. The e-mail was not sent to the general public and therefore it could not affect his reputation in the community or deter any third parties from associating with him. Furthermore, Sadid has failed to provide any evidence that any opinion of Sadid was affected by the email. Therefore, the Court finds that even though the e-mail's language is derogatory, the term "nut case" is not defamatory because Sadid's reputation was not affected. Lineberry is entitled to his opinion.

Defendants are entitled to summary judgment on Count Three.

CONCLUSION

Defendants are entitled to summary judgment on each count in the Amended Complaint. Both parties raised issues not addressed in this decision; however, those issues were not addressed because the above issues are dispositive. Defendants are hereby granted summary judgment in this matter. Defense counsel is instructed to submit

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a proposed final judgment. Plaintiff's counsel will have three days to file any objection to the proposed judgment.

IT IS SO ORDERED.

DATED: December 18, 2009.

DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of December, 2009, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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PAGES (INCLUDING COVER): 8

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DKT # 1777-2010

TO: Dena Burke, Fax # 332-7558

MESSAGE: Please file the attached CLAIMANT'S BRIEF

If transmission is incomplete, call John Lynn at (208) 685-2333.

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IDAHO INDUSTRIAL COMMISSION
JUDICIAL DIVISION, IDOLAPPEALS

HABIB SADID SSN: [redacted] Claimant, IDAHO STATE UNIVERSITY, Employer, And IDAHO DEPARTMENT OF LABOR,	DOCKET NO. 1777-2010 **CLAIMANT'S BRIEF**

Comes now, the Claimant, by and through his counsel of record, and submits the following BRIEF in response to the EMPLOYER'S BRIEF ON CLAIM FOR REVIEW.

FACTS

It is apparent that Claimant's claim for unemployment benefits and the Employer's response follows a long and contentious dispute over the reasons behind Claimant's termination of employment. The Employer alleges that Claimant's conduct in the workplace was "Unprofessional, disruptive and non-collegial" which support'

98

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HABIB SADID SSN: [redacted]	DOCKET NO. 1777-2010
Claimant,	**CLAIMANT'S BRIEF**
IDAHO STATE UNIVERSITY,	
Employer,	
And	
IDAHO DEPARTMENT OF LABOR,	

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adequate cause' for termination under Idaho State University ("ISU") policy (Exhibit 7). Claimant, in turn, maintains that the ostensible grounds for termination are mere pretext, and that the true reason for discharge stems from Claimant's criticism of ISU administrators, much of which was published in the local newspaper (Exhibit D).

The Employer has taken great pain and considerable liberty with its rendition of the facts to convince this tribunal that Claimant committed misconduct as contemplated by Idaho Code § 72-1366 (5). However, the facts upon which this tribunal must decide are limited. The Commissioners must conduct a *de novo* review of the record here which consist of the documents admitted during the proceeding below and the testimony of Dr. Sadid at the January 5th hearing.

Given the state of this record, the Commission is not in a position to determine whether Claimant was rightfully or wrongfully terminated. The only determination that can be made by this tribunal is whether the Employer has met its burden or proof, on this record, that Claimant committed some form of misconduct. The Employer cannot meet its burden of proof because it had not offered substantial and competent evidence supporting its case. The documents presented by the Employer (Exhibits 3-7) are hearsay and hearsay evidence, standing alone, is not sufficient to support findings of fact (*Application of Citizen's Utilities Company,* 82 Idaho 208, 213, 351, P. 2d 487, 492 (1960)). On the other hand, the positive, uncontradicted testimony of a credible witness must be accepted as true even if the witness is an interested party. Thus the Claimant's sworn testimony must be given greater weight and consideration over allegations of misconduct contained in the documents. Here the Claimant not only testified that the alleged claims of misconduct were false, but that the numerous

documents submitted corroborate his position.

For example, the Employer cites many alleged transgressions committed over a lengthy period of time up to and including certain events in April of 2009 and thereafter (Exhibit 3-7), culminating in Dean Jacobsen's recommendation for dismissal (Exhibit 5, pp 15-20). What the Employer did not reveal, however, is the fact that all of these transgressions were the subject of a Faculty Appeal Board grievance hearing. This hearing transpired over several days with numerous witnesses sworn under oath and cross-examine; a recording of this hearing has been provided as Exhibit 10, F. This grievance process culminated in a decision dated October 23, 2009, whereby four of the five Board members[1] found insufficient evidence to justify termination. Not only did the Faculty Appeal Board find inadequate cause for termination, but opined "In view of the gravity of the recommended action, the majority found the absence of required documentation disturbing" (Exhibit 9, A). Moreover, there is nothing in the record that explains or justifies the President's decision to overturn the recommendation of the Faculty Appeal Board. Therefore, even if the Commissioners were inclined to give credence to the documentary evidence here, there is nothing in this record to undermine the findings of the Faculty Appeal Board. Consequently, the Employer's proof of misconduct is wholly lacking particularly in the face of Claimant's uncontradicted sworn testimony.

THE CIVIL LITIGATION

The Employer places import on the civil proceedings before Judge Nye (EMPLOYER'S BRIEF, p.3, 4). Judge Nye has granted ISU's Motion for Summary

[1] The lone dissenting member was appointed by the Provost

Judgment and has found that Claimants alleged 'protected speech' in his pending civil lawsuit against ISU is not protected. However, the Employer neglected to advise the Commission that this is not a final decision.[2] The question as the whether Claimant engaged in 'protected speech' is and will remain highly contested. An example of this speech can be found in the record (Exhibit 10, D) where an article dated November 10, 2008, posits the question: "Are President Vailas' Policies Damaging ISU"? A review of this article may shed light on why this claim is so hotly contested; but whether Claimant engaged in 'protected speech' and retaliated for it is not within purview of this tribunal and is better left to the civil court to decide. Moreover, the 'protected speech' inquiry does not address the issue of misconduct as the two are separate and distinct. Even if the speech reviewed by Judge Nye is ultimately deemed unprotected, it may still explain why President Vailas countermanded the Faculty Appeal Board decision and the Board's concern over a "disturbing" termination process (Exhibit 9, B). The fact that Claimant's speech may not be protected does not, in any way, prove misconduct.

THE DOCUMENTARY EVIDENCE

Having no substantial or competent evidence to reply upon, the Employer makes claim that its documents are not hearsay. The Claimant concedes that the documents authored by him may be excepted by the hearsay rule, however, these documents support Claimant's position (Exhibit 4. pp 4-6, 29-31; pp 12, 13 and 10 C, G, H, I).

The Employer represents that its documents authored by its agents are admissible under the public record and reports exception to the hearsay rule (I.R.E. 803 (8)). This assertion is disingenuous. These self-serving documents were not records or reports setting forth 'regularly conducted and regularly recorded activities'. Their veracity and

[2] A decision on Plaintiff's (Claimant's) Motion for Reconsideration is pending.

trustworthiness is challenged, highlighting, precisely, the reason for the hearsay rule. The only document that could fall within this exception would be the Faculty Appeal Board findings as they followed from an investigation pursuant to authority granted by law, ISU policy (Exhibit 5, pp 11-13).

Likewise, in no way do ISU's one-sided documents establish termination for cause. The documents as a whole establish nothing except that the parties strongly disagree as to why Claimant was terminated -- a matter better left to the civil court for resolution. Suffice it to say that ISU's leitmotif, its sweeping claim that these documents "recite a long history of unprofessional, disruptive and insubordinate behavior" (EMPLOYER'S BRIEF, P.8) flies directly in the face of Claimant's last three performance evaluations (Exhibit 10, C (2006, 2007); Exhibit10, E (2008)). The documents thoroughly impeach ISU's justification for termination.

DR. SADID'S DENIAL OF MISCONDUCT

As if existing in a parallel universe, the Employer suggests that Claimant didn't deny, and therefore admits, misconduct. The appeal hearing held January 5th speaks for itself. Claimant clearly stated that he committed no misconduct. Claimant also testified and outlined the course of history with ISU including his lengthy and distinguished service (Exhibit 10, C, attachment 6 (CV)). Claimant testified that all of the nonsense leveled against him culminated in a grievance hearing where ISU threw everything at him *ad nauseam* including new charges that surfaced during the hearing (Exhibit 10, F). It is not necessary to do so, but Claimant invites the Commissioners to listen to this hearing for it reflects Claimant's denial of any wrongdoing and provides insight as to why the Faculty Appeals Board found that the termination process was not only without merit but

disturbing.

CONCLUSION

As the Commission may well surmise, this dispute goes far beyond eligibility for unemployment benefits. The narrow focus here, however, is easily resolved. The Employer has not offered substantial and competent evidence supporting its case and, therefore, cannot meet its burden of proof. The proof evidence by the Employer consists of self-serving documents and uncorroborated hearsay. Claimant, on the hand, testified; he denied doing anything that would constitute misconduct, corroborated his own documents filed in response to the numerous accusation brought against him and explained the context from which this dispute arose- a context which surely raise concerns over ISU's good faith.

But Claimant's testimony does not stand alone. Claimant's peers reviewed all the alleged transgressions in detail and found a disturbing termination process lacking in merit. In short, the Employer's effort to justify a denial of employment benefits rings hollow – full of hyberbole, silliness and zeal. The true significance of the Employer's position here is that it shows, again, the arrogance and conceit with which it destroyed the career of one of its most accomplished professors. This is but one chapter in a long story that is far from over.

Dated this 23rd day of February, 2010

John C. Lynn
Attorney for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 25 day of February, 2010, that a true and correct copy of the foregoing CLAIMANT'S BRIEF was served by regular United States Mail, upon the following:

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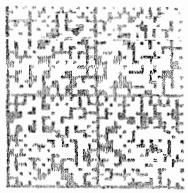

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DATE: March 5, 2010

TO: Industrial Commission
Tracey K. Rolfsen
Sam Johnson

FILED
MAR - 5 2010
INDUSTRIAL COMMISSION

FROM: John A. Bailey, Jr.

RE: Sadid v. ISU and IDOL

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COMMENTS: Attached please find the following documents in the above-captioned matter:

1. Letter to the Industrial Commission; and
2. Employer's Reply Brief on Claim for Review.

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March 5, 2010

FILED
MAR - 5 2010
INDUSTRIAL COMMISSION

Industrial Commission
Judicial Division, IDOL Appeals
P. O. Box 83720
Boise, Idaho 83720-0041

Re: *Sadid v. ISU and IDOL*
IDOL Docket No: *1777-2010*
Claimant: *Habib Sadid*
Employer: *Idaho State University*

Dear Clerk:

Enclosed please find **Employer's Reply Brief on Claim for Review** for filing in the above-captioned matter.

Thank you for your assistance and if you have any questions, please give me a call.

Best regards,

JOHN A. BAILEY, JR.

JAB:mc
Enclosure
c: Tracey K. Rolfsen (via facsimile)
Sam Johnson (via facsimile)

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IDAHO INDUSTRIAL COMMISSION

JUDICIAL DIVISION, IDOL APPEALS

HABIB SADID, SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	IDOL Docket No. 1777-2010 **EMPLOYER'S REPLY BRIEF ON CLAIM FOR REVIEW**

Comes now, the Employer, Idaho State University, by and through its counsel of record, and submits the following reply brief in response to the Claimant's brief in the above captioned case.

1. The Commission May Consider All of the Documents on Record

As discussed in the Employer's Brief on Claim for Review, the Appeals Officer in this case erroneously held that all documentary evidence is hearsay, which is insufficient to support findings

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of fact. In our previous brief, we demonstrated her error; documents authored by the claimant are not hearsay, official documents and records of ISU are not hearsay for these purposes. And even hearsay documents are sufficient to support a finding of fact if they are corroborated by non-hearsay evidence, such as the letters and emails authored by the Claimant. Viewed in light of the correct understanding of law, the evidence in the record is more than sufficient to establish cause for termination.

The documents submitted by ISU conclusively establish that the Dean of Engineering, Dr. Richard Jacobsen, began proceedings to terminate Dr. Sadid's employment for cause; namely, a long history of unprofessional and disruptive behavior that was deemed to be detrimental to the College of Engineering. Numerous examples of that behavior are noted in the documents and testified to in the recording of the faculty senate hearing which Dr. Sadid submitted as Exhibit 10 F. The official records submitted by ISU are excluded from the hearsay rule pursuant to the business records exception. They are direct evidence that the reason given by ISU at the time of the termination was cause, namely, the particular behavior of Dr. Sadid recited in those documents.

In other words, the evidence is undisputed that ISU cited cause as the reason for Dr. Sadid's termination. There is no contention that the reason given at the time was retaliation or some other reason other than cause. The questions before the Industrial Commission are whether this cause cited is sufficient, and whether the stated cause is merely a pretext for unlawful retaliation, as alleged by Dr. Sadid.

While the official records of ISU are non-hearsay evidence of the reasons for termination, the Claimant argues they should be considered hearsay for purposes of determining whether that behavior actually occurred. Even if that were correct hearsay for that purpose, they are richly

corroborated by the letters and emails authored by Dr. Sadid, which are not hearsay. This Commission may consider hearsay evidence that is corroborated by non-hearsay evidence. *Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 440, 113 NE 507, 509 (NY 1916); *Williapoint Oysters v. Ewing*, 174 F.2d 676, 691 (9th Cir. 1949); *Con.Ed.Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 217, 59 S.Ct. 206, 230 (1938).

2. The Documentary Evidence Establishes Sufficient Cause for Termination.

At page four of his brief, the claimant concedes that the documents authored by him are not hearsay. He argues, however, that they support his position. A review of these documents shows precisely the opposite. For instance, Dr. Sadid cites Exhibit 4, pages 4 to 6, as documents that support his position. ISU submits that his letter is a perfect example of the unprofessional and disruptive behavior that led to his termination. This letter is Dr. Sadid's response to a letter of reprimand from his department chair (Ex. 4, p. 7) for Dr. Sadid's statements about the Dean of Engineering in a widely disseminated e-mail (Ex. 4, p.9). The email shows that Dr. Sadid became upset, or claimed to be upset, when he reviewed the draft minutes of a faculty meeting. He accused the dean of having changed the minutes to reflect badly on Dr. Sadid. As anyone who has ever attended a committee meeting knows, minutes are always draft until they are approved at a subsequent meeting. Dr. Sadid, however, assumed foul play. Rather than merely asking for a correction of the particular item, he launched into an unnecessary tirade in an e-mail to an administrative assistant which he copied to all members of the engineering faculty:

> I never said the faculty should be consulted about decisions at all levels. Yes, I did express my dissatisfaction with Dr. Jacobson's performance. Dr. Jacobson has done nothing for the College in three years except, hiding behind three chairs who do not know what they are doing and a spokesman who has been defending him for some time. Dr. Jacobson ignores the faculty, has no focus on the college issues, manipulation [*sic*] faculty all the time and

> creates friction among faculty. The faculty in the [College of Engineering] do agree with what I am saying. I truly believe that Dr. Jacobson and his three chairs should step down immediately, if we want the college to move forward and be prepared for ABET. ... Priscilla, was someone else involved in writing the minutes? I would like to know who was involved (if any) in preparation of the minutes.

(Ex. 4, p. 9) When he was mildly reprimanded by the chair of his department for this unprofessional behavior (See letter by Dr. Zoghi, Ex. 4, p.7), Dr. Sadid responded with additional invective in a letter to the ISU Provost, Dr. Gary Olson. (Ex. 4, pp.4-6) He makes the disingenuous argument that he did not know they were a draft of the minutes, and that he was not "accusatory." He then goes on:

> Have I questioned the dean's honesty? Yes, I cannot trust this man based on many untrue statements he has made to me. The majority of the faculty would support my claim. The dean's behavior has been reported to the administration long ago through his job performance evaluations by the engineering faculty. However, the administration has ignored faculty complaints. This has forced some people to take the case to the public, which pays our salaries.
>
> My suspicions that Dr. Jacobsen intentionally changed the minutes of the March 11 faculty meeting stems from my previous knowledge of what had happened to the minutes of [College of Engineering] chairs' meetings. Apparently, the minutes taken in some chairs' meetings do not accurately describe the discussions that took place during the meetings. Important discussions are sometimes eliminated from the minutes. Some faculty members will attest to these claims.
>
> ... My distrust of Dr. Jacobsen is not new. I am not alone in this distrust, and it has been reported to the upper administration many times through several channels. Unfortunately, the administration has not responded to these complaints. ISU is a public institution; when the system does not respond to complaints, isn't it any citizen's obligation to report misuse of power and waste of money?

Dr. Sadid cites these documents to the Commission as evidence tending to prove that he was terminated in retaliation for his exercise of free speech. ISU submits to the contrary that these documents are examples of Dr. Sadid's unprofessional and disruptive behavior. He turned a question about the wording of meeting minutes into an occasion for a public tirade against his dean,

and when reprimanded for it, he used his response for a further opportunity to accuse his superiors of dishonesty, fraud, misuse of power, and waste of money. In most workplaces, such insubordination as this would be adequate grounds for termination by itself. In the case of Dr. Sadid, this unprofessional outburst was merely one of many incidents.

3. Dr. Sadid's Denial of Misconduct is Insufficient Evidence to Disprove Cause.

Clearly, Dr. Sadid does not recognize this behavior as misconduct of any kind. Apparently, he feels he is privileged to accuse any administrator who disagrees with him of fraud and corruption. It was therefore to be expected that Dr. Sadid would testify to the appeals officer that he committed no misconduct. That is his conclusion, but it is not evidence. Dr. Sadid made no effort to deny the behaviors shown in the documentary evidence, in particular as shown in his own writings. He goes so far as to hold up this evidence of his own incivility as proof of the bad behavior of his superiors in the ISU Administration. The evidence, therefore, is undisputed that Dr. Sadid engaged in the behaviors which ISU found to be unprofessional and disruptive.

4. The Opinion of the Faculty Senate is Insufficient Evidence to Disprove Cause.

ISU submits that Dr. Sadid's behavior would be cause for termination in any workplace. In Dr. Sadid's case, because he was a tenured member of the faculty of ISU, he was entitled to a hearing before a committee of the faculty senate. This committee was empowered to advise the university president of its opinion whether there were sufficient grounds for termination of a tenured faculty member. However, under the applicable rules, this opinion is advisory only. It should be noted by the Commission that the faculty committee made no findings about Dr. Sadid's behavior; it found that the procedures followed by ISU were inadequate, in that it should have given Dr. Sadid more time to remediate his behavior. Thus, the committee did not make a finding that Dr. Sadid did not

engage in misconduct, in fact, the clear conclusion from their decision is that his behavior was bad enough to require remediation. Further, its one page advisory opinion to Dr. Vailas is not evidence that his termination was not for cause.

5. Dr. Sadid Presented No Evidence of Pretext or Retaliation.

The evidence in the record, as discussed above, establishes that Dr. Sadid engaged in behavior that ISU considered to be misconduct, and that ISU considered them to be cause for termination. Dr. Sadid alleges that the cause cited by ISU is a pretext, and that ISU really terminated him in retaliation for his exercise of free speech. As discussed in our previous brief, Dr. Sadid makes little effort to argue that the "cause" did not occur. He simply argues that it was not the real reason for his termination. But, neither in his testimony to the appeals officer, nor in his documentary evidence, nor in his evidence to the faculty senate, nor in his evidence to the Sixth District Court, did Dr. Sadid ever submit a single piece of proof that the real reason for his termination was retaliation over his letters to the editor and editorials in the local newspaper. Although, Dr. Sadid states repeatedly that he believes it to be true, he has never presented any evidence in support of that belief.

As we noted before, Dr. Sadid has pursued this claim in a lawsuit against ISU and several colleagues and superiors in the university. His claim was dismissed on summary judgment. We previously provided to the commission a copy of the decision by Judge Nye dismissing Dr. Sadid's case.

In his response brief, the claimant dismisses Judge Nye's decision on the grounds that it is not final, as a decision on Dr. Sadid's motion for reconsideration was pending. However, Judge Nye issued his decision denying the motion for reconsideration on February 24, the day before the claimant filed his brief. A copy of Judge Nye's decision on motion for reconsideration is attached

for the Commission's consideration. The Commission may take notice of this decision, and consider it to be conclusive on this issue.

6. Conclusion.

In summary, the evidence is undisputed that Dr. Sadid's termination was for cause. The evidence is undisputed that the misconduct cited by ISU as cause for termination actually occurred. Dr. Sadid admits that the behavior occurred but attempts to claim that it does not amount to misconduct, and further alleges that the "cause" stated by ISU is a pretext for retaliation against him for a exercising his first amendment rights. He presents no evidence beyond his own opinion that his termination was in retaliation for his letters and editorials. The courts of Idaho have already dismissed his retaliation claim on the grounds that he has no evidence to support it.

Thus, what is left before the Commission is to determine whether the undisputed behavior of Dr. Sadid as shown by the evidence in the record is sufficient misconduct to be considered adequate cause for termination. ISU respectfully submits that Dr. Sadid would have been fired for cause from any workplace in which he exhibited similar behaviors.

For this reason, ISU respectfully requests that the Commission overturn the decision of the appeals officer at the Department of Labor granting unemployment benefits to the claimant.

RESPECTFULLY SUBMITTED this 5 day of ~~February~~ March, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: John A. Bailey
JOHN A. BAILEY, JR.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5 day of March, 2010, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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John A. Bailey

JOHN A. BAILEY, JR.

IN THE DISTRIT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

2010 FEB 24 PM 3:31

HABIB SADID, an individual,

Plaintiff,

v.

IDAHO STATE UNIVERSITY, ROBERT WHARTON, JAY KUNZE, MICHAEL JAY LINEBERRY, MANOOCHEHR ZOGHI, RICHARD JACOBSEN, GARY OLSON, AUTHUR VAILAS and JOHN/JANE DOES I through X, whose true identities are presently unknown,

Defendants.

Case No. CV-2008-3942-OC

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DECISION ON MOTION FOR RECONSIDERATION

COPY

This matter came before this Court for hearing on Plaintiff's Motion for Reconsideration on January 19, 2010. The Plaintiff was represented by Sam Johnson. The Defendants were represented by John Bailey. The Plaintiff's Motion was filed in response to the Court's Decision on Motion for Summary Judgment dated December 18, 2009. The Court reviewed the documents submitted by the parties, heard oral argument from counsel, reviewed its Decision on Summary Judgment and due to the complexity of the case, the Court took the matter under advisement. Now, the Court issues its decision **denying** the Plaintiff's Motion for Reconsideration.

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DISCUSSION

1. Whether the Court Applied the Proper Test. The Plaintiff asks the Court to apply *Karr v. Bermeosolo*, 142 Idaho 444, 129 P.3d 88 (2005) rather than *Garcetti v. Ceballos*, 547 U.S. 410, 425(2006) when analyzing protected speech. Plaintiff asserts that the Idaho Supreme Court in *Karr* uses the *Pickering* balancing test, which better applies to academic settings. *See,* Plaintiff's Memorandum On Motion for Reconsideration, p. 4. It should be noted that *Karr* did not involve an academic setting in that Maureen Karr was employed by the Idaho State Veterans Home as a registered nurse manager. Karr wrote a letter to the Governor of Idaho asking him to address issues at the Veterans Home. She was disciplined for writing the letter. Ultimately, Kerr was terminated from employment. She filed suit alleging that she was wrongfully terminated. The District Court granted all defendants summary judgment on the basis that the letter was not protected speech under the First Amendment and there was no evidence linking the termination to the letter. The Supreme Court affirmed the summary judgment.

In light of Plaintiff's request, the Court has reviewed *Karr*, in which the Idaho Supreme Court stated the four part test for determining whether speech is constitutionally protected as follows:

> First, the court must determine whether the speech may be fairly characterized as constituting speech on a matter of public concern. If the speech involves a matter of public concern, then the court must balance the employee's interest in commenting upon matters of public concern against the interest of the state, as an employer, in promoting the efficiency of the public services it performs. Third, if

the balance favors the employee, then the employee must show that the protected speech was a substantial or motivating factor in the detrimental employment decision. Finally, if the employee meets this burden, then the employer is required to show by a preponderance of the evidence that it would have reached the same decision even in the absence of protected speech.

Fridenstine v. Idaho Dept. of Admin., 133 Idaho 188, 194, 983 P.2d 842, 848 (1999) (quoting *Lockhart v. State, Dept. of Fish & Game*, 127 Idaho 546, 552, 903 P.2d 135, 141 (Ct.App.1995)). "[T]he inquiry into the protective status of the speech is one of law, not fact." *Lubcke v. Boise City/Ada County Hous. Auth.*, 124 Idaho 450, 466, 860 P.2d 653, 668 (1993) (quoting *Connick v. Myers*, 461 U.S. 138, 148 n. 7, 103 S.Ct. 1684, 1691, 75 L.Ed.2d 708, 720 (1983)); *see also Farnworth v. Femling*, 125 Idaho 283, 286, 869 P.2d 1378, 1382 (1994). The Court makes an independent judgment of whether the statement is of public concern taking into consideration the manner, time and place in which it was made. *Lockhart*, 127 Idaho at 552, 903 P.2d at 141 (citing *Connick*, 461 U.S. at 152, 103 S.Ct. at 1692-93, 75 L.Ed.2d at 723).

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690-91, 75 L.Ed.2d at 720-21. This determination turns on the nature of the employee's speech-whether it concerns matters involving political, social or other concerns to the community. *Gardner v. Evans*, 110 Idaho 925, 933, 719 P.2d 1185, 1193 (1986) (citing *Connick*, 461 U.S. at 146, 103 S.Ct. at 1689-90, 75 L.Ed.2d at 719-20). A public employee still enjoys First Amendment protection even if his or her views are expressed privately. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16, 99 S.Ct. 693, 696, 58 L.Ed.2d 619, 624-25 (1979). **However, speech focused on internal policy and personnel grievances does not implicate the First Amendment.** *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir.1992). (emphasis added)

Karr v. Bermeosolo, 142 Idaho 444 (2005).

This Court is not convinced that the *Karr* test is the correct test to apply.

Karr was decided by the Idaho Supreme Court on October 5, 2005. *Garcetti* was

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decided by the U.S. Supreme Court in 2006. Although there is some discussion in *Garcetti* that "expression related to academic scholarship or classroom instruction" may be outside the *Garcetti* test, the Supreme Court expressly did not carve out an academia exception.[1] This Court will not carve out such an exception, but will leave it to the appellate courts to address. *Garcetti* is more recent than *Karr* and this Court believes it is the test to be applied.

Alternatively, even though the Plaintiff asserts *Karr* is the correct test to use regarding academics and protected speech, the results are the same. The Court still must determine whether the speech at issue may be characterized as public speech. The Court delved into this discussion in its Decision on Motion for Summary Judgment. The result in the Court's Decision was that there was no matter of public concern because the statements Sadid made went to matters involving internal administrative disputes and relayed personal grievances. As such, Sadid does not pass the first prong of the *Karr* test and therefore no more analysis needs to be done under this test.

Furthermore, the Court agrees with the Plaintiff in that "[t]he guarantees of the First Amendment 'share a common purpose of assuring freedom of communication on matters relating to the functioning of government.'" *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575, 65 L. Ed. 2d 973, 100 S.Ct. 2814

[1] Additionally, this Court perceives a distinction between speech in the classroom setting and speech in a newspaper. Even if there is an academia exception, this Court would not apply it to the facts of this case.

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(1980)) (Plaintiff's Memo In Supp. Of Motion for Reconsideration, pp. 5-6). However, the very case that Sadid asks this Court to review clearly states that "speech focused on internal policy and personnel grievances does not implicate the First Amendment." *Karr* (citing *Hyland*). This rule, when applied to the findings from the Court's earlier decision, again results in the Court holding that the Plaintiff's argument of protected speech does not rise to the level of implicating the First Amendment protections because it was personal and not public.

2. Multiple letters. Plaintiff argues that the Court focused on only two letters he wrote to the newspaper when the Court held that Plaintiff's speech was not protected speech. While the Court only referenced two letters in the recitation of facts, the Court's holding was that all of the challenged speech was made by a public employee rather than a private citizen. Additionally, it is the Court's holding that none of the challenged speech was "a matter of public concern." Instead, the Court determined that all of the speech dealt with "individual personal disputes and grievances." The Court's intent was to apply this holding to all of Professor Sadid's expressions of record.

3. Breach of Contract: Plaintiff's Argument of Failure to Complete Evaluations. Plaintiff asked the Court to reconsider the contract claim as he asserts that the Court committed error in reaching its conclusion that annual evaluations of a tenured professor are not required. Sadid's argument relies on

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the "section of the Handbook favorable to Plaintiff which on its face compels the annual evaluation of 'each faculty member in that department...'" *See,* Plaintiff's Memorandum in Support of Motion for Reconsideration, p. 7. Sadid asserts that the annual evaluations cited in the handbook in section (B)(1) are a separate responsibility to the periodic tenure evaluations that should be done every five years cited in (B)(7).[2] After reconsidering and reviewing the file and arguments, the Court again finds that the language of the handbook is clear and unambiguous and therefore it again applies (B)(7) as the relevant provision for the evaluation requirements of a tenured faculty.

Furthermore, Plaintiff contends that he has not received a performance evaluation since 1999, and therefore when following the five year rule of (B)(7) the next evaluation is due in 2004. Plaintiff asserts that the evaluations during that time were not completed.[3] However, in Exhibit A, attached to Defendant's Memorandum in Opposition of Reconsideration, the copies of the evaluations show that evaluations were done for 2000 (signed by Sadid), 2003 (evaluation completed but not delivered to Sadid due to a "contentious situation"), 2005 (copy of evaluation sent to Sadid), 2006 (signed by Sadid) and 2007 (signed by Sadid).

[2] Both of the handbook citations are found in the FACULTY /STAFF HANDBOOK under Part 4, Section IV.

[3] In its Decision on Motion for Summary Judgment, the Court found that the Statute of Limitations bars any alleged breach occurring more than five years prior to the filing of the Complaint. The Court reaffirms this finding and therefore considers only those alleged breaches that took place after 2003. In Defendant's Exhibit A, attached to the Defendant's memorandum in Opposition of Reconsideration, copies of the evaluations for January 2006 – December 2006 and January 2007 – December 2007 are both signed and dated by the Plaintiff. This shows that evaluations were completed within a 5 year span from 2003 to 2008, and ultimately eliminates the breach of contract claim by the Plaintiff.

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Therefore, the Court finds that the Plaintiff's contentions are misleading as evaluations were completed at least within five years of each other. The Court, therefore, reiterates that there was no breach of contract by the Defendant and its decision is affirmed.

4. Redress of Grievances. The Decision on the Motion for Summary Judgment issued by this Court was "against the Amended Complaint and against all defendants." Decision, p. 4. The Court recognizes that Plaintiff filed this action on September 29, 2008 and that he petitioned for redress of his grievances. The Court also recognizes the Plaintiff alleges that the Defendants have continued to retaliate against him after the filing of this claim. That is one of the reasons he filed a Motion to Amend Complaint on August 27, 2009. The Decision on Summary Judgment deals only with those allegations of retaliation that come before August 27, 2009.

CONCLUSION

The Court has reconsidered the issues raised by Plaintiff. Based upon the above discussion, the Court stands by its prior decision. Therefore, the Plaintiff's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DATED: February 24, 2010.

DAVID C. NYE
District Judge

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of February, 2010, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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Amy J Wegner
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ORIGINAL

INDUSTRIAL COMMISSION

JUDICIAL DIVISION, IDOL APPEALS

HABIB SADID, SSN: [redacted] Claimant, v. IDAHO STATE UNIVERSITY, Employer and IDAHO DEPARTMENT OF LABOR	**DOCKET NUMBER: 1777-2010** **MOTION TO STRIKE EMPLOYER'S REPLY BRIEF ON CLAIM FOR REVIEW**

COMES NOW Claimant, by and through his attorney, Sam Johnson of the law firm of Johnson & Monteleone, L.L.P., and hereby moves to strike the "*EMPLOYER'S REPLY BRIEF ON CLAIM FOR REVIEW*", filed by counsel for the Employer, on or about March 5, 2010.

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THIS MOTION is made and based upon the grounds that Rule 5 of the Rules of Appellate Practice and Procedure Under the Idaho Employment Security Law expressly prohibits the filing of a reply brief. The Rule plainly states, "No reply brief shall be allowed." (Emphasis added). The Employer here should not be able to gain an unfair advantage in this proceeding by ignoring the governing rules of procedure and submitting a "reply brief" in flagrant violation thereof. The act of doing so here by the Employer is particularly egregious in light of the fact the reply brief contains an abundance of inaccurate information.

WHEREFORE, Claimant respectfully asks that the *"EMPLOYER'S REPLY BRIEF ON CLAIM FOR REVIEW"* be immediately stricken from the record.

DATED: This 10 day of March, 2010.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorney for Claimant

CERTIFICATE OF MAILING, DELIVERY, OR FACSIMILE TRANSMISSION

I CERTIFY that on March 10, 2010, I caused a true and correct copy of the foregoing document to be:

☐ mailed ☐ hand delivered ☐ CM/ECF Electronic Filing ☒ transmitted fax machine to: (208) 232-6109	John A. Bailey, Jr. Racine Olson Nye Budge & Bailey, Chtd. 201 E. Center P. O. Box 1391 Pocatello, ID 83204-1391

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	)	**IDOL # 1777-2010** FILED MAR 15 2010 INDUSTRIAL COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of March, 2010, a true and correct copy of **Claimant's Attorney' s Motion to Strike Employer's Reply Brief on Claim for Review, filed March 10, 2010** was served by regular United States mail upon the following:

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JOHN C LYNN
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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID,
SSN: [redacted],

Claimant,

vs.

IDAHO STATE UNIVERSITY,

Employer,

and

IDAHO DEPARTMENT OF LABOR.

IDOL # 1777-2010

DECISION AND ORDER

Appeal of a Decision granting Claimant unemployment insurance benefits and an Order denying Employer's request to reopen issued by an Idaho Department of Labor Appeals Examiner. AFFIRMED in part, and REVERSED in part.

Employer, Idaho State University, appeals the Idaho Department of Labor's ("IDOL" or "Department") Decision finding Claimant eligible for benefits as well as IDOL's Order denying Employer's request to reopen the hearing. The Appeals Examiner found in her Decision that Employer discharged Claimant, but not for misconduct. Employer failed to appear for the hearing. On August 8, 2008, Employer submitted a request to re-open the hearing. The Appeals Examiner denied that request because Employer failed to provide sufficient facts to warrant re-opening. Employer appeals the Order to Deny Re-Opening to the Commission. We will address both that Order and the Decision below.

Employer also specifically requested a new hearing before the Commission, or in the alternative, to remand back to the Appeals Bureau. (Employer's Claim for Review, filed January 19, 2010; Employer's Reply to Memorandum in Opposition to Claim for Review, filed January 29, 2010). The Commission denied both requests, however the Commission granted the parties

parties the opportunity to file briefs regarding the matter. (Order Denying New Hearing and Setting Briefing Schedule, filed February 9, 2010). Both Employer and Claimant submitted briefs. (Employer's brief, filed February 22, 2010, Claimant's brief, filed February 25, 2010). Employer further submitted a reply brief, to which Claimant moved to strike. (Employer's reply brief, filed March 5, 2010, Claimant's Motion to Strike, filed March 10, 2010).

The undersigned Commissioners have conducted a *de novo* review of the record in accordance with Idaho Code § 72-1368(7). Super Grade, Inc. v. Idaho Depart. of Commerce and Labor, 144 Idaho 386, 390, 162 P.3d 765, 769 (2007). The Commission has relied on the audio recording of the hearing held before the Appeals Examiner on January 5, 2010, along with the Exhibits [1 through 10] admitted into the record during that proceeding.

Employer's Brief

According to the Commission's February 9, 2010, Order Setting Briefing Schedule, Employer's brief was due no later than February 19, 2010. Employer's brief is date stamped as "filed" with the Commission on February 22, 2010. Therefore, whether Employer timely filed its brief with the Commission pursuant to the Rules of Appellate Practice and Procedure under the Idaho Employment Security Law ("RAPP"), effective as amended March 1, 2009, is at issue.

"Appeals before the Commission are governed by the Rules of Appellate Practice and Procedure Under the Idaho Employment Security Law." Vernon K. Smith v. Idaho Dept. of Labor, 148 Idaho 72, 218 P.3d 1133, 1135 (2009). Rule 2 of the RAPP defines "filing" as either personal delivery, mailing or faxing a document to the Commission. Rule 2(D) further provides that when faxing, the document must be received by 5:00 p.m. to be considered filed on that date. Documents filed thereafter are deemed filed on the next business day. According to the facsimile time stamp found on the top of Employer's brief, Employer faxed the brief at 5:35 p.m. on Friday, February 19, 2010. (Employer's brief). Because Employer filed its brief after 5:00

p.m., it is deemed filed on Monday, February 22, 2010. Employer did not timely file its brief with the Commission. Employer's brief will not be considered in this decision.

Motion to Strike

Claimant moved to strike Employer's reply brief on the basis that the Commission's rules expressly forbids reply briefs. (Claimant's Motion to Strike). RAPP Rule 5(A) states in pertinent part that "No reply brief shall be allowed." Therefore, Claimant's Motion to Strike Employer's reply brief is GRANTED. Since the Commission's rules do not allow reply briefs, Employer's reply brief will not be considered.

FINDINGS OF FACT

The Commission concurs with and adopts the Findings of Fact set forth in the Appeals Examiner's Order to Deny Re-Opening. The Commission sets forth additional findings of fact as follows:

1. Claimant worked for Employer on two occasions. During his last period of employment, Claimant worked as a full professor from August 1991 until he was discharged on October 23, 2009. Claimant was suspended on August 4, 2009 pending the University President's ruling on the recommended termination notice.

2. Claimant had a history of voicing concerns via emails and at faculty meetings. On April 6, 2009, Claimant received a warning letter from the Chair of the Department of Civil and Environmental Engineering informing Claimant to raise his concerns via the proper procedure. Claimant was to first discuss the matter with the Chair of the Department, then to the Dean of the College of Engineering, then to Employer's upper administration.

3. Employer sent another letter on April 15, 2009, again warning Claimant that voicing his concerns at faculty and campus-wide meetings and through widely disbursed emails and communication intended to expose another individual to public hatred, contempt, or ridicule, or to impeach his or her integrity or reputation was not appropriate. The letter, again, reminded Claimant to utilize proper procedures from raising his concerns.

4. At an April 21, 2009 faculty meeting, Claimant again raised personal matters and expressed criticism of the administration.

5. Dean Jacobsen issued a Notice of Contemplated Action due to Claimant's

continued pattern of behavior.

6. After further review, the University President, Dr. Vailas, discharged Claimant.

DISCUSSION

Order to Deny Re-Opening

After failing to appear for the hearing conducted by the Appeals Examiner on January 5, 2010, Employer timely requested that the Appeals Examiner re-open the hearing. The Appeals Examiner denied Employer's request finding that Employer received adequate due process and had an opportunity to participate in the hearing. The Commission previously dealt with whether the Order to Deny Re-opening was proper in its February 9, 2010, Order to Deny New Hearing. The Commission agreed that Employer had received adequate due process and therefore was not entitled to a new hearing. Therefore, the analysis in the Commission's February 9, 2010 Order to Deny New Hearing is incorporated herein. Employer was provided adequate due process and had an opportunity to be heard at a meaningful time, in a meaningful place. The Appeals Examiner's Order to Deny Re-opening was proper and is AFFIRMED.

Decision of the Appeals Examiner

Claimant worked as a full professor for Employer from August, 1991 until October 23, 2009. Employer discharged Claimant for a myriad of reasons, including insubordination and for being disruptive and unprofessional. (Exhibit 5, pp. 19-20). Due to Claimant's ongoing behavior, Employer believed that it had adequate cause to discharge Claimant. Employer points to several emails and letters Claimant sent showing criticism to the administration, as well as statements made by Claimant at faculty meetings and an awards banquet that Employer contends were unprofessional and disruptive. Employer's decision to discharge Claimant was based on its policies which state that discipline is warranted if acts or omissions directly and substantial affect or impair an employee's performance of his or her profession or assigned duties or the interest of

the Board; or constitutes conduct that is seriously prejudicial to the University. (Exhibit 5, p. 15). In April, 2009, Employer supplied Claimant with two letters, each stating to use the proper protocol in expressing his concerns, and that failure to follow the protocol could lead to discipline. (Exhibit 3, p. 28; Exhibit 4, p. 32). Employer contends that Claimant again expressed previously raised personal concerns during a staff meeting that had a designated agenda.

Claimant does not dispute that he authored the emails and letters found in the record or that he made the comments in the staff meeting. Instead, Claimant denies that his actions constitute misconduct and maintains that his actions were not disruptive or unprofessional. (Audio Recording).

Idaho Code § 72-1366(5) provides that a claimant is ineligible for unemployment insurance benefits if that individual's unemployment resulted from the claimant's discharge for employment-related misconduct. What constitutes "just cause" in the mind of an employer for dismissing an employee is not necessarily the legal equivalent of "misconduct" under Idaho's Employment Security Law. The two issues are separate and distinct. In a discharge, whether the employer had reasonable grounds for dismissing a claimant is irrelevant. The only concern is whether the reasons for discharge constituted "misconduct" connected with the claimant's employment such that the claimant can be denied unemployment benefits. Beaty v. City of Idaho Falls, 110 Idaho 891, 892, 719 P.2d 1151, 1152 (1986).

The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer. Appeals Examiner of Idaho Dept. of Labor v. J.R. Simplot Co., 131 Idaho 318, 320, 955 P.2d 1097, 1099 (1998). A "preponderance of the evidence" simply means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not. Edwards v. Independence Services, Inc., 140 Idaho 912, 915, 104 P.3d 954, 957 (2004).

The Idaho Supreme Court has defined misconduct as a willful, intentional disregard of the employer's interest; a deliberate violation of the employer's rules; or a disregard of standards of behavior which the employer has a right to expect of its employees. Gunter v. Magic Valley Regional Medical Center, 143 Idaho 63, 137 P.3d 450 (2006) (*citing* Johns v. S. H. Kress & Company, 78 Idaho 544, 548, 307 P.2d 217, 219 (1957)). In addition, the Court requires the Commission to consider all three grounds in determining whether misconduct exists. Dietz v. Minidoka County Highway Dist., 127 Idaho 246, 248, 899 P.2d 956, 958 (1995). We have carefully considered all three grounds for determining misconduct.

Before analyzing each of the following grounds, the Commission must clarify the hearsay evidence found in the record. Employer did not appear at the hearing. Instead, Employer supplied a significant amount of correspondence from individuals regarding the alleged adverse affects of Claimant's criticisms. The written statements made by those other than Claimant are considered hearsay. "Hearsay is defined as testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion of the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." State v. Woodbury, 127 Idaho 757,759, 905 P.2d 1066, 1068 (Ct.App. 1995).

The Commission holds discretionary power to admit or exclude hearsay evidence. As stated by the Idaho Supreme Court:

> The Commission has the discretionary power to consider any type of reliable evidence having probative value, even if that evidence is not admissible in a court of law. Stolle v. Bennett, 144 Idaho 44, 49-50 (2007). The Commission has the discretion to admit evidence if "it is a type commonly relied upon by prudent persons in the conduct of their affairs." Id.; I.C. § 67-5251. This does not mean, however, that the Commission is required to admit such evidence. Rather, the Commission is given latitude to exclude hearsay evidence.

Higgins v. Larry Miller Subaru-Mitsubishi, 145 Idaho 1, 175 P.3d 163 (2007).

However, hearsay evidence, alone, is insufficient to support findings of fact. Application

of Citizen Utilities Company, 82 Idaho 208, 214, 351 P.2d 487, 493 (1960). The Commission's findings must be supported by substantial and competent evidence. Id. at 213, 351 P.2d at 492. Substantial and competent evidence is defined as "relevant evidence that a reasonable mind might accept to support a conclusion." Henderson v. Ecclipse Traffic Control and Flaggin Inc., 147 Idaho 628, 213 P.3 718, 722 (2009).

Employer's hearsay evidence is admitted into the record based on its probative value and is afforded appropriate weight. Since Employer was absent from the hearing, the information contained therein provides insights into Employer's arguments. However, because the authors of the statements and those allegedly adversely affected by Claimant's emails/letters/public statements did not testify, that evidence is afforded a lesser degree of weight and persuasion in the face of sworn testimony provided during the proceeding in direct contradiction to it. The hearing examiner, as the trier of fact, is entitled to place greater or less weight on any particular piece of evidence according to its relative credibility. Morgan v. Idaho Dept. of Health and Welfare, 120 Idaho 6, 8, 813 P.2d 345, 347 (1991). Therefore, to the extent that Employer relies on written assertions of individuals other than Claimant, those written statements are considered hearsay and carry less weight than Claimant's assertions.

The analysis proceeds to determine whether Claimant's conduct constitutes misconduct. Under the "standards-of-behavior" test, the employer must prove by a preponderance of the evidence that the claimant's conduct fell below the standard of behavior it expected and that the employer's expectation was objectively reasonable under the particular circumstances. Harris, 141 Idaho at 4, 105 P.3d at 270. As the Idaho Supreme Court has pointed out, an "employer's expectations are ordinarily reasonable only where they have been communicated to the employee." Folks v. Moscow School District No. 281, 129 Idaho 833, 838, 933 P.2d 642, 647 (1997). Therefore, the employer must communicate expectations and duties that do not naturally

flow from the employment relationship. Pimley v. Best Values, Inc., 132 Idaho 432, 974 P.2d 78 (1999). Notably, there is no requirement that the employer must demonstrate that the employee's behavior was subjectively willful, intentional, or deliberate in his or her disregard of the employer's expectations. Welch v. Cowles Publishing Co., 127 Idaho 361, 364, 900 P.2d 1372, 1375 (1995).

Employer contends that Claimant's conduct of openly criticizing the administration in widely dispersed emails, faculty meetings, and social functions constitutes misconduct. Employer informed Claimant of the proper protocol to raise his concerns. In an April 6, 2009 letter to Claimant, Employer wrote "In the future, you are directed to follow proper protocol in expressing your concerns (first to the Chair of the Department of Civil and Environmental Engineering, then to the Dean of the College of Engineering, then to Idaho State University's upper administration)." (Exhibit 3, p. 28). Again, in an April 15, 2009 letter, Employer stated "You should not use such channels as campus-wide meetings, engineering faculty meetings, and widely-distributed email communications to make negative comments about the performance and/or character of current and former university staff and employees...Communications intended to expose another individual to public hatred, contempt, or ridicule, or to impeach his or her integrity or reputation are not appropriate. You have previously been counseled to observe collegiality in the workplace and to follow the protocol of meeting first with your department chair, next with the dean of engineering, and then, if necessary, with other ISU administrators regarding your concerns. Continuing failure to follow these guidelines will be cause for disciplinary action." (Exhibit 4, p. 32.).

Claimant did not rebut that he received the letters at hearing, and referred to receiving the letters in his correspondence with Employer. (Exhibit 4, pp. 29-33, Exhibit 10, p. 146). This information clearly shows that Employer informed Claimant of the proper procedure to express

his concerns and that making statements that "expose another individual to public hatred, contempt or ridicule, or to impeach his or her integrity or reputation are not appropriate" and should not be made in faculty or campus-wide meetings or in widely distributed emails.

Employer's expectation is objectively reasonable under these circumstances. Employer contends that actions, such as Claimant's, impair or affect the interest of the college and university by creating a negative and disruptive atmosphere in the college, and that fundraising efforts are hampered by negative publicity generated by Claimant's criticisms. (Exhibit 7, p. 3). Employer's concerns are well taken and the adverse affect of openly criticizing administration can have the above effect. It is important to note that Employer did not forbid Claimant from raising his concerns. Rather, Employer required Claimant to raise his issues through a certain procedure. There is also nothing inherently inappropriate about the procedure required by Employer, nor does Claimant directly attack the validity of the procedure at hearing. Therefore, Employer's expectation is reasonable.

Therefore, the analysis turns to whether Claimant's conduct at an April 21, 2010, staff meeting violated the "standard-of-behavior" expressed and warned of in Employer's previous letters. Claimant provided a transcribed copy of the meeting for the record. (Exhibit 10, pp. 36-47). According to that transcription, at the meeting Claimant stated that the University was corrupt for 20 years, that the administration is absolutely corrupt, and that nothing has changed since the University president arrived. (Exhibit 10, p. 38). Further, Claimant told the members of the meeting that the administrators are lying with bold face, that they have isolated the faculty and done nothing except when needed. (Exhibit 10, p. 38). Claimant further stated that the administration refuses to communicate with faculty at all levels and that it is doing whatever it wants. (Exhibit 10, p. 41). When discussing leadership of the administration, Claimant said that he had documents to show that those people are unethical and are just "power hungers". (Exhibit

10, p. 43). They were working to protect their own interest and not the public. Claimant stated that he truly questioned the integrity and honesty of the administration in the College and the University. (Exhibit 10, p. 44).

There is little doubt that these statements represent the type of conduct that Employer warned Claimant of in the April 6 and 15, 2009 letters. Claimant's statements raised personal concerns and attack members of the administration in a faculty meeting. Employer contends that the faculty meeting had a set agenda, which did not include Claimant's statements or the subject matter. (Exhibit 10, p. 11). Employer's expectation was clear that such matters should be raised through proper channels and not at faculty meetings, the record demonstrates that Claimant's conduct during the April 21, 2009, faculty meeting fell below Employer's reasonable and communicated expectation.

This case is analogous to an Idaho Supreme Court case were a claimant continued to criticize employer and its polices despite the employer's clear directive to express those criticism in private. Gatherer v. Doyles Wholesale, 111 Idaho 470, 725 P.2d 175 (1986). The claimant in that case continued to express his criticism vociferously and in front of other employees. Id., 111 Idaho at 178, 725 P.3d at 473. The Court ruled that the claimant's repeated failure to comply with the employer's directives was viewed as both an intentional disregard of the employer's interest and violated the employer's standard of behavior. Id. In this case, Claimant's criticism continued despite Employer's clear warning.

Claimant may argue that his actions did not constitute misconduct and were for the benefit of the College and faculty. However, Claimant's subjective state of mind for making the comments is irrelevant. Mattews v. Bucyrus erie co., 101 Idaho 657, 659, 619 P.2d 1110, 1112 (1980.). Employer clearly informed Claimant that his critical comments should not be raised at the faculty meetings. Because Claimant is ineligible for benefits under the "standards-of-

behavior" test, it is unnecessary to analyze this matter under the other two grounds. Claimant is ineligible for unemployment insurance benefits.

CONCLUSION OF LAW

Employer discharged Claimant for employment-related misconduct.

ORDER

Based on the forgoing analysis, the Decision of the Appeals Examiner is REVERSED. Employer discharged Claimant for employment-related misconduct. This is a final order under Idaho Code § 72-1368(7).

DATED this 24 day of March, 2010.

INDUSTRIAL COMMISSION

R.D. Maynard, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of March, 2010, a true and correct copy of **Decision and Order** was served by regular United States mail upon each of the following:

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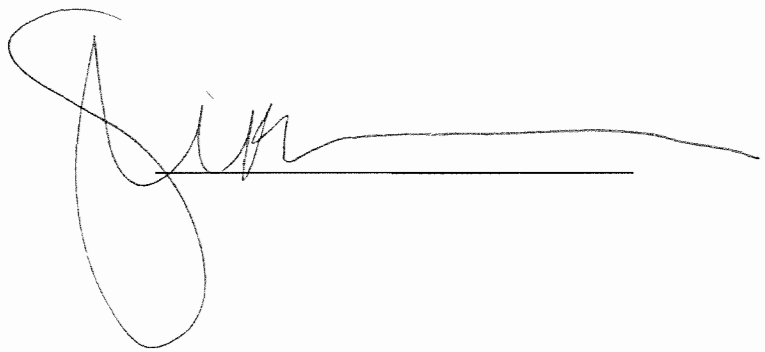

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR,	)	IDOL #1777-2010 **MOTION FOR RECONSIDERATION**

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COMES NOW the above-named Claimant, by and through his attorney of record, JOHN C. LYNN, and hereby moves the COMMISSION to reconsider its DECISION AND ORDER filed March 24, 2010. Claimant sincerely believes that two COMMISSION members who signed this DECISION erred in the findings of fact and the application of law. This Motion is based on the file herein and the specific factors set forth below.

As an introduction, the COMMISSION cites the appropriate burden of proof, that is, "the burden of proving misconduct by a preponderance of the evidence falls strictly on the employer [citation omitted]. A 'preponderance of evidence' simply means that when weighing all the evidence in the record, the evidence on which the finder of facts relies is more probably true than not [citation omitted]" (DECISION, p. 5). Moreover, the COMMISSION recognized that "to the extent that Employer relies on written assertions of individuals other than Claimant, those written statements are considered hearsay and carry less weight than Claimant's assertions" (*Id.* p. 7). With these principals of law in mind, the COMMISSION should reconsider the evidence upon which its DECISION rests; this evidence is insufficient to find in favor of the Employer.

First, it is apparent that Claimant's termination is not a typical case. Claimant's dispute with Idaho State University ("ISU") has been long and contentious. The back and forth documentation on the issues reflects a "stand-off" on who is right. For example, the April 6, 2009 reprimand (Exhibit 3, p. 28), which the COMMISSION holds as significant in terms of establishing ISU's "standards of behavior", is countered by Claimant's response (Exhibit 4, p. 5) that Chair Zoghi's accusations are "baseless and untrue". In the Exhibit, Claimant further admits that he has questioned the Dean's

honesty as did "a majority of the faculty". Further, Claimant questioned the timing, and therefore the sincerity, of Zoghi's letter. The allegations in Zoghi's letter dated April 6, 2009, were not mentioned in Claimant's April 7th Annual Evaluation, which raises further concerns about credibility.

It is highly unfair and contrary to the principles of law mentioned above to assume that Zoghi's April 6th Reprimand is true on this record. Likewise, ISU's April 15, 2009 letter signed by Dean Jacobsen (Exhibit 4, p. 32) is countered by Claimant's April 27, 2009 letter to Provost Olson (Exhibit 10, I). Claimant refutes the accusations as baseless, untrue and fabrications:

> I have served ISU for twenty-two years and performed my job very well, earned many awards, and more importantly, I have earned the respect of all of my students, the majority of my colleagues, and my fellow community members. I work hard to promote ISU and its engineering program everywhere, and my contributions to ISU and the community are well recognized and documented. Dr. Jacobsen's accusations are totally baseless and untrue. I would hope that Dr. Jacobsen would offer some evidence to prove his claim; I would certainly like the opportunity to respond. I have never threatened anybody in my life, here on campus or elsewhere. Dr. Jacobsen's comments are false accusations and fabrications designed and systematically executed in an attempt to provide me and create misleading evidence of supposed wrong-doings and violations on my part. I believe his actions are retribution for my ongoing lawsuit against ISU.
>
> (*Id.* at p. 2)

There is no way the COMMISSION can resolve the opposing assertions in the extensive documentation involving the many issues in this case without a full-blown evidentiary hearing. ISU's "evidence" establishing any wrongdoing here is all hearsay; it is of questionable admissibility and value because Claimant has not had a chance in these proceedings to challenge these assertions through cross-examination of witnesses. Unresolved issues of fact do not run to the favor of the Employer.

Second, the termination arose out of an academic setting which has its own peculiar form of management – a two-headed management system where tenured faculty have considerable say in how the University is run. Concurrent with that power is the concept of "academic freedom" which provides considerable protection to faculty against reprisals from administrators who, from time to time, must face criticism from faculty.

Here, Professor Sadid, a senior and highly accomplished member of the faculty (see Exhibit 10, C, Attach. 6), has been critical of ISU administrators. For example, on November 16, 2008, Claimant published an article entitled "Are President Vailas' Policies Damaging ISU?" (Exhibit 10, D). The following is an excerpt from this article:

> Many professors are choosing to leave ISU because they realize there is no future here under Vailas' "blood from turnips" policies.
>
> Vailas speaks of "honesty, transparency and accountability" without holding administrators accountable for their actions and performance. Hiring unqualified faculty for administrative positions, Vailas continues shuffling his fishing and hunting buddies from one administrative position to another.

Claimant had published many such articles over the years and eventually filed suit against ISU claiming retaliation over the expression of First Amendment "protected speech"[1], including the above quote. Claimant contends that his termination is the direct result of "protected speech" and his lawsuit. The COMMISSION cannot determine, and should not determine, these issues, but it surely must have occurred to the COMMISSION that a retaliatory motive may be behind the termination. If so, then ISU's sincerity over enforcement of what it presents as fair "standards of behavior" would be seen in a much different light. Claimant testified at length as to his "protected speech" and the role he believes it played in his termination. This testimony has gone

[1] Judge Nye's decision holding the Claimant's speech was unprotected is now on appeal to Idaho Supreme Court.

unrebutted. Whether Claimant was the victim of retaliation is, at most, an unresolved issue. Again, this undeveloped and unresolved issue is not a factor that runs in favor of the Employer.

Third, the chain of events leading to Claimant's termination is highly unusual and suspect. No doubt the COMMISSION is aware that for state employees, the Notice of Contemplated Action ("NOCA") is designed to give the employee an opportunity to rebut specific charges supporting discipline. Here, the May 6, 2009 NOCA (Exhibit 5, p. 22) sets out one specific accusation of wrongdoing – the April 21, 2009 faculty/staff meeting. The NOCA was followed by Claimant's July 17, 2009 meeting (Exhibit 10, C, Attach. 2) with Dean Jacobsen to discuss, supposedly, all the accusations against him.

ISU policy states:

> 2. General
>
> This process is intended to assure a faculty member of his or her rights and to resolve the grievance at the earliest moment possible. Therefore, the following procedures include:
>
> a. an informal opportunity to meet with the person(s) making the recommendation of suspension, dismissal or termination to present any reasons, evidence, or information in mitigation or opposition to the recommendation before a recommendation is sent to the President recommending a faculty member's suspension, dismissal, or termination, and
>
> . . .
>
> b. a formal grievance procedure.
>
> (Exhibit 5, p. 7)

The two April reprimands and the April 21st meeting were the specific issues discussed at the July 17th meeting (a written outline of this discussion is set forth in Exhibit 10, C, p. 10). The COMMISSION should take note of the many mitigating

factors identified with respect to Claimant's conduct at the April 21st faculty/staff meeting. Notwithstanding the intent and scope of this July 17th meeting, the August 3, 2009 Recommendation of Dismissal (Exhibit 5, p. 15) is far more expansive, a tactic ISU employed during the subsequent grievance hearing when additional, new charges were advanced. The scope of ISU's claims greatly expanded from the events in April of 2009 to what ISU's attorney now claims is a "long history of unprofessional, disruptive and insubordinate behavior by Dr. Sadid" (EMPLOYER'S BRIEF ON CLAIM FOR REVIEW, p. 8).

The COMMISSION should be troubled by this obvious piling on of charges, particularly when no ISU witness has offered any explanation for this deviation from policy. Based on this record, it would be fair to conclude that ISU did not believe that Claimant's conduct at the April 21, 2009 meeting was egregious enough to justify termination. Claimant's conduct at the meeting was not at all inappropriate given the context of the meeting, the subjects discussed and the tradition of frank discussion.

Fourth, the COMMISSION's findings of fact with respect to Claimant's conduct at the April 21, 2009 faculty/staff meeting is based on a synopsis (Exhibit 10, pp. 33-44) submitted by Claimant; this is not a transcription of the actual meeting. This is double hearsay and highly unreliable. The actual recording of this meeting is found on the CD marked as Exhibit 10, F[2]. To do justice to this case, the COMMISSION should listen to the **actual** comments made by all attendees. It was a lengthy meeting (two hours plus). It was not a pubic meeting, but a private faculty/staff meeting. Dean Jacobsen and

[2] This CD has two types of files – a standard audio recording of the Claimant's April 21st faculty/staff meeting and eleven compressed MSV files of Claimant's Grievance hearing. Some computers may need to download the free software "sonyplugin129" from the internet to allow a Windows Media Player to play the MSV files.

Provost Olson encouraged the participants to speak their mind. In fact, the Provost openly disparaged the Board of Education (minute 43)[3]. Professor Ellis told the Dean personally that he had major issues with his performance (minute 30). Claimant, on more than one occasion, expressed the idea that faculty and the administration should work together. Dean Jacobsen ends the meeting with a comment to the effect that he was not offended by anything said and he appreciated candor.

The point here is that the COMMISSION, if it truly believes that Claimant's conduct at this meeting was somehow below the "standards of behavior" expected by ISU should digest the actual meeting and the context from which it arose – a university faculty/staff meeting - an open, candid and frank discussion, including the criticism of Dean Jacobsen by Claimant and others which is typical of this type of meeting.

Fifth **and most important**, the COMMISSION has completely disregarded the most significant aspect of the evidence presented. After the Recommendation of Termination was issued, Claimant initiated a formal grievance (Exhibit 10, C, pp. 3-6) under ISU policy (Exhibit 5, pp. 3-14). This is the "due process" protection afforded ISU tenured faculty. Under the policies, ISU must establish "adequate cause" which is defined rather expansively (Exhibit 5, p. 3). Moreover, the "adequate cause" standard is a lower standard that the "misconduct" standard under Idaho's Employment Security Law.

The grievance process under ISU policy is extensive. An Appeals Board is established, composed of five persons: a Chair appointed by the Faculty Senate, two appointees from the Executive Committee of the Faculty Senate, one faculty appointee by the Provost and one faculty appointee by the grievant. A formal hearing is held (Exhibit

[3] The time scale may differ depending on the player.

5, p. 11). In this case, the hearing consumed several days of testimony; witnesses were sworn under oath and the parties were represented by counsel. All of the myriad of allegations against Claimant were addressed *ad nauseum*, including Claimant's conduct at the April 21, 2009 meeting. The entire proceeding was tape-recorded and has been presented to the COMMISSION as part of Exhibit 10, F, as mentioned above. It is by far the best evidence to discern whether Claimant's conduct at the April 21, 2009 meeting, or any other alleged misconduct, suffices for purposes of "misconduct" as contemplated by these proceedings.

The COMMISSION might want to review the testimony of tenured Professor Ellis who was present at the April 21st faculty/staff meeting[4]. Professor Ellis testified that in ten (10) years, he never witnessed Claimant threaten anyone. With respect to Claimant's conduct at the April 21st meeting, he did not believe Claimant was unprofessional – other university meetings had been a lot more contentious and these meetings were supposed to be open and frank. He recalled the remark by Dean Jacobsen that the meeting had been good.

The COMMISSION should also review the testimony of Professor Delehante, former Chairman of the Faculty Senate[5]. Professor Delehante testified about the importance of professors speaking the truth as he or she sees it. He testified about the importance of "academic freedom". Part of a professor's service obligation to a university is to criticize the administration. Heated discussions with strong language are commonplace in the academic setting. Professor Delehante specifically testified that

[4] "Grievance 4th B" at 1:11:50.
[5] "Grievance 5th A" at 41:00.

accusations by faculty to the effect that administrators are "incompetent" or are "destroying the university" are protected by "academic freedom".

The Appeals Board findings are set out in Exhibit 9, p. 4. Four of the five Appeals Board members "found that sufficient evidence has not been presented to justify termination...." (The lone dissenter was the Provost's appointee). Noteworthy in these findings is the following comment:

> Furthermore, a significant factor influencing the decision was the majority's belief that due process was not followed. In view of the gravity of the recommended action, the majority found the absence of required documentation disturbing.
>
> (*Id.*)

The ISU Faculty Senate followed these findings with a Resolution dated October 26, 2009, in complete support of Claimant and expressed in the strongest of terms:

> Whereas: Dr. Habib Sadid, ISU Professor of Engineering, ISU Distinguished Teacher, ISU Distinguished Award recipient, ISU research-active scholar and 22-year member of the ISU faculty has reported to the faculty the findings of the Faculty Grievance Appeals Board.
>
> Whereas: The Faculty Grievance Appeals Board, a panel of ISU faculty peers duly selected using long-established principles and procedures to provide reasoned judgment, has found the dismissal actions against Dr. Sadid to be without merit.
>
> WHEREAS: The recommendation for and pursuit of dismissal action against Dr. Sadid calls into question the administrative judgment regarding due process of ISU Provost Dr. Gary A. Olson and ISU College of Engineering Dean Dr. Richard Jacobsen, and has resulted in highly uncomplimentary depictions of ISU in the national higher education process.
>
> Be it Resolved: The Idaho State University Faculty Senate, in the strongest possible terms, requests and expects that ISU President Dr. Arthur C. Vailas concur with the Faculty Grievance Appeals Board findings and restore Dr. Sadid to his position as Professor of Engineering with all due rights and responsibilities.
>
> (Exhibit 9, p. 5)

Despite the above findings from the Appeal Board and the resultant Resolution from the Faculty Senate, President Vailas terminated Claimant anyway. Nothing in these proceedings explains or sheds light on this peculiar happenstance – President Vialas turned ISU policy and process on its head. Given the principles of law to be applied here, the fact that the best evidence before the COMMISSION runs in favor of the Claimant should not be ignored.

The COMMISSION need not resolve whether Claimant has been systematically set up to fail with phony and pretextual reprimands or whether ISU has acted in good faith. What is important to recognize here is that this case is complex and will need to be resolved in the courts. The COMMISSION should be mindful of the limitations of its process and should not focus too narrowly on one event, the April 21, 2009 meeting, for the simple reason the voluminous hearsay record before it suggests that Claimant's termination was flawed. Moreover, the COMMISSION has ignored or glossed over the most important evidence before it. Further, no witness has testified on behalf of ISU whereas Claimant, on the other hand, has testified and made an effort to describe the history and context from which the termination arose.

The credibility of ISU is more relevant to a fair determination than any one alleged transgression, particularly when all have already been reviewed in exhausting detail. Claimant encourages the COMMISSION to respect the burden of proof when difficult and underdeveloped cases come before it. When there is doubt, it must run to the favor of the employee rather than the employer for obvious reasons. The Appeals Examiner recognized the limitations of this process as well as the burden of proof. The

COMMISSION should reconsider its DECISION in light of the true nature of the evidence here.

DATED This 12 day of April, 2010.

JOHN C. LYNN
Attorney for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 12 day of April, 2010, I served a true and correct copy of the foregoing document, by depositing the same in the US Mail, postage prepaid, to the following:

John A. Bailey
Racine, Olson, Nye, Budge & Bailey, Chtd.
P. O. Box 1391
Pocatello, ID 83204

Deputy Attorney General
State of Idaho
Idaho Dept. of Labor
317 W. Main St..
Boise, ID 83735

JOHN C. LYNN
Attorney for Claimant

LAW OFFICES OF

RACINE OLSON NYE BUDGE & BAILEY
CHARTERED

201 EAST CENTER STREET
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POCATELLO, IDAHO 83204-1391

TELEPHONE (208) 232-6101
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www.racinelaw.net

SENDER'S E-MAIL ADDRESS: jab@racinelaw.net

W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
ERIC L. OLSEN
CONRAD J. AIKEN
RICHARD A. HEARN, M.D.
LANE V. ERICKSON
FREDERICK J. HAHN, III
DAVID E. ALEXANDER
PATRICK N. GEORGE
SCOTT J. SMITH
JOSHUA D. JOHNSON
STEPHEN J. MUHONEN
CANDICE M. MCHUGH
CAROL TIPPI VOLYN
BRENT L. WHITING
JONATHON S. BYINGTON
DAVE BAGLEY
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ALL OFFICES TOLL FREE
(877) 232-6101

LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL

April 20, 2010

IDAHO INDUSTRIAL COMMISSION
Attn: Unemployment Appeals
P. O. Box 83720
Boise, Idaho 83720-0041

Re: *Sadid v. ISU and IDOL*
IDOL Docket No: *1777-2010*
Claimant: *Habib Sadid*
Employer: *Idaho State University*

Dear Clerk:

Enclosed please find **Employer's Objection to Claimant's Motion For Reconsideration** for filing in the above-captioned matter.

Thank you for your assistance and if you have any questions, please give me a call.

Best regards,

JOHN A. BAILEY, JR.

JAB:mc
Enclosure
c: Tracey K. Rolfsen
Sam Johnson
John C. Lynn

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John A. Bailey, Jr. (ISB No. 2619)
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208) 232-6101
Fax: (208) 232-6109

Attorney for Employer Idaho State University

ORIGINAL

APPEALS BUREAU

IDAHO DEPARTMENT OF LABOR

HABIB SADID, SSN: [redacted]	)	Docket No. 1777-2010
Claimant,	)	
vs.	)	**EMPLOYER'S OBJECTION TO CLAIMANT'S MOTION FOR RECONSIDERATION**
IDAHO STATE UNIVERSITY,	)	
Employer,	)	
and	)	
IDAHO DEPARTMENT OF LABOR.	)	

COMES NOW the Employer, Idaho State University, by and through its counsel of record, John A. Bailey, Jr., of the firm of Racine, Olson, Nye, Budge & Bailey, Chtd., and hereby states its OBJECTION to the Claimant's Motion for Reconsideration filed April 12, 2010.

The comments to Rule 8(F) of the Rules of Appellate Practice and Procedure state that a request for reconsideration "will ask that the Commission reexamine its decision in light of additional legal arguments, a change in law, a misinterpretation of law, or an argument or aspect of the case that was overlooked." The comment explains that requests based on legal arguments that could have been

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raised earlier will not ordinarily be granted; "the intent is ... to discourage reactionary motions when a party merely wants the Commission to "think it over again.""

The Claimant's Motion to Reconsider merely asks the Commission to "think it over again." The Commission's decision on March 24 finding that the Claimant was terminated for cause applied the proper legal standard to the appropriate facts in the record.[1] Claimant confuses the standard applicable before the Commission – whether the termination was the result of employment-related misconduct – with that applicable in the administrative appeals of his termination, and with the standard applicable in his wrongful termination, retaliation and other claims now pending in the courts. The Claimant concedes that the Commission cannot decide whether there was "just cause" for termination under University rules, or whether the University may be liable in the various claims he has filed in Court actions. But he then argues that the Commission therefore cannot determine whether Claimant's misconduct resulted in his termination. As the Commission found in its decision in this case, what constitutes "just cause" for dismissing an employee is not necessarily the legal equivalent of "misconduct" under the employment security law. Thus, there is no reason why the Commission cannot decide this issue.

The Claimant's Motion points the Commission toward evidence which is not relevant to the Commission's resolution of this case, because it deals with whether his termination was proper under University procedural rules, or constituted unlawful retaliation for his First Amendment activities. This evidence, which was fully before the Commission at the time of its March 24, 2010 decision,

---

[1] The Commission made its decision without reference to the brief filed by the Employer, holding that it was not timely because it was filed by fax after 5 p.m. on the date it was due. The Employer respectfully brings to the Commission's attention that the brief was also filed by mail on the same day, which, under Rule 2(D)(2), is timely filing.

does not change the core of relevant facts on which the Commission properly focused. They are:

1. The Claimant was warned on April 9 and April 15, 2009, to follow the chain of command in voicing complaints, and not to attack administrators in widely-disseminated emails and meetings.

2. On April 21, 2009, in a faculty meeting that was open to persons outside of the Department of Engineering, the Claimant made numerous scurrilous attacks on administrators, accusing them of criminal activity, waste, fraud and abuse, among other things.

3. The Employer's expectations as to Claimant's behavior were objectively reasonable and clearly communicated to the Claimant, and the Claimant's behavior on April 21 fell below those standards.

The Motion to Reconsider does not address these facts, but merely attempts to obscure them by raising other issues. In any event, these other issues go primarily to the Claimant's subjective state of mind, which is irrelevant in this proceeding. *Matthews v. Bucyrus Erie Co.*, 101 Idaho 657, 659 (1980).

The Motion to Reconsider raises no argument not addressed below, and should be denied.

DATED this 20 day of April, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: John A. Bailey
JOHN A. BAILEY, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of April, 2010, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Sam Johnson JOHNSON & MONTELEONE, L.L.P. 405 South Eighth Street, Suite 250 Boise, Idaho 83702 **(Attorney for Claimant)**	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile *(208) 947-2424*
John C. Lynn ATTORNEY AT LAW 776 E. Riverside Drive, Suite 200 Eagle, Idaho 83616 **(Attorney for Claimant)**	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile *(208) 429-1925*
Tracey K. Rolfsen Deputy Attorney General IDAHO DEPARTMENT OF LABOR 317 W. Main Street Boise, Idaho 83735 **(Attorney for Idaho Department of Labor)**	[✓] U. S. Mail Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile *(208) 334-6125*

John A. Bailey

JOHN A. BAILEY, JR.

LAW OFFICES OF
RACINE OLSON NYE BUDGE & BAILEY
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POCATELLO ID 832

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FILED
APR 23 2010
INDUSTRIAL COMMISSION

IDAHO INDUSTRIAL COMMISSION
Attn: Unemployment Appeals
P. O. Box 83720
Boise, Idaho 83720-0041

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RONALDO A. COULTER
Camacho Mendoza Coulter Law Group, PLLC
Attorney at Law
776 E. Riverside Drive, Suite 200
Eagle, Idaho 83616
Telephone: (208) 672 6112
Facsimile: (208) 672 6114
Idaho State Bar No.3850
ron@cmclawgroup.com

Attorneys for Plaintiff

IDAHO INDUSTRIAL COMMISSION

HABIB SADID Claimant, vs. IDAHO STATE UNIVERSITY Employer/Respondent IDAHO DEPARTMENT OF LABOR Respondent	**NOTICE OF WITHDRAWAL AND SUBSTITUTION OF COUNSEL** **Docket No: 1777-2010**

NOTICE IS HEREBY GIVEN that Claimant, Habib Sadid has retained the law firm of Camacho Mendoza Coulter Law Group, PLLC to substitute as counsel for Sam Johnson. The following specific attorneys of the law firm of Camacho Mendoza Coulter Law Group, PLLC will serve as counsel for Plaintiff in this matter:

RONALDO A. COULTER
Camacho Mendoza Coulter Law Group, PLLC
Attorney at Law
776 E. Riverside Drive, Suite 200
Eagle, Idaho 83616
Telephone: (208) 672 6112
Facsimile: (208) 672 6114
ron@cmclawgroup.com

ROBERT G. TEFFETELLER
Camacho Mendoza Coulter Law Group, PLLC
Attorney at Law
776 E. Riverside Drive, Suite 200
Eagle, Idaho 83616
Telephone: (208) 672 6112
Facsimile: (208) 672 6114
ron@cmclawgroup.com

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All notices, pleading and other correspondence in the above-captioned matter should hereafter be directed to Ronaldo A. Coulter and Robert G. Teffeteller at the above address

Dated 5/3/2010

R.A. (Ron) Coulter
Substituting Attorney

Dated 5/3/2010

Robert G. Teffeteller
Substituting Attorney

Dated May 3, 2010

Sam Johnson
Withdrawing Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of May, 2010, I caused to be served a true and correct copy of the foregoing by the following method to:

JOHN A. BAILEY, JR RACINE, OLSON, NYE,BUDGE & BAILEY CHTD. PO BOX 1391 POCATELLO, IDAHO 83701	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
DEPUTY ATTORNEYS GENERAL IDAHO DEPARTMENT OF LABOR 317 WEST MAIN STREET BOISE, IDAHO 83735	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, SSN [redacted] Claimant, v. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	**IDOL # 1777-2010** **ORDER GRANTING RECONSIDERATION**

Request for reconsideration of a decision from the Industrial Commission finding Claimant was ineligible for unemployment insurance benefits. The request for reconsideration is GRANTED.

Claimant filed a Motion for Reconsideration pursuant to Idaho Code §72-1368(7). Claimant requests reconsideration of the Idaho Industrial Commission's Decision and Order filed on March 24, 2010. The Commission affirmed in part and reversed in part the Decision issued by an Appeals Examiner with the Idaho Department of Labor ("Department"). The Commission found that Employer discharged Claimant for employment-related misconduct, thus Claimant was ineligible for unemployment insurance benefits.

Claimant worked for Employer as a full professor from August 1991 until he was discharged on October 23, 2009. Claimant has a history of voicing concerns via emails and at faculty meetings. In April 2009 Claimant received a two warning letters from the Chair of the Department of Civil and Environmental Engineering informing Claimant to raise his concerns via the proper procedure. Claimant was to first discuss the matter with the Chair of the Department, then to the Dean of the College of Engineering, then to Employer's upper administration. At an April 21, 2009 faculty meeting, Claimant again raised personal matters

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and expressed criticism of the University's administration. Dean Jacobsen issued a Notice of Contemplated Action, and after further review, University President Vailas discharged Claimant.

The Commission decision found that Employer communicated it standard of behavior to Claimant and his conduct fell below that standard when, at a the April 21, 2009, staff meeting, Claimant stated that the University was corrupt for 20 years, that the administration is absolutely corrupt, and that the administrators are lying with bold face. (Exhibit 10, p. 38). The Commission concluded that Employer discharged Claimant for employment-related misconduct and Claimant was ineligible for benefits.

Claimant requests reconsideration of the Commission's conclusions because Claimant's comments were not inappropriate given the context of the April 21, 2009 meeting. Claimant argues that the audio recording of the April 21, 2009 meeting (Exhibit 10F), when taken as a whole, demonstrates that Claimant's comments were accepted and appreciated by Employer's administration.

Employer's objection to Claimant's motion avers that Claimant is merely asking the Commission to reweigh the evidence and arguments already presented to the Commission. Employer also argues that while its brief in the underlying matter was faxed after 5 p.m. on the date it was due, February 19, 2010, the brief was also mailed on the same day, which means the brief was timely filed.

For clarification and to assist with future filings, the Commission will briefly address Employer's argument regarding its untimely brief. The envelope in which Employer's brief arrived has a meter mark dated February 19, 2010, but does not contain a postmark from the United States Postal Service. The Commission does not recognize meter marks for the determination of filing time. As noted by the Idaho Supreme Court, the "USPS routinely postmarks stamped mail but does not ordinary postmark metered mail. Thus, to ensure that a

mailed notice is timely filed, parties should always either use an ordinary postage stamp to ensure that the mailpiece is postmarked or specifically request a postmark on metered mail to verify when the USPS took custody." Smith v. Idaho Department of Labor, 148 Idaho 72, 218, 222 P.3d 1133, 1137 (2009). In the absence of a postmark the Commission looks to the date Employer's brief was filed by the Commission, which was February 22, 2010. Thus, both filings of Employer's brief were untimely.

In the motion for reconsideration, Claimant argues that when the CD of the April 21, 2009 meeting is reviewed it is apparent that Claimant's remarks were not inappropriate. Claimant states that the audio recording was admitted as a CD labeled Exhibit 10F. In reviewing the record, the Commission finds that Exhibit 10F is a single piece of paper. The lower right hand corner is labeled Exhibit 10, page 130, Exhibit F. The Commission file does not include any audio recording, other than the recording of the hearing held by the Appeals Examiner. Reviewing the file as whole, it appears that Exhibit 10F was an audio recording that was admitted into evidence by the Appeals Examiner at the hearing. To further the interests of justice, Claimant is entitled to a review of the complete evidentiary record. The Commission will review a duplicate CD as was designated as Exhibit 10F by the Appeals Examiner.

ORDER

I

Claimant's request for reconsideration is GRANTED. Claimant will serve a duplicate CD, Exhibit 10F, on the Commission and all interested parties within 10 days of the date of this order. The Commission will not accept any additional evidence other than a duplicate of Exhibit 10F.

II

The parties will be afforded an opportunity to argue their positions based on Exhibit 10F

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in briefs. Claimant will have 10 days from the date of service of Exhibit 10F to file a brief. Employer and IDOL will have 7 days from the date Claimant's brief is filed in which to file responding briefs, if they so choose.

IT IS SO ORDERED.

DATED this 5 day of August, 2010.

INDUSTRIAL COMMISSION

R.D. Maynard, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of August, 2010 a true and correct copy of **ORDER GRANTING RECONSIDERATION** was served by regular United States Mail upon:

JOHN A BAILEY JR
PO BOX 1391
POCATELLO ID 83204-1391

RONALDO COULTER
776 E RIVERSIDE DR, SUITE 200
EAGLE ID 83616

DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
STATE HOUSE MAIL
317 W MAIN STREET
BOISE ID 83735

mcs

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RONALDO A. COULTER
Camacho Mendoza Coulter Law Group, PLLC
Attorney at Law
776 E. Riverside Drive, Suite 200
Eagle, Idaho 83616
Telephone: (208) 672 6112
Facsimile: (208) 672 6114
Idaho State Bar No.3850
ron@cmclawgroup.com

Attorneys for Plaintiff

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, SSN: [redacted], Claimant, v. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	**IDOL # 1777-2010** **NOTICE OF SERVICE OF DUPLICATE CD, EXHIBIT 10F, PURSUANT TO ORDER GRANTING RECONSIDERATION**

NOTICE IS HEREBY GIVEN that Claimant, Habib Sadid, through his counsel, R.A. (Ron) Coulter, of the law firm of Camacho Mendoza Coulter Law Group, PLLC, has served a duplicate CD, Exhibit 10F, on the Commission and all interested parties pursuant to the ORDER GRANTING RECONSIDERATION (attached hereto as Exhibit A) dated August 5, 2010. For the convenience of the parties, and in case the parties use multiple operating systems or hardware platforms, the file on the disc is in four formats: MP3, WAV, WMA, and AAC.

Because the ORDER GRANTING RECONSIDERATION requires service of the CD within ten (10) days of the date of the order (August 5, 2010), and because ten (10) days from the

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date of the order is August 15, 2010, a Sunday, Claimant is serving this CD on all interested parties by mail, or personal delivery to the Commission by 5:00 p.m., on Monday, August 16, 2010, pursuant to the following administrative rule of the Department of Labor:

> . . . In computing any period of time prescribed or allowed by the Employment Security Law or the Claims for Wages Act, the day of the act, event, or default is not to be included. Saturdays, Sundays, and holidays shall be counted during the period unless the last day of the period is a Saturday, Sunday, or legal holiday in which event the period shall not expire until the next business day following the Saturday, Sunday, or legal holiday.
>
> See ID ADC 09.01.06.090

Claimant also notes that if the day of the ORDER GRANTING RECONSIDERATION, August 5, 2010, is excluded, ten (10) days from the 6th of August, 2010 is the 16th of August, which is a Monday. By either computation, the serving of the CD on Monday, August 16, 2010 is timely.

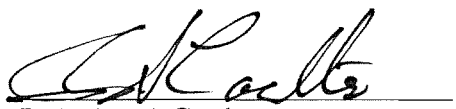
Dated this 16th day of August, 2010.

R.A. (Ron) Coulter
Attorney for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of August, 2010, I caused to be served a true and correct copy of the foregoing by the following method to:

IDAHO INDUSTRIAL COMMISSION 700 S. CLEARWATER LANE BOISE, ID 83712 P.O. BOX 83720 BOISE, ID 83720-0041	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
JOHN A. BAILEY, JR RACINE, OLSON, NYE, BUDGE & BAILEY CHTD. PO BOX 1391 POCATELLO, ID 83204-1391	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
DEPUTY ATTORNEY GENERAL IDAHO DEPARTMENT OF LABOR ***STATE HOUSE MAIL*** 317 WEST MAIN STREET BOISE, ID 83735	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail



R.A. (Ron) Coulter

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, SSN: [redacted] Claimant, v. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	**IDOL # 1777-2010** **ORDER GRANTING RECONSIDERATION** FILED AUG 05 2010 INDUSTRIAL COMMISSION

Request for reconsideration of a decision from the Industrial Commission finding Claimant was ineligible for unemployment insurance benefits. The request for reconsideration is GRANTED.

Claimant filed a Motion for Reconsideration pursuant to Idaho Code §72-1368(7). Claimant requests reconsideration of the Idaho Industrial Commission's Decision and Order filed on March 24, 2010. The Commission affirmed in part and reversed in part the Decision issued by an Appeals Examiner with the Idaho Department of Labor ("Department"). The Commission found that Employer discharged Claimant for employment-related misconduct, thus Claimant was ineligible for unemployment insurance benefits.

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EXHIBIT A

169

and expressed criticism of the University's administration. Dean Jacobsen issued a Notice of Contemplated Action, and after further review, University President Vailas discharged Claimant.

The Commission decision found that Employer communicated it standard of behavior to Claimant and his conduct fell below that standard when, at a the April 21, 2009, staff meeting, Claimant stated that the University was corrupt for 20 years, that the administration is absolutely corrupt, and that the administrators are lying with bold face. (Exhibit 10, p. 38). The Commission concluded that Employer discharged Claimant for employment-related misconduct and Claimant was ineligible for benefits.

Claimant requests reconsideration of the Commission's conclusions because Claimant's comments were not inappropriate given the context of the April 21, 2009 meeting. Claimant argues that the audio recording of the April 21, 2009 meeting (Exhibit 10F), when taken as a whole, demonstrates that Claimant's comments were accepted and appreciated by Employer's administration.

Employer's objection to Claimant's motion avers that Claimant is merely asking the Commission to reweigh the evidence and arguments already presented to the Commission. Employer also argues that while its brief in the underlying matter was faxed after 5 p.m. on the date it was due, February 19, 2010, the brief was also mailed on the same day, which means the brief was timely filed.

For clarification and to assist with future filings, the Commission will briefly address Employer's argument regarding its untimely brief. The envelope in which Employer's brief arrived has a meter mark dated February 19, 2010, but does not contain a postmark from the United States Postal Service. The Commission does not recognize meter marks for the determination of filing time. As noted by the Idaho Supreme Court, the "USPS routinely postmarks stamped mail but does not ordinary postmark metered mail. Thus, to ensure that a

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mailed notice is timely filed, parties should always either use an ordinary postage stamp to ensure that the mailpiece is postmarked or specifically request a postmark on metered mail to verify when the USPS took custody." Smith v. Idaho Department of Labor, 148 Idaho 72, 218, 222 P.3d 1133, 1137 (2009). In the absence of a postmark the Commission looks to the date Employer's brief was filed by the Commission, which was February 22, 2010. Thus, both filings of Employer's brief were untimely.

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ORDER

I

Claimant's request for reconsideration is GRANTED. Claimant will serve a duplicate CD, Exhibit 10F, on the Commission and all interested parties within 10 days of the date of this order. The Commission will not accept any additional evidence other than a duplicate of Exhibit 10F.

II

The parties will be afforded an opportunity to argue their positions based on Exhibit 10F

171

in briefs. Claimant will have 10 days from the date of service of Exhibit 10F to file a brief. Employer and IDOL will have 7 days from the date Claimant's brief is filed in which to file responding briefs, if they so choose.

IT IS SO ORDERED.

DATED this 5 day of August, 2010.

INDUSTRIAL COMMISSION

R.D. Maynard, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of August 2010 a true and correct copy of **ORDER GRANTING RECONSIDERATION** was served by regular United States Mail upon:

JOHN A BAILEY JR
PO BOX 1391
POCATELLO ID 83204-1391

RONALDO COULTER
776 E RIVERSIDE DR, SUITE 200
EAGLE ID 83616

DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
STATE HOUSE MAIL
317 W MAIN STREET
BOISE ID 83735

mcs

172

RONALDO A. COULTER
Camacho Mendoza Coulter Law Group, PLLC
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Telephone: (208) 672 6112
Facsimile: (208) 672 6114
Idaho State Bar No.3850
ron@cmclawgroup.com

Attorneys for Claimant

2010 AUG 26 P 3:43

RECEIVED
INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY Employer/Respondent IDAHO DEPARTMENT OF LABOR Respondent	**IDOL# 1777-2010** **CLAIMANT'S BRIEF ON EXHIBIT 10F PERMITTED BY ORDER GRANTING RECONSIDERATION OF AUGUST 5, 2010**

COMES NOW, The Claimant Habib Sadid (Professor Sadid), by and through his attorney of record, Ronaldo A. Coulter, and hereby submits his BRIEF ON EXHIBIT 10F PERMITTED BY ORDER GRANTING RECONSIDERATION OF AUGUST 5, 2010.

I
PROCEDURAL HISTORY

On October 30, 2009, Claimant was discharged from his position at Idaho State University and subsequently applied for unemployment benefits for which he was initially found ineligible on December 3, 2009. On December 16, 2009, Claimant appealed the original determination. On January 5, 2010, a telephonic hearing was held to consider the appeal of Claimant. On January 6, 2010, the Appeals Examiner reversed the original decision of ineligibility of December 3, 2009 and found that the Employer failed to meet its burden of proving by a preponderance of evidence that the Claimant had engaged in inappropriate conduct. On or about January 13, 2010, the Employer through counsel requested that the hearing be re-opened as through no fault of the Employer, the Employer did not receive adequate notice of the telephonic hearing and therefore was unable to participate. On or about the January 14, 2010, the Appeals Bureau denied the request to re-open the hearing.

On or about January 18, 2010, the Employer through counsel filed an appeal to the Industrial Commission requesting that the Commission hold a hearing that would allow the Employer to provide evidence which it could not previously provide at the telephonic hearing or remand the case to the Appeals Examiner for an additional hearing and decision. On February 9, 2010, the Employer's request for a hearing before the Idaho Industrial Commission was denied. Additionally, the Employer's request that the matter be remanded to the Appeals Bureau for a new hearing was denied. However, The Industrial Commission ruled that the Employer's timely appeal of the Appeals Examiner's decision denying a rehearing was also an appeal of the decision of the Appeals Examiner's decision awarding unemployment benefits to Claimant. Wherefore, the Industrial Commission informed the parties that it would review *de novo* the evidentiary record established during the Appeals Examiner's hearing of January 5, 2010,

established a briefing schedule for both the Claimant and the Employer, and informed both parties that it would then issue a new decision upon completion of its review.

On March 24, 2010, the Industrial Commission issued its Decision and Order wherein it reversed the decision of the Appeals Examiner awarding unemployment benefits to Claimant and declared that Claimant was discharged for employment-related misconduct and therefore ineligible for unemployment benefits. On April 12, 2010, Claimant through counsel filed a Motion for Reconsideration with the Industrial Commission. On or about April 20, 2010, the Employer filed an Employer's Objection to the Claimant's Motion for Reconsideration.

On August 5, 2010, the Industrial Commission issued an Order Granting Reconsideration. It further ordered the Claimant to serve a duplicate CD, Exhibit 10F on the Commission and all interested parties within ten (10) days of the date of the Order. It further ordered that Claimant would be afforded the opportunity to submit a ***brief arguing its position based on 10F***; said brief to be submitted ten (10) days from the date of service of Exhibit 10F. Lastly, the order called for the Employer and IDOL, if they desired, to submit briefs within seven (7) days of the date Claimant's brief was filed with the Industrial Commission. On August 16, 2010, Exhibit 10F was filed with the Industrial Commission, mailed to the IDOL and mailed to the Employer.

II
THE APPLICABLE LAW

In reviewing Exhibit 10F, the Industrial Commission must decide whether the speech and conduct of Professor Sadid at the April 21, 2009, Idaho State University, College of Engineering Faculty Staff meeting constituted "misconduct" connected with the Claimant's employment such that the Claimant can be denied unemployment benefits. *Beaty v. City of Idaho Falls*, 110 Idaho

891, 892, 719 P.2d 1151, 1152 (1986)." *See* March 24, 2010 Decision and Order of the Industrial Commission pages 5 and 6:

> The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer. *Appeals Examiner of Idaho Dept. of Labor v. J.R.. Simplot Co.*, 131 Idaho 318, 320, 955 P.2d 1097, 1099 (1998) The Idaho Supreme Court has defined misconduct as a willful, intentional disregard of the employer's interest; a deliberate violation of the employer's rules; or a disregard of standards of behavior which the employer has a right to expect of its employees. *Gunter v. Magic Valley Regional Medical Center*, 143 Idaho 63, 137 P.3d 450 (2006) *(citing Johns v. S. H. Kress & Company,* 78 Idaho 544, 548, 307 P.2d 217, 219 (1957)).

See March 24, 2010 Decision and Order of the Industrial Commission pages 5 and 6

III

ANALYSIS

A. Professor Sadid Did Not Engage In Any Conduct Sufficient to Disqualify Him From Receiving Unemployment Benefits As His Conduct was not a Willful, Intentional Disregard Of His Employer's Interest; A Deliberate Violation Of The Employer's Rules; Nor A Disregard Of Standards Of Behavior Which The Employer Had A Right To Expect Of Him

1. <u>During the April 21, 2009 College of Engineering Faculty Staff Meeting, Professor Sadid's Conduct Was Not In Disregard of the Standards of Behavior that His Employer Had a Right to Expect. His Employer Expressed Satisfaction With The Meeting, The Employer Expressed That the Employer Valued the Discussion, And the Employer Publicly Expressed That the Employer Was Not Offended By Any Remarks Made During the Meeting</u>

The Notice of Contemplated Action (NOCA) (Exhibit 5., pp. 22-23) specifically alleges that during the April 21, 2009 College of Engineering Faculty/Staff meeting (hereinafter referred to as "the Meeting" or Meeting), Professor Sadid was unprofessional, non-collegial, disruptive and insubordinate. The NOCA also alleged that Professor Sadid disrupted the meeting in complete disregard of an established agenda by "revisiting personnel issues" that had previously

been discussed in an appropriate forum and by labeling some Idaho State University personnel as corrupt and untruthful. Lastly, the NOCA alleged that Professor Sadid falsely asserted that for the past fourteen years that the Deans of the College of Engineering had failed in their fund raising responsibilities, as the Deans were deficient in their duties to raise funds for College of Engineering.

An analysis of the 2 hour, 17 minute 21 second Meeting reveals that Professor Sadid's behavior was that which could be expected of an academic fully engaged in discussions of significant importance in a precise, forceful, professional and appropriate manner. A recording of this meeting is captured on Exhibit 10F. A review of this recording reveals that Professor Sadid was candid but in no way was Professor Sadid engaged in behavior that could be described as misconduct especially in light of the academic setting in which the meeting took place. Preliminarily, it must be noted that the first part of the published agenda was a Call to Order and Introduction and Comments by the Provost, Gary Olson. (Exhibit A) Rather than following the established agenda, it is clear from listening to Exhibit 10F that Professor Sadid did not disregard the established agenda; rather, it was Dean Jacobsen who departed from the agenda and began an earnest discussion of the Faculty Workload Policy. What follows is an analysis of relevant sections of the recording where Professor Sadid and others are engaged in discussions in the meeting. For ease of identification, the specific place on the recording is marked in bold:[1]

Recording: 3:20 -13:34 sec.
In a discussion prior to the arrival of Provost Olson, Dr. Jacobsen initiates a discourse

[1] The annotations used to mark segments of the recording are as follows: 3:20 -13:34 would indicate that the relevant segment of the recording begins at 3 minutes and 20 seconds into the recording and ends at 13 minutes and 34 seconds into the recording; 1:12:59 – 1:21:26 would indicate that the relevant segment of the recording begins at 1 hour, 12 minutes, and 59 seconds into the recording and ends at 1 hour, 21 minutes, and 26 seconds into the recording.

regarding the Faculty Workload Policy and how it must be addressed throughout the University and specifically within the College of Engineering. At a point during this discourse, Professor Sadid, in a very civil tone, questioned the metrics that would be involved in determining the faculty workload specifically, what metrics would be used to determine the research value of faculty members. It is clear that Dr. Jacobsen was somewhat frustrated by Professor Sadid's question and follow-up question and he specifically asks other Chairs present in the meeting to join in the discussion. At this point, Dr. George Imel, Chair of the Department of Nuclear Engineering joins in the discussion with Professor Sadid. It is clear from listening to the recording that this issue was important to both parties. However, both parties were engaged, Dr. George Imel being louder, more argumentative, and more aggressive than Professor Sadid. It is important to note that Dean Jacobsen actually agreed that the present ad hoc method needed to be addressed and metrics established; thus agreeing with the argument set forth by Professor Sadid.

Recording: 13:59 – 17:50
In a continuation of the discussion of Faculty Workload Policy specifically in the College of Engineering, Dr. Sadid tries to discuss the specifics of an evaluation that he received from Dr. Zoghi. Professor Sadid's point was that without the establishment of a standardized metrics based system, there did not exist an accurate way to judge a faculty member's performance. Dr. Jacobsen informs Professor Sadid that a discussion of a specific faculty member's evaluation is not a proper subject for an open discussion. However, Professor Sadid disagrees with Dr. Jacobsen but does so in a civil tone and provides his rationale. From the recording, one can hear an attendee ask that the

discussion move toward a general discussion of a topic of common import to the college and not dwell on a single person's issue, Professor Sadid remarked that it is a concern of everyone especially in light of the lack of communication between the College of Engineering Chair and the faculty. At one point, Professor Sadid asked for a show of hands as to who in the room believed they had effective communications with the Chair of the College of Engineering. From the recording, it can be surmised that Professor Sadid only saw two people raise their hands. At all times, Professor Sadid's speech was appropriate and there is nothing to indicate that his behavior was a disruption to the meeting.

Recording: 23:24 – 25:17
Professor Sadid questions the workload criteria and mentions that this has been a problem for the last three years. Professor Sadid again questions the metrics especially, when an administrator tells the faculty that they have exceeded the expectations but there are no metrics. Professor Sadid asked what is the administration doing and questions the commitment of the Dean and the Chairs especially in light of his raising questions for three years.

Recording: 28:50 – 29:40
Provost Olson opens the floor for questions. A faculty member other than Professor Sadid prefaces a question to Provost Olson openly calling into question the performance of Dean Jacobsen and raising the issue of whether or not a dean, especially a part-time dean is really needed in the College of Engineering. Indeed, this faculty member said to Provost Olson, "I have some major issues with the performance of our Dean." Provost Olson jokingly said that he thought that when he came in he heard Professor Sadid say that they could do away with deans. Professor Sadid points out that this is true. He states

that in two years he has not noticed that the Dean had taken responsibility for anything. Therefore, and based on that history, the necessity of a dean should be questioned.

Recording: 34:50 – 38:09
Professor Sadid in an exchange with Provost Olson asked if there would be communications with the faculty from his office. Provost Olson responded that he had just said that there would be. Professor Sadid then states that Idaho State University had a long corrupt history prior to the arrival of Dr. Vailas. Professor Sadid stated that with Dr. Vailas' arrival that he expected change. However, Professor Sadid commented that the present administration would lie with bold face and was not honest with faculty. Dr. Olson was not offended by the question and cited his experience at the University of South Florida. It was Dr. Olson's opinion that Dr. Vailas has instituted measures to address issues raised by Professor Sadid to make them viable and more transparent.

Recording: 41:28 - 44:06 Discussion on the Budget Process Provost Disparages Idaho State Board of Education
An unidentified faculty member (first name Ken) questioned the budget process and insinuated that Dean Jacobsen had kept the process a secret. Dean Jacobsen wanted to address the question but Dr. Olson stepped in and informed the faculty member that Dean Jacobsen did not have access to the budget. The Provost went on to explain how the process worked. The Provost expressed his dismay with the entire budget process. Provost Olson then went on to disparage the members of the Idaho State Board of Education. He remarked that he thought that he had already been in the state with the "wackiest" state government with Blagojevich but this really takes the cake; and, if you think that this is really something, you ought to go to the State Board of Education meeting. That is really like going to the circus. "I don't think any of those people have

ever gone to college much less getting a degree in one."

Recording: 59: 16 – 1:01:24
There was a discussion regarding investment in education that the university needed to do. Dr. Olson brought up the government of Thailand's commitment to education and what that country has done to improve its academic infrastructure. Professor Sadid commented that no government would provide funds through a grant if the government did not see that the institution was already committed to the investment. Professor Sadid then asked Dr. Olson if Dr. Olson would hold his Deans responsible for raising funds. Dr. Olson replied, "I will yep". Professor Sadid said that in the past fourteen years, there have been two deans neither of which raised any funds. Professor Sadid then rhetorically asked how can we survive in this economy? Dr. Olson replied to Professor Sadid by saying "You are right" and then remarked that we all have a role to play.

Recording: 1:12:59 – 1:21:26
An Administrative Assistant becomes very emotional, almost to the point of tears in describing the treatment that she has received at the College of Engineering by its faculty. She says she would leave if she could. Professor Sadid comments that her problem is a result of poor leadership. The Administrative Assistant does not agree with Professor Sadid that it is all leadership. This exchange provokes a response from Dean Jacobsen in which Dean Jacobsen questions the basis of why Professor Sadid maintains that everything that is wrong at the College of Education is based on the failure of leadership. Professor Sadid, without being disrespectful replies to the Dean's inquiry and several times in his reply stated that he had proof to back up his position. Dean Jacobsen comments that he is not interested in any of Professor Sadid's proof. Dean Jacobsen

suggests that they [faculty and administration] had to work together if they were going to be successful. Professor Sadid asks of Dean Jacobsen if the Dean was working with them. Dean Jacobsen replied that he was and Professor Sadid responded that he was not. Dean Jacobsen responded that he did not agree with Professor Sadid's assessment.

Recording: 1:45:50 – 1:46:45 Dean Jacobsen Not Offended by Comments and Desires an Open Dialogue
In speaking to his belief that the members of the College of Engineering had to work together, Dr. Jacobsen stated, "I'm not offended by anything you have said" in speaking to the whole group. Dr. Jacobsen goes on to say that "I have never learned to properly have the ability to hold a grudge" Further Dean Jacobsen said, "I like it when people open up and say what they think." At that point Professor Sadid chimed in and mentioned two words: "Honesty" and "Integrity" to which Dr. Jacobsen replied "that goes without saying Habib."

Recording: 1:54:50 – 1:55:00 Dr. Jacobsen Expresses that the Meeting was Good "Don't Hate This Type of Discussion."
A faculty member "Bruce" asked to speak on a topic and in so doing remarked that the meeting had been contentious. Dr. Jacobsen responded. "Its been a good meeting. Don't hate this kind of discussion. It is not a bad idea to do this."

In summary, an analysis of Exhibit 10F reveals the following:

- That Professor Sadid was engaged in the discussions during the meeting where he felt that he had input. In addressing Dean Jacobsen, Provost Dr. Gary Olson and others, Professor Sadid was very direct, very professional and not intimidated by others during this discourse.

- That other faculty members beside Professor Sadid questioned the performance of the administration and specifically questioned the performance of Dean Jacobsen. Indeed, one faculty member suggested that given the part-time status of the Dean Jacobsen, perhaps the College of Engineering would be better off without a Dean. Still another faculty member, relying on false information, questioned Dean Jacobsen's honesty and the lack of transparency in the budget process.
- That Provost Dr. Gary Olson was not offended by Professor Sadid's descriptive words used to underscore Professor Sadid's observation that the present administration of Dr. Vailas' lacked in integrity and was not truthful.
- That Provost Dr. Gary Olson in this public forum, in language that would be considered insubordinate and disrespectful in a non-academic forum, lambasted the Idaho State Board of Education and its members and in very strong and disparaging remarks likened the members to uneducated circus performers.
- That a member of the faculty was very upset with how she had been personally treated and expressed a strong personal desire to leave the employ of the Employer.
- That Dean Jacobsen publicly maintained that he was not offended by anything anyone had said at the Meeting; and of significant importance Dean Jacobsen states publicly that "Its been a good meeting. Don't hate this kind of discussion. It is not a bad idea to do this."

2. Professor Sadid's Speech Is Constitutionally Protected And Therefore Must Fall Within the Standards Of Behavior Which The Employer Had A Right To Expect Of Him

In the Employer's claim for review, the Employer relied heavily upon the grant of

Summary Judgment issued in litigation involving the Employer and Professor on December 18, 2009. In that case, the Sixth District Court, Judge David C. Nye, presiding, held that as a matter of law that there was no First Amendment protection for Claimant who was speaking not on matters of public concern, nor was Claimant speaking as private citizen on matters of public concern. Further, even if the Claimant was speaking on a matter of public concern as a private citizen, the speech of Claimant was not a motivating factor for the decision to take any action complained of in Claimant's complaint. The Employer represented to the Industrial Commission that:

> "Accordingly, it has already been determined in a court of law that Dr. Sadid had no "right" to make statements for which he has suffered retaliation, and that it was not a cause for the adverse employment actions, ***including his termination***." (Emphasis added) (Employer's Brief on Claim for Review., p. 4)

The above quote is a misstatement of fact. It is clear from Exhibit B herein that the court considered the original complaint and the amended complaint. The amended complaint also added new factual allegations but retained the same three counts: "(1) count one – claim under §1983; (2) count two - breach of employment contact and implied covenant of good faith and fair dealing; and (3) count three - defamation." (Exhibit B., p. 3 of 25) An examination of Exhibit C, the amended complaint, reveals that the complaint ***was not amended*** to include an additional count of wrongful termination. Such a claim would have been an impossibility as Claimant was discharged October 30, 2009 and Exhibit C was filed on October 15, 2009. Further, the Court's decision was narrowly tailored to the allegations made in the complaint and concluded that the "Defendants [Employer] are entitled to summary judgment on each count in the Amended Complaint." (Exhibit B., p. 24 of 25) Claimant has yet to file a wrongful termination claim. Therefore, the Industrial Commission cannot rely on a decision made by the Court where the

decision is not applicable to a cause of action that may be filed in the future. The Employer's brief failed to inform the Industrial Commission that on January 19, 2010, the Court specifically refused to address the fact that the District Court failed to address a critical component of Claimant's case specifically leaving the decision in the hands of the Appellate Courts. This critical component is that all of Claimant's speech was done within the confines of academic freedom and therefore is protected speech as guaranteed by the 1st and 14th Amendments of the U.S. Constitution and Article 1, Sections 9 and 10 of the Constitution of the State of Idaho.

In the case of *Garcetti v Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), the court held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. In response to a concern expressed by Justice Souter in his dissenting opinion regarding the impact of the majority's holding on teachings of "public university professors" and academic freedoms found in "public colleges and universities," the majority qualified its holding, adding the following caveat:

> Justice Souter suggests today's decision may have important ramifications for academic freedom at least as a constitutional value ... There is some argument that expressions 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***. *Garcetti v. Ceballos*, 547 U.S. at 425 (Emphasis added)

In writing this caveat, the Court reserved for later resolution the intricate and complex question of the First Amendment protections applied to academic speech.

Although aware of the Supreme Court's caveat concerning the academic freedom exception to the *Garcetti* analysis, the District Court deliberately chose not to address the issue of academic freedom and how Professors Sadid's speech was either protected or not protected by

the First Amendment's application to academic freedom. Instead, the trial judge abdicated this responsibility to the Idaho Appellate Courts:

> THE COURT: What I hear you telling me basically
> 14 is -- if I pare it all down on that first issue – is
> 15 that I should not apply Garcetti to the facts of this
> 16 case because that case was not intended to extend to the
> 17 academic world. ***If that's true, isn't that a decision***
> 18 ***better left to the appellate courts*** if we're going to
> 19 carve out an exception there?
> 20 MR. JOHNSON: Well, perhaps, your Honor. But I
> 21 believe the way that we would ask the Court to review
> 22 that and analyze that is at least give us a ruling on
> 23 it. ***Let us know where this Court stands on that***
> 24 ***particular issue.***
> 25 THE COURT: ***So you have something to appeal.*** (Tr. p. 112)[2]
>
> 10 THE COURT: And I understand that. Had they said-
> 11 if they were clear enough to say that this case does not
> 12 extend to the academic situation, then we've got the
> 13 exception. I'm not sure that I read their language as
> 14 being clear enough for me as a district judge. (Tr. p. 113)

In *Kerr v. Hurd*, 694 F.Supp.2d 817, 2010 WL 890638 (S.D.Ohio, March 15, 2010), the trial court at the federal level did not hesitate to let the parties know where it stood on a question of significant importance to the academic community. Dr. Elton Kerr (Kerr) was a medical professor hired by the entity, University Medical Services (UMSA). As an employee of USMA, Dr. Kerr also taught at Wright State School of Medicine (WS-SOM). His immediate supervisor was Dr. William W. Hurd (Hurd). Kerr was eventually terminated from his contract with USMA, which had the effect of terminating his employment with the medical school. Kerr brought a cause of action alleging, among other claims, a violation of his First Amendment rights in that he had been retaliated against for advocating the use of "vaginal delivery over unnecessary cesarian

[2] The relevant pages of the transcript on Claimant/Plaintiff's Motion For Reconsideration heard on January 19, 2010 is included herein as Exhibit D.

procedures, and lecturing WS-SOM residents on the proper and appropriate use of forceps" *Id.* at 10. Hurd argued that *Garcetti* was applicable to this case, as Kerr was not speaking as a private citizen as the speech concerning vaginal delivery was made in Kerr's role as an employee instructing students at WS-SOM; therefore, the school had a right to regulate Kerr's speech. Acknowledging Hurd's assertion that the United States Supreme Court did not decide whether *Garcetti* applied to speech cases arising in an academic environment, in the absence of a United States Supreme Court, or Sixth Circuit Court of Appeals decision to the contrary, the court was bound by precedent[3]. However the court, in performing its duty at the federal trial level, went on to state the following:

> Even without the binding precedent, this Court would find an academic exception to *Garcetti.* ***Recognizing an academic freedom exception to the Garcetti analysis is important to protecting First Amendment values***. Universities should be the active trading floors in the marketplace of ideas. Public universities should be no different from private universities in that respect. At least where, as here, the expressed views are well within the range of accepted medical opinion, they should certainly receive First Amendment protection, particularly at the university level. See Justice Souter's dissent in *Garcetti,* citing *Keyishian v. Bd. of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). The disastrous impact on Soviet agriculture from Stalin's enforcement of Lysenko biology orthodoxy stand as a strong counterexample to those who would discipline university professors for not following the "party line." Dr. Hurd suggests that any academic freedom exception to *Garcetti* must be construed narrowly and limited to classroom teaching, relying on *Gorum v. Sessions,* 561 F.3d 179 (3rd Cir.2009)(Motion, Doc. No. 84, at 14). The Court finds no suggestion in the motion papers that Dr. Kerr's advocacy for forceps deliveries was outside either the classroom or the clinical context in which medical professors are expected to teach. (Emphasis added)

Kerr v. Hurd, 2010 WL 890638 at 20.

Thus, the court found that Kerr's advocacy could not be excluded from the protection of the First

[3] The precedent the court was referring to was the unreported case of *Evans-Marshall v. Bd. of Ed. of Tipp City Exempted Village Sch. Dist.*, 2008 WL 2987174 (S.D.Ohio) which considered *Garcetti* rejecting the Seventh Circuit's position and adopting the Fourth Circuit's position applying the traditional *Pickering-Connick* approach to cases involving in-class speech by primary and secondary public school teachers. Applying the precedent the court sustained the Defendant's motion for summary judgment.

Amendment. The court based its decision on the fact that the speech was made within his role as an employee and instructor of the school. Therefore, protecting First Amendment values warranted an academic freedom exception to the rule that public employees making statements pursuant to their official duties were not speaking as citizens for First Amendment purposes. Public and private universities are supposed to be active trading floors in the marketplace of ideas. Aware of the fact that the Supreme Court expressly left undecided in *Garcetti* the extent to which its analysis would apply in an academic setting, the Sixth Circuit, granted constitutional protection to teacher in-class speech; or as stated in *Garcetti,* speech related to *scholarship or teaching.*[4] It may be expressly inferred from the position taken by the Sixth Circuit, that because of the critical role that the academic community plays in educating the public and expanding the scope of human knowledge, the boundaries around protected speech must be broad so as not to chill the public discourse. *See Amici Curiae Brief for the American Association of University Professors, the Foundation for Individual Rights in Education (Fire), and the Thomas Jefferson Center for the Protection of Free Expression in Support of Plaintiff-Appellant*, 2010 WL 2642629 at 23 (July 2010)

Academic speech under the First Amendment is neither governed by *Garcetti* nor susceptible to the "official duties" analysis reflected in Garcetti. Therefore, the scope of First Amendment protection for academic speech (i.e. scholarship or teaching) must be governed by more than a half-century of decisions, beginning with *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct.1203, (1957), which recognizes the vital role that academic speech by college and university professors plays in our society and the First Amendment interest in that speech:

[4] *See also Sheldon v. Dhillon,* 2009 WL 4282086, pp.*3 -*4 (N.D. Cal. Nov. 25, 2009) acknowledging that *Garcetti* by its express terms does not address the context squarely presented here; and acknowledging that the Ninth Circuit has not determined the scope of the First Amendment's application to the classroom.

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. ***Scholarship cannot flourish in an atmosphere of suspicion and distrust.*** Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die. (Emphasis added)

Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211 - 1212 (U.S. 1957)

More recently, and one year prior to *Garcetti,* the Tenth Circuit, in *Schrier v. University of Colorado*, 427 F.3d 1253 recognized that academic freedom was of particular concern of the First Amendment:

> Courts have conspicuously recognized that academic freedom is a "special concern" of the First Amendment:
>
> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Vanderhurst v. Colo. Mountain Coll. Dist.,* 208 F.3d 908, 913 (10th Cir.2000) (academic freedom is "a special concern of the First Amendment"); *see also Shelton v. Tucker,* 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). ***We have also noted that a greater degree of conflict is to be expected in a university setting due to the autonomy afforded members of the university community***. *Hulen,* 322 F.3d at 1239 (recognizing that "conflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy").[5]

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[5] *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003) reads in pertinent part as follows:

At the same time, conflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy. *See* Sweezy, 354 U.S. at 250, 77 S.Ct. 1203 (plurality opinion); *id.* at 262, 77 S.Ct. 1203 (Frankfurter, J., concurring in result); American Ass'n of Univ. Professors, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, *available at* http://www.aaup.org/statements/Redbook/1940stat.htm (last updated June 2002).

The actual website has changed to http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm and the relevant quote is that "***Controversy is at the heart of the free academic inquiry*** which the entire statement is

Schrier v. University of Co. 427 F.3d 1253, 1265 -1266 (C.A.10 (Colo.),2005) (Emphasis added)

Through a review of Exhibit 10F, it can be seen that Professor Sadid's speech in the April 21, 2009 Meeting addressed issues critical to scholarship at Idaho State University. Professor Sadid engaged Dr. Jacobsen in a discourse regarding the Faculty Workload Policy and how it must be addressed throughout the University and specifically within the College of Engineering. Using his own circumstance by way of example, Professor Sadid made the point that without a standardized metrics based system, the College of Engineering did not have an accurate way to measure and therefore correctly and precisely judge the performance of its faculty. Professor Sadid voiced his disappointment in the lack of honesty and integrity exhibited by the past and present administrations. Professor Sadid addressed the need for the Employer to invest in the infrastructure of the university commenting that it would be difficult for the university to receive grant funding if the grantor did not see a commitment by the university. Professor Sadid openly expressed his displeasure with what he perceived as the non-existent fund raising efforts of the past fourteen years by the Deans of the College of Engineering. Exhibit 10F lays bare the robust atmosphere in which Professor Sadid, as well as others, criticized the administration. Indeed, there is no doubt that Professor Sadid's and other's comments were the spark of controversy; however, controversy is to be expected and is the heart of free academic inquiry. *See* fn. 5.

On March 24, 2010, the Industrial Commission issued its Decision and Order wherein it reversed the decision of the Appeals Examiner awarding unemployment benefits to Claimant and declared that the Claimant was discharged for employment-related misconduct and therefore ineligible for unemployment benefits. In this case, the Industrial Commission stated:

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designed to foster" (Emphasis added)

> ...This case is analogous to an Idaho Supreme Court case were a claimant continued to criticize employer and its polices despite the employer's clear directive to express those criticism in private. *Gatherer v. Doyles Wholesale*, 111 Idaho 470, 725 P.2d 175 (1986)... Claimant may argue that his actions did not constitute misconduct and were for the benefit of the College and faculty. However, Claimant's subjective state of mind for making the comments is irrelevant. *Mattews v. Bucyru- Erie Co.*, 101 Idaho 657, 659, 619 P.2d 1110, 1112 (1980.).

March 24, 2010 Decision and Order of the Industrial Commission pages 10 and11

Contrary to the position taken in the Industrial Commission's March 24, 2010 Decision and Order, it would be a mistake to simply equate Claimant's, administrator's (i.e., Provost etc.) professor's, teacher's and other academic's standard of behavior with non-similarly situated private or public employee's for purposes of First Amendment protection related to academic freedom. Academic Freedom provides considerable protection to academics who from time to time, or consistently as the situation dictates, criticize or face criticism of their academy peers or superiors. Thus, the comparison of the Industrial Commission of this matter to that of the Claimants in *Gatherer v. Doyles Wholesale,* and *Matthews v. Bucyrus Erie Co* is inappropriate. In *Gatherer*, the Claimant was a warehouse supervisor of a candy and tobacco wholesaler. Claimant's family had previously owned the business and Claimant constantly criticized and took issue with the new owner's policies. Claimant was instructed not to raise his voice where other employees could hear the criticisms. When asked to work overtime one day, Claimant "'created a scene' in front of the other employees in the office." *Gatherer* at 471, 176. The Claimant was subsequently discharged. In *Matthews,* the Claimant was terminated for obtaining a leave of absence under false pretenses not for expressing his legitimated concerns in an appropriate forum. In both cases, the Employers were not public entities, nor were the

Claimant's distinguished tenured professors with more than twenty-two years seniority.[6] The latter comparison would chill an academic's ability to speak without fear on controversial subjects, where the opinion of the academic ran counter to the administration's party line. The current decision of the Industrial Commission is known throughout Idaho State University, the Employer. The Industrial Commission's decision at present mirrors that of the District Court and has thus far failed to take into consideration the fact that Professor Sadid's speech enjoys constitutional protection. As could be predicted, the District Court's decision has brought significant apprehension to academics within Idaho. (Exhibit E) As most recently argued in the Fourth Circuit:

> ***Both in practice and in constitutional law, the actual duties of state university professors implicate - indeed, demand - a broad range of discretion and autonomy that find no parallel elsewhere in public service.*** Much of the controlling language of *Garcetti* implicitly recognizes the profound differences between academic speech by professors and other public employees, something that the court below declined to do. For example, ***the Garcetti majority's suggestion that most public employees are subject to "managerial discipline" on the basis of statements contrary to agency policy would be anathema in the academic setting; indeed, academic speech usually does not represent the official policy or view of the university.*** Further, although the *Garcetti* majority comfortingly referred to "whistle-blower protection laws and labor codes" as a parallel source of protection for public workers, such alternate recourses are unlikely to avail most state university professors. (Emphasis added)

Amici Curiae Brief for the American Association of University Professors, the Foundation for Individual Rights in Education (Fire), and the Thomas Jefferson Center for the Protection of Free Expression in Support of Plaintiff-Appellant, 2010 WL 2642629 pp. 21-22 (July 2010)

Academic Freedom if it is to mean anything must encompass the ability of faculty members of a public university:

> " to speak or write—as a private citizen or within the context of one's activities as an employee

[6] The Bucyrus-Erie Company is a maker of heavy machinery used in heavy construction. See http://www.bucyruseriemodels.com/home.aspx . This company is not a public university and its employees are not public employees engaged in academic pursuit.

> of the university—without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties, ***the functioning of the university, and university positions and policies."*** (Emphasis added)

University of Wisconsin Madison, Recommendation to Amend Faculty Policies and Procedures as adopted by the Faculty Senate, April 12, 2010 (Exhibit F)

In light of the facts of this case, the historical and special concern given to academic freedom and the lead set in the judicial districts mentioned herein, it is imperative that the Industrial Commission conclude that the academic freedom exception to *Garcetti* must apply to this case.

IV

CONCLUSION

It has been shown herein, through a complete and thorough examination of Exhibit 10F, that Professor Sadid's speech in the April 21, 2009 meeting was very direct, forceful yet professional and of a character that one would expect to encounter in an academic setting among tenured faculty members. As noted herein, contention and controversy are at the heart of a vibrant academic community. In this case, the Employer's representative refused to characterize the Meeting as contentious. Instead, the employer characterized the Meeting as "being a good meeting" and implored the faculty to refrain from disdaining such meetings. The Employer's representative further commented that he enjoyed it when faculty members "open[ed] up and say [said] what they think [thought]". Given the content, context, and academic setting in which Professor Sadid engaged in discussion, his actions were not only within the standard of behavior an Employer could expect of its employees, Professor Sadid's speech and participation by the Employer's own admission, did not offend the Employer. Lastly but of significant importance, Professor Sadid's speech during the Meeting was protected under academic freedom, which is a

"special concern" of the First Amendment. Therefore, Professor Sadid's speech was sheltered by the 1st and 14th Amendments of the U.S. Constitution and Article 1, Sections 9 and 10 of the Constitution of the State of Idaho. An examination of Exhibit 10F demands that the Industrial Commission conclude that its Decision and Order of March 24, 2010 must be reversed thereby securing unemployment benefits for the Claimant in this matter.

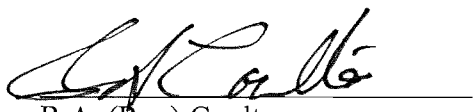
Dated this 26th day of August 2010.

R.A. (Ron) Coulter
Attorney for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of August, 2010, I caused to be served a true and correct copy of the foregoing by the following method to:

IDAHO INDUSTRIAL COMMISSION 700 S. CLEARWATER LANE BOISE, ID 83712 P.O. BOX 83720 BOISE, ID 83720-0041	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
JOHN A. BAILEY, JR RACINE, OLSON, NYE, BUDGE & BAILEY CHTD. PO BOX 1391 POCATELLO, ID 83204-1391	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
DEPUTY ATTORNEY GENERAL IDAHO DEPARTMENT OF LABOR ***STATE HOUSE MAIL*** 317 WEST MAIN STREET BOISE, ID 83735	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail



R.A. (Ron) Coulter

College of Engineering
Faculty/Staff Meeting
Tuesday, April 21, 2009 - 3:00 p.m.
Rendezvous A, REND

Agenda

1. Call to Order
2. Faculty Meeting Minutes – Wednesday, April 8, 2009. Minutes not yet available, will be distributed later.
3. Introduction and Comments – Provost Gary Olson
4. Opening Remarks – Dean Jacobsen
5. Lack of Academic Progress – Dismissal Policy – Dr. Wabrek **(See attached Item #5)**
6. Utilizing Space In Colonial Hall – Bruce Savage
7. ISU Enrollment Plan for AYs 2010-2014 **(See attached Item #7)**
8. Proposed Path to an ISU Enrollment Plan **(See attached Item #8)**
9. Other Business
10. Announcements:
    a. Reminder – Provost Olson's Meeting with ALL Faculty Tomorrow, Wednesday, April 22nd, in the PSUB Movie Theater
    b. Engineering Advisory Council Meeting, Monday, May 4th at 5:30 p.m., PSUB Woodriver Room **(See attached Item #10b)**
11. Adjourn

EXHIBIT A

[redacted]

2009 DEC 18 PM 4:27

IN THE DISTRIT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HABIB SADID, an individual, Plaintiff, v. IDAHO STATE UNIVERSITY, ROBERT WHARTON, JAY KUNZE, MICHAEL JAY LINEBERRY, MANOOCHEHR ZOGHI, RICHARD JACOBSEN, GARY OLSON, AUTHUR VAILAS and JOHN/JANE DOES I through X, whose true identities are presently unknown, Defendants.	Case No. CV-2008-3942-OC DECISION ON MOTION FOR SUMMARY JUDGMENT

This matter came before this Court for hearing on Defendant's Motion for Summary Judgment on November 2, 2009. The Plaintiff was represented by Sam Johnson. The Defendants were represented by John Bailey. Stephanie Morse was the court reporter. The Court reviewed the documents submitted by the parties, heard oral argument from counsel, and took the matter under advisement. Now, the Court issues its decision **granting** the Defendants' Motion for Summary Judgment.

BACKGROUND AND PROCEDURAL HISTORY

The Plaintiff, Habib Sadid, was an associate professor in the Department of Civil Engineering at Idaho State University ("ISU"). He began working for the University in

EXHIBIT B

1991. In 1993, Sadid was given full tenure and he became an associate professor. In 1999, he became a full professor at ISU.

In 2001, Sadid published a letter to ISU faculty and administrators. The letter criticized the ISU administration for its plan to merge the College of Technology with the College of Engineering. The administration eventually decided not to follow through with the merger for 2001 and the plan did not arise again until 2003.

In 2003, Sadid spoke to the Idaho State Journal about the merger again. Sadid argues that the plan was designed in secret, which is deceptive to the community and to ISU faculty and staff. Some of Sadid's comments were published in the paper and some were published internally by ISU. Sadid contends that ISU retaliated against him for the comments made in 2001 and 2003.

Sadid claims that some of the acts of retaliation are that ISU did not perform its faculty evaluations of him from 2001 to 2006. Sadid alleges that more acts of retaliation came in 2006 when he was not appointed as the chair of the College of Engineering and in 2008 when Michael Lineberry wrote an e-mail which referred to Sadid as a "nut case." Sadid claimed that the Lineberry statement defamed him and that it is part of the retaliation against him. Sadid claims that the 2006 retaliation led to an economic loss suffered by Sadid in the amount of $35,000 per year. On August 24, 2006, Sadid was offered an opportunity to apply for the chair position, however, he declined. The position was eventually given to a candidate outside of ISU. Additionally, Sadid alleges that ISU has further retaliated against him by increasing his salary at the lowest percentage.

On September 29, 2008, Sadid filed a non-verified Complaint against ISU and Lineberry that contains three counts: (1) violation of constitutional rights under 42 U.S.C. §1983; (2) Breach of Employment Contract and the implied Covenant of Good Faith and Fair Dealing; and (3) Defamation of Character. The Prayer for Relief seeks monetary damages, costs, and attorney fees. On August 27, 2009, Sadid filed a Motion to Amend Complaint and attached a proposed amended complaint to the motion. The motion states that it is based upon the grounds that Sadid needed to identify and include additional Defendants and needed to include additional factual allegations based upon discovery ensued to date. The Motion to Amend Complaint was set for hearing on October 5, 2009. The Defendants, ISU and Lineberry, filed a motion for summary judgment based on the original Complaint and set it for oral argument on October 13, 2009. In response to the motion for summary judgment, Sadid filed a motion for additional time under Rule 56(f), which the Court granted. The Court also granted the motion to amend complaint and on October 15, 2009, Sadid filed his First Amended Complaint, which added six more defendants: Robert Wharton; Jay Kunze; Manoochehr Zoghi; Richard Jacobsen, Gary Olson; and Authur Vailas.[1] The amended complaint also added new factual allegations but retained the same three counts: (1) count one – claim under §1983; (2) count two – breach of employment contact and implied covenant of good faith and fair dealing; and (3) count three – defamation. Additionally, the Prayer

[1] Nothing in the record suggests that the added defendants were properly served with the Amended Complaint. However, Defendants' Reply Memorandum re: Defendants' Motion for Summary Judgment states that it is filed on behalf of all defendants. Therefore, it appears that the added defendants have at least voluntarily appeared in this matter.

for Relief in the amended complaint still sought monetary damages, costs, and attorney fees. However, it also sought injunctive relief ordering ISU to instate Sadid as Chair of the College of Civil Engineering. No other relief is sought.

After allowing Sadid the additional time he requested pursuant to IRCP 56(f), oral argument on Defendants' motion for summary judgment occurred on November 2, 2009. The Court deems the summary judgment motion to be against the Amended Complaint and against all defendants.

STANDARD OF REVIEW

Rule 56(c) of the Idaho Rules of Civil Procedure allows that summary judgment "shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (quoting I.R.C.P. 56(c)); *see also Idaho Building Contractors Association v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995); *Avila v. Wahlquist*, 126 Idaho 745, 890 P.2d 331 (1995).

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. *Finholt v. Cresto*, 143 Idaho 894, 896-97, 155 P.3d 695, 697-98 (2007). Generally, the record is to be construed in the light most favorable to the party opposing summary judgment, with all reasonable inferences drawn in that party's favor. *Id.* If reasonable persons could reach different conclusions or inferences from the evidence, the motion must be denied. *Id.* However,

the nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. The nonmoving party's case must be anchored in something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *Id.*; *Tuttle v. Sudenga Industries, Inc.*, 125 Idaho 145, 868 P.2d 473 (1994).

Summary judgment is properly granted in favor of the moving party, when the nonmoving party fails to establish the existence of an element essential to that party's case upon which that party bears the burden of proof at trial. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994); *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126 (1988)). The party opposing the summary judgment motion "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* (quoting IDAHO R. CIV. P. 56(e); *Nelson v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990)). If the nonmoving party does not come forward as provided in the rule, then summary judgment should be entered against that party. *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

DISCUSSION

On or about September 14, 2007, Sadid filed a formal complaint with the Equal Employment Opportunity Commission ("EEOC") and claimed ISU discriminated against him for his national origin and/or religion and also retaliated against him since 2001.

Sadid asserts that claim was filed under Title VII of the Civil Rights Act. He acknowledges that he received a "right to sue" letter from the EEOC and he was informed that he must file a Title VII civil action for illegal discrimination within 90 days of receiving the letter. Sadid admits he abandoned any claim under Title VII and is now pursuing the claims under § 1983 and he claims that the only time barring for filing Section 1983 claim is the statute of limitation as discussed below. Therefore, this matter does not concern Title VII but concerns 42 U.S.C. § 1983, breach of contract law, and the Idaho Tort Claims Act. The Court will first address the § 1983 Claim.

I. Plaintiff's 42 U.S.C. § 1983 Claim

Sadid claims that the Defendants have violated his right to freedom of speech under the First Amendment of the United States Constitution and Article 1 Sections 9 and 10 of the Idaho Constitution along with his property rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article 1 Section 13 of the Idaho Constitution. Sadid seeks relief for these alleged violations under Title 42 Section 1983 of the United States Code.

Sadid alleges that in his capacity as a faculty member and full professor of ISU, he has, from time to time, openly and publicly expressed his views regarding matters of public concern relating to ISU and its standing in the academic and local community. *See, First Amended Complaint, pg. 5, para. 13.* Sadid further specifically identifies two separate incidences in which he claims he exercised his protected right to free speech. First, he alleges that in 2001 he published a letter to his fellow faculty members and to

ISU administrators criticizing ISU's decision to merge the College of Technology with the College of Engineering. *Id., at para. 14.* Second, Sadid alleges that in 2003, he publically spoke out against ISU's renewed plan, designed in secret, to merge the two colleges and that some of his comments were published in the Idaho State Journal while other of his comments were published internally at ISU. *Id., at para. 15.* Sadid claims that the University retaliated against him for the expression of protected speech.

There are five questions the court must answer to determine whether under § 1983 there is a valid First Amendment retaliation claim. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). The questions are:

1. whether the plaintiff spoke on a matter of public concern;
2. whether the plaintiff spoke as a private citizen or public employee;
3. whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
4. whether the state had an adequate justification for treating the employee differently from other members of the general public; and
5. whether the state would have taken the adverse employment action even absent the protected speech.

Id. If the plaintiff did not speak as a citizen on a matter of public concern then the plaintiff does not have a First Amendment cause of action based on his employer's reaction to the speech. *Brewster v. Bd. Of Educ.*, 149 F.3d 971 (9th Cir. 1991). The plaintiff has the burden of proof on the first three tests. That is, Plaintiff has the burden

of showing that: (1) "the speech addressed an issue of public concern"; (2) "the speech was spoken in the capacity of a private citizen and not a public employee"; and (3) "the state took adverse employment action" and the speech "was a substantial or motivating factor in the adverse action." *Jacobson v. Schwarzenegger,* --- F.Supp.2d ----, 2009 WL 2633762 (C.D.Cal. 2009). Only if plaintiff passes these three tests does the burden shift to the defendants to show that the government's interests outweigh the plaintiff's First Amendment rights, or that it would have taken the same action even in the absence of the protected conduct. *Id.*

1. **Matter of Public Concern**. A public employee's speech is protected under the First Amendment only if it falls within the core of First Amendment protection--speech on matters of public concern. *Engquist v. Oregon Dept. of Agr.*, --- U.S. ----, 128 S.Ct. 2146, 2152, 170 L.Ed.2d 975 (2008); *Connick v. Myers*, 461 U.S. 138, 146-47, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The Supreme Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *see Connick*, 461 U.S. at 143, 103 S.Ct. 1684; *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

The question of whether the matter was a public concern is a question of law. *Berry v. Dept. of Soc. Servs.*, 447 F.3d 642, 648 (9th Cir. 2006). If the speech in question

does not address a matter of public concern then it is unprotected. *Eng* at 1071. When the speech is a political, social or other concern to the community, then it is a matter of public concern. *Connick v. Myers*, 461 U.S. 128, 103 S.Ct. 1684 (1983). Alternatively, if the speech deals with "individual personnel disputes and grievances" and it is not related to the "relevance to the public's evaluation of the performance of governmental agencies" then it is not a matter of public concern. *McKinley v. City of Eloy*, 705, F.2d 1110, 1114 (9th Cir. 1983). Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. *Connick*, 461 U.S. at 147-148. The plaintiff bears the burden of showing the court that the speech is a matter of public concern. *Eng* citing *Connick.*

Sadid claims that he was speaking of a matter of a public concern. In two of the letters (Exhibit A, written February 9, 2003 and March 9, 2003) the Court infers that Sadid is arguing that this is a matter of public concern because it is an issue of interest to the tax paying public. However, "[t]o presume that all matters which transpire within a government office are of public concern would mean virtually every remark and certainly every criticism directed at a public official would plant the seed of a constitutional case." *Connick* at 149, 103 S.Ct. 1684. Therefore, to simply claim that all matters relating to ISU's plans of department mergers are matters of public concern is overly broad.

The Defendant directed the Court to a case that is similar to this one, *Hong v. Grant*, 516 F.Supp.2d 1158 (C.D. Cal. 2007). In *Hong*, the defendant (among several

others named) was Grant, who was the Chair of the Department of Chemical Engineering and Materials Science at the University of California-Irvine. The plaintiff was Hong, who was an engineering professor at the university. He made several critical statements about the hiring and promotion of other professors. He claimed his First Amendment rights were violated when the university retaliated against his statements by denying him a salary increase. The defendants moved for summary judgment, which the district court granted in their favor.

The district court analyzed whether Hong's statements were matters of public concern and concluded that they were not by stating: "While Hong argues that his statements are of public concern because they exposed government waste and mismanagement, they are more properly characterized as internal administrative disputes which have little or no relevance to the community as a whole." *Id.* at 1169. The court followed the rule set out in *Connick* that a statement by an employee is not the public's concern if it "cannot fairly be considered as relating to any matter of political, social or other concern to the community." *Hong* at 1169 quoting *Connick*, 461 U.S. at 146, 103 S.Ct. 1684.

The *Hong* Court also related its decision to a 7th Circuit case, *Colburn v. Trustees of Indiana University*, 973 F.2d 581 (7th Cir. 1992). In *Colburn*, two professors claimed that they were denied tenure and a promotion because the university retaliated against their claimed protected speech. In the letters that the professors wrote they claimed that the "integrity of the University was being threatened." *Id.* at 586. The court held that

even though the public would have appreciated the knowledge of the alleged wrongdoing of the department, it noted that simply because the matter would be interesting to the public does not make it a matter of public concern. *Id.* As a result, the court granted the defendant's motion for summary judgment against the two professors.

After reviewing the argument of Sadid, the case law, and the entire content, form and context of his letters, the Court disagrees with Sadid's claim that this was a matter of public concern. The Court finds that the letters contain nothing more than personal grievances against ISU regarding matters that relate directly to Sadid's interest in his employment. The content and opinions may in fact be interesting to the public; however, the value of interest alone does not make the matter a public concern. Furthermore, simply because it involves a matter that may have occurred behind close governmental doors does not make it a public concern. Sadid's statements go more to matters of an internal administrative dispute than a matter of public concern. Here, Sadid has failed to show that the statements made were a public concern. He cannot pass the 1st test under *Eng.* As a result, Sadid does not have a valid First Amendment claim for protected speech.

2. **Speaking as a Public Employee or Private Citizen.** When a person enters the government employee workforce, by necessity, he must accept certain limitations on his freedom. *Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878 (1994). Government employers need a significant degree of control over their employees' words and actions, much like private employers do. *Connick* at 143, 103 S.Ct. at 1684. If the government

employer did not have control "there would be little chance for the efficient provision of public services." *Id.*

> To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.

Arnett v. Kennedy, 416 U.S. 134, 168, 94 S.Ct. 1633, 1651, (1974). Also, governmental employees "often occupy trusted positions in society" and therefore, when they speak out in public "they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.*

Sadid asserts that he was speaking as a private citizen when he wrote the articles for the newspaper.[2] He argues that because his job description does not mention anything to the fact of a duty to write newspaper articles that critique the ISU administration is evidence that he was speaking as a citizen. The Court disagrees with Sadid's argument. Whether his job description requires him to write articles is not the determining factor of him being in the role of a citizen or a public employee. After reviewing Sadid's letters that were published, the Court finds that the tone of the letters is that of an employee of ISU. Additionally, Sadid should understand that he has limitations of his speech that he accepted when becoming a state employee. Furthermore, Sadid continuously argues in his brief and even in the published article itself that he was speaking as a private citizen,

[2] This argument is directly contrary to his assertion in the Amended Complaint that he spoke in "his capacity as a Faculty Member and Full Professor of ISU".

yet in both of the published articles he identifies himself as an ISU employee. Therefore, due to the tone and language of the letter the Court finds that Sadid was speaking as an employee and not as a private citizen. As a result, Sadid has also failed to meet the 2nd test under *Eng*.

3. **Whether the Protected Speech was a Substantial or Motivating Factor in ISU's Action.** As found in the discussion above, the Court finds in favor of the Defendants on this issue for two reasons: 1) the letters written by Sadid were not protected speech and 2) nothing in the evidence provided by the Plaintiff proves that ISU had any motivation for not hiring Sadid as the Chair. In fact, the Court finds that there is nothing in the record to suggest that Sadid even applied for the position of Chair. Without such an application, Sadid could have no reasonable expectation that he would be hired for the position. Sadid has failed to meet the 3rd test under *Eng*.

In light of the foregoing analysis, Sadid's First Amendment claim fails each of the first three questions under the *Eng* test and the Court finds that there is not a valid First Amendment claim. Therefore, Defendants are granted summary judgment on Count One.

II. Breach of Contract and Implied Warranty

Sadid alleges, in Count Two of his Amended Complaint, that ISU breached his employment contract and breached the implied warranty of good faith and fair dealing associated with that contract. Specifically, Sadid alleges that ISU and its employees failed to perform annual evaluations of Sadid for the years 2001 through 2006 and that this failure constitutes a breach of ISU policy and his employment contract. Defendants

allege, in their motion for summary judgment, that they are entitled to summary judgment on Count Two because the contract claim is time barred, plaintiff has failed to establish a breach, plaintiff has failed to establish any damages, and because he failed to follow the grievances procedures set forth in the Faculty Handbook.

In response to defendants' summary judgment motion as to Count Two, Sadid argues that breaches occurring in 2003 through 2006 are not barred by the five year statute of limitations and breaches occurring in 2001 and 2002 are not time barred because they are "captured" by the continuing violation doctrine. Additionally, Sadid argues that he did file a grievance under the Faculty Handbook and that it was denied.

1. Whether The Contract Claim Is Time Barred. An action for a written contract must be brought within five years. *I.C. § 5-216.* The statutory time period does not begin to run until a cause of action has accrued. *Saddlehorn Ranch Landowner's, Inc. v. Dyer*, 146 Idaho 747, 750, 203 P.3d 677, 680 (2009); *citing Simons v. Simons*, 134 Idaho 824, 830, 11 P.3d 20, 26 (2000). Sadid is claiming that ISU had a contractual obligation to perform annual evaluations and ISU breached the contract because from 2001 until 2006 ISU did not complete his annual evaluations.

Sadid argues that because the Complaint was filed on September 29, 2008, the five year statute of limitations allows the Court to look back to September 29, 2003, for any alleged breach of contract. Sadid further argues that the "continuing violation" doctrine applies to his breach of contract claim and would allow him to attach the 2001 and 2002 alleged breaches. Sadid did not provide any law that supports the argument that

the "continuing violation" doctrine applies to contract actions as opposed to § 1983 actions or state tort actions. The Court did not find any law that states that the doctrine relates to claims of breach of contract, similar to this situation.

In the absence of any case law on this issue, this Court finds that each incidence – each time an evaluation was not performed – constitutes a separate breach and not an ongoing breach. To find otherwise would effectively render the limitation period for any cause of action alleging failure to perform meaningless when the performance is to be done on a regular basis. The purpose of a statute of limitations is to bar stale claims and avoid problems of proof arising from stale memories. Accepting Sadid's continuing violation theory on a breach of contract claim would hinder and frustrate the ultimate aim of limitations periods. The breach of contract claim does not involve an ongoing breach but multiple separate breaches. Therefore, the statute of limitations bars any alleged breach occurring more than five years prior to the filing of the Complaint. Sadid cannot purse a breach of contract claim for any event occurring prior to September 29, 2003.

2. Whether Plaintiff Has Shown a Breach of Contract. Sadid claims that the failure of ISU to do the evaluations caused him damages because he did not receive an annual salary increase or the Chair position. Sadid directs the Court to section (B)(1) of the ISU Handbook, which states:

> Each year the chair of a department must submit to the Dean of the Chair's college an evaluation of each faculty member in that department...the evaluation, together with the opinion of higher administrators, will be used as one (1) basis for the final recommendation relative to reappointment, nonreappointment, acquisition or tenure, or as other personnel action, whichever is appropriate.

FACULTY/STAFF HANDBOOK, Part 4, Section IV, (B)(1). The Defendants argue that (B)(7) actually applies, which states:

> It is the policy of the Board that at intervals not to exceed five (5) years following the award of tenure to faculty members, the performance of tenured faculty must be reviewed by members of the department or unit and the department chairperson or unit head. The review must be conducted in terms of the tenured faculty member's continuing performance in the following general categories: (a) teaching effectiveness, (b) research or creative activities, (c) professional related services, (d) other assigned responsibilities, and (e) overall contributions to the department.

FACULTY/STAFF HANDBOOK, Part 4, Section IV, (B)(7). Overall, after reviewing the ISU faculty handbook provisions that counsel has provided, the Court does not agree with Sadid's argument of a breach of contract by ISU by failure to conduct an annual evaluation of Sadid. The Court recognizes that Defendant Kunze acknowledged that he had a responsibility to conduct faculty evaluations and that he did not complete the performance evaluation process with Sadid on an annual basis. *Kunze's Deposition, Exhibit A to the Affidavit of Counsel, p. 46, Ll. 11-22; p. 49, Ll. 9-14; p. 56, Ll. 1-10; p. 62, Ll. 2-22.* However, Sadid received his tenure in 1993, and according to the ISU Faculty Handbook, annual evaluations of a tenured professor are not required. What matters in this case is whether Sadid received an evaluation every 5 years after receiving tenure. For the five year period immediately preceding the filing of the Complaint Sadid testified that he did not receive an evaluation in 2003, 2004, 2005, and 2006. *See, Affidavit of Plaintiff in Opposition to Defenndants' Motion for Summary Judgment, para. 5.* There is nothing in the record relating to 2007 or 2008. If Sadid received an

evaluation in either of these years, his breach of contract claim fails. Sadid, as plaintiff, carries the burden of proof on the issue of breach of contract. His failure to provide any evidence that ISU failed to evaluate him at any time during the five years immediately preceding the filing of his Complaint warrants summary judgment against him on the breach of contract claim.

Alternatively, the Court does not need to determine whether or not the evaluations were completed at least every five years for a tenured professor because Sadid did not provide any evidence that shows he had a contract for a yearly salary increase. Additionally, at the hearing for this motion, Sadid did not rebut the Defendant's claim that he could not receive the Chair position simply because he did not apply for the position. Sadid's contract does not guarantee annual evaluations, yearly salary increases, or the Chair position. He has not shown any injury from the alleged breach of contract.

The Court grants Defendants summary judgment on Count Two of the Amended Complaint, the breach of contract claim, on the grounds that the statute of limitations has terminated any claim for breach occurring prior to September 29, 2003, and that the Plaintiff has not shown that ISU failed to evaluate him at any time within the five years immediately preceding the filing of the Complaint. Alternatively, Sadid has not shown a contractual requirement that in which the parties agreed to assign Sadid the Chair position, a yearly salary increase, or an annual evaluation. ISU did not breach the contract. Defendants are granted summary judgment on Count Two.

III. The Defamation Claim

Sadid alleges, in Count Three of his Amended Complaint, that Lineberry and ISU defamed him. This is a tort claim under state law. Specifically, Sadid alleges that Lineberry sent an e-mail on the ISU email system on August 1, 2008, and it addressed matters regarding the operation of the College of Engineering. Also in the e-mail was a statement about Sadid that referred to him as a "nut case." Sadid alleges that the contents of the email were defamatory to his character and that the e-mail constituted retaliation. Lineberry and ISU moved for summary judgment on Count Three on the grounds that Sadid failed to file a Notice of Tort Claim prior to commencing litigation, that defendants are entitled to immunity under I.C. § 6-904(3), and that no defamation occurred.

In response to Defendants' motion for summary judgment as to Count Three, Sadid argues that his Notice of Tort Claim was timely filed because it was filed before the filing of the Amended Complaint, that Lineberry was not acting within his official capacity at ISU when he made the "nut-case" statement, and that Lineberry acted with malice such that the immunity under I.C. § 6-904(3) does not apply.

1. Whether the Plaintiff's Defamation Claim is Barred by the Idaho Tort Claim Act. Sadid filed his original Complaint on September 29, 2008. He served the Complaint and Summons on ISU and Lineberry on October 15, 2008. *See, Affidavit of Service signed by Eric Hansen and filed on October 31, 2008, and Affidavit of Service signed by Jamie Hansen and filed on October 31, 2008.* Two copies of the Summons and Complaint and Demand for Jury Trial were served on the Attorney General on October 6,

2008. *See, Affidavit of Service signed by Tri-County Process Serving and filed on October 15, 2008.* Defendants ISU and Lineberry filed a Motion to Dismiss on November 26, 2008, alleging that Plaintiff had not properly served the Secretary of State as required by the ITCA. On December 3, 2008, Plaintiff served the Summons, Complaint and Notice of Tort Claim on the Secretary of State. *See, Affidavit of Service signed by Tri-County Process Serving and filed on December 8, 2008.*[3] Sadid filed his Amended Complaint on October 15, 2009. It alleges that "A written Notice of Tort Claim has been filed in compliance with the Idaho Tort Claims Act, with the Secretary of State for the State of Idaho pursuant to Idaho Code § 6-905 and § 6-907." *See paragraph 32 of the Amended Complaint.*

Lineberry's e-mail that Sadid claims is defamatory was sent in August 2008. Whether his defamation claim is barred is an issue that "can be decided as a matter of law *via* the notice requirement of the Idaho Tort Claims act." *McQuillen v. City of Ammon*, 113 Idaho 719, 722, 747 P.2d 741, 744 (1987).

Idaho Code § 6-905 reads:

> All claims against the state arising under the provisions of this act and all claims against an employee of the state for any act or omission of the employee within the course or scope of his employment shall be presented to and filed with the secretary of state within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

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[3] The Notice of Tort Claim is not in the Court's file. However, the Affidavit of Plaintiff in Opposition to Defendants' Motion for Summary Judgment states that "A written Notice of Tort Claim has been filed in compliance with the Idaho Tort Claims Act, with the Secretary of State for the State of Idaho pursuant to Idaho Code § 6-905 and § 6-907." *See paragraph 20 of the Affidavit.*

I.C. §6-905. The statutory period begins to run at the occurrence of the wrongful act even if the full extent of damage is unknown. *McQuillen, 113 Idaho, at 722.* "Knowledge of facts which would put a reasonably prudent person on inquiry is the equivalent to knowledge of the wrongful act and will start the running of the 120-day period." *Id.* The ITCA states that the claim must be "presented and filed within the time limits." I.C. § 6-908. The State or its employee has 90 days to respond to the claim. I.C. § 6-909. If the claim is denied, the claimant may institute an action in the district court. I.C. § 6-910. Compliance with the Idaho Tort Claims Act's notice requirement is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate." *McQuillen* (citing *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982); I.C. § 6-908). The notice requirement is in addition to the applicable statute of limitations. *Id.*

In the original Complaint filed on September 29, 2008, the Plaintiff did not allege the he had filed a written notice in compliance with the Idaho Tort Claims Act. The Plaintiff argues that this was remedied by his Amended Complaint filed on October 15, 2009, which does note the filing of the notice with the Secretary of State. *Plaintiff's First Amended Complaint And Demand For Jury Trial, p. 9.* However, the Plaintiff's argument is misleading, whether the Amended Complaint corrects the problem is irrelevant. The focus should be that the Plaintiff filed suit ***before*** he filed the notice with the Secretary of State, which is a mandatory condition precedent to bringing the suit.

In *Euclid Ave. Trust v. City of Boise,* 146 Idaho 306, 193 P.3d 853 (2008), Euclid filed a Complaint, Petition for Judicial Review and Request for Jury Trial on December 12, 2005. The pleading sought judicial review of the City's actions, a declaration that an emergency ordinance was invalid, mandatory relief and civil damages. A few days after the complaint was filed, Euclid filed a tort claim. Euclid filed an amended complaint in January, adding a due process claim. The City filed a motion to dismiss and a motion for summary judgment. The trial court granted the City summary judgment and Euclid appealed. On appeal, the Idaho Supreme Court recognized that the trial court had granted summary judgment to the City on Euclid's claim under the ITCA because Euclid did not comply with the notice requirements of the ITCA. The Supreme Court affirmed the summary judgment without any discussion of whether the amended complaint cured the failure to file the notice before filing suit.

Plaintiff, in effect, asks the Court to ignore the filing of the original complaint and to look only to the filing of the amended complaint to determine if notice was timely given. However, plaintiff also argues that for purposes of deciding the statute of limitations issues, the filing of the amended complaint relates back to the date of filing of the original complaint. These are inconsistent positions. A plaintiff cannot "cure" a failure to give proper notice prior to filing suit by giving such notice after filing suit. To do so defeats the purpose of the notice requirement. Sadid's original Complaint alleged a claim for defamation. This claim clearly falls under the ambit of the ITCA. ISU and Lineberry had the right to receive a notice of this claim before litigation began. ISU and

Lineberry had the right to have 90 days to decide whether to accept or reject the claim before litigation began. Those rights, granted under the ITCA, were denied when Sadid served the notice of tort claim with the complaint on the Secretary of State. By then, the complaint for defamation had been filed and the purposes for the notice requirement frustrated.

The purposes of the notice of claim requirement under the ITCA are to: (1) save needless expense and litigation by providing opportunity for amicable resolution of differences among parties, (2) allow authorities to conduct a full investigation into the cause of the injury in order to determine the extent of the state's liability, if any, and (3) allow the state to prepare defenses. *Driggers v. Grafe,* --- P.3d ----, 2009 WL 4067998 (Ct. App. 2009). Therefore, using its discretion, the Court finds that the alleged defamation claim is barred by the Idaho Tort Claim Act as to any claim against ISU or against Lineberry alleging he acted within the scope of his official capacity at ISU.[4]

In reaching this conclusion, the court is aware of *Madsen v. Idaho Dept. of Health and Welfare*, 114 Idaho 624, 759 P.2d 915 (Ct. App. 1988), in which the Court of Appeals suggested that a plaintiff could dismiss his complaint without prejudice, serve his notice under the ITCA, and then file a new complaint – if the time period for serving notice had not yet expired. However, Sadid did not dismiss his Complaint but merely filed an Amended Complaint, thus frustrating the purposes of the notice requirement. Sadid even filed a Notice of Intent to Take Default prior to the filing of the Amended

[4] These are the only two defendants against whom the defamation claim is asserted.

Complaint and within 90 days of the time he claims the notice of tort claim was served on the Secretary of State. Obviously, Sadid had no intent to stay litigation while the State investigated his claim or the other purposes of the notice requirement were met.

2. Whether Immunity Applies. Defendants argue that even if the defamation action is not barred by the notice requirements of the ITCA, they have immunity under I.C. § 6-904(3). That statute states:

> A government entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which:
>
> . . . .
>
> 3. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Plaintiff's Amended Complaint asserts that Lineberry acted with malice when he sent the e-mail. Sadid further argues in opposition to summary judgment that Lineberry did not act within his course and scope of employment when he sent the e-mail. I.C. § 6-903(a) states that the State is only liable for wrongful acts of its employees if they were acting within the course and scope of employment. Therefore, Sadid cannot bring this defamation action against ISU. Lineberry, on the other hand, cannot claim the immunity afforded by I.C. § 6-904(3) for conduct falling outside the scope of his employment and done with malice.

3. Whether Defamation Occurred. If the comments do not harm the reputation of the plaintiff in the community or deter third parties from associating with him then they are not defamatory comments, even if they are derogatory. *Rubenstein v. University*

of Wisconsin Bd. Of Regents, 422 F.Supp. 61, 64 (E.D. Wis. 1976). Additionally, if comments are not made to the general community then the community cannot "lower its estimation" of the plaintiff. *Id.* In *Rubenstein*, the plaintiff filed a claim of defamation for the defendant's comment of "old biddy" referring to the plaintiff, along with an additional opinion that the plaintiff was not suitable for the promotion at issue and also commenting that the plaintiff was "just out to make trouble." *Id.* The court dismissed the plaintiff's defamation claims because the remarks did not harm her reputation. *Id.*

The issue of defamation in this case is much like that of *Rubenstein*. Sadid claims that the comments made by Lineberry were defamatory and resulted in him not getting the Chair position. The e-mail was not sent to the general public and therefore it could not affect his reputation in the community or deter any third parties from associating with him. Furthermore, Sadid has failed to provide any evidence that any opinion of Sadid was affected by the email. Therefore, the Court finds that even though the e-mail's language is derogatory, the term "nut case" is not defamatory because Sadid's reputation was not affected. Lineberry is entitled to his opinion.

Defendants are entitled to summary judgment on Count Three.

CONCLUSION

Defendants are entitled to summary judgment on each count in the Amended Complaint. Both parties raised issues not addressed in this decision; however, those issues were not addressed because the above issues are dispositive. Defendants are hereby granted summary judgment in this matter. Defense counsel is instructed to submit

a proposed final judgment. Plaintiff's counsel will have three days to file any objection to the proposed judgment.

IT IS SO ORDERED.

DATED: December 18, 2009.

DAVID C. NYE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of December, 2009, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

Sam Johnson Johnson & Monteleone, LLP 405 S. Eighth Street, Suite 250 Boise, Idaho 83702	☐ U.S. Mail ☐ Overnight Delivery ☐ Hand Deliver ☒ Fax: 208-947-2424
John A. Bailey Racine, Olson, Nye, Budge & Bailey, Chtd. P.O. Box 1391 Pocatello, Idaho 83204	☐ U.S. Mail ☐ Overnight Delivery ☐ Hand Deliver ☒ Fax: 232-6109

Deputy Clerk

Sam Johnson
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405 South Eighth Street, Suite 250
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sam@treasurevalleylawyers.com
Idaho State Bar No. 4777

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

ORIGINAL

HABIB SADID, an individual, Plaintiff, v. IDAHO STATE UNIVERSITY, ROBERT WHARTON, JAY KUNZE, MICHAEL JAY LINEBERRY, MANOOCHEHR ZOGHI, RICHARD JACOBSEN, GARY OLSON, AUTHUR VAILAS and JOHN/JANE DOES I through X, whose true identities are presently unknown, Defendants.	**Case No. CV 2008-3942OC** **FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL**

COMES NOW Plaintiff, Habib Sadid, by and through his attorney of record, Sam Johnson, of the law firm of Johnson & Monteleone, L.L.P., and for causes of action against the above-named Defendants complains and alleges as follows:

EXHIBIT C

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, Habib Sadid, Ph.D., PE, is now, and at all relevant times herein was a Tenured Faculty member and Full Professor with the College of Engineering at Idaho State University, located in the city of Pocatello, Idaho. Professor Sadid currently resides in Pocatello, Bannock County, Idaho.

2. Defendant Idaho State University (hereinafter "ISU"), is now, and at all relevant times herein was, a "body politic and corporate, with its own seal and having power to sue and be sued in its own name" (*See* Idaho Code § 33-3003) and is now and at all relevant times herein "was established in the city of Pocatello, Idaho, an institution of higher education to be designated and known as the Idaho State University, consisting of such colleges, schools or departments as may from time to time be authorized by the state board of education." *See* Idaho Code § 33-3001.

3. Defendant Robert Wharton, at relevant times herein, held the position of Provost and Vice President for Academic Affairs for ISU, and while in his official capacity acted under color of law, regulation, custom or policy in a manner which caused Plaintiff to suffer from the deprivation of rights, privileges, or immunities secured to Plaintiff by the United States Constitution and the Constitution of the State of Idaho, and is being sued in his individual and representative capacities.

4. Defendant Jay Kunze, at relevant times herein, held the position of Dean for the College of Engineering for ISU, and while in his official capacity acted under color of law, regulation, custom or policy in a manner which caused Plaintiff to suffer from the deprivation of rights, privileges, or immunities secured to Plaintiff by the United States

Constitution and the Constitution of the State of Idaho, and is being sued in his individual and representative capacities.

5. Defendant Michael Lineberry, is now, and at all relevant times herein was acting pursuant to custom and policy derived from the official capacity delegated to him by ISU, and is being sued in both his individual and representative capacities.

6. Defendant Manoochehr Zoghi, at relevant times herein, has held and does currently hold the position of Chair of Department of Civil and Environmental Engineering for ISU, and while in his official capacity acted under color of law, regulation, custom or policy in a manner which caused Plaintiff to suffer from the deprivation of rights, privileges, or immunities secured to Plaintiff by the United States Constitution and the Constitution of the State of Idaho, and is being sued in his individual and representative capacities.

7. Defendant Richard Jacobsen, at relevant times herein, has held and does currently hold the position of Dean for the College of Engineering for ISU, and while in his official capacity acted under color of law, regulation, custom or policy in a manner which caused Plaintiff to suffer from the deprivation of rights, privileges, or immunities secured to Plaintiff by the United States Constitution and the Constitution of the State of Idaho, and is being sued in his individual and representative capacities.

8. Defendant Gary Olson, at relevant times herein, has held and does currently hold the position of Provost and Vice President for Academic Affairs for ISU, and while in his official capacity acted under color of law, regulation, custom or policy in a manner which caused Plaintiff to suffer from the deprivation of rights, privileges, or immunities secured

to Plaintiff by the United States Constitution and the Constitution of the State of Idaho, and is being sued in his individual and representative capacities.

9. Defendant Arthur Vailas, at relevant times herein, has held and does currently hold the position of President for ISU, and while in his official capacity acted under color of law, regulation, custom or policy in a manner which caused Plaintiff to suffer from the deprivation of rights, privileges, or immunities secured to Plaintiff by the United States Constitution and the Constitution of the State of Idaho, and is being sued in his individual and representative capacities.

10. John/Jane Does I through X, Defendants ("the Doe Defendants"), are individuals or entities, political, corporate, or otherwise, whose true identities are unknown at the present time, but who engaged in the activities and conduct set forth herein. Alternatively, John/Jane Does I through X are entities or individuals who are now, or at the material and operative times were, the agents, employees, independent contractors, subdivisions, franchisees, wholly-owned subsidiaries, or divisions of Defendants herein, or are entities or individuals acting on behalf of, or in concert with, the individual Defendant(s) named herein.

11. The amount in controversy is greater than the sum of $10,000.00, and this claim therefore exceeds the jurisdictional limits of the magistrate's division and thereby satisfies the monetary prerequisites of the district court.

FACTUAL ALLEGATIONS

12. Professor Sadid has been a Tenured Faculty member and Associate Professor in the Department of Civil Engineering at ISU since 1994, and has been a Full Professor at

ISU since 1999; and, as such, Professor Sadid enjoys a property interest in his employment with ISU.

13. In his capacity as a Faculty Member and Full Professor of ISU, Professor Sadid has, from time to time, openly and publicly expressed his views embracing matters of public concern relating to ISU, and its standing in the academic and local community; these expressions constitute "protected speech".

14. In 2001, for instance, Professor Sadid published a letter to his fellow faculty members and ISU administrators criticizing ISU's decision to merge the College of Technology with the College of Engineering. ISU ultimately withdrew the merger plan by secretly tabling the issue for the time being.

15. In 2003, Professor Sadid spoke publicly against ISU's renewed plan, designed in secret, to again merge the College of Engineering with the College of Technology. (A true and correct copy of the newspaper publication is appended hereto as Exhibit "A" and by this reference hereby incorporated herein). Professor Sadid has spoken openly and publicly on other matters and on other occasions relating to ISU and of importance to the academic and local community, some of such publications were likewise published in the newspaper (*see Exhibit "A"*), while others were published internally at ISU.

16. Starting in 2001 and for the next five (5) years thereafter, ISU acting through the then-Dean of Engineering, Defendant Jay Kunze, failed or refused to conduct annual performance evaluations of Professor Sadid's work and these retaliatory practices caused Professor Sadid to suffer economic losses due to a lack of otherwise normal and customary salary increases and growth and advancement opportunities.

17. Thereafter, in August 2006, the ISU faculty by unanimous vote selected Professor Sadid as the Chair of the Department of Civil Engineering which selection was approved and ratified by the new Dean of Engineering, Defendant Jacobsen. Nonetheless, ISU acting through its Provost, Defendant Wharton, overrode the selection of Professor Sadid and instead demanded a national search be conducted by a committee chaired by two non-engineering faculty, who were hand selected by Provost Defendant Wharton. These retaliatory measures culminated in Defendant ISU's selection and appointment of an associate professor from Dayton, Ohio, to Chair of the Department of Engineering, effective July 2007. The new appointee was clearly not as qualified as Professor Sadid.

18. Defendants would not have decided to hire the associate professor from Ohio instead of Professor Sadid, unless motivated to retaliate against Professor Sadid for his use of protected speech.

19. Defendants have likewise retaliated against Professor Sadid by increasing his salary at the lowest of percentages in spite of him performing at the highest levels of academic excellence.

20. On or about August 1, 2008, ISU once again retaliated against Professor Sadid. This retaliation took the form of an e-mail published by ISU administrator, Defendant Lineberry, where Defendant Lineberry accused Professor Sadid of throwing a "tirade" and referred to him as a "nut-case" who "cannot help himself". (A true and correct copy of the above referenced e-mail is appended hereto as Exhibit "B" and by this reference hereby incorporated herein).

21. On September 29, 2008, Professor Sadid petitioned the courts for redress of his grievances and asserted his right to trial by jury by initiating this lawsuit.

22. Since filing suit on September 29, 2008, the Defendants have continued to retaliate against Professor Sadid not only for exercising his rights to freedom of speech, but have likewise retaliated against Professor Sadid for petitioning the court for redress of grievances and for asserting his right to trial by jury.

23. On or about, April 6, 2009, for example, Defendant Chair Zoghi sent a letter to Professor Sadid falsely accusing him of, *inter alia*, confronting an administrative assistant in an "accusatory" manner in an effort to tarnish the exemplary record Professor Sadid has created for himself at ISU. (A true and correct copy of the above referenced letter is appended hereto as Exhibit "C" and by this reference hereby incorporated herein).

24. Thereafter, on or about May 6, 2009, Defendant Dean Jacobsen placed Professor Sadid on notice of his intent to have Professor Sadid dismissed from ISU based upon outlandish accusations not supported by real facts. (A true and correct copy of the above referenced notice is appended hereto as Exhibit "D" and by this reference hereby incorporated herein). The outlandish nature of Defendant Dean Jacobsen's accusations are demonstrated most positively by the contrasting performance evaluations signed by Defendant Dean Jacobsen and Defendant Chair Zoghi, praising Professor Sadid for his laudatory efforts as an outstanding and leading professor at ISU. (A true and correct copy of the above referenced performance evaluations are appended hereto as Exhibit "E" and by this reference hereby incorporated herein).

25. Thereafter, on or about July 2, 2009, Defendant Provost Olson issued Professor Sadid a "formal letter of reprimand" over alleged "transgressions of ISU's purchasing policies." The alleged transgressions claimed by Defendant Provost Olson, even if true,

simply did not warrant the level of disciplinary action taken against Professor Sadid. (A true and correct copy of the above referenced reprimand is appended hereto as Exhibit "F" and by this reference hereby incorporated herein).

26. Next, on August 4, 2009, Defendant President Vailas, notified Professor Sadid of Defendant Dean Jacobsen's recommendation that Professor Sadid's employment with ISU be terminated for "adequate cause" and Defendant Professor Vailas has now restricted Professor Sadid's access to the ISU campus and has placed him on administrative leave. (A true and correct copy of the above referenced notification is appended hereto as Exhibit "G" and by this reference hereby incorporated herein).

27. Defendants, through their concerted actions, systematically, and by design, pattern, and practice have continually retaliated against Professor Sadid for speaking openly on matters of public concern and by doing so have impaired and violated Professor Sadid's rights to freedom of speech guaranteed under the First Amendment to the United States Constitution, and Article 1, Sections 9 and 10 of the Constitution of the state of Idaho. The incidents of retaliation have continued to the present day.

28. Defendants have now placed Professor Sadid's employment based property interest in jeopardy without due process by alleging arbitrary, capricious and pretextual grounds for termination in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 13 of the Constitution of the State of Idaho.

29. The above-referenced retaliatory actions likewise stand in direct violation of Professor Sadid's tenured contract of employment with ISU and the laws of the state of Idaho, the Rules and Governing Policies and Procedures of the State Board of Education,

and all policies and procedures of ISU and any of its departments or offices expressly incorporated therein.

30. As a direct and proximate result of the breach of the employment contract and the violations of Professor Sadid's constitutional rights, Professor Sadid has suffered direct and consequential losses and damages in amounts to be determined at trial. The losses and damages comprise both economic and non-economic harms, including impairment of reputation, personal humiliation, and injury to his mental and physical health and well being. The losses and damages are prospective in nature and will likely continue for the foreseeable future.

31. Defendants would not have retaliated against Professor Sadid but for the fact Professor Sadid chose to exercise his right to engage in protected speech.

32. A written Notice of Tort Claim has been filed in compliance with the Idaho Tort Claims Act, with the Secretary of State for the State of Idaho pursuant to Idaho Code § 6-905, and § 6-907.

33. As a direct and proximate result of the acts and omissions of Defendants, Professor Sadid has been required to retain the services of Johnson & Monteleone, L.L.P., in connection with the prosecution of this action and requests an award of attorney fees and costs incurred in the prosecution and maintenance of the instant action.

COUNT ONE – DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER COLOR OF LAW

34. Plaintiff incorporates herein by reference all of the foregoing and following allegations of the Complaint.

35. By retaliating against Professor Sadid in the manner and under the circumstances heretofore set forth in this Complaint, Defendants have impaired and violated Professor

Sadid's rights to freedom of speech guaranteed under the First Amendment to the United States Constitution, and Article 1, Sections 9 and 10 of the Constitution of the State of Idaho and his property rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 13 of the Constitution of the State of Idaho. These violations entitle Professor Sadid to relief under Title 42, Section 1983 of the United States Code, and under the Idaho Constitutional provisions cited above.

36. As a direct and proximate result of the violations of Professor Sadid's constitutional rights, Professor Sadid has suffered direct and consequential losses and damages in amounts to be determined at trial.

COUNT TWO – BREACH OF EMPLOYMENT CONTRACT AND THE COVENANT OF GOOD FAITH AND FAIR DEALING IMPLIED THEREIN

37. Plaintiff incorporates herein by reference all of the foregoing and following allegations of the Complaint.

38. A valid and binding contract of employment was formed and entered into by and between Plaintiff and Defendant ISU.

39. Defendant ISU materially breached the contract of employment and the covenant of good faith and fair dealing implied therein.

40. As a direct and proximate result of the breach of the employment contract and the covenant of good faith and fair dealing implied therein, Plaintiff has suffered direct and consequential losses and damages in amounts to be determined at trial.

COUNT THREE – DEFAMATION OF CHARACTER

41. Plaintiff incorporates herein by reference all of the foregoing and following allegations of the Complaint.

42. Defendants ISU's and Lineberry's retaliatory and slanderous affronts perpetrated against and published of and concerning Professor Sadid, with actual malice, have defamed his character and good standing in the community.

43. As a result of these libelous and defaming statements, Professor Sadid's reputation in the community, and his professional, financial, and dignitary interests have been harmed.

44. Professor Sadid is therefore entitled to recover damages in amounts to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment against Defendants as follows:

1. For Plaintiff's special and general damages in amounts which may be proven at trial;

2. For injunctive relief directing the instatement of Plaintiff to the position of Chair of the College of Civil Engineering or to such higher position as this Court deems just and equitable in the premises;

3. For Plaintiff's reasonable costs and attorney fees incurred herein; and

4. For such other and further relief as this Court deems just and equitable in the premises.

DATED: This 13 day of October, 2009.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

Pursuant to I.R.C.P. 38(b), Plaintiff hereby demands a trial by jury on any and all issues properly triable by jury in this action.

DATED: This 13 day of October, 2009.

JOHNSON & MONTELEONE, L.L.P.

Sam Johnson
Attorneys for Plaintiff

IN THE SUPREME COURT OF THE STATE OF IDAHO

HABIB SADID, an individual, Plaintiff/ Appellant/ Cross Respondent, vs. IDAHO STATE UNIVERSITY, ROBERT WHARTON, JACK KUNZE, MICHAEL JAY LINEBERRY, MANOOCHEHR ZOGHI, RICHARD JACOBSEN, GARY OLSON, ARTHUR VAILAS and JOHN/JANE DOES I through X, whose true identities are presently unknown, Defendants/ Respondents/ Cross Appellants.	Supreme Court No. 37563-2010

REPORTER'S TRANSCRIPT ON APPEAL

Appeal from the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock, HONORABLE DAVID C. NYE District Judge, Presiding.

APPEARANCES:

For the Plaintiff/Appellant/ Cross Respondent:	RONALDO A. COULTER ROBERT G. TEFFETELLER Camacho, Mendoza, Coulter Law Group, PLLC 776 E. Riverside Drive, Suite 200 Eagle, Idaho 83616
For the Defendants/Respondents/ Cross Appellants:	JOHN A. BAILEY, JR. Racine, Olson, Nye, Budge & Bailey, Chartered P.O. Box 1391 Pocatello, Idaho 83204

EXHIBIT D

I N D E X

and the context of the speech here, Dr. Sadid was clearly speaking as a private citizen. As we have pointed out before, it's not a part of his official duties to criticize ISU and the local newspaper. And despite the arguments to the contrary, there is just no way around that conclusion. That isn't a part of his official capacity. He doesn't get paid to do that, which was another item that the judge looked at in the Hong opinion. Those are outside the scope of his duties.

And when the Court rendered its decision on summary judgment, the Court indicated and found that whether the job description requires Dr. Sadid to write articles is not the determining fact. But, your Honor, we submit that it is. Garcetti itself says that it is. Garcetti talks about whether or not the speech is protected hinging on whether or not the speech was uttered in the scope of one's official duties.

The United States Supreme Court stated in Garcetti the controlling factor in Ceballos' case -- again, Ceballos was the deputy prosecuting attorney subjected to discipline -- and says a controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendered deputy. That was the controlling factor, your Honor. It's not a

controlling factor to look to see whether or not the newspaper or someone identifies Dr. Sadid as a member of the faculty at ISU.

What separates a public employee from someone acting in their capacity as a private citizen is the determination of whether or not when the speech was uttered it was done pursuant to official duties. And, your Honor, it quite clearly was not. Quite clearly it was not.

And so, your Honor, with respect to this issue on the First Amendment and the protected status of Dr. Sadid's speech, we would ask the Court to reconsider in light of the Pickering/Connick test. The most recent case that has followed those principles in Idaho is the Karr case that I cited to a few moments ago.

Your Honor, we believe that in our particular case, as a matter of law, that no matter really what test you apply, you end up with the same result because it seems to be that the distinguishing factor between the Pickering/Connick and then the Garcetti and Eng is this element of whether or not someone was acting in their official duties when they gave the speech or issued a speech.

And we think that whether or not the Court wants to apply on reconsideration the Pickering/Connick test or

the Garcetti/Eng type of test to the speech in question, that the result would have to be the same and that Dr. Sadid's speech is protected and should be protected, your Honor.

Again, we are speaking on matters of public concern. We're talking about a tenured professor who has been with the institution at ISU for over 22 years, your Honor. If people in his position can't speak publicly on matters such as those that are found in those articles, who will be able to do it? No one other than a professor that's been there with that duration and that length of tenure is in a position to make that kind of speech, your Honor.

So we believe that it's particularly critical for this Court to declare that Dr. Sadid spoke on matters of public concern and, therefore, was protected from discipline for doing it. And again, your Honor, we believe that either test gets you there. But nonetheless, we believe the proper test is the pre-Garcetti framework.

And, your Honor, with respect to the First Amendment, the only other item that I wish to fall back on at the moment is this notion about the importance of that public speech. If, again, a professor such as Habib Sadid cannot speak on those matters and hope to

have protection under the First Amendment, I think it creates a really troubling scenario for information to be passed to our public so it can be informed on the matters such as what's going on at a public institution of higher learning.

And so we do believe that this is an important case, your Honor. And we do believe that our position is strong in this particular case with respect to the First Amendment. But, your Honor, we also believe that we have a valid claim for breach of contract.

THE COURT: Before you move on to that --

MR. JOHNSON: Yes.

THE COURT: What I hear you telling me basically is -- if I pare it all down on that first issue -- is that I should not apply Garcetti to the facts of this case because that case was not intended to extend to the academic world. If that's true, isn't that a decision better left to the appellate courts if we're going to carve out an exception there?

MR. JOHNSON: Well, perhaps, your Honor. But I believe the way that we would ask the Court to review that and analyze that is at least give us a ruling on it. Let us know where this Court stands on that particular issue.

THE COURT: So you have something to appeal.

MR. JOHNSON: So that we do have something, if we need to go there.
THE COURT: Okay.
MR. JOHNSON: But better yet, your Honor, we believe that in the Garcetti case, the United States Supreme Court expressly stated that as of this date, we don't feel we have the need and, therefore, we don't address whether or not this analysis would carry over to a case relating to scholarship and education.
THE COURT: And I understand that. Had they said -- if they were clear enough to say that this case does not extend to the academic situation, then we've got the exception. I'm not sure that I read their language as being clear enough for me as a district judge.
MR. JOHNSON: And I see that as a fair point. Certainly, your Honor. But I would say is that what the United States Supreme Court is doing, we believe, is saying that in cases involving speech, academia, scholarship and teaching, we've got this other framework that has already been established and has been in play. And until the United States Supreme Court expressly extends the Garcetti test to this setting, then the previous analysis, by simple logic, must apply.
THE COURT: Okay. I understand your position.
MR. JOHNSON: And so our final position on the

Garcetti matter, your Honor -- and I'll move on, but I just want to make this one last point.
THE COURT: Go ahead.
MR. JOHNSON: Is that Garcetti certainly doesn't expressly provide that the previous analytical framework doesn't apply to the academic setting.
And so we've got a scenario where logic works its way down and the ultimate conclusion is that we've got to look at the pre-Garcetti analysis for speech in this setting, your Honor.
So that would be our position on it. And I thank your Honor for inquiring on that particular question, and I hope that I've addressed it to the Court's satisfaction.
Your Honor, on the breach of contract, again, we're asking the Court to reconsider a certain aspect of the breach of the contract and that's whether Professor Sadid has shown a breach. And, your Honor, the way we read that Faculty Handbook, we just can't see how any other conclusion can be rendered in this particular case.
That handbook plainly and clearly spells out that ISU has a duty to conduct an annual evaluation of each professor. It says "must." The handbook expressly uses the word "must," which has always been deemed as

mandatory language in the legal setting, your Honor.
And so that mandatory language says that all faculty members must be evaluated annually. And, your Honor, there is no provision in that handbook that says, "Well, by this we really just mean that it's the nontenured faculty members."
And so our point on that particular item, your Honor, is that we've got expressed, plain, unambiguous language that requires ISU to conduct a performance evaluation of each faculty member on an annual basis. And if you apply that handbook language to the facts, clearly ISU and the defendants here didn't fulfill that obligation to Dr. Sadid.
As the Court acknowledged in its decision on summary judgment -- and I'm looking at your decision, your Honor, on page 16 of 25 -- the Court -- this Court says, "The Court recognizes that Defendant Kunze acknowledged that he had a responsibility to conduct faculty evaluations and that he did not complete the performance evaluation process with Sadid on an annual basis."
And that testimony is from ISU directly on point certainly creates a genuine issue of material fact on whether or not ISU breached its contractual obligation with Dr. Sadid. In fact, I think it's fair to argue that we ought to enter a judgment finding that ISU, as a

matter of law, did breach the contract.
THE COURT: Well, I don't follow that, Counselor, for the simple reason that Kunze is giving his interpretation of the contract. But that's my job to interpret the contract, not his. And if the contract is clear and unambiguous, I have to interpret it. And if he's wrong on that interpretation, that doesn't allow you a judgment in his favor -- against him.
MR. JOHNSON: Well, that may all be true, your Honor. And I will grant that to the Court that if this Court declares that the language is clear and unambiguous, then it's a matter for this Court to decide what of law and not of fact. But if we look strictly at the language and look at nothing else, your Honor --
THE COURT: Tell me how you distinguish the paragraph that's quoted from the contract higher up on page 16. How come that doesn't apply to this situation?
MR. JOHNSON: Further up on page 16, your Honor?
THE COURT: On page 16 of my decision where there is the block quote coming straight out of the handbook.
MR. JOHNSON: Oh, on the periodic --
THE COURT: The five years.
MR. JOHNSON: -- performance evaluation?
THE COURT: Are you saying that that's different from the annual review?

Academic Freedom, Constitutional Free Speech, and Faculty Governance

By Nick Gier, President, Higher Education Council
Idaho Federation of Teachers, AFT/AFL-CIO

For more details on the Sadid case go to www.idaho-aft.org/Sadid.htm

The AAUP strongly supports the right of faculty to exercise an independent voice in shared governance, without fear of discipline or punishment by the institution.

--Gary Rhoades, General Secretary
American Association of University Professors

In 1889 the founders of the State of Idaho gave the "immediate government of the University of Idaho to the faculty." This faculty prerogative was not formally recognized until 1968, when the Faculty Senate was established for "shared governance" between the faculty and the administration.

Because meaningful faculty governance came so late in the life of the nation's universities, the principle of academic freedom has not been formally extended to the right to speak freely in all venues of university governance. Recently, cases of administrators accusing their faculty of insubordination and unprofessional conduct and actually dismissing professors for these reasons have increased. This obviously has caused alarm among the nation's professors.

In 2006 Supreme Court voted 5-4 in *Garcetti v. Ceballos* that public employers can limit their employee's constitutional right to free speech in the performance of their official duties. Richard Ceballos was a deputy district attorney in Los Angeles who claimed that he was demoted (to "DA Siberia" so it seems) because of a dispute with his supervisor Gil Garcetti. Ceballos filed a grievance, but an appeal board ruled that Ceballos had failed to prove retaliation.

Lower court judges have cited *Garcetti* in higher education cases, but they seem to have ignored Justice Anthony Kennedy's exception. Writing for the majority, he stated that the decision would not "apply in the same manner to a case involving speech related" to university professors.

The four justices who dissented in *Garcetti v. Ceballos* were very concerned about removing a large segment of the population from constitutional speech protection. Justice John Paul Stevens cited a case in which an English teacher's right to criticize her school district's policies as racist was upheld.

Why should teachers lose their free speech rights just because they are public employees, especially teachers whose job is to prepare students for life in a democratic

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E

society? The motto for my union, the American Federation of Teachers, is "Democracy in Education--Education for Democracy."

When he proposed that faculty may be exempt from *Garcetti*, Justice Kennedy mentioned only teaching and research, not faculty governance. As far as I know, the principle of shared governance is practiced only on college and universities campuses, and this makes them significantly different from a district attorney's office or any other public employee workplace.

In a recent column in the *Chronicle of Higher Education* (12/9/09), Gary Olson, Provost at Idaho State University, also limits academic freedom to teaching and research. As he states: "A college or university has no comparable incentive to protect extra-disciplinary speech because such discourse is peripheral to the normal workings of the campus."

I'm truly amazed that Olson has somehow forgotten about faculty governance, especially since his faculty has been so aggressive in claiming its prerogatives in this area. In 2005 the ISU faculty held a no-confidence vote on then President Richard Bowen and he was forced to leave the university. In April of 2010, 68 percent of those ISU faculty voting declared that they had no confidence Provost Olson.

When professors raise issues in faculty senates and general faculty meetings, they are rarely speaking from their disciplines; rather, they are talking generally about the institution's mission, curriculum, or budget allocations. Faculty committees vote on tenure and promotion across the disciplines, and faculty have a major say in these essential decisions. Faculty appeal boards also consider faculty grievances and sometimes (not often enough from my experience) rule against the administration.

In a strong response to the misuse of *Garcetti* in faculty cases, the American Association of University Professors maintains that the "critical distinction between a faculty member and an employee of a corporation [is that] the faculty member is acting not as a spokesperson for the institution--and so subject to control *for* the views expressed--but as a citizen *of* the institution."

A federal judge recently rejected a suit by a UC Irvine professor who claimed that he was denied a merit raise because he had criticized his department for hiring too many part-time faculty. Using *Garcetti,* the judge ruled that the professor was speaking as a public employee and therefore not protected by the First Amendment.

Conscientious faculty members are now in an incredible bind: just when they need free speech protection, *Garcetti* takes it away. In his dissent in *Garcetti* Justice David Souter wrote: "I have to hope that today's majority does not mean to imperil the First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'"

Last October ISU President Arthur Vailas dismissed tenured engineering professor Habib Sadid for a long history of criticizing (sometimes harshly) ISU administrators. An award winning teacher, public servant, and active researcher, Sadid had received excellent annual evaluations up until 2008.

The dismissal was triggered by an April, 2009 faculty meeting in which the dean reminded those present that they should not afraid of expressing their opinions. Listening to a tape of the meeting, a reasonable person could conclude that Sadid was far from the most disruptive participant.

Sadid appealed his dismissal and an appeal board voted 4-1 in his favor. The majority concluded that ISU administrators had denied Sadid due process and had failed to prove its case. The Faculty Senate asked Vailas to reverse his decision by a vote of 19-5, but Vailas declined to do so.

In 2007 Sadid filed a suit charging that ISU had retaliated against him because he had spoken out against administrative decisions. Last December District Judge David Nye ruled against Sadid, arguing that he had not provided sufficient evidence for retaliation.

Nye also cited *Garcetti* to bolster his defense of the ISU's actions. As Nye wrote: "Sadid should understand that he has limitations of his speech that he accepted when becoming a state employee," and that he "does not have a valid First Amendment claim." Justice Kennedy, however, says that Sadid may indeed have such a claim.

The charges against Sadid involve very serious accusations of libel, harassment, and threatening physical harm. Two security agents escorted him off the campus and he has not been permitted to return. The faculty appeal board wrote that the lack of documentation for these charges was "disturbing."

Many at ISU and the larger community are asking the following questions: Why wasn't proper legal action taken at the time of these alleged infractions? Why didn't Sadid's department chair mention them in his annual evaluations? Why wasn't Sadid given a chance to defend himself? If these charges are as serious as the administrators hype them, then they were negligent in not calling the police.

Sadid's attorney has appealed Judge Nye's decision and they are preparing a suit challenging his dismissal. My faculty union has given Sadid [redacted] for the obvious reason that if his termination stands, then the free speech rights of all America's professors are threatened.

Last June the University of Minnesota Board of Regents issued a revised statement on academic freedom, that includes "to speak or write without institutional discipline or restraint on matters . . . related to professional duties and the functioning of the university."

Within the month I will be requesting that Idaho faculty senates adopt similar language to make sure that academic freedom includes faculty governance as well as teaching and research. Idaho's faculty deserve nothing less than full free speech rights in all areas.

(As adopted by the Faculty Senate at its meeting on 12 April 2010)

RECOMMENDATION TO AMEND *FACULTY POLICIES AND PROCEDURES* 8.01.

Sponsored by Donald Downs (District 68), Lester Hunt (District 66), Bruce Jones (District 1), Barry Orton (District 115), Jean-Pierre Rosay (District 63), Eric Schatzberg (District 82), Howard Schweber (District 68), John Sharpless (District 60), Bruce Thomadsen (District 88), Stephen Vaughn (District 61), and the University Committee

The Basic Issue

We ask that the Faculty Senate consider an important issue regarding academic freedom that has arisen in the wake of a 2006 U.S. Supreme Court decision, *Garcetti v. Ceballos*. The issue has gained national attention, and many academic freedom organizations have called for appropriate remedial action. The issue pertains to the right of faculty members to criticize or question policies and actions undertaken by their respective institutions. Our intention is to amend *Faculty Policies and Procedures* in order to address this problem.

Background

In 2006, the U.S. Supreme Court rendered an opinion that poses a threat to the academic freedom of faculty members who make statements that challenge institutional authority and/or positions. In *Garcetti v. Ceballos*, the court held that an assistant district attorney could be punished by his office for complaining in a memorandum that the office had been submitting too many affidavits for warrants that were unsupported by probable cause.

Even though Ceballos' comments raised important questions about an important public office, the court concluded that he was not speaking as a private citizen, but rather was speaking pursuant to his official duties as an employee. Consequently, his speech did not merit First Amendment protection. In order for employee speech to be protected by the First Amendment, the person must be speaking as a "private citizen" about a "matter of public interest." Ceballos fell short because he was speaking pursuant to his official duties.

Garcetti v. Ceballos narrowed the First Amendment protection of public employees who make statements critical of their employers. The issue is not that Ceballos and similarly situated individuals should always prevail in their First Amendment claims, but rather that the court ruled that the First Amendment provides no protection whatsoever when it comes to speech made as part of one's official duties. In the past, the court applied a First Amendment balancing test to public employee speech that addressed a "matter of public concern." *Garcetti v. Ceballos* withdraws this protection if an employee is speaking as part of his or her official duty–a term that is broadly defined for most faculty members.

In a dissent in *Garcetti v. Ceballos*, Justice Souter worried that the new doctrine could harm the academic freedom of faculty members, whose jobs often involve vigorous debate concerning university matters. Our campus has witnessed vigorous debates in recent decades over such matters as free speech, academic freedom, the Athletic Board, the Madison Plan, sexual orientation and the military, and the Graduate School. These and other issues have often led to the formation of policy, yet such policy has seldom ended the debate.

Judicial events since *Garcetti v. Ceballos* indicate that Justice Souter's concerns were well founded. In *Renken v. Gregory* (2008), an engineering professor was punished for internally criticizing how the University of Wisconsin-Milwaukee was handling a grant he had received from the NSF; and in *Hong v. Grant* (2007), a professor at the University of California at Irvine was denied a merit raise because he had criticized the engineering school's actions regarding hiring, promotions, and staff. And in *Gorum v. Sessoms* (2007), a professor was terminated after several public clashes with the president of Delaware State University. In each of these cases the courts refused to apply a First Amendment balancing test on the basis of the *Garcetti v. Ceballos* decision.

(continued)

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The impact of *Garcetti v. Ceballos* has garnered much commentary, including: reforms enacted by the Faculty Senate of the University of Minnesota; an article by Peter Schmidt in the *Chronicle of Higher Education* ("Balancing of Power: Professors' Freedoms Under Assault in the Courts," 27 February 2009: http://chronicle.com/free/v55/i25/25a00103.htm); and extensive coverage by the AAUP (see the AAUP's website: http://www.aaup.org/AAUP/protectvoice/Legal/ "Legal Cases Affecting Free Speech."

Conclusion

State law (Wisconsin Administrative Code UWS 4.01(2)) says that faculty members enjoy "all the rights and privileges of a United States citizen, and the rights and privileges of academic freedom as they are generally understood in the academic community. This policy shall be observed in determining whether or not just cause for dismissal exists. The burden of proof of the existence of just cause for a dismissal is on the administration."

Faculty must be free "to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties and the functioning of the university" (AAUP 1994 statement "On the Relationship of Faculty Governance to Academic Freedom"). The proposed amendment to *Faculty Policies and Procedures* 8.01. would provide principled protection for faculty engaged in speech pursuant to their official duties. It would also provide a concrete definition of academic freedom that has been missing from *FPP* while also providing the university with appropriate power to punish true insubordination.

8.01. FACULTY RIGHTS.

A. Members of the faculty individually enjoy and exercise all rights secured to them by the Constitutions of the United States and the State of Wisconsin, and by the principles of academic freedom as they are generally understood in higher education, including professional behavior standards and the expectation of academic due process and just cause, as well as rights specifically granted to them by: regent action, University of Wisconsin System rules, these policies and procedures, and relevant practices or established custom of their colleges or schools and departments.

B. Academic freedom is the freedom to discuss and present scholarly opinions and conclusions regarding all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to reach conclusions according to one's scholarly discernment. It also includes the right to speak or write—as a private citizen or within the context of one's activities as an employee of the university—without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties, the functioning of the university, and university positions and policies.

   Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that when one is speaking on matters of public interest or concern, one is speaking on behalf of oneself, not the institution.

C. In any consideration of matters of tenure and academic freedom, the following statement of policy is relevant. It was enunciated at the time of the previous codification of the Laws and Regulations of the University of Wisconsin by the Regents of the University of Wisconsin on January 10, 1964. "In adopting this codification of the rules and regulations of the University of Wisconsin relating to tenure, the Regents reaffirm their historic commitment to security of professorial tenure and to the academic

(continued)

freedom it is designed to protect. These rules and regulations are promulgated in the conviction that in serving a free society the scholar must himself be free. Only thus can he seek the truth, develop wisdom and contribute to society those expressions of the intellect that ennoble mankind. The security of the scholar protects him not only against those who would enslave the mind but also against anxieties which divert him from his role as scholar and teacher. The concept of intellectual freedom is based upon confidence in man's capacity for growth in comprehending the universe and on faith in unshackled intelligence. The university is not partisan to any party or ideology, but it is devoted to the discovery of truth and to understanding the world in which we live. The Regents take this opportunity to rededicate themselves to maintaining in this university those conditions which are indispensable for the flowering of the human mind."

-fax-

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DATE: September 1, 2010

TO: Industrial Commission
Tracey K. Rolfsen
Ronaldo A. Coulter

FILED
SEP 01 2010
INDUSTRIAL COMMISSION

FROM: John A. Bailey, Jr.

RE: Sadid v. ISU and IDOL

18 Pages (including this one) are being transmitted. If you do not receive all of the pages, please contact our office immediately at the above telephone number. An original:

[ ] will NOT follow by mail.
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COMMENTS: Attached please find the following documents in the above-captioned matter:

1. Letter to the Industrial Commission; and
2. Employer's Brief on Reconsideration.

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- fax

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September 1, 2010

Via Fax: (208) 332-7558
and U.S. Mail

FILED
SEP 01 2010
INDUSTRIAL COMMISSION

IDAHO INDUSTRIAL COMMISSION
Attn: Unemployment Appeals
P. O. Box 83720
Boise, Idaho 83720-0041

Re: Sadid v. ISU and IDOL
IDOL Docket No: 1777-2010
Claimant: Habib Sadid
Employer: Idaho State University

Dear Clerk:

Enclosed please find **Employer's Brief on Reconsideration** for filing in the above-captioned matter.

Thank you for your assistance and if you have any questions, please give me a call.

Best regards,

for JOHN A. BAILEY, JR.

JAB:mc
Enclosure
c: Tracey K. Rolfsen (via fax and U.S. mail)
Ronaldo A. Coulter (via fax and U.S. mail)

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September 1, 2010

Via Fax: (208) 332-7558
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IDAHO INDUSTRIAL COMMISSION
Attn: Unemployment Appeals
P. O. Box 83720
Boise, Idaho 83720-0041

Re: *Sadid v. ISU and IDOL*
IDOL Docket No: *1777-2010*
Claimant: *Habib Sadid*
Employer: *Idaho State University*

Dear Clerk:

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Thank you for your assistance and if you have any questions, please give me a call.

Best regards,

/s/ JOHN A. BAILEY, JR.

JAB:mc
Enclosure
c: Tracey K. Rolfsen (via fax and U.S. mail)
Ronaldo A. Coulter (via fax and U.S. mail)

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Attorney for Employer Idaho State University

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	IDOL Docket No. 1777-2010 **EMPLOYER'S BRIEF ON RECONSIDERATION** FILED SEP 01 2010 INDUSTRIAL COMMISSION

COMES NOW the Employer, Idaho State University, by and through counsel of record, and submits the following brief on Reconsideration of the Commission's Order denying benefits to the Claimant, Dr. Habib Sadid, pursuant to the Commission's Order of August 5, 2010. The Commission ordered Claimant to submit a duplicate of Exhibit 10F, which is a recording of the April 21, 2009 faculty meeting of the College of Engineering, and held he could submit additional arguments based on the recording to demonstrate that his conduct at that meeting was not inappropriate. As discussed below, Employer submits that the recording demonstrates that

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, SSN: [redacted]	)	IDOL Docket No. 1777-2010
Claimant,	)	
vs.	)	**EMPLOYER'S BRIEF ON RECONSIDERATION**
IDAHO STATE UNIVERSITY,	)	
Employer,	)	
and	)	
IDAHO DEPARTMENT OF LABOR.	)	

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Claimant's conduct amounted to cause for dismissal, and urges the Commission to uphold its Decision and Order of March 24, 2010.

The Employer hereby objects to the Claimant's submissions dated August 26, 2010. The Commission's Order Granting Reconsideration stated that it would accept no additional evidence, and the Claimant has attached six additional exhibits in violation of this Order. The Claimant also raises new issues relating to First Amendment rights that are unrelated to the issues cited in his Motion for Reconsideration. Employer respectfully requests that the additional evidence and argument be disregarded. Also, Claimant's Brief is overlength, in violation of Industrial Commission Rule 5(C).

FACTS

Dr. Sadid was a tenured professor of engineering at Idaho State University. His employment was terminated for cause in November 2009 based on a recommendation by the Dean of Engineering and approved by the university president. The university followed proper procedures leading to the termination. The Dean of Engineering issued a notice of contemplated action to Dr. Sadid on May 6, 2009. (Ex. 5, p.22) The notice cited a specific prior instance of "unprofessional, non-collegial, disruptive and insubordinate" behavior; a prior warning against such behavior; specific warnings at the time of the behavior (the meeting recorded in Exhibit 10F); a long history of disruptive and defamatory behavior; and a similarly long history of refusing to comply with instructions and counseling from his superiors. The notice invited Dr. Sadid to meet with the Dean to discuss any reason, evidence or information in opposition or mitigation to the contemplated action. The requested meeting was held in July, 2009, but failed to reach any satisfactory conclusion.

While the decision on the Dean's recommendation was pending, Dr. Sadid continued to

engage in inappropriate behavior. In June 2009, in comments to College of Engineering staff members, he accused the Dean of lying under oath in proceedings related to a lawsuit filed by Dr. Sadid. He then distributed to the entire College of Engineering faculty cartoons on the subject. (Ex. 3, pp. 12-15) He also engaged in unauthorized purchases in violation of University procedures, which he had twice previously been warned against. (Ex. 6, pp. 15-25) His response to an additional warning was to have his lawyers accuse the University of "retaliation." (Ex. 6, p 17)

On August 4, 2009, the ISU President accepted the recommendation of the Dean and placed Dr. Sadid on administrative leave with pay. (Ex. 5,p. 2) Pursuant to University policy, Dr. Sadid was given a hearing in front of a panel of faculty members, which was authorized to give a nonbinding advisory opinion to the president. That hearing was held over several days in October. The panel advised against termination, not on the grounds that his behavior had been appropriate, but on the grounds that they felt he had not been given sufficient notice and opportunity to correct his inappropriate behavior. The president declined to accept the recommendation of the faculty panel, and terminated Dr. Sadid on November 8, 2009.

Dr. Sadid filed for unemployment benefits. The University submitted a response to his claim for benefits. (Ex. 7) By decision dated December 3, 2009, the Department of Labor determined that Dr. Sadid was ineligible for benefits. (Ex. 8) The Department held, on the basis of the documentation and written statement provided by ISU, that Dr. Sadid violated the University's policies and was terminated for good cause. Dr. Sadid requested an appeal hearing, not disputing the facts regarding his behavior, but, rather, asserting that the real reason he was fired was retaliation for his exercise of his right to freedom of speech. (Ex. 9, p.2)

Dr. Sadid had filed suit against ISU and some of his College of Engineering colleagues in September 2008 alleging discrimination and retaliation. On December 18, 2009, while Dr. Sadid's appeal hearing was pending, Sixth District Judge David Nye granted summary judgment in favor of Idaho State University and the other defendants. The court dismissed Dr. Sadid's claim that his rights to free speech were violated. The court found that the public comments for which Dr. Sadid claimed he suffered retaliation were not protected speech, but merely the kind of disruptive or insubordinate speech for which an employee may be punished or terminated.

Dr. Sadid claimed in his lawsuit against ISU that he was retaliated against for a series of public statements and newspaper articles in opposition to various plans of the previous administration. The Sixth District Court considered his factual allegations and held that, as a matter of law, the issues in question were not matters of public concern, but rather matters of internal administrative dispute. Judge Nye also found that Dr. Sadid had not spoken as a private citizen, but expressly as an employee of ISU. He ruled, consistent with U.S. Supreme Court precedent, that there is no First Amendment protection for University employees speaking on matters of purely internal interest. Finally, the court determined that there was no evidence that Dr. Sadid's speech, even if it were protected, was a motivating factor in the employment decision.

Accordingly, it has already been determined in a court of law that Dr. Sadid had no "right" to make the statements for which he claims he has suffered retaliation, and that it was not a cause for the adverse employment actions for which he filed suit.[1]

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[1]Dr. Sadid argues in his Brief on Exhibit 10F, at pp. 12-13, that Judge Nye's Decision dismissing his case did not address his termination. This is arguable at the very least. Dr. Sadid's Amended Complaint raised all the factual issues having to do with his termination, including the Dean's Notice of Contemplated Action based on Dr. Sadid's behavior at the April 21, 2009 meeting (Claimant's Exhibit C, ¶24); his reprimand for violation of purchasing procedures (¶25);

On December 22, 2009, the Department of Labor mailed out a notice of the appeals hearing scheduled for January 4. As Idaho State University was closed from December 23 until January 4, ISU did not receive notice of the hearing in time to participate.

At the hearing, consistent with his notice of appeal, Dr. Sadid did not challenge the facts which ISU contends were cause for his termination. He asserted that the letters of reprimand and other complaints about his behavior were simply an attempt by ISU to lay a paper trail to cover ISU's retaliation against him. (Recorded hearing at approximately 22:00) In responding to the allegations of disruptive and insubordinate behavior, Dr. Sadid generally acknowledged that it had occurred – he merely justified his behavior on various grounds, while continuing to assert that the *real* reason for his termination was retaliation for his protected speech. Essentially the only testimony directly addressing whether cause for termination existed came at the very end of his testimony, when the appeals examiner asked Dr. Sadid if he had done anything to warrant termination. Dr. Sadid answered, "no." (Recorded hearing at approximately 23:45)

The appeals examiner held in favor of Dr. Sadid on the grounds that all of the documents submitted by ISU were "hearsay," which could not support a factual finding, while Dr. Sadid's uncontroverted oral testimony, that he did not do anything to warrant termination, was sufficient to justify a finding in his favor.

ISU's Notification to Dr. Sadid of his termination for cause (¶26); retaliation (various paragraphs); and that the alleged cause for termination was a pretext to cover retaliation (¶27). Because his Amended Complaint was filed before the final decision to terminate him, he can perhaps argue that his claim for wrongful termination was not decided by Judge Nye's summary judgment ruling. But it is clear that he raised all the issues of retaliation and academic freedom that he is arguing before the Commission on this Motion for Reconsideration. And Judge Nye ruled firmly against him on these same issues. Whether he may have an additional claim for wrongful termination is not relevant to any issue before the Commission.

ISU's request for a rehearing was denied. ISU filed a claim for review before the Industrial Commission and requested an evidentiary hearing, which was denied. However, on review, the Commission admitted the documentary evidence that was excluded at the appeal hearing. (Decision and Order of March 24, 2010, p. 7)

The Commission found that ISU clearly expressed to Dr. Sadid its standards of behavior, which the Commission found were objectively reasonable. (Decision and Order of March 24, 2010, p. 9) The Commission then found that Dr. Sadid's admitted behavior at the April 21, 2009 faculty meeting violated ISU's standards of behavior, based on a transcript provided by Dr. Sadid. (Decision and Order of March 24, 2010, pp. 9-10). On review, the Commission held Dr. Sadid ineligble for benefits. (Decision and Order of March 24, 2010, p. 10)

Dr. Sadid contended in his Motion for Reconsideration that, in essence, it was beyond the competence of the Commission to judge ISU's "sincerity" in establishing its standards of behavior. (Claimant's Brief on Motion for Reconsideration, p. 4) Dr. Sadid further argued that it was improper for the Commission to consider the transcript of the April 21 hearing that he submitted, and should instead review the audio recording as a whole. He argued it would demonstrate that, in context, his statements did not transgress ISU's standards of behavior. The Commission agreed that it should consider the actual recording, if available, rather than a transcript, and has invited the parties to submit arguments based on the recording.

LAW AND ARGUMENT

The Commission previously held that the question in a claim for unemployment benefits is not whether the employer had "just cause" for terminating the claimant, but whether the reasons for discharge constitute "misconduct" connected with employment within the meaning of Idaho Code

§ 72-1366. That section of the Code expressly states that the personal eligibility requirement of a claimant is that his unemployment is not due to the fact that he was discharged for misconduct in connection with his employment. It does not matter whether the termination would violate University policies or breach the employment contract. If it was the result of the claimant's employment-related misconduct, the claimant is ineligible for benefits.

The Commission previously held that the Employer has the burden of showing by a preponderance of the evidence that the termination was for misconduct, citing *Idaho Department of Labor v. J.R. Simplot Co.,* 131 Idaho 318, 320, 955 P.2d 1097, 1099 (1998). Misconduct is defined as a "willful, intentional disregard of the employer's interest; a deliberate violation of the employer's rules; or a disregard of standards of behavior which the employer has a right to expect of its employees. *Gunter v. Magic Valley Regional Medical Center,* 143 Idaho 63, 137 P.3d 450 (2006). The Commission went on to find that ISU clearly communicated its expected standards of behavior to Dr. Sadid, and that those standards were objectively reasonable. (Decision and Order of March 24, 2010, pp. 7-9)

The Commission then considered the assorted allegations, contentions and slanders raised by Dr. Sadid in the April 21, 2009 meeting, and found that "[t]here is little doubt that these statements represent the type of conduct that Employer warned Claimant of in the April 6 and 15, 2009 letters." (Decision and Order of March 24, 2010, p. 10) The Commission found that he violated the clearly-expressed standards of the employer by raising them during a faculty meeting and not through proper channels.

The sole issue on reconsideration is whether the recordings show that ISU "invited" Dr. Sadid's comments in that forum. The recording indisputably show that ISU did not. Dr. Sadid, in his

Brief on Reconsideration, also argues that his speech is constitutionally protected even if in violation of reasonable standards of behavior. This issue, although not relevant to this tribunal's decision, will also be addressed below.

1. Dr. Sadid's Behavior at the April 21 Faculty Meeting. The College of Engineering faculty meeting of April 21, 2009 lasted more than two hours. The Dean had prepared an agenda of items for discussion, but the faculty also expected ISU's new Provost to address the faculty. The Provost was not present when the meeting started, so Dean Jacobsen moved to the next item on the agenda, which was to remind the department chairs and the faculty committee assigned to the task that the new College-wide faculty workload policy needed to be finished within two weeks.

At about the 3:15 mark of the recording, Dr. Sadid asked a question, ostensibly about the uses to which the workload policy would be put, but in reality a complaint about his previous evaluations. He asked the Dean specifically, "if the College did not have a policy, how did you evaluate faculty?" The Dean explained that the individual Departments had workload policies, and that Dr. Sadid, when he had been Chair of Civil Engineering, had used one. A discussion between Dr. Sadid and a current Chair followed for several minutes, and at about the 11:30 mark, Dean Jacobson intruded and took control.

The Dean explained the history of workload policies at ISU and the College of Engineering. At about the 13:00 mark, Dr. Jacobson suggests there is no need to ascribe blame for the shortcomings of workload policies in the past, but the College should instead work on producing a policy that has some uniformity while meeting the needs of the individual Departments. At about 14:00, Dr. Sadid asked a question about the policy under development, which the Dean answered. Dr. Sadid can then be heard, beginning at 14:17, reciting a litany of his accomplishments and asking

how his Department chair, in his latest evaluation, "arrived at this decision that I barely meet expectations?"

Dr. Sadid stated his disagreement with the evaluation, based on the supposed lack of metrics, and asserted that Dr. Jacobson, as Dean, was responsible for the Chair's evaluation. At 15:06, Dr. Jacobson cut him off. The conversation went on as follows:

> Dean: "**I am not going to review a single annual review in this meeting, a public setting –** "
>
> Sadid: "Well, I can't help that – "
>
> Dean: "**Nor, nor am I going to comment on what Dr. Zoghi's review of your performance for this year was about. Sorry. It's not a subject –**"
>
> Sadid: "(garbled) But how can you approve of Dr. Zoghi's decision, based on what metric?"
>
> Dean: "**It's not a subject for an open meeting, Habib.**"
>
> Sadid: "It is subject. When can we discuss it? You don't have any communication."
>
> Dean: "Well that's not true, of course –"
>
> Sadid: "Yes, it is very true. Ask how many people think we have communications with Dr. Jacobson? Two? That's good."

An argument then developed between faculty members until Dean Jaconson cut it off at 16:20,

> Dean: "There are always things we can do better, and I'd be the first to admit it. Beyond that, **I really don't think we should discuss a single review process here.** (Inaudible objection) Now the workload policy is a fair subject for discussion –"
>
> Sadid: "I'm asking you how you arrive at the conclusions –"
>
> Dean: "You know, **I think we should talk about the workload policy from the bottom up.** How –"
>
> Sadid: "(inaudible statement; the words, "exceeds expectations" can be heard)"
>
> Dean (cutting him off): "Sorry. Go ahead."

> Female faculty member: "I'm sorry, this is my first time attending a meeting, but that sounds like a one-on-one personal meeting, and I really don't want to go through these (inaudible) things ..."
>
> Dean: "**Yeah, this is just –**"
>
> Sadid: "This is everybody's problem. You guys are (inaudible) This is everyone's problem. You are afraid to raise your voice because of all the retaliations."

Discussion of the workload policy followed. At the 23:44 mark, Dr. Sadid *again* raised the issue of how past evaluations were performed, and the failures of the administration to develop a consistent workload policy over the previous three years. During this speech, the Provost, Dr. Olson, arrived.

As the Commission can see, Dr. Sadid refused to stick to the agenda and ignored specific instructions to keep to the agenda items and not to discuss matters relating to specific annual reviews, to the point that other faculty members had to express an opinion that the issue he was raising was not appropriate. Clearly, it represents precisely the kind of disruptive conduct that the Employer warned Dr. Sadid against in the April 6 and April 15 warning letters establishing the standards of behavior he was expected to follow.

But that was not all. About three minutes into the Provost's presentation, another faculty member made a comment critical of the Dean's duties regarding the Idaho Falls program. Dr. Sadid, unasked, cut off the Provost's response and spoke for nearly two minutes, concluding with,

> Sadid: "If the Administration doesn't communicate with the faculty, we go up the ladder, then faculty has no choice but to take issue public, so public can see what's going on on this campus. So we don't want to go there, but the Administration –"
>
> Provost: "Well, let me say two things about that. [Discussion of proposed town hall-type meetings]. So at least out of my office, you'll see a lot more communication. That doesn't mean necessarily we communicate about everything you might want. **Because sometimes personnel, well, more often than not personnel-type issue you can't bring up."**

The Provost made a direct statement to Dr. Sadid that personnel issues of the type he regularly sought to discuss in open meetings were not appropriate. He went on to discuss a review his office was making of the College that could result in the closing of departments or of the entire College, and requested faculty members make their views known.

Dr. Sadid then launched into another monologue about the 20-year history of corruption at the university, the President's failure to change things, and the administration's "lying with bold face." He brought up the workload policy again, and the Dean, saying, "the Dean of the college is the Dean of these administrators who don't do their jobs."

Again, this was precisely the kind of outburst of personal recrimination, unrelated to his academic duties, that Dr. Sadid had been warned against. It was not invited by either the Dean or the Provost, both of whom had specifically cautioned Dr. Sadid against raising such personnel issues in public meetings.

At the 1:00:30 mark of the recording, Dr. Sadid again questioned the Provost about fundraising. He asked in effect whether the Provost agreed that Deans should be involved in raising money, and the Provost agreed. Dr. Sadid then said, "I have been at the College of Engineering for 22 years. In the past 14 years there have been two Deans. They haven't raised any money. How can you [survive?] in this environment with Deans not raising funds?"

Again, this was the kind of inappropriate attack on the integrity of another faculty member that Dr. Sadid was expressly warned not to make in open meetings. He was also returning to the kind of backward-looking recriminations that were out of place in the meeting, and that neither the Dean not the Provost were seeking. The Dean had previously told Dr. Sadid the purpose of the meeting was not to ascribe blame for the bad policies of the past, but to look forward.

The Dean did not indicate his thanks for Dr. Sadid's comments. At 1:03:00 in the recording, after the Provost had left, the Dean said, "Let's go back to the agenda. One of the things I have to say is, this is the first time I've ever heard the Dean's performance discussed in a meeting with the Provost in a public setting. I don't know whether that's usual at Idaho State or not. That's a rather interesting phenomenon." Dr. Sadid responded with an accusation about the lack of communication between faculty and the administration.

Beginning at 1:11:30, Dr. Sadid made another series of allegations regarding past mismanagement of the College by the last two Deans.

At the 1:18:00 mark, at the end of a lengthy discussion about the bad effects on the College of the conflicts among faculty members, Dr, Jacobson suggested to Dr. Sadid that his complaints, specifically his allegations that everyone he disagreed with was "bad" in some way, were not helpful to the process of improving matters in the College. Dr. Sadid cut him off:

> Sadid: "I have documented from [former ISU President] Bowen all the way down, I have documented that these people are unethical, these people are just power-hungers, they are working for their own interests ... "

This continued for another two minutes. At the 1:20:17 mark, Dr. Jacobson again stated he would not discuss certain issues in that forum, and Dr. Sadid again persisted.

The comments that Dr. Sadid points out in his Brief on Reconsideration are not germane to the issues before the Commission. The Dean's general comment that he was not offended by anything said during the meeting is irrelevant. The Dean is not the Employer, and the standard of behavior expected of faculty members is not measured by whether a Dean is offended. In any event, specific comments, referenced above, by the Dean to Dr. Sadid advising him against raising issues at the meeting are more determinative of this issue than his general comments to the faculty as a whole.

Nor did the Provost ever indicate that he was "not offended" (Claimant's Brief on Exhibit 10F, p. 11) by Dr. Sadid's comments about the current administration's "lying with bold face."[sic] Rather, the Provost brushed off his complaints and moved on to other issues. The Provost had previously warned Dr. Sadid that personnel issues were not appropriate for open meetings.

Nor are statements made by other persons relevant before this tribunal. The question is not whether Dr. Sadid was critical of the Dean, the Administration or anyone else, but whether his behavior comported with the standards established in the warnings he received on April 9 and April 15. Dr. Sadid was specifically advised, as the Commission found, that "in the future, you are directed to follow proper protocol in expressing your concerns (first to the Chair of the Department of Civil and Environmental Engineering, the to the Dean of the College of Engineering, then to Idaho State University's upper administration)." (Exhibit 3, p. 28) Dr. Sadid was later advised, "You should not use such channels as campus-wide meetings, engineering facutly meetings, and widely-distributed email communications to make negative comments about the performance and/or character of current and former university staff and employees. ... Communications intended to expose another individual to public hatred, contempt, or ridicule, or to impeach his or her integrity or reputation are not appropriate. ... Continuing failure to follow these guidelines will be cause for disciplinary action." (Exhibit 4, p. 32)

Dr. Sadid repeatedly violated these standards of behavior in the April 21, 2009 faculty meeting. The recording makes that fact abundantly clear. His statements were not invited, as he claims, and the recording makes it clear he was repeatedly cautioned not to raise certain subjects. His comments clearly were not appreciated, either. As this, the sole issue on reconsideration, can be

answered in the negative, the Employer respectfully suggests that the Claimant's motion to reconsider should be denied, and the Commission should affirm its decision in this matter.

2. Academic Freedom. The second half of Dr. Sadid's brief attempts to argue that anything he might happen to say, at any time and in any forum, dealing with Idaho State University, falls under the banner of "academic freedom" and is therefore constitutionally privileged. As an initial matter, this argument is irrelevant to the question before the Commission. As the Commission previously held, the question in a claim for unemployment benefits is not whether the employer had "just cause" for terminating the claimant, but whether the reasons for discharge constitute "misconduct" connected with employment within the meaning of Idaho Code § 72-1366. (Decision and Order of March 24, 2010, p. 5) As the Commission noted, whether the employer had reasonable grounds for dismissing a claimant is irrelevant; the only issue is whether the true reasons for discharge constituted work-related misconduct.

Misconduct is defined as "(1) a willful, intentional disregard of the employer's interest; (2) a deliberate violation of the employer's rules; or (3) a disregard of standards of behavior which the employer has a right to expect of its employees." *Quinn v. J.R. Simplot Co.*, 131 Idaho 318, 321, 955 P.2d 1097, 1100 (1998). This Commission found that Dr. Sadid disregarded reasonable standards of behavior.

Dr. Sadid is now claiming a privilege to engage in the misconduct identified above, on the ground that "academic freedom" requires that he be permitted to disrupt meetings, slander colleagues and otherwise ignore standards of behavior applicable to others. However, as his own arguments make clear, no court has ever established such a privilege. Dr. Sadid relies primarily on *Kerr v. Hurd,* 2010 WL 890638 (S.D. Ohio 2010), but that decision *declined* to establish an academic freedom

exception to the employer's right to control employee conduct. Dr. Sadid cannot cite a single case in which a court has done so. It is not the place of the Industrial Commission to create such an exception where courts have refused.

Second, the academic concerns raised by Dr. Sadid are simply missing from this case. Nothing in the grounds for termination cited by the University has anything to do with scholarship or teaching. All of the comments discussed above were related to issues of internal management of an institution and its employees, not to academic issues. Dr. Sadid's position is clearly expressed (at page 19 of his Brief) that because ISU is a university and he is an "academic," he therefore gets to be disruptive and violate reasonable standards of behavior. This carries the concept of academic freedom far beyond the realm of "scholarship or teaching," which the U.S. Supreme Court noted as an area of concern in *Garcetti v. Ceballos,* 547 U.S. 410, 425, 126 S.Ct. 1951 (2006).

The offending comments identified above are not related to "scholarship or teaching," but merely have to do with Dr. Sadid's disagreements with the proper authorities over the management of his employer, Idaho State University. He offers no reasons why "academic freedom" should protect such comments. He can cite no legal precedent for his position except a resolution by the faculty senate of the University of Wisconsin, which is not a precedent which the Industrial Commission needs to consider.

CONCLUSION

The Commission noted in its Order granting reconsideration that Claimant is entitled to a review of the complete record, including the recording of the April 21, 2009 faculty meeting. The review reveals nothing that changes the Commission's analysis that Dr. Sadid's behavior violated the Employer's expressly-stated, reasonable standards. For this reason, Dr. Sadid's additional evidence

and new issues should be disregarded, and the Commission's Decision and Order of March 24, 2010 should be affirmed.

SUBMITTED this 1st day of September, 2010.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

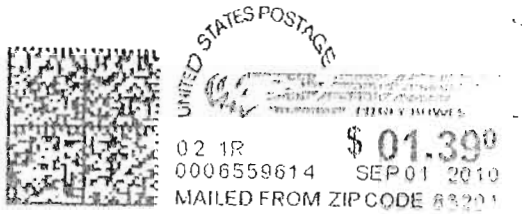
By: _____
JOHN A. BAILEY, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of September, 2010, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Ronaldo A. Coulter CAMACHO MENDOZA COULTER LAW GROUP, PLLC 776 E. Riverside Drive, Suite 200 Eagle, ID 83616 **(Attorney for Claimant)**	[X] [ ] [ ] [X]	U. S. Mail Postage Prepaid Hand Delivery Overnight Mail Facsimile *(208) 672-6114*
Tracey K. Rolfsen Deputy Attorney General IDAHO DEPARTMENT OF LABOR 317 W. Main Street Boise, Idaho 83735 **(Attorney for Idaho Department of Labor)**	[X] [ ] [ ] [X]	U. S. Mail Postage Prepaid Hand Delivery Overnight Mail Facsimile *(208) 429-1925*

_____
JOHN A. BAILEY, JR.



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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY Employer/Respondent IDAHO DEPARTMENT OF LABOR Respondent	**IDOL# 1777-2010** **MOTION TO PERMIT FILING OF A BRIEF IN EXCESS OF 20 PAGES OR IN THE ALTERNATVE SUBSTITUTE WITH BRIEF OF 20 PAGES**

COMES NOW, The Claimant Habib Sadid (Professor Sadid), by and through his attorney of record, Ronaldo A. Coulter, and hereby moves the Industrial Commission pursuant to R.A.P.P. 5(c) to permit the filing of a brief in excess of 20 pages in the above entitled case or in the alternative, substitute the brief that has been timely filed with Exhibit B of the affidavit of Counsel for Claimant which is identical to the one that is 23 pages in length. This motion is supported by the affidavit of the undersigned attorney. Said affidavit is attached hereto and

incorporated by reference herein.

DATED this 2nd day of September 2010.

CAMACHO MENDOZA COULTER LAW GROUP, PLLC

R. A. (RON) COULTER
Attorney for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September 2010, I caused to be served a true and correct copy of the foregoing by the following method to:

IDAHO INDUSTRIAL COMMISSION 700 S. CLEARWATER LANE BOISE, ID 83712 P.O. BOX 83720 BOISE, ID 83720-0041	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
JOHN A. BAILEY, JR RACINE, OLSON, NYE, BUDGE & BAILEY CHTD. PO BOX 1391 POCATELLO, ID 83204-1391	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
TRACEY K. ROLFSEN DEPUTY ATTORNEY GENERAL IDAHO DEPARTMENT OF LABOR ***STATE HOUSE MAIL*** 317 WEST MAIN STREET BOISE, ID 83735	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail

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State of Idaho)
) ss.
County of Ada)

I, RONALDO A. COULTER, being first duly sworn on oath, deposes and says:

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1. On August 26, 2010, the subject brief was timely filed by the Claimant in this matter.

2. That the brief that was timely submitted on August 26, 2010 on behalf of Claimant was 23 pages in length.

3. That it has been my experience in filing appeals before the Idaho Supreme Court that briefs that are only one to three pages over the 50-page limit are routinely accepted.

4. That on any appeal filed before the Idaho Supreme Court, that a brief timely filed is considered accepted as to being timely filed; and, unless specifically rejected by the court, with instructions to shorten the brief to comply with I.A.R. 34, a brief slightly over 50 pages is considered accepted.

5. That I am familiar with the procedures in filing motions for the filing of briefs in excess of 50 pages before the Idaho Supreme Court. (Exhibit A)

6. That on August 27, 2010, I filed a motion to file a brief in excess of 50 pages with the Idaho Supreme Court in support of the appellate brief filed on behalf of Claimant; and permission was granted by the court. (Exhibit A)

7. That on September 1, 2010, I was timely served with the Employer's Brief on Reconsideration wherein the Employer noted that the brief submitted by Claimant was "overlength", and not in compliance with R.A.P.P. 5(c).

8. That in an abundance of caution, even though Claimant's brief was timely filed, there has been no indication from the Industrial Commission that the brief had been rejected due to length, and my experience with the Appellate courts leads me to conclude that though it is not necessary, I file the subject motion on behalf of Claimant asking that the Industrial Commission

accept the brief presently filed that is 23 pages in length or substitute the brief with one that is 20 pages in length.

9. That Exhibit B is 20 pages in length and is the exact same brief (i.e. word for word) that was timely filed on August 26, 2010.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

CAMACHO MENDOZA COULTER LAW GROUP, PLLC

R. A. (RON) COULTER
Attorney for Claimant

SUBSCRIBED AND SWORN to before me this 2nd day of September, 2010.

Notary Public

My Commission Expires: May 25th, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of September 2010, I caused to be served a true and correct copy of the foregoing by the following method to:

IDAHO INDUSTRIAL COMMISSION 700 S. CLEARWATER LANE BOISE, ID 83712 P.O. BOX 83720 BOISE, ID 83720-0041	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
JOHN A. BAILEY, JR RACINE, OLSON, NYE, BUDGE & BAILEY CHTD. PO BOX 1391 POCATELLO, ID 83204-1391	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
TRACEY K. ROLFSEN DEPUTY ATTORNEY GENERAL IDAHO DEPARTMENT OF LABOR ***STATE HOUSE MAIL*** 317 WEST MAIN STREET BOISE, ID 83735	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail

R.A. (Ron) Coulter

RONALDO A. COULTER
Camacho Mendoza Coulter Law Group, PLLC
Attorney at Law
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Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF IDAHO

HABIB SADID, an individual, **Plaintiff/Appellant** **vs.** **IDAHO STATE UNIVERSITY, ROBERT WHARTON, JACK KUNZE, MICHAEL JAY LINEBERRY, MANOOCHEHR ZOGHI, RICHARD JACOBSEN, GARY OLSON, ARTHUR VAILAS and JOHN/JANE DOES I through X, whose true identities are presently unknown,** **Defendant/Respondents.**	**SUPREME COURT** **No. 37563-2010** **MOTION TO PERMIT FILING OF A BRIEF IN EXCESS OF 50 PAGES**

COMES NOW, plaintiff-appellant, Professor Habib Sadid, by and through his counsel, Ronaldo A. Coulter, Attorney at Law, and moves this Court pursuant to Idaho Appellate Rules (I.A.R.) 32 (d) and 34(b) to permit the filing of a brief in excess of 50 pages in the above-

EXHIBIT A

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entitled case. The filing of a brief in excess of the usual limit has been found to be necessary for the following reasons:

- This appeal involves Constitutional issues which the District Court below specifically felt needed to be resolved at the Appellate Court level.

- This case is a case of first impression within Idaho and will require the court to interpret a U.S. Supreme Court case as it applies to academia in Idaho. Therefore, the appeal submitted required extensive briefing and citations to law in several federal circuits outside of and including the 9th Circuit as well as Idaho. The brief was revised and reduced to its present size and has the least amount of pages to make the arguments essential to the case.

- The actual appeal is 51 pages which includes the Certificate of Service. The remainder of the brief which had to be counted by I.A.R. 34(b) includes the Table of Contents, Table of Authorities and the both covers for a total of 60 pages by rule.

Counsel for the respondent has not been contacted in regard to the instant motion.

DATED this 27th day of August, 2010.

CAMACHO MENDOZA COULTER LAW GROUP, PLLC

R. A. (RON) COULTER
Attorney for Appellant

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of August, 2010, I caused to be served a true and correct copy of the foregoing by the following method to:

JOHN A. BAILEY, JR
RACINE, OLSON, NYE, BUDGE & BAILEY
CHTD.
P.O. BOX 1391
POCATELLO, IDAHO 83701

(x) U.S. Mail
( ) Hand Delivery
( ) Certified Mail, Return Receipt Requested
( ) Overnight Mail
( ) Facsimile
( ) Statehouse Mail

CAMACHO MENDOZA COULTER LAW GROUP, PLLC

R. A. (RON) COULTER
Attorney for Appellant

IDAHO SUPREME COURT

Clerk of the Courts
(208) 334-2210

IDAHO COURT OF APPEALS

P.O. Box 83720
Boise, Idaho 83720-0101

RONALDO ARTHUR COULTER
776 E RIVERSIDE DR STE 200
EAGLE, ID 83616

ORDER GRANTING BRIEF IN EXCESS OF 50 PAGES

Docket No. 37563-2010	HABIB SADID v. IDAHO STATE UNIVERSITY	Bannock County District Court #2008-3942

A Motion to Permit Filing of a Brief in Excess of 50 Pages having been filed; therefore, good cause appearing,

IT IS HEREBY ORDERED that APPELLANT/CROSS-RESPONDENT'S Motion to Permit Filing of a Brief in Excess of 50 pages, but not to exceed 60 pages, be, and hereby is, GRANTED.

FOR THE SUPREME COURT

Stephen W. Kenyon, Clerk

cc: All Counsel

For the Court:
Stephen W. Kenyon
Clerk of the Courts

08/27/2010 KML

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Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID SSN: [redacted] Claimant, vs. IDAHO STATE UNIVERSITY Employer/Respondent IDAHO DEPARTMENT OF LABOR Respondent	**IDOL# 1777-2010** **CLAIMANT'S BRIEF ON EXHIBIT 10F PERMITTED BY ORDER GRANTING RECONSIDERATION OF AUGUST 5, 2010**

COMES NOW, The Claimant Habib Sadid (Professor Sadid), by and through his attorney of record, Ronaldo A. Coulter, and hereby submits his BRIEF ON EXHIBIT 10F PERMITTED BY ORDER GRANTING RECONSIDERATION OF AUGUST 5, 2010.

EXHIBIT B

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I
PROCEDURAL HISTORY

On October 30, 2009, Claimant was discharged from his position at Idaho State University and subsequently applied for unemployment benefits for which he was initially found ineligible on December 3, 2009. On December 16, 2009, Claimant appealed the original determination. On January 5, 2010, a telephonic hearing was held to consider the appeal of Claimant. On January 6, 2010, the Appeals Examiner reversed the original decision of ineligibility of December 3, 2009 and found that the Employer failed to meet its burden of proving by a preponderance of evidence that the Claimant had engaged in inappropriate conduct. On or about January 13, 2010, the Employer through counsel requested that the hearing be re-opened as through no fault of the Employer, the Employer did not receive adequate notice of the telephonic hearing and therefore was unable to participate. On or about the January 14, 2010, the Appeals Bureau denied the request to re-open the hearing.

On or about January 18, 2010, the Employer through counsel filed an appeal to the Industrial Commission requesting that the Commission hold a hearing that would allow the Employer to provide evidence which it could not previously provide at the telephonic hearing or remand the case to the Appeals Examiner for an additional hearing and decision. On February 9, 2010, the Employer's request for a hearing before the Idaho Industrial Commission was denied. Additionally, the Employer's request that the matter be remanded to the Appeals Bureau for a new hearing was denied. However, The Industrial Commission ruled that the Employer's timely appeal of the Appeals Examiner's decision denying a rehearing was also an appeal of the decision of the Appeals Examiner's decision awarding unemployment benefits to Claimant. Wherefore, the Industrial Commission informed the parties that it would review *de novo* the evidentiary record established during the Appeals Examiner's hearing of January 5, 2010,

established a briefing schedule for both the Claimant and the Employer, and informed both parties that it would then issue a new decision upon completion of its review.

On March 24, 2010, the Industrial Commission issued its Decision and Order wherein it reversed the decision of the Appeals Examiner awarding unemployment benefits to Claimant and declared that Claimant was discharged for employment-related misconduct and therefore ineligible for unemployment benefits. On April 12, 2010, Claimant through counsel filed a Motion for Reconsideration with the Industrial Commission. On or about April 20, 2010, the Employer filed an Employer's Objection to the Claimant's Motion for Reconsideration.

On August 5, 2010, the Industrial Commission issued an Order Granting Reconsideration. It further ordered the Claimant to serve a duplicate CD, Exhibit 10F on the Commission and all interested parties within ten (10) days of the date of the Order. It further ordered that Claimant would be afforded the opportunity to submit a ***brief arguing its position based on 10F***; said brief to be submitted ten (10) days from the date of service of Exhibit 10F. Lastly, the order called for the Employer and IDOL, if they desired, to submit briefs within seven (7) days of the date Claimant's brief was filed with the Industrial Commission. On August 16, 2010, Exhibit 10F was filed with the Industrial Commission, mailed to the IDOL and mailed to the Employer.

II
THE APPLICABLE LAW

In reviewing Exhibit 10F, the Industrial Commission must decide whether the speech and conduct of Professor Sadid at the April 21, 2009, Idaho State University, College of Engineering Faculty Staff meeting constituted "misconduct" connected with the Claimant's employment such that the Claimant can be denied unemployment benefits. *Beaty v. City of Idaho Falls*, 110 Idaho

891, 892, 719 P.2d 1151, 1152 (1986)." *See* March 24, 2010 Decision and Order of the Industrial Commission pages 5 and 6:

> The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer. *Appeals Examiner of Idaho Dept. of Labor v. J.R.. Simplot Co.*, 131 Idaho 318, 320, 955 P.2d 1097, 1099 (1998) The Idaho Supreme Court has defined misconduct as a willful, intentional disregard of the employer's interest; a deliberate violation of the employer's rules; or a disregard of standards of behavior which the employer has a right to expect of its employees. *Gunter v. Magic Valley Regional Medical Center*, 143 Idaho 63, 137 P.3d 450 (2006) *(citing Johns v. S. H. Kress & Company,* 78 Idaho 544, 548, 307 P.2d 217, 219 (1957)).

See March 24, 2010 Decision and Order of the Industrial Commission pages 5 and 6

III

ANALYSIS

A. Professor Sadid Did Not Engage In Any Conduct Sufficient to Disqualify Him From Receiving Unemployment Benefits As His Conduct was not a Willful, Intentional Disregard Of His Employer's Interest; A Deliberate Violation Of The Employer's Rules; Nor A Disregard Of Standards Of Behavior Which The Employer Had A Right To Expect Of Him

1. <u>During the April 21, 2009 College of Engineering Faculty Staff Meeting, Professor Sadid's Conduct Was Not In Disregard of the Standards of Behavior that His Employer Had a Right to Expect. His Employer Expressed Satisfaction With The Meeting, The Employer Expressed That the Employer Valued the Discussion, And the Employer Publicly Expressed That the Employer Was Not Offended By Any Remarks Made During the Meeting</u>

The Notice of Contemplated Action (NOCA) (Exhibit 5., pp. 22-23) specifically alleges that during the April 21, 2009 College of Engineering Faculty/Staff meeting (hereinafter referred to as "the Meeting" or Meeting), Professor Sadid was unprofessional, non-collegial, disruptive and insubordinate. The NOCA also alleged that Professor Sadid disrupted the meeting in complete disregard of an established agenda by "revisiting personnel issues" that had previously

been discussed in an appropriate forum and by labeling some Idaho State University personnel as corrupt and untruthful. Lastly, the NOCA alleged that Professor Sadid falsely asserted that for the past fourteen years that the Deans of the College of Engineering had failed in their fund raising responsibilities, as the Deans were deficient in their duties to raise funds for College of Engineering.

An analysis of the 2 hour, 17 minute 21 second Meeting reveals that Professor Sadid's behavior was that which could be expected of an academic fully engaged in discussions of significant importance in a precise, forceful, professional and appropriate manner. A recording of this meeting is captured on Exhibit 10F. A review of this recording reveals that Professor Sadid was candid but in no way was Professor Sadid engaged in behavior that could be described as misconduct especially in light of the academic setting in which the meeting took place. Preliminarily, it must be noted that the first part of the published agenda was a Call to Order and Introduction and Comments by the Provost, Gary Olson. (Exhibit A) Rather than following the established agenda, it is clear from listening to Exhibit 10F that Professor Sadid did not disregard the established agenda; rather, it was Dean Jacobsen who departed from the agenda and began an earnest discussion of the Faculty Workload Policy. What follows is an analysis of relevant sections of the recording where Professor Sadid and others are engaged in discussions in the meeting. For ease of identification, the specific place on the recording is marked in bold:[1]

> **Recording: 3:20 -13:34 sec.**
> In a discussion prior to the arrival of Provost Olson, Dr. Jacobsen initiates a discourse regarding the Faculty Workload Policy and how it must be addressed throughout the University and specifically within the College of Engineering. At a point during this

[1] The annotations used to mark segments of the recording are as follows: 3:20 -13:34 would indicate that the relevant segment of the recording begins at 3 minutes and 20 seconds into the recording and ends at 13 minutes and 34 seconds into the recording; 1:12:59 – 1:21:26 would indicate that the relevant segment of the recording begins at 1 hour, 12 minutes, and 59 seconds into the recording and ends at 1 hour, 21 minutes, and 26 seconds into the recording.

discourse, Professor Sadid, in a very civil tone, questioned the metrics that would be involved in determining the faculty workload specifically, what metrics would be used to determine the research value of faculty members. It is clear that Dr. Jacobsen was somewhat frustrated by Professor Sadid's question and follow-up question and he specifically asks other Chairs present in the meeting to join in the discussion. At this point, Dr. George Imel, Chair of the Department of Nuclear Engineering joins in the discussion with Professor Sadid. It is clear from listening to the recording that this issue was important to both parties. However, both parties were engaged, Dr. George Imel being louder, more argumentative, and more aggressive than Professor Sadid. It is important to note that Dean Jacobsen actually agreed that the present ad hoc method needed to be addressed and metrics established; thus agreeing with the argument set forth by Professor Sadid.

Recording: 13:59 – 17:50

In a continuation of the discussion of Faculty Workload Policy specifically in the College of Engineering, Dr. Sadid tries to discuss the specifics of an evaluation that he received from Dr. Zoghi. Professor Sadid's point was that without the establishment of a standardized metrics based system, there did not exist an accurate way to judge a faculty member's performance. Dr. Jacobsen informs Professor Sadid that a discussion of a specific faculty member's evaluation is not a proper subject for an open discussion. However, Professor Sadid disagrees with Dr. Jacobsen but does so in a civil tone and provides his rationale. From the recording, one can hear an attendee ask that the discussion move toward a general discussion of a topic of common import to the college and not dwell on a single person's issue, Professor Sadid remarked that it is a concern of everyone especially in light of the lack of communication between the College of Engineering Chair and the faculty. At one point, Professor Sadid asked for a show of hands as to who in the room believed they had effective communications with the Chair of the College of Engineering. From the recording, it can be surmised that Professor Sadid only saw two people raise their hands. At all times, Professor Sadid's speech was appropriate and there is nothing to indicate that his behavior was a disruption to the meeting.

Recording: 23:24 – 25:17

Professor Sadid questions the workload criteria and mentions that this has been a problem for the last three years. Professor Sadid again questions the metrics especially, when an administrator tells the faculty that they have exceeded the expectations but there are no metrics. Professor Sadid asked what is the administration doing and questions the commitment of the Dean and the Chairs especially in light of his raising questions for three years.

Recording: 28:50 – 29:40

Provost Olson opens the floor for questions. A faculty member other than Professor Sadid prefaces a question to Provost Olson openly calling into question the performance of Dean Jacobsen and raising the issue of whether or not a dean, especially a part-time dean is really needed in the College of Engineering. Indeed, this faculty member said to Provost Olson, "I have some major issues with the performance of our Dean." Provost Olson jokingly said that he thought that when he came in he heard Professor Sadid say

that they could do away with deans. Professor Sadid points out that this is true. He states that in two years he has not noticed that the Dean had taken responsibility for anything. Therefore, and based on that history, the necessity of a dean should be questioned.

Recording: 34:50 – 38:09
Professor Sadid in an exchange with Provost Olson asked if there would be communications with the faculty from his office. Provost Olson responded that he had just said that there would be. Professor Sadid then states that Idaho State University had a long corrupt history prior to the arrival of Dr. Vailas. Professor Sadid stated that with Dr. Vailas' arrival that he expected change. However, Professor Sadid commented that the present administration would lie with bold face and was not honest with faculty. Dr. Olson was not offended by the question and cited his experience at the University of South Florida. It was Dr. Olson's opinion that Dr. Vailas has instituted measures to address issues raised by Professor Sadid to make them viable and more transparent.

Recording: 41:28 - 44:06 Discussion on the Budget Process Provost Disparages Idaho State Board of Education
An unidentified faculty member (first name Ken) questioned the budget process and insinuated that Dean Jacobsen had kept the process a secret. Dean Jacobsen wanted to address the question but Dr. Olson stepped in and informed the faculty member that Dean Jacobsen did not have access to the budget. The Provost went on to explain how the process worked. The Provost expressed his dismay with the entire budget process. Provost Olson then went on to disparage the members of the Idaho State Board of Education. He remarked that he thought that he had already been in the state with the "wackiest" state government with Blagojevich but this really takes the cake; and, if you think that this is really something, you ought to go to the State Board of Education meeting. That is really like going to the circus. "I don't think any of those people have ever gone to college much less getting a degree in one."

Recording: 59: 16 – 1:01:24
There was a discussion regarding investment in education that the university needed to do. Dr. Olson brought up the government of Thailand's commitment to education and what that country has done to improve its academic infrastructure. Professor Sadid commented that no government would provide funds through a grant if the government did not see that the institution was already committed to the investment. Professor Sadid then asked Dr. Olson if Dr. Olson would hold his Deans responsible for raising funds. Dr. Olson replied, "I will yep". Professor Sadid said that in the past fourteen years, there have been two deans neither of which raised any funds. Professor Sadid then rhetorically asked how can we survive in this economy? Dr. Olson replied to Professor Sadid by saying "You are right" and then remarked that we all have a role to play.

Recording: 1:12:59 – 1:21:26
An Administrative Assistant becomes very emotional, almost to the point of tears in describing the treatment that she has received at the College of Engineering by its faculty. She says she would leave if she could. Professor Sadid comments that her problem is a

result of poor leadership. The Administrative Assistant does not agree with Professor Sadid that it is all leadership. This exchange provokes a response from Dean Jacobsen in which Dean Jacobsen questions the basis of why Professor Sadid maintains that everything that is wrong at the College of Education is based on the failure of leadership. Professor Sadid, without being disrespectful replies to the Dean's inquiry and several times in his reply stated that he had proof to back up his position. Dean Jacobsen comments that he is not interested in any of Professor Sadid's proof. Dean Jacobsen suggests that they [faculty and administration] had to work together if they were going to be successful. Professor Sadid asks of Dean Jacobsen if the Dean was working with them. Dean Jacobsen replied that he was and Professor Sadid responded that he was not. Dean Jacobsen responded that he did not agree with Professor Sadid's assessment.

Recording: 1:45:50 – 1:46:45 Dean Jacobsen Not Offended by Comments and Desires an Open Dialogue
In speaking to his belief that the members of the College of Engineering had to work together, Dr. Jacobsen stated, "I'm not offended by anything you have said" in speaking to the whole group. Dr. Jacobsen goes on to say that "I have never learned to properly have the ability to hold a grudge" Further Dean Jacobsen said, "I like it when people open up and say what they think." At that point Professor Sadid chimed in and mentioned two words: "Honesty" and "Integrity" to which Dr. Jacobsen replied "that goes without saying Habib."

Recording: 1:54:50 – 1:55:00 Dr. Jacobsen Expresses that the Meeting was Good "Don't Hate This Type of Discussion."
A faculty member "Bruce" asked to speak on a topic and in so doing remarked that the meeting had been contentious. Dr. Jacobsen responded. "Its been a good meeting. Don't hate this kind of discussion. It is not a bad idea to do this."

In summary, an analysis of Exhibit 10F reveals the following:

- That Professor Sadid was engaged in the discussions during the meeting where he felt that he had input. In addressing Dean Jacobsen, Provost Dr. Gary Olson and others, Professor Sadid was very direct, very professional and not intimidated by others during this discourse.
- That other faculty members beside Professor Sadid questioned the performance of the administration and specifically questioned the performance of Dean Jacobsen. Indeed, one faculty member suggested that given the part-time status of the Dean Jacobsen, perhaps the College of Engineering would be better off without a Dean. Still another

faculty member, relying on false information, questioned Dean Jacobsen's honesty and the lack of transparency in the budget process.

- That Provost Dr. Gary Olson was not offended by Professor Sadid's descriptive words used to underscore Professor Sadid's observation that the present administration of Dr. Vailas' lacked in integrity and was not truthful.
- That Provost Dr. Gary Olson in this public forum, in language that would be considered insubordinate and disrespectful in a non-academic forum, lambasted the Idaho State Board of Education and its members and in very strong and disparaging remarks likened the members to uneducated circus performers.
- That a member of the faculty was very upset with how she had been personally treated and expressed a strong personal desire to leave the employ of the Employer.
- That Dean Jacobsen publicly maintained that he was not offended by anything anyone had said at the Meeting; and of significant importance Dean Jacobsen states publicly that "Its been a good meeting. Don't hate this kind of discussion. It is not a bad idea to do this."

2. Professor Sadid's Speech Is Constitutionally Protected And Therefore Must Fall Within the Standards Of Behavior Which The Employer Had A Right To Expect Of Him

In the Employer's claim for review, the Employer relied heavily upon the grant of Summary Judgment issued in litigation involving the Employer and Professor on December 18, 2009. In that case, the Sixth District Court, Judge David C. Nye, presiding, held that as a matter of law that there was no First Amendment protection for Claimant who was speaking not on matters of public concern, nor was Claimant speaking as private citizen on matters of public

concern. Further, even if the Claimant was speaking on a matter of public concern as a private citizen, the speech of Claimant was not a motivating factor for the decision to take any action complained of in Claimant's complaint. The Employer represented to the Industrial Commission that:

> "Accordingly, it has already been determined in a court of law that Dr. Sadid had no "right" to make statements for which he has suffered retaliation, and that it was not a cause for the adverse employment actions, ***including his termination***." (Emphasis added) (Employer's Brief on Claim for Review., p. 4)

The above quote is a misstatement of fact. It is clear from Exhibit B herein that the court considered the original complaint and the amended complaint. The amended complaint also added new factual allegations but retained the same three counts: "(1) count one – claim under §I983; (2) count two - breach of employment contact and implied covenant of good faith and fair dealing; and (3) count three - defamation." (Exhibit B., p. 3 of 25) An examination of Exhibit C, the amended complaint, reveals that the complaint ***was not amended*** to include an additional count of wrongful termination. Such a claim would have been an impossibility as Claimant was discharged October 30, 2009 and Exhibit C was filed on October 15, 2009. Further, the Court's decision was narrowly tailored to the allegations made in the complaint and concluded that the "Defendants [Employer] are entitled to summary judgment on each count in the Amended Complaint." (Exhibit B., p. 24 of 25) Claimant has yet to file a wrongful termination claim. Therefore, the Industrial Commission cannot rely on a decision made by the Court where the decision is not applicable to a cause of action that may be filed in the future. The Employer's brief failed to inform the Industrial Commission that on January 19, 2010, the Court specifically refused to address the fact that the District Court failed to address a critical component of Claimant's case specifically leaving the decision in the hands of the Appellate Courts. This

critical component is that all of Claimant's speech was done within the confines of academic freedom and therefore is protected speech as guaranteed by the 1st and 14th Amendments of the U.S. Constitution and Article 1, Sections 9 and 10 of the Constitution of the State of Idaho.

In the case of *Garcetti v Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006), the court held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. In response to a concern expressed by Justice Souter in his dissenting opinion regarding the impact of the majority's holding on teachings of "public university professors" and academic freedoms found in "public colleges and universities," the majority qualified its holding, adding the following caveat:

> Justice Souter suggests today's decision may have important ramifications for academic freedom at least as a constitutional value ... There is some argument that expressions 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***. *Garcetti v. Ceballos*, 547 U.S. at 425 (Emphasis added)

In writing this caveat, the Court reserved for later resolution the intricate and complex question of the First Amendment protections applied to academic speech.

Although aware of the Supreme Court's caveat concerning the academic freedom exception to the *Garcetti* analysis, the District Court deliberately chose not to address the issue of academic freedom and how Professors Sadid's speech was either protected or not protected by the First Amendment's application to academic freedom. Instead, the trial judge abdicated this responsibility to the Idaho Appellate Courts:

> THE COURT: What I hear you telling me basically
> 14 is -- if I pare it all down on that first issue – is

15 that I should not apply Garcetti to the facts of this
16 case because that case was not intended to extend to the
17 academic world. ***If that's true, isn't that a decision***
18 ***better left to the appellate courts*** if we're going to
19 carve out an exception there?
20 MR. JOHNSON: Well, perhaps, your Honor. But I
21 believe the way that we would ask the Court to review
22 that and analyze that is at least give us a ruling on
23 it. ***Let us know where this Court stands on that***
24 ***particular issue.***
25 THE COURT: ***So you have something to appeal.*** (Tr. p. 112)[2]

10 THE COURT: And I understand that. Had they said-
11 if they were clear enough to say that this case does not
12 extend to the academic situation, then we've got the
13 exception. I'm not sure that I read their language as
14 being clear enough for me as a district judge. (Tr. p. 113)

In *Kerr v. Hurd*, 694 F.Supp.2d 817, 2010 WL 890638 (S.D.Ohio, March 15, 2010), the trial court at the federal level did not hesitate to let the parties know where it stood on a question of significant importance to the academic community. Dr. Elton Kerr (Kerr) was a medical professor hired by the entity, University Medical Services (UMSA). As an employee of USMA, Dr. Kerr also taught at Wright State School of Medicine (WS-SOM). His immediate supervisor was Dr. William W. Hurd (Hurd). Kerr was eventually terminated from his contract with USMA, which had the effect of terminating his employment with the medical school. Kerr brought a cause of action alleging, among other claims, a violation of his First Amendment rights in that he had been retaliated against for advocating the use of "vaginal delivery over unnecessary cesarian procedures, and lecturing WS-SOM residents on the proper and appropriate use of forceps" *Id.* at 10. Hurd argued that *Garcetti* was applicable to this case, as Kerr was not speaking as a private citizen as the speech concerning vaginal delivery was made in Kerr's role as an employee

[2] The relevant pages of the transcript on Claimant/Plaintiff's Motion For Reconsideration heard on January 19, 2010 is included herein as Exhibit D.

instructing students at WS-SOM; therefore, the school had a right to regulate Kerr's speech. Acknowledging Hurd's assertion that the United States Supreme Court did not decide whether *Garcetti* applied to speech cases arising in an academic environment, in the absence of a United States Supreme Court, or Sixth Circuit Court of Appeals decision to the contrary, the court was bound by precedent[3]. However the court, in performing its duty at the federal trial level, went on to state the following:

> Even without the binding precedent, this Court would find an academic exception to *Garcetti*. ***Recognizing an academic freedom exception to the Garcetti analysis is important to protecting First Amendment values***. Universities should be the active trading floors in the marketplace of ideas. Public universities should be no different from private universities in that respect. At least where, as here, the expressed views are well within the range of accepted medical opinion, they should certainly receive First Amendment protection, particularly at the university level. See Justice Souter's dissent in *Garcetti,* citing *Keyishian v. Bd. of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). The disastrous impact on Soviet agriculture from Stalin's enforcement of Lysenko biology orthodoxy stand as a strong counterexample to those who would discipline university professors for not following the "party line." Dr. Hurd suggests that any academic freedom exception to *Garcetti* must be construed narrowly and limited to classroom teaching, relying on *Gorum v. Sessions,* 561 F.3d 179 (3rd Cir.2009)(Motion, Doc. No. 84, at 14). The Court finds no suggestion in the motion papers that Dr. Kerr's advocacy for forceps deliveries was outside either the classroom or the clinical context in which medical professors are expected to teach. (Emphasis added)

Kerr v. Hurd, 2010 WL 890638 at 20.

Thus, the court found that Kerr's advocacy could not be excluded from the protection of the First Amendment. The court based its decision on the fact that the speech was made within his role as an employee and instructor of the school. Therefore, protecting First Amendment values warranted an academic freedom exception to the rule that public employees making statements

[3] The precedent the court was referring to was the unreported case of *Evans-Marshall v. Bd. of Ed. of Tipp City Exempted Village Sch. Dist.*, 2008 WL 2987174 (S.D.Ohio) which considered *Garcetti* rejecting the Seventh Circuit's position and adopting the Fourth Circuit's position applying the traditional *Pickering-Connick* approach to cases involving in-class speech by primary and secondary public school teachers. Applying the precedent the court sustained the Defendant's motion for summary judgment.

pursuant to their official duties were not speaking as citizens for First Amendment purposes. Public and private universities are supposed to be active trading floors in the marketplace of ideas. Aware of the fact that the Supreme Court expressly left undecided in *Garcetti* the extent to which its analysis would apply in an academic setting, the Sixth Circuit, granted constitutional protection to teacher in-class speech; or as stated in *Garcetti,* speech related to *scholarship or teaching.*[4] It may be expressly inferred from the position taken by the Sixth Circuit, that because of the critical role that the academic community plays in educating the public and expanding the scope of human knowledge, the boundaries around protected speech must be broad so as not to chill the public discourse. *See Amici Curiae Brief for the American Association of University Professors, the Foundation for Individual Rights in Education (Fire), and the Thomas Jefferson Center for the Protection of Free Expression in Support of Plaintiff-Appellant*, 2010 WL 2642629 at 23 (July 2010)

Academic speech under the First Amendment is neither governed by *Garcetti* nor susceptible to the "official duties" analysis reflected in Garcetti. Therefore, the scope of First Amendment protection for academic speech (i.e. scholarship or teaching) must be governed by more than a half-century of decisions, beginning with *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct.1203, (1957), which recognizes the vital role that academic speech by college and university professors plays in our society and the First Amendment interest in that speech:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are

[4] *See also Sheldon v. Dhillon,* 2009 WL 4282086, pp.*3 -*4 (N.D. Cal. Nov. 25, 2009) acknowledging that *Garcetti* by its express terms does not address the context squarely presented here; and acknowledging that the Ninth Circuit has not determined the scope of the First Amendment's application to the classroom.

accepted as absolutes. ***Scholarship cannot flourish in an atmosphere of suspicion and distrust.*** Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die. (Emphasis added)

Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211 - 1212 (U.S. 1957)

More recently, and one year prior to *Garcetti,* the Tenth Circuit, in *Schrier v. University of Colorado*, 427 F.3d 1253 recognized that academic freedom was of particular concern of the First Amendment:

> Courts have conspicuously recognized that academic freedom is a "special concern" of the First Amendment:
>
> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Vanderhurst v. Colo. Mountain Coll. Dist.,* 208 F.3d 908, 913 (10th Cir.2000) (academic freedom is "a special concern of the First Amendment"); *see also Shelton v. Tucker,* 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). ***We have also noted that a greater degree of conflict is to be expected in a university setting due to the autonomy afforded members of the university community***. *Hulen,* 322 F.3d at 1239 (recognizing that "conflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy").[5]

Schrier v. University of Co. 427 F.3d 1253, 1265 -1266 (C.A.10 (Colo.),2005) (Emphasis added)

Through a review of Exhibit 10F, it can be seen that Professor Sadid's speech in the April

[5] *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003) reads in pertinent part as follows:

> At the same time, conflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy. *See* Sweezy, 354 U.S. at 250, 77 S.Ct. 1203 (plurality opinion); *id.* at 262, 77 S.Ct. 1203 (Frankfurter, J., concurring in result); American Ass'n of Univ. Professors, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, *available at* http:// www.aaup.org/statements/Redbook/1940stat.htm (last updated June 2002).

The actual website has changed to http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm and the relevant quote is that "***Controversy is at the heart of the free academic inquiry*** which the entire statement is designed to foster" (Emphasis added)

21, 2009 Meeting addressed issues critical to scholarship at Idaho State University. Professor Sadid engaged Dr. Jacobsen in a discourse regarding the Faculty Workload Policy and how it must be addressed throughout the University and specifically within the College of Engineering. Using his own circumstance by way of example, Professor Sadid made the point that without a standardized metrics based system, the College of Engineering did not have an accurate way to measure and therefore correctly and precisely judge the performance of its faculty. Professor Sadid voiced his disappointment in the lack of honesty and integrity exhibited by the past and present administrations. Professor Sadid addressed the need for the Employer to invest in the infrastructure of the university commenting that it would be difficult for the university to receive grant funding if the grantor did not see a commitment by the university. Professor Sadid openly expressed his displeasure with what he perceived as the non-existent fund raising efforts of the past fourteen years by the Deans of the College of Engineering. Exhibit 10F lays bare the robust atmosphere in which Professor Sadid, as well as others, criticized the administration. Indeed, there is no doubt that Professor Sadid's and other's comments were the spark of controversy; however, controversy is to be expected and is the heart of free academic inquiry. *See* fn. 5.

On March 24, 2010, the Industrial Commission issued its Decision and Order wherein it reversed the decision of the Appeals Examiner awarding unemployment benefits to Claimant and declared that the Claimant was discharged for employment-related misconduct and therefore ineligible for unemployment benefits. In this case, the Industrial Commission stated:

> …This case is analogous to an Idaho Supreme Court case were a claimant continued to criticize employer and its polices despite the employer's clear directive to express those criticism in private. *Gatherer v. Doyles Wholesale*, 111 Idaho 470, 725 P.2d 175 (1986)… Claimant may argue that his actions did not constitute misconduct and were for the benefit of the College and faculty. However, Claimant's subjective state of mind for making the comments is irrelevant. *Mattews v. Bucyru- Erie Co.*, 101 Idaho 657, 659, 619 P.2d 1110, 1112 (1980.).

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March 24, 2010 Decision and Order of the Industrial Commission pages 10 and11

Contrary to the position taken in the Industrial Commission's March 24, 2010 Decision and Order, it would be a mistake to simply equate Claimant's, administrator's (i.e., Provost etc.) professor's, teacher's and other academic's standard of behavior with non-similarly situated private or public employee's for purposes of First Amendment protection related to academic freedom. Academic Freedom provides considerable protection to academics who from time to time, or consistently as the situation dictates, criticize or face criticism of their academy peers or superiors. Thus, the comparison of the Industrial Commission of this matter to that of the Claimants in *Gatherer v. Doyles Wholesale,* and *Matthews v. Bucyrus Erie Co* is inappropriate. In *Gatherer*, the Claimant was a warehouse supervisor of a candy and tobacco wholesaler. Claimant's family had previously owned the business and Claimant constantly criticized and took issue with the new owner's policies. Claimant was instructed not to raise his voice where other employees could hear the criticisms. When asked to work overtime one day, Claimant "'created a scene' in front of the other employees in the office." *Gatherer* at 471, 176. The Claimant was subsequently discharged. In *Matthews,* the Claimant was terminated for obtaining a leave of absence under false pretenses not for expressing his legitimated concerns in an appropriate forum. In both cases, the Employers were not public entities, nor were the Claimant's distinguished tenured professors with more than twenty-two years seniority.[6] The latter comparison would chill an academic's ability to speak without fear on controversial subjects, where the opinion of the academic ran counter to the administration's party line. The current decision of the Industrial Commission is known throughout Idaho State University, the

[6] The Bucyrus-Erie Company is a maker of heavy machinery used in heavy construction. See http://www.bucyruseriemodels.com/home.aspx . This company is not a public university and its employees are not public employees engaged in academic pursuit.

Employer. The Industrial Commission's decision at present mirrors that of the District Court and has thus far failed to take into consideration the fact that Professor Sadid's speech enjoys constitutional protection. As could be predicted, the District Court's decision has brought significant apprehension to academics within Idaho. (Exhibit E) As most recently argued in the Fourth Circuit:

> ***Both in practice and in constitutional law, the actual duties of state university professors implicate - indeed, demand - a broad range of discretion and autonomy that find no parallel elsewhere in public service.*** Much of the controlling language of *Garcetti* implicitly recognizes the profound differences between academic speech by professors and other public employees, something that the court below declined to do. For example, ***the Garcetti majority's suggestion that most public employees are subject to "managerial discipline" on the basis of statements contrary to agency policy would be anathema in the academic setting; indeed, academic speech usually does not represent the official policy or view of the university.*** Further, although the *Garcetti* majority comfortingly referred to "whistle-blower protection laws and labor codes" as a parallel source of protection for public workers, such alternate recourses are unlikely to avail most state university professors. (Emphasis added)

Amici Curiae Brief for the American Association of University Professors, the Foundation for Individual Rights in Education (Fire), and the Thomas Jefferson Center for the Protection of Free Expression in Support of Plaintiff-Appellant, 2010 WL 2642629 pp. 21-22 (July 2010)

Academic Freedom if it is to mean anything must encompass the ability of faculty members of a public university:

> " to speak or write—as a private citizen or within the context of one's activities as an employee of the university—without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties, ***the functioning of the university, and university positions and policies."*** (Emphasis added)

University of Wisconsin Madison, Recommendation to Amend Faculty Policies and Procedures as adopted by the Faculty Senate, April 12, 2010 (Exhibit F)

In light of the facts of this case, the historical and special concern given to academic freedom and the lead set in the judicial districts mentioned herein, it is imperative that the Industrial Commission conclude that the academic freedom exception to *Garcetti* must apply to

this case.

IV

CONCLUSION

It has been shown herein, through a complete and thorough examination of Exhibit 10F, that Professor Sadid's speech in the April 21, 2009 meeting was very direct, forceful yet professional and of a character that one would expect to encounter in an academic setting among tenured faculty members. As noted herein, contention and controversy are at the heart of a vibrant academic community. In this case, the Employer's representative refused to characterize the Meeting as contentious. Instead, the employer characterized the Meeting as "being a good meeting" and implored the faculty to refrain from disdaining such meetings. The Employer's representative further commented that he enjoyed it when faculty members "open[ed] up and say [said] what they think [thought]". Given the content, context, and academic setting in which Professor Sadid engaged in discussion, his actions were not only within the standard of behavior an Employer could expect of its employees, Professor Sadid's speech and participation by the Employer's own admission, did not offend the Employer. Lastly but of significant importance, Professor Sadid's speech during the Meeting was protected under academic freedom, which is a "special concern" of the First Amendment. Therefore, Professor Sadid's speech was sheltered by the 1st and 14th Amendments of the U.S. Constitution and Article 1, Sections 9 and 10 of the Constitution of the State of Idaho. An examination of Exhibit 10F demands that the Industrial Commission conclude that its Decision and Order of March 24, 2010 must be reversed thereby securing unemployment benefits for the Claimant in this matter.

Dated this 26th day of August 2010.

R.A. (Ron) Coulter
Attorney for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of August, 2010, I caused to be served a true and correct copy of the foregoing by the following method to:

IDAHO INDUSTRIAL COMMISSION 700 S. CLEARWATER LANE BOISE, ID 83712 P.O. BOX 83720 BOISE, ID 83720-0041	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
JOHN A. BAILEY, JR RACINE, OLSON, NYE, BUDGE & BAILEY CHTD. PO BOX 1391 POCATELLO, ID 83204-1391	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
DEPUTY ATTORNEY GENERAL IDAHO DEPARTMENT OF LABOR ***STATE HOUSE MAIL*** 317 WEST MAIN STREET BOISE, ID 83735	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail

R.A. (Ron) Coulter

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, Claimant, v. IDAHO STATE UNIVERSITY, Employer, and IDAHO DEPARTMENT OF LABOR.	)	**IDOL # 1777-2010** **DECISION AND ORDER ON RECONSIDERATION**

Appeal of a Decision granting Claimant unemployment insurance benefits and an Order denying Employer's request to reopen issued by an Idaho Department of Labor Appeals Examiner. Denial of request to reopen is AFFIRMED, and Decision granting benefits REVERSED.

This matter originally came before the Idaho Industrial Commission on appeal and a Decision and Order was issued. Thereafter, Claimant filed a Motion for Reconsideration which argued the importance of what was said at the April 21, 2009 faculty meeting. A recording of the April 21, 2009 faculty meeting was admitted into evidence before the Appeals Examiner, but no recording appeared in the Commission's file. Accordingly, the Commission requested the Claimant resubmit the April 21, 2009 faculty meeting recording as Exhibit 10F. The parties were also given an opportunity to brief their positions based on Exhibit 10F. With the complete record, the Commission now issues its Decision and Order with Exhibit 10F on the above entitled matter.

Employer, Idaho State University, appeals the Idaho Department of Labor's (IDOL or Department) Decision finding Claimant eligible for benefits as well as IDOL's Order denying Employer's request to reopen the hearing. The Appeals Examiner found in her Decision

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that Employer discharged Claimant, but not for misconduct. Employer failed to appear for the hearing. On August 8, 2008, Employer submitted a request to re-open the hearing. The Appeals Examiner denied that request because Employer failed to provide sufficient facts to warrant re-opening.

The Commission will briefly address a few procedural issues. First, Employer's request for a new hearing or remand is denied per the Commission's February 9, 2010 Order. Second, as discussed in the prior Decision and Order and in the Order Granting Reconsideration, Employer's original brief filed February 22, 2010, is untimely. Third, Claimant's Motion to Strike is granted, since the Commission's rules do not allow reply briefs; Employer's reply brief will not be considered. Finally, the Commission will grant Claimant permission to file a 22 page brief, but will not consider the attached exhibits.

The undersigned Commissioners have conducted a *de novo* review of the record in accordance with Idaho Code § 72-1368(7). Super Grade, Inc. v. Idaho Depart. of Commerce and Labor, 144 Idaho 386, 390, 162 P.3d 765, 769 (2007). The Commission has relied on the audio recording of the hearing held before the Appeals Examiner on January 5, 2010, along with the Exhibits [1 through 10, including 10F] admitted into the record during that proceeding.

FINDINGS OF FACT

The Commission concurs with and adopts the Findings of Fact set forth in the Appeals Examiner's Order to Deny Re-Opening. The Commission sets forth additional findings of fact as follows:

1. Claimant worked for Employer on two occasions. During his last period of employment, Claimant worked as a full professor from August 1991 until he was discharged on October 23, 2009. Claimant was suspended on August 4, 2009 pending the University President's ruling on the recommended termination notice.

2. Claimant had a history of voicing concerns via emails and at faculty meetings. On April 6, 2009, Claimant received a warning letter from the Chair of the Department of Civil and Environmental Engineering informing Claimant to raise his concerns via the proper procedure. Claimant was to first discuss the matter with the Chair of the Department, then to the Dean of the College of Engineering, then to Employer's upper administration.

3. Employer sent another letter on April 15, 2009, again warning Claimant that voicing his concerns at faculty and campus-wide meetings and through widely disbursed emails and communication intended to expose another individual to public hatred, contempt, or ridicule, or to impeach his or her integrity or reputation was not appropriate. The letter, again, reminded Claimant to utilize proper procedures raising his concerns.

4. At an April 21, 2009 faculty meeting, Claimant again raised concerns about work and personal matters, and expressed criticism of the administration.

5. Dean Jacobsen issued a Notice of Contemplated Action due to Claimant's continued pattern of behavior.

6. After further review, the University President, Dr. Vailas, discharged Claimant.

DISCUSSION

Claimant worked as a full professor for Employer from August, 1991 until October 23, 2009. Employer discharged Claimant for a myriad of reasons, including insubordination and for being disruptive and unprofessional. (Exhibit 5, pp. 19-20). Due to Claimant's ongoing behavior, Employer believed that it had adequate cause to discharge Claimant. Employer points to several emails and letters Claimant sent showing criticism to the administration, as well as statements made by Claimant at faculty meetings and an awards banquet that Employer contends were unprofessional and disruptive. Employer's decision to discharge Claimant was based on its policies which state that discipline is warranted if acts or omissions directly and substantially affect or impair an employee's performance of his or her profession or assigned duties or the interest of the Board; or constitutes conduct that is

seriously prejudicial to the University. (Exhibit 5, p. 15). In April, 2009, Employer supplied Claimant with two letters, each stating to use the proper protocol in expressing his concerns, and that failure to follow the protocol could lead to discipline. (Exhibit 3, p. 28; Exhibit 4, p. 32). Employer contends that Claimant again expressed previously raised personal concerns during a staff meeting that had a designated agenda.

Claimant does not dispute that he authored the emails and letters found in the record or that he made the comments in the staff meeting. Instead, Claimant denies that his actions constitute misconduct and maintains that his actions were not disruptive or unprofessional. (Audio Recording).

Idaho Code § 72-1366(5) provides that a claimant is ineligible for unemployment insurance benefits if that individual's unemployment resulted from the claimant's discharge for employment-related misconduct. What constitutes "just cause" in the mind of an employer for dismissing an employee is not necessarily the legal equivalent of "misconduct" under Idaho's Employment Security Law. The two issues are separate and distinct. In a discharge, whether the employer had reasonable grounds for dismissing a claimant is irrelevant. The only concern is whether the reasons for discharge constituted "misconduct" connected with the claimant's employment such that the claimant can be denied unemployment benefits. Beaty v. City of Idaho Falls, 110 Idaho 891, 892, 719 P.2d 1151, 1152 (1986).

The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer. Appeals Examiner of Idaho Dept. of Labor v. J.R. Simplot Co., 131 Idaho 318, 320, 955 P.2d 1097, 1099 (1998). A "preponderance of the evidence" simply means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not. Edwards v. Independence Services, Inc., 140 Idaho 912, 915, 104

P.3d 954, 957 (2004).

The Idaho Supreme Court has defined misconduct as a willful, intentional disregard of the employer's interest; a deliberate violation of the employer's rules; or a disregard of standards of behavior which the employer has a right to expect of its employees. Gunter v. Magic Valley Regional Medical Center, 143 Idaho 63, 137 P.3d 450 (2006) (*citing* Johns v. S. H. Kress & Company, 78 Idaho 544, 548, 307 P.2d 217, 219 (1957)). In addition, the Court requires the Commission to consider all three grounds in determining whether misconduct exists. Dietz v. Minidoka County Highway Dist., 127 Idaho 246, 248, 899 P.2d 956, 958 (1995). We have carefully considered all three grounds for determining misconduct.

Before analyzing each of the following grounds, the Commission must clarify the hearsay evidence found in the record. Employer did not appear at the hearing. Instead, Employer supplied a significant amount of correspondence from individuals regarding the alleged adverse affects of Claimant's criticisms. The written statements made by those other than Claimant are considered hearsay. "Hearsay is defined as testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion of the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." State v. Woodbury, 127 Idaho 757,759, 905 P.2d 1066, 1068 (Ct.App. 1995).

The Commission holds discretionary power to admit or exclude hearsay evidence. As stated by the Idaho Supreme Court:

> The Commission has the discretionary power to consider any type of reliable evidence having probative value, even if that evidence is not admissible in a court of law. Stolle v. Bennett, 144 Idaho 44, 49-50 (2007). The Commission has the discretion to admit evidence if "it is a type commonly relied upon by prudent persons in the conduct of their affairs." Id.; I.C. § 67-5251. This does not mean, however, that the Commission is required to admit such evidence. Rather, the Commission is given latitude to exclude hearsay evidence.

Higgins v. Larry Miller Subaru-Mitsubishi, 145 Idaho 1, 175 P.3d 163 (2007).

However, hearsay evidence, alone, is insufficient to support findings of fact. Application of Citizen Utilities Company, 82 Idaho 208, 214, 351 P.2d 487, 493 (1960). The Commission's findings must be supported by substantial and competent evidence. Id. at 213, 351 P.2d at 492. Substantial and competent evidence is defined as "relevant evidence that a reasonable mind might accept to support a conclusion." Henderson v. Ecclipse Traffic Control and Flaggin Inc., 147 Idaho 628, 213 P.3 718, 722 (2009).

Employer's hearsay evidence is admitted into the record based on its probative value and is afforded appropriate weight. Since Employer was absent from the hearing, the information contained therein provides insights into Employer's arguments. However, because the authors of the statements and those allegedly adversely affected by Claimant's emails/letters/public statements did not testify, that evidence is afforded a lesser degree of weight and persuasion in the face of sworn testimony provided during the proceeding in direct contradiction to it. The hearing examiner, as the trier of fact, is entitled to place greater or less weight on any particular piece of evidence according to its relative credibility. Morgan v. Idaho Dept. of Health and Welfare, 120 Idaho 6, 8, 813 P.2d 345, 347 (1991). Therefore, to the extent that Employer relies on written assertions of individuals other than Claimant, those written statements are considered hearsay and carry less weight than Claimant's assertions.

The analysis proceeds to determine whether Claimant's conduct constitutes misconduct. Under the "standards-of-behavior" test, the employer must prove by a preponderance of the evidence that the claimant's conduct fell below the standard of behavior it expected and that the employer's expectation was objectively reasonable under the particular circumstances. Harris, 141 Idaho at 4, 105 P.3d at 270. As the Idaho Supreme Court has pointed out, an "employer's expectations are ordinarily reasonable only where they have been communicated to

the employee." Folks v. Moscow School District No. 281, 129 Idaho 833, 838, 933 P.2d 642, 647 (1997). Therefore, the employer must communicate expectations and duties that do not naturally flow from the employment relationship. Pimley v. Best Values, Inc., 132 Idaho 432, 974 P.2d 78 (1999). Notably, there is no requirement that the employer must demonstrate that the employee's behavior was subjectively willful, intentional, or deliberate in his or her disregard of the employer's expectations. Welch v. Cowles Publishing Co., 127 Idaho 361, 364, 900 P.2d 1372, 1375 (1995).

Employer contends that Claimant's conduct of openly criticizing the administration in widely dispersed emails, faculty meetings, and social functions constitutes misconduct. Employer informed Claimant of the proper protocol to raise his concerns. In an April 6, 2009 letter to Claimant, Employer wrote "In the future, you are directed to follow proper protocol in expressing your concerns (first to the Chair of the Department of Civil and Environmental Engineering, then to the Dean of the College of Engineering, then to Idaho State University's upper administration)." (Exhibit 3, p. 28). Again, in an April 15, 2009 letter, Employer stated "You should not use such channels as campus-wide meetings, engineering faculty meetings, and widely-distributed email communications to make negative comments about the performance and/or character of current and former university staff and employees...Communications intended to expose another individual to public hatred, contempt, or ridicule, or to impeach his or her integrity or reputation are not appropriate. You have previously been counseled to observe collegiality in the workplace and to follow the protocol of meeting first with your department chair, next with the dean of engineering, and then, if necessary, with other ISU administrators regarding your concerns. Continuing failure to follow these guidelines will be cause for disciplinary action." (Exhibit 4, p. 32.).

Claimant did not rebut that he received the letters at hearing, and referred to receiving the letters in his correspondence with Employer. (Exhibit 4, pp. 29-33, Exhibit 10, p. 146). This information clearly shows that Employer informed Claimant of the proper procedure to express his concerns and that making statements that "expose another individual to public hatred, contempt or ridicule, or to impeach his or her integrity or reputation are not appropriate" and should not be made in faculty or campus-wide meetings or in widely distributed emails.

Employer's expectation is objectively reasonable under these circumstances. Employer contends that actions, such as Claimant's, impair or affect the interest of the college and university by creating a negative and disruptive atmosphere in the college, and that fundraising efforts are hampered by negative publicity generated by Claimant's criticisms. (Exhibit 7, p. 3). Employer's concerns are well taken and the adverse affect of openly criticizing administration can have the above effect. It is important to note that Employer did not forbid Claimant from raising his concerns. Rather, Employer required Claimant to raise his issues through a certain procedure. There is also nothing inherently inappropriate about the procedure required by Employer, nor does Claimant directly attack the validity of the procedure at hearing. Therefore, Employer's expectation is reasonable.

Therefore, the analysis turns to whether Claimant's conduct at an April 21, 2009 staff meeting violated the "standard-of-behavior" expressed and warned of in Employer's previous letters. After a review of the audio recording of the April 21, 2009, the Commission finds that Claimant did violate the standard of behavior which Employer expected.

With the resubmission of Exhibit 10F, the Commission had the benefit of listening to the entire meeting, not merely reviewing the transcribed notes. Even so, the Commission's conclusion remains unchanged. While it is true that some of Claimant's concerns at the

faculty meeting were genuinely related to the workload policy and the business of the faculty meeting, the other portion of Claimant's comments were not. At the meeting Claimant stated that the University was corrupt for 20 years, that the administration is absolutely corrupt, and that nothing has changed since the new University president arrived. (Exhibit 10F). Further, Claimant told the members of the meeting that the administrators are lying with bold face, that they have isolated the faculty and done nothing except when needed. Claimant further stated that the administration refuses to communicate with faculty at all levels and that it is doing whatever it wants. When discussing leadership of the administration, Claimant said that he had documents to show that those people are unethical and are just "power hungers." (Exhibit 10F). They were working to protect their own interest and not the public. Claimant stated that he truly questioned the integrity and honesty of the administration in the College and the University.

Dean Jacobsen did conclude with statements about the meeting being a good meeting and that it was not a bad idea to hold the meeting. The Dean also stated that he believed that the College has the ability to move ahead "but not sniping at each other, and working against each other, and undermining each other." (Exhibit 10F). The Dean's general statements were directed to the meeting as a whole, which included many comments and discussions in addition to those by Claimant, but the Dean's general statements do not negate the numerous previous warnings that Claimant had received.

The Commission concludes that the statements made by Claimant in the faculty meeting represent the type of conduct that Employer warned Claimant of in the April 6 and 15, 2009 letters. Claimant's statements raised personal concerns and attack members of the administration in a faculty meeting. Employer contends that the faculty meeting had a

set agenda, which did not include Claimant's statements or the subject matter. Employer's expectation was clear that such matters should be raised through proper channels and not at faculty meetings, the record demonstrates that Claimant's conduct during the April 21, 2009, faculty meeting fell below Employer's reasonable and communicated expectation.

As noted in the prior Decision and Order, this case is similar to Gatherer v. Doyles Wholesale, 111 Idaho 470, 725 P.2d 175 (1986). In that case, Gatherer had been repeatedly instructed to privately approach management with his disagreements with the employer's policies. The Court found that Gatherer's outbursts, which resulted in Gatherer's discharge, can only be viewed as showing a disregard for the standards that his employer had a right to expect of its employees.

Claimant's long history of disagreement with Employer does not negate Employer's ability to request Claimant raise his concerns via the proper procedures. Claimant was to first discuss the matter with the Chair of the Department, then to the Dean of the College of Engineering, then to Employer's upper administration. Employer's warning letters to Claimant on April 6 and April 15 communicated the standard of behavior which Employer expected Claimant uphold. While the record also demonstrates that Claimant is a highly accomplished professor, those facts do not negate the expectation that Claimant raise volatile concerns through the proper procedure.

Claimant raises First Amendment freedom of speech arguments in his brief on reconsideration. Claimant alleges that his speech is constitutionally protected and, therefore, must fall within the standards of behavior which Employer had a right to expect. Claimant's arguments are duly noted, but they are separate from the issue of whether Employer discharged Claimant for misconduct. Misconduct and Claimant's eligibility for

unemployment benefits are determined by the standards set forth above. In particular, the current discussion is focused on whether Claimant's conduct fell below a standard of behavior which Employer had a right to expect, which in this case is substantially more restrictive than what is granted by the First Amendment.

Claimant's motion for reconsideration reminds the Commission that the grievance process at Idaho State University is extensive and after the hearings regarding Claimant's allegations were held, a recommendation to restore Claimant to his position was issued by the Faculty Senate. Regardless, President Vailas terminated Claimant. Claimant points out that that Employer's grievance process requires proof of adequate cause to terminate an employee. The law and process for receiving unemployment benefits does not vary depending on the particular grievance procedure an employer may have established. In this case, Employer has the burden of proving Claimant was discharged for employment related reasons.

Claimant may argue that his actions did not constitute misconduct and were for the benefit of the College and faculty. However, Claimant's subjective state of mind for making the comments is irrelevant. Matthews v. Bucyrus-Erie Co., 101 Idaho 657, 659, 619 P.2d 1110, 1112 (1980). Employer clearly informed Claimant that his critical comments should not be raised at the faculty meetings. Because Claimant is ineligible for benefits under the "standards-of-behavior" test, it is unnecessary to analyze this matter under the other two grounds. Claimant is ineligible for unemployment insurance benefits.

CONCLUSION OF LAW

Employer discharged Claimant for employment-related misconduct.

ORDER

Based on the forgoing analysis, the Decision of the Appeals Examiner is REVERSED. Employer discharged Claimant for employment-related misconduct. The Appeals Examiner's Decision Denying Employer's Request to Re-Open is AFFIRMED. This is a final order under Idaho Code § 72-1368(7).

DATED this 20th day of January, 2011.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

R. D. Maynard, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2011, a true and correct copy of **DECISION AND ORDER ON RECONSIDERATION** was served by regular United States mail upon each of the following:

JOHN A BAILEY JR
PO BOX 1391
POCATELLO ID 83204-1391

RONALDO COULTER
776 E RIVERSIDE DR, SUITE 200
EAGLE ID 83616

DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
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Attorneys for Appellant

INDUSTRIAL COMMISSION
ATTN:UNEMPLOYMENT APPEALS
317 WEST MAIN STREET 2ND FLOOR
P.O. BOX 83720-0041
BOISE IDAHO 83720

HABIB SADID
SSN: [redacted]

Appellant,

vs.

IDAHO STATE UNIVERSITY

Employer/Respondent

IDAHO DEPARTMENT OF LABOR

Respondent

IDOL# 1777-2010

NOTICE OF APPEAL

TO THE ABOVE NAMED RESPONDENT, IDAHO STATE UNIVERSITY AND THE EMPLOYER/RESPONDENT ATTORNEY OF RECORD JOHN A. BAILEY, Racine, Olson Nye, Budge & Bailey, Chtd., P.O.Box 1391, Pocatello, Idaho, 83204, e-mail: jab@racinelaw.net, and THE IDAHO INDUSTRIAL COMMISSION AND ITS ATTORNEYS.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant appeals against the above-named respondents to the Idaho Supreme Court for the Decision and Order entered in the above-entitled action on the 20th day of January, 2011, rendered by the Idaho Industrial Commission which was a final order under Idaho Code (I.C.) § 72-1368(7).

2. That the appellant has a right to appeal to the Idaho Supreme Court, and the decision and order described in paragraph 1 above is an appealable decision and order under and pursuant to I.C. 72-1368(9) and Idaho Appellate Rule (I.A.R.) 11(d).

3. A preliminary statement of issues which the appellant asks the Court to review at a minimum; and, which shall not prevent the appellant from timely asserting other issues for review are:

(a) The Industrial Commission erred when it concluded that appellant's behavior at the April 21, 2009 faculty meeting fell below a standard of behavior reasonably to be expected by the employer.

(b) In finding that the appellant engaged in misconduct, the Industrial Commission erred in concluding that the concept of academic freedom as recognized and protected by the First Amendment of the United States Constitution and Article 1, and Sections 9 and 10 of the Constitution of the State of Idaho have no bearing in determining whether or not appellant's speech was misconduct.

4. As this appeal involves questions of fact established by the record, the appellant requests that full transcripts of the proceeding before the Appeals Examiner be produced and included in the record on appeal to the Idaho Supreme Court. The appellant also requests that the following be made a part of the record if not included in the standard record submitted to the Court from the Industrial Commission:

(a) All briefs submitted by the appellant and employer in this action;

(b) All exhibits submitted by the appellant and employer to this action; and

(c) All decisions and orders made in this action by any government agency.

1. I certify that:

(a) A copy of this appeal has been filed with the Idaho Industrial Commission;

(b) That the appellant filing fee to the Idaho Supreme Court has been paid;

(c) That the appellant filing fee to the Idaho Industrial Commission has been paid; and

(d) That service has been made upon all parties pursuant to I.A.R. 20.

DATED this 17th day of February, 2011

CAMACHO MENDOZA COULTER LAW GROUP, PLLC

R.A. (RON) COULTER
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of February 2011, I caused to be served a true and correct copy of the foregoing by the following method to:

JOHN A. BAILEY, JR CAROL TIPPI VOLYN RACINE, OLSON, NYE, BUDGE & BAILEY CHTD. PO BOX 1391/CENTER PLAZA POCATELLO, IDAHO 83204-1391	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
OFFICE OF THE ATTORNEY GENERAL STATE OF IDAHO 700 W. STATE STREET P.O. BOX 83720 BOISE, IDAHO 83720-0010	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail

DATED this 17th day of February, 2011

CAMACHO MENDOZA COULTER LAW GROUP, PLLC

R.A. (RON) COULTER
Attorney for Appellant

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

HABID SADID, Appellant/Claimant,	**SUPREME COURT # 38549**
vs.	**CERTIFICATE OF APPEAL**
IDAHO STATE UNIVERSITY,	**OF CLAIMANT HABID SADID**
Respondent/Employer,	
and	
IDAHO DEPARTMENT OF LABOR, Respondent.	

Appeal From:	Industrial Commission Chairman Thomas E. Limbaugh, presiding
Case Number:	IDOL # 1777-2010
Order Appealed from:	DECISION AND ORDER ON RECONSIDERATION FILED JANUARY 20, 2011
Representative for Claimant:	R.A. COULTER 776 E. Riverside Drive, Ste. 200 Eagle, ID 83615
Representative for Employers:	JOHN A. BAILEY, JR. P.O. Box 1391 Pocatello, ID 83204-1391
Representative for IDOL:	TRACEY K. ROLFSEN, Deputy Attorney General 317 W. Main Street Boise ID 83735
Appealed By:	HABIB SADID, Claimant/Appellant
Appealed Against:	IDAHO STATE UNIVERSITY, Employer/Respondent and IDAHO DEPARTMENT OF LABOR, Respondent

Notice of Appeal Filed:	February 18, 2011
Appellate Fee Paid:	$86.00 to Supreme Court and $50.00 to Industrial Commission Checks were received.
Transcript:	Transcript will be ordered
Dated:	February 18, 2011

Dena K. Burke
Assistant Commission Secretary

CERTIFICATION

I, DENA K. BURKE , the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the NOTICE OF APPEAL FILED FEBRUARY 17. 2011; AND THE DECISION AND ORDER ON RECONSIDERATION FILED JANUARY 20, 2011; and the whole thereof, Docket Number 1777-2010 for Habib Sadid.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 18th day of FEBRUARY, 2011.

INDUSTRIAL COMMISSION

Dena K. Burke

Dena K. Burke
Assistant Commission Secretary

CERTIFICATION

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

HABID SADID, Claimant/Appellant, vs. IDAHO STATE UNIVERSITY, Employer/Respondent, and IDAHO DEPARTMENT OF LABOR, Respondent.	**SUPREME COURT NO# 38549-2011** **NOTICE OF COMPLETION**

TO: STEPHEN W. KENYON, CLERK OF THE COURTS; AND CHARLES D. COULTER, ESQ., FOR CLAIMANT HABID SADID; AND JOHN A. BAILEY, JR., ESQ., FOR EMPLOYER IDAHO STATE UNIVERSITY; AND IDAHO DEPARTMENT OF EMPLOYMENT

YOU ARE HEREBY NOTIFIED that the Agency's Record was completed on this date, and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

CHARLES D. COULTER
P.O. BOX 239
BOISE, ID 83701-0239

JOHN A. BAILEY, JR.
P.O. BOX 1391
POCATELLO, ID 83204-1391

TRACEY K. ROLFSEN
DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
317 W. MAIN ST.
BOISE, ID 83735

You are further notified that, pursuant to Rule 29(a), Idaho Appellate Rules, all parties have ***twenty-eight days*** from this date in which to file objections to the Record, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record are filed ***within the twenty-eight day period***, the Record shall be deemed settled.

DATED at Boise, Idaho this 13TH day of JUNE, 2011.

INDUSTRIAL COMMISSION

Dena K. Burke

Dena K. Burke
Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

3/16

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

HABID SADID, Claimant/Appellant, vs. IDAHO STATE UNIVERSITY, Employer/Respondent, and IDAHO DEPARTMENT OF LABOR, Respondent.	)	**SUPREME COURT NO# 38549-2011** **AMENDED** **NOTICE OF COMPLETION**

TO: STEPHEN W. KENYON, CLERK OF THE COURTS; AND
R.A. COULTER, ESQ., FOR CLAIMANT HABID SADID; AND
JOHN A. BAILEY, JR., ESQ., FOR EMPLOYER IDAHO STATE UNIVERSITY;
AND IDAHO DEPARTMENT OF EMPLOYMENT

YOU ARE HEREBY NOTIFIED that the Agency's Record was completed on this date, and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

R.A. COULTER 776 E. RIVERSIDE DR STE 200 EAGLE, ID 83616	JOHN A. BAILEY, JR. P.O. BOX 1391 POCATELLO, ID 83204-1391	TRACEY K. ROLFSEN DEPUTY ATTORNEY GENERAL IDAHO DEPARTMENT OF LABOR 317 W. MAIN ST. BOISE, ID 83735

You are further notified that, pursuant to Rule 29(a), Idaho Appellate Rules, all parties have ***twenty-eight days*** from this date in which to file objections to the Record, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record are filed ***within the twenty-eight day period***, the Record shall be deemed settled.

DATED at Boise, Idaho this 14TH day of JUNE, 2011.

INDUSTRIAL COMMISSION

Dena K. Burke

Dena K. Burke
Assistant Commission Secretary

317

RONALDO A. COULTER
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Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, Claimant/Appellant, vs. IDAHO STATE UNIVERSITY, Employer/Respondent, and IDAHO DEPARTMENT OF LABOR, Respondent.	**SUPREME COURT NO# 38549-2011** **IDOL # 1777-2010** **MOTION TO CORRECT AGENCY'S RECORD TO INCLUDE EXHIBIT 10F AUDIO CD FILED AUGUST 16, 2010**

COMES NOW, Claimant/Appellant, Habib Sadid, through his counsel of record, R.A. (Ron) Coulter, of the law firm of Camacho Mendoza Coulter Law Group, PLLC, and submits this Motion to Correct Agency's Record to Include Exhibit 10F Audio CD Filed August 16, 2010. This Motion is made pursuant to Idaho Appellate Rules 29(a) and 31(a)(4). Claimant/Appellant requests that the audio CD, Exhibit 10F, previously served on the Idaho Industrial Commission on August 16, 2010 pursuant to the Agency's order granting reconsideration on August 5, 2010, be incorporated into the Agency's Record following

Claimant's Notice of Service of Duplicate CD, Exhibit 10F, found at page 166 of the Agency's Record served June 14, 2011. This Motion is supported by the Memorandum in Support of Motion to Correct Agency's Record to Include Exhibit 10F Audio CD Filed August 16, 2010. For the convenience of the Agency, Claimant/Appellant is also attaching two copies of the audio CD, Exhibit 10F, previously submitted to the Agency, so that upon the granting of this Motion, the Agency need only attach the CD(s) to the settled Agency's Record to be filed with the Idaho Supreme Court. Copies of the audio CD, Exhibit 10F, will be served by mail on the parties along with the service of this Motion and its supporting documents.

Dated this 27th day of June, 2011.

R.A. (Ron) Coulter
Attorney for Claimant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June, 2011, I caused to be served a true and correct copy of the foregoing by the following method to:

IDAHO INDUSTRIAL COMMISSION 700 S. CLEARWATER LANE BOISE, ID 83712 P.O. BOX 83720 BOISE, ID 83720-0041	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
JOHN A. BAILEY, JR RACINE, OLSON, NYE, BUDGE & BAILEY CHTD. PO BOX 1391 POCATELLO, ID 83204-1391	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
TRACEY K. ROLFSEN DEPUTY ATTORNEY GENERAL IDAHO DEPARTMENT OF LABOR 317 WEST MAIN STREET BOISE, ID 83735	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail

R.A. (Ron) Coulter

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Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABIB SADID, Claimant/Appellant, vs. IDAHO STATE UNIVERSITY, Employer/Respondent, and IDAHO DEPARTMENT OF LABOR, Respondent.	**SUPREME COURT NO# 38549-2011** **IDOL # 1777-2010** **MEMORANDUM IN SUPPORT OF MOTION TO CORRECT AGENCY'S RECORD TO INCLUDE EXHIBIT 10F AUDIO CD FILED AUGUST 16, 2010**

COMES NOW, Claimant/Appellant, Habib Sadid, through his counsel of record, R.A. (Ron) Coulter, of the law firm of Camacho Mendoza Coulter Law Group, PLLC, and submits this Memorandum in Support of Motion to Correct Agency's Record to Include Exhibit 10F Audio CD Filed August 16, 2010.

PROCEDURAL HISTORY

On February 17, 2011, Claimant filed a Notice of Appeal to the Idaho Supreme Court of the Decision and Order entered in the above-entitled action on January 20, 2011 and rendered by

the Idaho Industrial Commission. In his Notice of Appeal, Claimant requested a full transcript of the proceedings before the Industrial Commission, including among other items, all briefs submitted, all exhibits submitted, and all decisions and orders made in this action. On June 14, 2011, the Agency served an Amended Notice of Completion and the Agency's Record on the Claimant/Appellant, the Employer/Respondent, and the Idaho Department of Labor/Respondent.

ARGUMENT

On August 5, 2010, the Industrial Commission issued an Order Granting Reconsideration. In that Order, the Commission noted that its files were missing an audio CD entitled Exhibit 10F, being a recording of the April 21, 2009 Idaho State University College of Engineering Faculty Staff Meeting. In the August 5th Order the Commission stated, "To further the interests of justice, Claimant is entitled to a review of the complete evidentiary record. The Commission will review a duplicate CD as was designated by Exhibit 10F by the Appeals Examiner."

Pursuant to the August 5th Order, Claimant filed a Notice of Service of Duplicate CD, Exhibit 10F, with the Commission on August 16, 2010. The Notice and a duplicate copy of the CD were served on the Employer and the Department of Labor by U.S. Mail. Claimant and Employer were also allowed to argue their positions based on Exhibit 10F via a brief and responding brief respectively. The audio CD, Exhibit 10F, was part of the Record at the Commission. Importantly, the audio file should remain in its audible form because a simple transcript would not convey the tone or demeanor of the speakers at the meeting.

In his Notice of Appeal, Claimant requested that copies of all briefs and exhibits be included in the Agency's Record on appeal. The audio CD, Exhibit 10F, was one such exhibit, and for that reason, the audio CD, Exhibit 10F, should be included in the Agency's Record.

Pursuant to Idaho Appellate Rule 29(a), Claimant requests the addition of audio CD, Exhibit 10F to the Agency's Record. Further, pursuant to Idaho Appellate Rule 31(a)(4) the clerk of the Agency shall lodge all "audio and audio-visual recordings offered or played during the proceedings" with the Supreme Court. Transcription of the CD is not requested or required.

CONCLUSION

Based on the foregoing arguments, Claimant respectfully requests that the Commission correct the Agency's Record to include a copy of the audio CD, Exhibit 10F, after the Notice of Service of Duplicate CD (*See* Agency's Record, p. 166), and before Claimant's Brief on Exhibit 10F at page 173 of the Agency's Record.

Dated this 27th day of June, 2011.

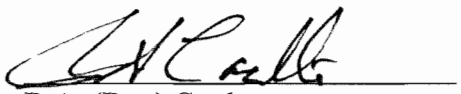
R.A. (Ron) Coulter
Attorney for Claimant/Appellant

320c

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of June, 2011, I caused to be served a true and correct copy of the foregoing by the following method to:

IDAHO INDUSTRIAL COMMISSION 700 S. CLEARWATER LANE BOISE, ID 83712 P.O. BOX 83720 BOISE, ID 83720-0041	( ) U.S. Mail (x) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
JOHN A. BAILEY, JR RACINE, OLSON, NYE, BUDGE & BAILEY CHTD. PO BOX 1391 POCATELLO, ID 83204-1391	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail
TRACEY K. ROLFSEN DEPUTY ATTORNEY GENERAL IDAHO DEPARTMENT OF LABOR 317 WEST MAIN STREET BOISE, ID 83735	(x) U.S. Mail ( ) Hand Delivery ( ) Certified Mail, Return Receipt Requested ( ) Overnight Mail ( ) Facsimile ( ) Statehouse Mail



R.A. (Ron) Coulter

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

HABID SADID, Claimant/Appellant, vs. IDAHO STATE UNIVERSITY, Employer/Respondent, and IDAHO DEPARTMENT OF LABOR, Respondent.	)	**SUPREME COURT NO# 38549-2011** **ORDER AUGMENTING RECORD**

On June 27, 2011, Claimant filed a motion to augment the Clerk's Record on appeal. Claimant requests that Exhibit 10F be made part of the record for this appeal, and Defendants have submitted no objection to the motion.

Accordingly, the motion to augment is hereby GRANTED. The Agency's Record shall include the Exhibit 10F and it shall be added to the List of Exhibits.

IT IS SO ORDERED.

DATED this 15th day of July, 2011.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2011 a true and correct copy of the **ORDER AUGMENTING RECORD** was served by regular Unite States Mail upon the following:

R.A. COULTER
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BOISE, ID 83735

CLERK OF THE COURTS
SUPREME COURT-JUDICIAL BRANCH
STATEHOUSE MAIL
BOISE, ID 83720-0101

db