FACULTY LEGAL ISSUES UPDATE

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I. INTRODUCTION

Faculty have been constructed as a significant management challenge. . . . Faculty are employees, potential revenue sources, resources to be redeployed, and competitors rather than colleagues.¹

It is an understatement to say that there is a tension between a college or university's need and/or desire to treat faculty members as their employees and the faculty members' desire for freedom and individual rights. Because of this tension, educational institutions face a number of challenges -- both practical and legal -- when dealing with issues related to faculty performance and discipline.

This article addresses the myriad of legal and structural issues that arise when investigating faculty misconduct and disciplining and terminating faculty members. It also provides a number of practical steps and tips for dealing with these issues.
II. INVESTIGATING FACULTY MISCONDUCT

A. The Importance Of A Thorough, Impartial And Effective Investigation

Concerns and complaints regarding potential wrongdoing by faculty members may come from a number of sources, ranging from anonymous information to rumors, to informal and formal complaints, to published news reports and criminal proceedings. When investigating potential wrongdoing, the investigation must be fair and professional. The college or university (and frequently the human resources department, in-house legal staff, internal auditors, ombudspersons and others) must be prepared to conduct a comprehensive, objective and professional investigation. The investigative process will permit your college or university to monitor itself – to ensure that its managers, supervisors, and employees comply with both the letter and the spirit of federal and state laws, as well as internal policies and guidelines.

Conducting an objective and thorough investigation minimizes the risk that a faculty member is disciplined or terminated for something he or she did not do. Perhaps things are not as they initially seemed, and the institution can avoid making an incorrect, devastating and costly decision.

The purpose of an investigation is to gather facts so that the investigator can make a credible determination as to what happened in a given situation. If someone is thought to have violated a policy, guideline, or procedure, conducting an effective investigation helps reach a conclusion that is based on the best facts available. Having accurate facts leads to a sound conclusion.
B. What Is The University’s Burden Of Proving Misconduct As Part Of An Internal Investigation?

For most colleges and universities faced with the decision of whether to terminate a faculty member for alleged misconduct, “proving” in the judicial sense of the word (i.e., by establishing “beyond a reasonable doubt” or with a “preponderance of the evidence”) that the misconduct actually occurred is neither practical nor plausible. Colleges and universities conducting internal investigations generally do not have the resources, time, or experience to conduct the kind of extended discovery that occurs in court litigation. Fortunately, the majority of courts recognize that imposing judicial-like burdens of proof on employers making decisions in the workplace is not legally required. The same courts agree, however, that an employer’s investigation and decision must be judged by some standard to ensure that its actions are not arbitrary, capricious, or illegal.

1. The good cause standard

In the absence of a university policy or state statute providing for a different standard, the standard that has been adopted by most courts for judging an institution’s decision to terminate a faculty member for alleged misconduct is one that derives from the notion of “good cause.” The standard can be paraphrased as follows: in order for a college or university to terminate an individual for alleged misconduct, the institution must make a

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2 See Pugh v. See’s Candies, Inc., 203 Cal. App. 3d 743 (1988). In a wrongful discharge action by an employee based on breach of contract, good cause for termination means a fair and honest cause or reason regulated by the good faith of the employer; Crosier v. United Parcel Service, 150 Cal. App. 3d 1132 (1983). The good cause determination needs to balance management discretion against the interest of the employee in maintaining employment.
good faith determination that sufficient cause existed based on reasonable grounds.


The rationale behind this standard is best explained by the California Supreme Court’s decision in Cotran v. Rollins Hudig Hall International, Inc.\(^3\) The plaintiff, Ralph Cotran, was employed by Rollins Hudig Hall International, Inc., an insurance brokerage firm, as a senior vice president in charge of its west coast operations. In 1993, the firm received reports that Cotran was sexually harassing two female employees. The company's director of human resources investigated the reports. In separate interviews that they subsequently reduced to written statements, both women relayed a number of similar incidents, including allegations that Cotran had made obscene phone calls to them at home and work, exposed himself to them while in the office, and masturbated when he was alone with them in his car. The president of the company later met with Cotran to discuss the allegations. He explained that an investigation would be made and that its outcome would turn on credibility. Cotran denied the accusations. He said nothing during the meeting about having had consensual affairs with the two women and could not explain the basis for the complaints. Following the meeting, Cotran was suspended pending further investigation.\(^4\)

The company’s internal investigation lasted approximately two weeks. During this time, the employer interviewed more than 20 witnesses, including five that Cotran suggested. The company concluded that the two women appeared credible. Although no other

\(^3\) 17 Cal. 4th 93 (1998).
\(^4\) Id. at 97
employees accused Cotran of harassing them while at Rollins, two female employees stated that they had also received strange phone calls from Cotran. The two women who brought the complaints signed affidavits repeating the details in their original, unsigned statements. Based on the information gathered during the investigation and the company’s credibility resolutions, the company concluded that it was "more likely than not" that the harassment had occurred and terminated Cotran.\(^5\)

Cotran sued Rollins for wrongful discharge. He claimed that the company had impliedly agreed to discharge him only for just cause and that the company did not have cause for discharge since he did not harass anyone. Cotran claimed that he had consensual sexual relationships with the two accusers. He said that he had not disclosed this during the company’s internal investigation because he felt “ambushed.” The trial court rejected Rollins’ defense that its decision was lawful because it had been reached honestly and in good faith. The court instructed the jury, “What is at issue here is whether the claimed acts took place. The issue for the jury to determine is whether the acts are in fact true. Those are issues that the jury has to determine.”\(^6\) The jury found that Cotran had not engaged in any of the behavior on which his termination was based, and awarded him $1.78 million in damages.\(^7\)

On appeal, Rollins Hudig Hall argued that the jury verdict was improper because the jury should have been instructed that an employer who terminates an employee for

\(^5\) Id.
\(^6\) Id. at 99.
\(^7\) Id.
misconduct need not prove the misconduct actually occurred. Rather, the firm argued, an employer need only reasonably and in good faith believe that the employee engaged in conduct that was inappropriate in the workplace. The California Supreme Court agreed and overturned the jury verdict. Relying on decisions from California and other states that define "just cause," the court ruled that "good cause" for termination does not depend on a jury finding that the fired employee actually engaged in the misconduct, but merely requires that the employer act with "a fair and honest cause or reason, regulated by good faith." To require the employer to be correct about the facts would interfere with the wide latitude an employer needs to make decisions involving high-ranking employees. The court stated:

The decision to terminate an employee for misconduct is one that not uncommonly implicates organizational judgment and may turn on intractable factual uncertainties, even where the grounds for dismissal are specific. If an employer is required to have in hand a signed confession or an eyewitness account for the alleged misconduct before it can act, the workplace will be transformed into an adjudicatory arena and effective decisionmaking will be thwarted . . . .

The proper inquiry for the jury . . . is not, "Did the employee in fact commit the act leading to dismissal?" It is "Was the factual basis on which the employer concluded a dischargeable offense had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual."8

Wrongful termination cases prior to Cotran have articulated similar standards for judging an employer's decision to terminate an employee for misconduct.9 The only

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8 Id. at 106.

9 See Southwest Gas v. Vargas, 111 Nev. 1064 (1995) ("allowing the jury to trump the factual findings of an employer that an employee has engaged in misconduct rising to the level of 'good cause' for discharge, made in good faith and in pursuit of legitimate business objectives, is a highly undesirable prospect."); Maietta v. United Parcel Service, Inc., 749 F. Supp. 1344, 1363 (D.N.J. 1990) (United Parcel Service employee
apparent distinction in the standards articulated by these cases is semantic. That is to say, some capture the objective arm of the standard with a phrase different from "reasonable grounds." For example, in one case, a district court uses the phrases "substantial evidence," and "credible support," and in another, the court uses the phrase "reasonable basis." All these cases agree that the employer need not be certain that the misconduct occurred in order to act.

b. What constitutes "reasonable grounds"?

As noted in Cotran, the "reasonable grounds" standard is an objective one. Furthermore, there is no set formula for evaluation so determining whether the institution's decision was based on "reasonable grounds" must be evaluated on a case-by-case basis.

In evaluating whether a college or university had reasonable grounds for terminating a faculty member for misconduct, the primary focus will be on the quality of the institution's investigation of the allegations. Based on the New Mexico Supreme Court's early decision

was terminated for allegedly falsifying and directing other employees to falsify production records); Crimm v. Missouri Pacific R. Co., 750 F. 2d 703 (8th Cir. 1984); Rulon-Miller v. International Business Machine, 162 Cal. App. 3d 241, 253 (1984) (the court held that "probable cause" would have been some reasonable basis for assuming that a significant company interest was at stake); Kestenbaum v. Pennzoil, 108 N.M. 20, 27 (1988) (the New Mexico Supreme Court foreshadowed the ruling in Cotran, and upheld the termination of a manager for sexual harassment because the employer "had reasonable grounds to believe that sufficient cause existed to justify the defendants' actions in discharging the plaintiff") and Simpson v. Western Graphics Corporation, 643 P.2d 1276 (1982) (employees were terminated for allegedly threatening violence against another employee).

While there are some cases that appear to impose merely the good faith standard (Benishelk v. Cody, 441 N.W. 2d 399, 401 (Iowa 1989)) or a standard based on mere suspicion (Caldor Inc. v. Bowden, 330 Md. 632, 646 (1993)), only one case was found endorsing a higher standard than "good faith based on reasonable grounds." In Scherer v. Rockwell Int'l., 975 F. 2d 356, 359-360 (7th Cir. 1992), the employee's contract stated the company could terminate him only if he was found guilty of gross default or misconduct, thus the court refused to apply the good faith based on reasonable grounds standard. The court implied, however, that absent the employment contract provision providing for proof of actual guilt, the good faith based on reasonable grounds standard would have applied.

Maietta, 749 F. Supp. at 1363; Crimm, 750 F. 2d at 713.
in *Kestenbaum v. Pennzoil*, it is clear that merely initiating and carrying out an internal investigation is not enough. Pennzoil investigated charges of sexual harassment against Kestenbaum by interviewing past and present female employees and giving him an opportunity to rebut the allegations. The court determined, however, that the investigation could not support a finding that Pennzoil acted on reasonable grounds in dismissing Kestenbaum for alleged sexual harassment. First, the court found the investigation deficient because investigators failed to “differentiate between firsthand knowledge, attributed hearsay or mere gossip or rumor.” Furthermore, the court found Pennzoil’s investigators did not observe the standards of good investigative practice and that Pennzoil made no efforts to evaluate how the investigation was handled. Thus, in conducting an internal investigation, employers must adhere to a policy of good investigative practices and must take time to adequately review the credibility and weight given to the evidence gathered.

A successful internal investigation is illustrated by *Maietta v. United Parcel Services, Inc.* The plaintiff in *Maietta* was one of 15 employees terminated for integrity violations, including allegedly falsifying and directing other employees to falsify production records. The terminations were a direct result of a district-wide investigation initiated by UPS. The internal UPS investigators interviewed over 70 UPS management- and supervisory-level employees during a one-month period. Employees were interviewed separately at an off-site location to ensure confidentiality. Employees also were asked to sign written statements.

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12 *Kestenbaum*, 108 N.M. at 28.
13 *Id.*
based on their interviews.\textsuperscript{15} The investigation file developed on the plaintiff contained allegations from a number of sources implicating him in wrongdoing and signed statements from two employees directly implicating him in integrity violations. The plaintiff was interviewed and confronted with the allegations, which he denied. After reviewing his investigation file, interview statement, and the statements of the two employees, the district manager terminated him. The court found that UPS’s investigation supported “a good faith determination that good cause existed to discharge Maietta as a matter of law.”\textsuperscript{16}

2. **What is the appropriate standard of proof for your institution?**

The standard of proof articulated in the *Cotran* decision is the standard that will apply to your institution unless there is a state law, a contractual provision or a faculty code of conduct rule provides for a different standard. Many colleges and universities impose standards different than the “just cause” standard for proving faculty misconduct. For example, some institutions have standards as high as “beyond a reasonable doubt” while others require “clear and convincing evidence” or a “preponderance of the evidence.”\textsuperscript{17} Institutions’ higher standards of proof stem from their reluctance to terminate faculty members without sufficient evidence. If, however, an institution’s faculty contracts and codes of conduct, as well as state law, are silent on the required standard of proof for

\textsuperscript{15} *Id.*, at 1353.

\textsuperscript{16} *Id.*, at 1364. See also *Crimm, supra* at 713. Missouri Pacific presented substantial evidence that appellant was discharged for good cause because it conducted a rather detailed investigation; prepared a formal investigation report; and sought advice from legal counsel.

\textsuperscript{17} *See, Deli v. University of Minnesota*, 511 N.W. 2d 46 (Minn. App. 1994) (under the University of Minnesota rules, the University had the burden of proving just cause for dismissal by clear and convincing evidence); *Bd. of Directors of Des Moines Area Community College v. Simons*, 493 N.W. 2d 879 (Iowa 1992) (Board’s decision to terminate faculty member supported by a preponderance of the evidence).
establishing employee misconduct, the *Cotran* standard will apply. As a result, colleges and universities need to analyze their contracts and faculty codes of conduct and any applicable state laws in order to determine which standard applies.

C. Conducting The Investigation

Prior to starting any investigation, plan the investigation carefully. No uniform rule governs conducting an investigation but a number of possible steps can be taken. The steps actually taken will depend on the characteristics and issues involved in the investigation. In addition, certain statutes, ordinances or rules applicable to public sector institutions impose special investigative requirements. When conducting an investigation involving faculty protected by such legislation, the terms of the legislation must be taken into account.

For a checklist of issues to consider in conducting investigations, see *Conducting Internal Investigations* contained in these Symposium materials.

D. Investigations As Part Of The Evaluation Cycle\(^\text{18}\)

Evaluations have a tremendous impact on employment decisions affecting faculty members at colleges and universities. Evaluations may go a long way towards supporting the appropriateness of discipline or dismissal of a faculty member. For example, when investigating possible discipline or dismissal of a faculty member for incompetence, one would hope to find evaluations with ratings reflecting unsatisfactory or below standard

\(^{18}\) Portions of this section are excerpted from James A. Rapp, *Education Law*. Mathew Bender: 1996, §2-6:09[5][b].
performance.\textsuperscript{19}

Evaluations can be an important piece of an investigation because evaluations that reflect similar misconduct by the faculty member in the past may lend support to any discipline imposed. All acts that constitute grounds for discipline, up to and including discharge, should be put in written form in an evaluation.

At the same time, the results of an investigation may play a part in a faculty member’s subsequent evaluation. If a claim of wrongdoing is investigated and found to have merit, the conduct at issue should be considered and addressed in subsequent evaluations of the faculty member. This not only supports the proposed action, but assures equal application of standards by administrative staff of the college or university.

III. DISCIPLINING FACULTY MEMBERS WITH SANCTIONS SHORT OF DISMISSAL

After concluding that a faculty member has engaged in misconduct, the college or university must decide what form of discipline to impose. This decision requires planning and a careful analysis of what form of discipline is appropriate for the conduct at issue.

In many situations, the penalty of dismissal may be an unduly severe sanction because it does not fit the offense. In such circumstances, universities should understand that lesser sanctions are available and should be considered. If the sanction of dismissal is not desirable under the circumstances or the evidence does not support a finding of adequate

\textsuperscript{19} Unfortunately, all too often, when a faculty member is being investigated for incompetence, the
cause for dismissal, consider applying a lesser sanction.\textsuperscript{20} University policies and procedures should provide for lesser sanctions. In addition, the AAUP Joint Subcommittee on Faculty Responsibility’s 1979 report recommends that institutions develop a list of sanctions that might be used in cases where the alleged conduct may provide cause for dismissal but where other factors indicate that lesser sanctions should be recommended.

A. Suggested Forms Of Discipline Other Than Dismissal

A variety of measures, other than dismissal, are available to universities when disciplining faculty members. Examples include:

- Oral or written reprimand or warning;
- Suspension or probation from service for a stated period of time;
- Loss of prospective benefits for a stated period of time (e.g. “regular” or “merit” increase in salary, promotion eligibility);
- Fines or penalties;
- Reduction in salary for a stated period;
- Placement on probation or extension of the probationary period,\textsuperscript{21}

faculty member's evaluations contain ratings of satisfactory or above.


\textsuperscript{21} Extending the probationary period as a form of discipline can sometimes be a mixed bag because certain faculty members may be thrilled to have a longer probationary period. In these circumstances, the punishment may actually be a benefit to the faculty member. This countervailing consideration should be taken into account in deciding whether to extend a faculty member’s probationary period as a form of discipline.
• Transfer or reassignment;
• Demotions; and
• Removal from extracurricular activities.

For example, in Wirsing v. Board of Regents of University of Colorado, 739 F. Supp. 551 (D. Col. 1990), the university applied the lesser sanction of withholding merit raises for one year. The plaintiff, a professor since the 1960s, thought that standard forms were inadequate to evaluate teaching and learning and refused to administer the university's standard evaluation forms in her classes. Although she was very highly rated and her department chair recommended a salary increase, the dean did not award her any merit increase because she refused to use the university's evaluation forms. The court upheld the dean's decision, reasoning that the use of the forms did not interfere with her course content or academic freedom.

B. Procedural Requirements For The Imposition Of Discipline Short Of Dismissal

Case law is not clear concerning whether a tenured public employee is entitled to notice or an opportunity to be heard before their institution can impose discipline short of termination. However, some form of procedure should be established and consistently followed.\(^2\) For example, before imposing a minor sanction, such as a reprimand, notify the

\(^2\) See, e.g., Maples v. Martin, 858 F. 2d 1546, 1550 (11th Cir. 1988) (no property interest when tenured university professors transferred from mechanical engineering department to other engineering departments with no diminution in salary or rank); Garvie v. Jackson, 845 F. 2d 647, 651 (6th Cir. 1988) (no property interest when university department head reassigned to regular teaching duties); Winkler v. County of DeKalb,
faculty member of the basis for the proposed action. After imposition of a minor sanction, the faculty member should have the right to file a grievance. In cases potentially warranting a major sanction, provide an advance hearing. The procedures that a college or university provides to a faculty member before imposing discipline will depend upon the institution’s policies and procedures and faculty codes of conduct, the applicable collective bargaining agreement and/or local, state and federal law.

The cases below provide examples of lesser sanctions and discuss the procedural requirements for imposing such sanctions.23

*Gilbert v. Homar, 117 S. Ct. 1807 (1997).*

Homar, a tenured police officer employed at East Stroudsburg University, was arrested and charged with a drug felony. Immediately after his arrest, the university suspended him without pay pending the university’s investigation. Although the criminal charges were dismissed, the university’s suspension of Homar remained in effect while the university continued its own investigation and the university ultimately demoted Homar. Homar sued, claiming that the university’s failure to provide him with a notice and a hearing before suspending him without pay violated his due process rights. The Supreme Court rejected Homar’s due process challenge, finding that as long as “a suspended employee receives a sufficiently prompt post-suspension hearing, the lost income is relatively

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23 The authors gratefully acknowledge the assistance of Ann H. Franke, Esq., Director of Employment Liability Services at United Educators Insurance Risk Retention Group, Inc., who prepared most of the case summaries in this section.
insubstantial, and fringe benefits such as health and life insurance, are not affected at all.” The Court also recognized that the state has a significant interest in immediately suspending employees charged with felonies who occupy positions of public trust and visibility, such as police officers. Finally, the Court pointed out that the purpose of a pre-suspension — to assure that there are reasonable grounds to support the suspension without pay — had already been assured by the arrest and filing of charges.


A professor accused of sexual harassment of a student and other conduct unbecoming to a college staff member alleged that suspension of teaching duties pending the outcome of the investigation deprived him of procedural due process. The court rejected the professor’s due process challenge, finding that the college was justified in taking temporary measures given the seriousness of the charges.

It is clear from the _Gilbert_ and _Shub_ cases that the courts approve of universities suspending tenured employees without pay and without a hearing pending the results of an investigation. This does not mean, however, that a university should automatically adopt a rule of suspending its faculty members without pay and without a hearing. Before doing so, the university needs to consider whether, from an employee relations and political standpoint, it is wise to place its faculty members on unpaid leaves of absence pending the outcome of an investigation without providing some kind of pre-suspension notice or a hearing. The

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24 Although the tenured employee in _Homan_ was not a faculty member, he was nevertheless tenured under Pennsylvania law. As a result, the circumstances in the _Homan_ case can be analogized to cases involving
university needs to consider what effects, if any, imposing such a sanction would have on the rest of its faculty and the students and how the community would view such conduct.

McClellan v. Board of Regents of the State University, 921 S.W. 2d 684 (Tenn. 1996).

A professor of exercise physiology made inappropriate sexual comments while overseeing the electrocardiogram of a female student. After a hearing, the professor was ordered to attend sensitivity counseling, barred for three years from teaching the only section of a required course, required to follow guidelines for administering EKGs, required to advise students that the EKG procedure is voluntary, and barred from teaching in the next summer session. The court rejected the professor’s due process challenge, concluding that he had received adequate notice of the charges, and the hearing committee, consisting of two professors and two students, met the requirements of the state Administrative Procedures Act.

Huang v. Board of Governors of the University of North Carolina, 902 F. 2d 1134 (4th Cir. 1990).

The court held that the transfer of a tenured full professor to another department did not impair his property interest. Moreover, he had ample opportunity to meet with administrators and also received a nine-day hearing. His insistence on a hearing under a different university code section was misplaced, since that section applied only to “dismissal, demotion in rank or serious sanction.”

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tenured faculty members and the analysis used in evaluating suspensions of tenured faculty members without pay should be the same.
Other cases involving transfers and changes in assignments include *Maples v. Martin*, 858 F. 2d 1546, 1550-51 (11th Cir. 1988) (transfer of tenured professors to another department without loss of rank or pay does not implicate any constitutionally-protected property interest); *Garvie v. Jackson*, 845 F. 2d 647, 651 (5th Cir 1988) (demotion from department chair to professor not a denial of a protected property interest); *Kelleher v. Flawn*, 761 F. 2d 1079, 1087 (5th Cir 1985) (reduction of graduate student’s teaching duties is not a denial of a protected property interest).


A tenured English professor who used sexual imagery in class was found to have violated sexual harassment policy. He was ordered to provide students and the department with a syllabus indicating, among other information, his teaching style; attend a sexual harassment seminar; undergo a formal evaluation; and “become sensitive to the particular needs and backgrounds of his students . . . .” The court of appeals ruled that the sexual harassment policy was too vague to give adequate notice that the professor’s long-standing teaching methods might subject him to punishment.


An English professor found to have violated sexual harassment policy was, after informal procedures, issued a formal letter of reprimand, subjected to parallel “shadow” classes, and, while still paid, removed from teaching for two semesters. After a hearing, he was suspended from teaching without pay for a year, with his return dependent on several
conditions, including participation in approved counseling. An internal appeal hearing followed thereafter. Professor Silva sought a preliminary injunction on First Amendment and due process grounds. With regard to due process, the court found that the informal process was constitutionally adequate, given the limited nature of the first set of sanctions. With respect to the formal process, it found a genuine issue regarding the adequacy of notice of the charges and the impartiality of a member of the appeals board. Although the court concluded that the university did not violate Silva’s due process rights when it imposed the sanctions after the informal procedure, the court did find that Silva’s classroom speech was protected by the First Amendment and that the university’s sexual harassment policy prohibiting such conduct was unconstitutional. As a result, the court ordered the university to reinstate Silva to his tenured position with full pay and benefits.


An assistant professor of Russian at the University of Massachusetts, Professor Newman was accused of plagiarism in a scholarly article on a seventeenth century Croatian poem. During the internal investigation, she had several opportunities to respond to the charges. She received a hearing in which she was entitled to challenge committee members for cause, present evidence, call and cross-examine witnesses, and received assistance from an advisor. Before the chancellor acted on the hearing committee’s report, the professor had an opportunity to reply to the chancellor. The university censured her publicly and disqualified her from serving as an administrator or on various academic boards for five years. The court assumed that the punishment deprived the professor of a liberty or property interest but concluded that the process she received was “more than sufficient,” given the
compelling interests at stake. "[A]t each stage of the proceedings, the University afforded
Professor Newman an opportunity to present her side of the story, it permitted her to challenge decision makers for bias, it permitted her to call witnesses, it permitted her to see, and to criticize, the evidence against her, and it permitted her to see all tentative recommendations, and to argue against them before they became final."

IV. TERMINATION FOR CAUSE

Terminating the employment of a tenured faculty member for cause is one of the most difficult actions that a college or university can take. The repercussions of such a dismissal often extend far beyond the terminated faculty member and can cause or reflect institutional discord. In addition, important academic and constitutional principles are often involved in such actions.

The grounds for dismissing a faculty member are typically delineated in the faculty member’s contract with the college or university, in the institution’s faculty code of conduct and, for public institutions, may also be regulated by statute. Although the contract may state certain specific grounds for dismissal, most contracts provide for dismissal based on the general concept of “cause.” Below, we address the substantive grounds for dismissing tenured faculty members for cause – for conduct occurring on and off campus – as well as the procedures which must be followed when dismissing tenured faculty for cause.

A. The Requirement Of A Nexus Or Adverse Effect

Courts considering the issue of dismissal for cause have held that a faculty member’s
conduct may not serve as grounds for dismissal in the absence of a showing of some nexus between the conduct and the performance of the faculty member's duties and responsibilities. The leading case on this issue is *Morrison v. State Board of Education*, 1 Cal. 3d 214 (1969). The *Morrison* case has been widely accepted and expanded by other courts. The AAUP has also accepted this concept, stating in its policies that "adequate cause for dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers."\(^{25}\)

The concept of nexus requires the University to base its decision on facts leading to a conclusion that a faculty member is unfit to continue in a position. It also facilitates the public interest in protecting students, faculty and the community by "not permitting the exercise of personal moral judgments by board members."\(^{26}\) The nexus requirement is especially significant where the grounds for dismissal occur off-campus or outside the work day. What might otherwise be viewed as private or personal conduct becomes a concern where the conduct directly affects the performance of the faculty member's duties.\(^{27}\)

The most commonly used factors in determining whether a nexus exists between the conduct and the faculty member's performance are: (1) age and maturity of the students; (2) size or population of the school and community; (3) likelihood that the faculty member's conduct has had, or will have, an adverse effect on students, other employees or the community; (4) the effect on faculty member-student relationships; (5) any disruption of the


educational process; (6) the severity of any adverse effect; (7) proximity or remoteness in
time of the conduct; (8) aggravating circumstances surrounding the conduct; (9) the
likelihood the conduct will recur; (10) the impact of publicity; (11) the motive for the
conduct; and (12) the extent to which disciplinary action may have an adverse or chilling
effect upon the exercise of constitutional rights.

B. Substantive Grounds For Cause For Dismissal

Although the courts have articulated the “nexus” standard for dismissals for cause, they have not actually defined cause. However, the findings of cause that have been upheld by the courts can be grouped into several categories.

1. On-campus conduct

   a) Immoral behavior

   Immoral behavior is a frequently cited cause for dismissal. Conduct constituting immoral conduct ranges from sexual misconduct or harassment to dishonesty. A dismissal for sexual misconduct was upheld in Cockburn v. Santa Monica Community College District, 161 Cal. App. 3d 734 (1984) after a professor, who had been previously warned to stop harassing female students, grabbed and embraced a student twice on her first day. A dismissal for dishonesty, among other grounds, was upheld in Jawa v. Fayetteville State University, 426 F. Supp. 218 (E.D.N.C. 1976) for a faculty member’s “reckless disregard for

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27 For an in-depth analysis, see Section IV, B2, infra.
28 The term on-campus conduct refers not only to conduct actually occurring inside the campus gates but includes any conduct occurring during any college or university connected activities, regardless of the location.
the truth” in dealing with his superiors. Similarly, the dismissal of a faculty member for misrepresenting his credentials was upheld in *Barszcz v. Board of Trustees*, 400 F. Supp. 675 (N.D. Ill. 1975). *Barszcz* involved a professor who claimed, when he was hired, that he would obtain a master’s degree within a few months but never did. Three years later, he was granted tenure and accepted the salary of a faculty member with a master’s degree. Another area of immoral conduct is plagiarism. In *Agarwal v. Regents of the University of Minnesota*, 788 F. 2d 504 (8th Cir. 1986), the university’s dismissal of a faculty member for plagiarizing a laboratory manual was upheld.

b) **Insubordination/neglect of duty**

Insubordination or neglect of duty as a cause for dismissal refers to the willful disregard of express or implied directions. As interpreted by the courts, it can encompass many acts or omissions, including refusal to discuss curriculum with superiors, refusal to prepare a course outline, refusal to use required textbooks, refusal to discuss teacher evaluations with superiors, and refusal to follow administrative directives relating to the schedule of classes and to advisory responsibilities.29 Dismissal for insubordination often involves two conflicting values – academic freedom or free speech on one side and the right of colleges and universities to expect cooperation and loyalty from their faculty on the other. In several cases, the courts have held that the dismissal of a faculty member for insubordination was improper because it infringed on the faculty member’s academic

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29 *Weeks, Managing Departments*, supra, at p. 93.
freedom or free speech rights. Courts have also recognized the interest of academic institutions in efficiency and cooperation and, in several recent cases, have rejected claims that dismissals were in retaliation for the exercise of free speech. As a result, dismissals for insubordination will be scrutinized by courts who are wary of pretextual dismissals in retaliation for dissent, criticism of authority or personal dislike. Courts are aware, however, of the need for collegiality and cooperation among faculty members and will view that as a legitimate reason for dismissing a faculty member.

c) Incompetence

Incompetence is the most difficult cause for dismissal to substantiate because it involves subjective opinions of a faculty member’s performance. Relevant factors for showing incompetence include peer evaluation, the amount of cooperation in remedying an identified problem, and student interest in and evaluation of course offerings. Although incompetence is often combined with other grounds, such as insubordination, courts have generally upheld the right of colleges and universities to dismiss incompetent tenured faculty members if the allegations are supported by substantial evidence. In one case, the charges of incompetence included failure to cover pertinent topics in the course syllabus, poor organization of lectures, failure to hold class regularly, and failure to provide opportunities

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32 Weeks, Managing Chairpersons, supra, at p. 94.
for students to meet with the professor on an individual basis.\textsuperscript{33} In another case, \textit{King v. University of Minnesota}, 774 F. 2d 224 (8\textsuperscript{th} Cir. 1985), a tenured faculty member was dismissed for incompetence based on complaints by students, colleagues and successive chairmen of his department concerning poor performance in teaching, research and service to the University.

d) Ethical misconduct

Professional ethics are an increasing concern among college and university professors and administrators.\textsuperscript{34} In 1987, the AAUP adopted a Statement of Professional Ethics that contains five basis points, two of which relate to the treatment of students and colleagues.\textsuperscript{35} The Statement provides that faculty should “respect the confidential nature of the relationship between professor and student. They should avoid any exploitation, harassment, or discriminatory treatment of students.”\textsuperscript{36} In regard to colleagues, it states that “professors do not discriminate against or harass colleagues. They respect and defend the free inquiry of associates.”\textsuperscript{37} The dismissal of a faculty member for violation of professional ethics was upheld in \textit{Korf v. Ball State University}, 726 F. 2d 1222 (7\textsuperscript{th} Cir. 1984), where a Professor offered his students good grades contingent upon sexual involvement.

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\item[\textsuperscript{33}] Riggins \textit{v. Board of Trustees of Ball State University}, 489 N.E. 2d 616 (Ind.Ct.App. 1986)
\item[\textsuperscript{34}] Weeks, \textit{Managing Chairperson}, supra, at p. 96.
\item[\textsuperscript{35}] Id.
\item[\textsuperscript{36}] Id.
\item[\textsuperscript{37}] Id.
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2. Off-campus conduct

Disciplining a faculty member for off-campus conduct presents a much more difficult issue for colleges and universities because issues of privacy, free speech, academic freedom and relevance play a much greater role. Arguably, a faculty member’s work and private life are separate and a college or university has no reason to know or care what a faculty member does on his own time. On the other hand, if a faculty member’s private conduct reflects poorly on the institution or affects the individual’s job performance or the institution’s confidence in his abilities, the college or university should be able to discipline him for this conduct. The balance of competing interests is more complicated when faculty members also serve as role models for students. In this situation, any “bad act” might affect job performance because it creates a bad role model for students. For this reason, it should be easier for a college or university to discipline a faculty member for off-campus conduct when that individual also serves as a role model.

In order to balance these competing interests, the college or university must establish a nexus between the conduct and the faculty member’s ability to perform her duties. In determining whether a college or university has a legitimate interest in disciplining a faculty member for off-campus conduct, the institution should focus on the specific nature of the conduct and the extent to which the conduct relates to the college or university’s business. The greater the connection, the easier it will be for the college or university to establish cause.
The following cases provide examples of off-campus conduct where courts concluded that a faculty member’s termination was justified.

*Board of Directors of Des Moines Area Community College v. Simons, 493 N.W.2d 879 (Iowa 1992).*

Simons was a psychology instructor who taught classes for students interested in becoming drug counselors. Simons invited one of her students, who had a history of drug abuse and addiction, to live with her until the student graduated. After graduation, the student moved in with a boyfriend, but soon returned because of the boyfriend’s heavy cocaine use. Although Simons knew of the boyfriend’s drug involvement, she ultimately allowed the boyfriend and the former student to live with her. Shortly thereafter, Simons saw a college student use cocaine in her home and allowed parties to be held at her house where she knew illegal drugs were being used. After complaints by neighbors, the police searched Simon’s home and arrested her, based on finding illegal drugs packaged for sale and loaded firearms in her bedroom. Simons was convicted of possession of a controlled substance and the president of the college told Simons that he was recommending that her contract with the college be terminated. After a hearing, the Board of Directors of the college found that Simons actions constituted “irresponsible errors of judgment” and that she “continuously tolerated and thus condoned the illegal activities.” The Board concluded that her conduct constituted just cause for dismissal. The court upheld the dismissal, agreeing with the college that retaining Simons as a faculty member would reflect negatively upon the college’s reputation and undermine police efforts to combat illegal drug activity.

Allen, a tenured faculty member and the college’s Chief of Campus Security, was discharged from his employment as Chief of Campus Security for making statements that appeared in a local newspaper that were racist and indicated a willingness to use force. The court upheld the college’s decision to discharge Allen, finding that Allen’s statements clearly demonstrated a lack of discretion and judgment on his part and his conduct was an embarrassment to the college and had a disruptive influence on campus as well as the community. The court also found that Allen’s statements, along with his inability to recognize any wrongdoing or error on his part, were not conduct that comported with the college’s expectations of its faculty and employees, especially those in sensitive positions such as the Chief of Campus Security.

Maddox v. University of Tennessee, 62 F. 3d 843 (6th Cir. 1995).

Maddox was a non-tenured assistant football coach at the university. After he was hired, he was arrested and charged with driving under the influence of alcohol and public intoxication. The incident was highly publicized in the community and embarrassing to the university. Maddox was placed on paid administrative leave pending the university’s investigation and, after the allegations were confirmed, was terminated. The court upheld the termination, partly because Maddox’s conduct was directly related to his ability to coach. The court pointed out that, as a member of the football coaching staff, Maddox represented not only the team but also the university and that, as a result of the full coverage of this incident by the media, the university fell out of favor with the public. The court also noted
that football coaches are “role models” and “mentors” to the players and, with so much emphasis on the misuse of drugs and alcohol by athletes, the coaches must be held accountable for their conduct that is inconsistent with this role.

*Samaan v. Trustees of the California State University and Colleges, 150 Cal. App. 3d 646 (1983).*

Professor Samaan, a tenured faculty member at the California State University in Sacramento, also had a private psychology practice through which he provided counseling services to children through the state’s Medi-Cal system. The university dismissed Samaan after learning that he had been convicted of grand theft as a result of over one hundred incidents of fraudulent billing to Medi-Cal in connection with his private practice. The court upheld the university’s dismissal of Samaan, finding that his conviction indisputably reflected adversely upon his honesty and, thus, was sufficient cause for dismissal.


Miller was a faculty member in the speech department of the West Valley Community College District until he was arrested and charged with selling cocaine. After his arrest, the Community College District commenced proceedings to dismiss him. Although Miller was acquitted on the cocaine charges, the court affirmed the district’s decision to dismiss Miller. The court found that the evidence supported the district’s conclusion that, as a result of his arrest, Miller’s relationships with faculty and students were impaired because he could not communicate proper values to the students. Therefore, he was unfit to teach.

After Reliford pled guilty to a burglary that occurred near, but not on, the university campus, the university dismissed Reliford from employment with the university pursuant to a state statute providing for the dismissal of state employees who are convicted of certain crimes. Reliford argued that, because the offense did not occur on campus and because the victim was not a university student, the statute did not apply and he should not have been terminated. The court rejected Reliford’s argument, holding that his interpretation of the statute would render state colleges and universities helpless to discipline faculty members whose lawless conduct has an adverse impact on their campus.

C. Procedural Requirements For Dismissing Faculty Members

Since tenured faculty members (and in some cases un-tenured faculty) have a protected property interest in continued employment, before a college or university can dismiss that individual, the institution must provide the faculty member with due process. In addition, faculty members must be afforded post-dismissal due process rights. History shows that dismissals of faculty members are more frequently challenged on procedural grounds than on substantive grounds. As a result, the procedural issues deserve careful attention.

The specific procedure that must be followed will vary depending upon the applicable laws, the internal university procedures and contracts, if any, between the faculty member and the institution. In general, however, the college or university must afford the faculty member adequate notice and an opportunity to be heard. The following is a checklist of the minimum procedural due process requirements that colleges and universities should provide
to a faculty member who is being terminated for cause:

- A clear and actual notice of the reasons for the dismissal in sufficient detail to enable the employee to respond;

- Notice of the names of those who have made the charges and the specific nature and factual basis for the charges;

- A reasonable time and opportunity to present testimony in the faculty member’s defense which may include the right to counsel and the right to cross-examine witnesses;

- A hearing before an impartial board or tribunal; and

- Post-termination review or appeal of the decision with the time within the faculty member may request appeal clearly stated in the decision.

Procedural due process is a flexible concept and the circumstances determine the actual procedure used. In making this decision, colleges and universities should be guided by flexibility, fairness and reasonableness.

V. LESSONS TO BE LEARNED

Colleges and universities must take into account a number of legal and practical considerations when investigating faculty members for misconduct and when deciding what, if any, discipline to impose. Below are several practical tips and/or suggestions that will help ensure that your institution satisfies any legal obligations and adequately considers all of the
practical implications of investigating and disciplining faculty members:

A. Analyze and evaluate all applicable statutes and university rules to determine what substantive and procedural rights are and should be guaranteed to faculty members.

Frequently, the various policies, rules, contracts and laws are inconsistent with each other. University counsel needs to (a) ensure that that these policies, rules, contracts and laws are in conformity with each other and (b) determine what procedure is appropriate.

Any disciplinary procedure must afford sufficient due process but not be so cumbersome or burdensome that issues are not resolved in a quick and timely fashion. You must strike a balance between thorough due process and speedy and efficient resolutions of faculty allegations. Your investigation and discipline procedure should permit investigation into the important issues involved and should allow the institution to move quickly in reaching a conclusion. All too often, universities get caught up in every detail of a particular situation and cannot put closure on the situation in an efficient manner to everyone’s satisfaction. An investigation and discipline procedure that successfully strikes the balance between these opposing needs will benefit your institution in many ways.

B. Determine what the appropriate standard of proof is for your institution.

Every college and university will face different issues when deciding what standard of proof should be used to prove faculty misconduct. As a result, your college or university must decide for itself what standard of proof is appropriate. Should it be the *Cotran* standard
of completing a good faith investigation and arriving at a reasonable conclusion? Should it be higher? Your institution should encourage and welcome debate and discussion on this issue so the institution can adopt a standard of proof that is acceptable to all key campus constituencies.

C. Train all campus officials who conduct or oversee investigations.

Colleges and universities must train all campus officials who conduct and oversee investigations involving faculty misconduct as well as all faculty members who participate in committees that make determinations about procedure and the process that must be afforded to faculty members. The training educates these individuals on what is required and sufficient for an adequate investigation as well as on what the appropriate standard of proof is and how to arrive at that standard. Training those involved in investigations of faculty misconduct will build the skills necessary for conducting an effective internal investigation, including:

- How to ask the right questions;

- How to obtain relevant evidence;

- How to sort relevant from irrelevant evidence and determine how much evidence is enough to conclude whether misconduct occurred;

- How to assess the credibility of your witnesses;

- How to handle privacy and free speech issues;
• How to handle a faculty member’s request for and right to counsel;

• How to obtain faculty member’s cooperation when he/she is reluctant to do so;

• How to provide appropriate due process before and after implementing discipline;

• How to effectively implement the results of an investigation; and

• How to prepare and utilize documentation that supports the results of an investigation and offers the faculty member sufficient information upon which to determine if he/she wishes to accept or challenge the university’s decision.