

ROBERT J. BEZEMEK  
PATRICIA LIM  
DAVID CONWAY

LAW OFFICES OF  
**ROBERT J. BEZEMEK**  
A PROFESSIONAL CORPORATION  
THE LATHAM SQUARE BUILDING  
1611 TELEGRAPH AVE., SUITE 936  
OAKLAND, CALIFORNIA 94612  
Telephone: (510) 763-5690 • Facsimile (510) 763-4255

## MEMORANDUM

TO: Rich Hansen, Foothill-DeAnza Faculty Association

FROM: Bob Bezemek

Re: Faculty and participation in civil disobedience and protests – the potential impact of an arrest or conviction

Date: February 7, 2017

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**Question: Do faculty risk the loss of their employment if they are *arrested* for civil disobedience activities?**

**Answer: In general, no. With narrow exceptions not usually applicable to protest activities, faculty members cannot be punished by colleges because they have been arrested.**

**Question: Were a faculty member to be *convicted* of an offense arising from civil disobedience or a protest, would the faculty member be subject to disciplinary action, including termination?**

**Answer: It is highly unlikely a faculty member convicted of an offense arising from civil disobedience or a protest, could be successfully disciplined by a college. Any discipline is subject to due process, and only when the conviction involved “immoral conduct” would there likely be any risk of punishment. But such a conclusion can result from actions which an arbitrator or judge concludes make one “unfit” to teach, a subject discussed further below.**

**Question: Should faculty be concerned that they could be subject to disciplinary action for anything else they allegedly do while participating in demonstrations, whether on campus or not?**

**Answer: While it is unlikely that faculty participation in free speech activities will result in discipline, every situation is different, and an analysis requires examining the facts**

**and the totality of circumstances. Faculty can face administrative investigation or disciplinary action because it is believed they have engaged in “unprofessional conduct,” or are “unfit for service”, and it is conceivable, though rare, that perceived improper actions during a protest are the cause of the inquiry or action.<sup>1</sup>**

### **Discussion and Analysis**

A wave of protest and civil disobedience is sweeping the country. They include marches, sit-ins, rallies, strikes, letters or phone calls to legislators, public statements, picketing and handbilling. Given the intensity of the debate and the divisions among the people, some protest activities involve carries at least a possibility of confrontation, violence, arrest, and conviction.

It is hardly surprising that faculty who are disposed to protest might be concerned about whether these activities might place their jobs at risk if they are arrested. These concerns about are reasonable, since demonstrating protesters and bystanders have sometimes been arrested in dragnet or mass arrests during public protests.

So, what do faculty need to know?

**Rule No. 1. As a general rule faculty are as free as anyone to participate in direct action/civil disobedience, on or off campus.** Such actions are an exercise of freedom of speech and association, and sometimes academic freedom or union activity. However, there are situations which might subject a faculty member to disciplinary action, and other things.

**Rule No. 2. In general, no faculty member can be dismissed or suspended by their employer based on an *arrest*.** See Cal. Labor Code section 432.7. However, there is a narrow exception – the Education Code allows unpaid suspensions of faculty for two categories of alleged sex and drug offences. And even those suspensions are subject to reversal through due process procedures.

In addition, this law does not prohibit an employer from independently investigating

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<sup>1</sup> Recall that during the “Occupy” protests in 2016, a college assistant professor’s shouts directed at a student at a demonstration led to her dismissal by the University of Missouri. *New York Times*, Feb. 26, 2015, Richard Perez-Pena reporting . The *Times* report added that, “When a young man making a video recording identified himself as a journalist, she told him to leave, grabbed at his camera and called out, “Hey, who wants to help me get this reporter out of here? I need some muscle over here.” And, “[l]ater, it emerged that she had been involved in a confrontation with the police in October, along with students who were trying to block a homecoming parade.” *Id.* The University announced, “The board believes that [the instructor’s] conduct was not compatible with university policies and did not meet expectations for a university faculty member.” A misdemeanor assault charge against her was dismissed as part of a plea deal.

allegations of misconduct that gave rise to an arrest, and then relying on that information to justify a dismissal in violation of, for instance, “unprofessional conduct.” See *Pinheiro v. Civil Service Commission* (2016) 245 Cal. App.4th 1458, 1471. However, where the conduct is lawful, “off the job” conduct then under Labor Code sections 98.6(g) and 96(k), one cannot be fired for such conduct.

**Rule No. 3. Only certain convictions will pose a risk to a faculty member’s employment, and most civil disobedience-related convictions are not likely to pose a risk of disciplinary action by the college unless they involve “moral turpitude,” a vague term given meaning by a decision of the California Supreme Court discussed below.**

There are many potential criminal offenses that can arise during a protest or demonstration.<sup>2</sup> None of these offenses should ordinarily pose any threat to one’s employment. However, every situation can be different, as I discuss below.<sup>3</sup>

#### **a. Statutes governing tenured and probationary teachers**

In the community colleges, the crucial statutes governing disciplinary action start with Education Code section 87732, which provides the grounds for dismissal or suspension of permanent (tenured) or probationary faculty.<sup>4</sup> Among other things, section 87732 states that a faculty member with tenure or probationary status is subject to discharge or suspension without pay for “**conviction of a felony or of any crime involving moral turpitude**”.<sup>5</sup>

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<sup>2</sup> Some of the typical offenses that may result from civil disobedience include: disorderly conduct, failing to disperse, failing to obey the order of a police officer, assault, battery, or interference of a police officer.

<sup>3</sup> It is critical that faculty and their unions recognize this, so that a faculty member can protect him or herself, and in the event of an arrest does not plead guilty to violating any criminal statutes without first understanding the potential consequences.

<sup>4</sup> One must recognize that the legal protections afforded community college faculty vary somewhat based on whether one is tenured or probationary on the one hand, or a temporary employee on the other. Some protections, however, apply with equal force regardless of this distinction.

<sup>5</sup> Section 87732 provides that “No regular employee or academic employee shall be dismissed except for one or more of the following causes:

- (a) Immoral or unprofessional conduct.
- (b) Dishonesty.
- (c) Unsatisfactory performance.
- (d) Evident unfitness for service.
- (e) Physical or mental condition that makes him or her unfit to instruct or associate with

That statement creates the first barrier to a college penalizing faculty – discipline for a conviction, whether for a felony or misdemeanor, must involve “moral turpitude” or it cannot justify punishment. *Board of Trustees of Santa Maria Joint Union High School Dist. v. Judge* (1975) 50 Cal. App.3d 920.

The meaning of “moral turpitude” was addressed by the Supreme Court in its landmark decision, *Morrison v. State Personnel Board*, 1 Cal. 3d 214, 220 (1969). There the court recognized that the term “moral turpitude” cannot be defined in the abstract:

“Terms such as ‘immoral or unprofessional conduct’ or ‘moral turpitude’ stretch over so wide a range that they embrace an unlimited area of conduct. In using them the Legislature surely did not mean to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval. Hence the courts have consistently related the terms to the issue of whether, when applied to the performance of the employee on the job, the employee has disqualified himself ... In the instant case the terms denote immoral or unprofessional conduct or *moral turpitude of the teacher which indicates unfitness to teach.*” Id. at 220-221.

In other words, for a conviction to result in punishment, the faculty member had to commit an offense that indicates an “unfitness to teach.” It is for this reason that a public employee could not be disciplined based on sexual preferences. See, e.g., *Morrison v. State Personnel Board, supra.* In contrast, a teacher who lied about an illness in order to pursue a personal interest - observing the launch of the Space Shuttle - was subject to review to determine whether her dishonesty made her “unfit” to teach and, if so, what punishment was warranted. See *Fontana Unified School District v. Burman* (1988) 45 Cal. 3d 208, 214-220.

The *Morrison* court also noted that immoral conduct is conduct which is hostile to the welfare of the school community, as shown by the character or notoriety of the act, and evidence that it impaired the services of the teacher in properly instructing students. Certainly in a college, as opposed to a public school, this is a high standard. The Court emphasized that there must be proof that the conduct made the teacher “unfit” to teach, and that this conclusion could be reached only after examining the conduct in question with these several more particularized standards in mind:

“[1] the likelihood that the conduct may have adversely affected students or fellow teachers, [and] the degree of such adversity anticipated, [2] the proximity or remoteness

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students.

(f) Persistent violation of, or refusal to obey, the school laws of the state or reasonable regulations prescribed for the government of the community colleges by the board of governors or by the governing board of the community college district employing him or her.

(g) **Conviction of a felony or of any crime involving moral turpitude.**

(h) Conduct specified in Section 1028 of the Government Code.”

in time of the conduct, [3] the type of teaching certificate held by the party involved, [4] the extenuating or aggravating circumstances, if any, surrounding the conduct, [5] the praiseworthiness or blameworthiness of the motives resulting in the conduct, [6] the likelihood of the recurrence of the questioned conduct, and [7] the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist ... in determining whether the teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the [institution's] standards." Morrison, supra., at pp. 229-230.

As is evident, in most instances the civil disobedience will involve the exercise of constitutional rights, a factor that often decisively defeats any threat of disciplinary action.

So, based on the above standards, it is generally unlikely that a faculty member would face potential discipline for a disobedience-related conviction.

### **b. Temporary Part-Time or Adjunct Faculty**

Part-time faculty are, as a general rule, as free as tenured or probationary faculty to participate in direct action/civil disobedience. The rights of adjunct faculty are, however, not as strong when it comes to defending against the loss of rehire preference or the loss of one's part-time work. This is because they are generally afforded little due process.

Often, administrative action taken to eliminate rehire preference is governed by the collective bargaining agreement. Hence, if a criminal conviction is relied upon to justify removing rehire preference, the part-timer will need to look at the rehire section of the agreement, or consider whether the loss of preference is in retaliation for exercising one's constitutional rights.

Dismissal of part-time faculty usually refers to a mid-assignment or end-of-assignment dismissal, and is ostensibly governed by Education Code section 87665, which states in a few brief words that temporary faculty may be dismissed in peremptory fashion:

“The governing board may terminate the employment of a temporary employee at its discretion at the end of a day or week, whichever is appropriate. The decision to terminate the employment is not subject to judicial review except as to the time of termination.”

In reality, section 87665 does not mean as much as appears. First, as confirmed in the recent *Santa Monica* case, this section does not affect *rehire preference*. *Santa Monica Faculty Association v. Santa Monica Community College District* (2015) 243 Cal. App.4th 538.

Second, section 87665 does not restrict the availability of either the grievance procedure (if there is helpful contractual language) or a petition for *writ of mandate*, to enforce

constitutional rights of freedom of speech, etc., or to assure that negotiated or district procedures are followed. See, e.g., *Anderson v. San Mateo Community College District* (1978) 87 Cal. App.3d 441, holding that the language restricting “judicial review” does not apply to mandate actions.<sup>6</sup> What this means is that if a dismissal violates District policy, or the terms of a collective bargaining agreement, relief may be available, but whether it actually is turns on a careful analysis of the particular situation.

So, for part-time faculty, an analysis similar to that envisioned by *Morrison* might prove useful, with a college’s ultimate decision to terminate being subject to a grievance or petition for writ of mandate filed in the Superior Court.

Tenured and part-time faculty alike are vulnerable to loss of employment even where no conviction has occurred, if they have committed acts warranting such disciplinary action. In one case, an adjunct faculty member of a Seattle community college was not rehired because she made attendance at an anti-WTO demonstration, led by a labor group, a factor in issuing grades to her students’ in an economics class. Her lawsuit against the college was unsuccessful, the court concluding that her constitutional rights of speech and association were outweighed by the College’s interest in “neutrality” and avoiding its students being placed in a “risky” situation where violence was expected to result. What probably most undermined her defense was that she had informed students they should pay close attention to what occurred at the protest because it would be on the “test.” While this case can be criticized because the subject of academic freedom was entirely omitted from the discussion, and the court disregarded the free speech interests of the students in hearing what their teacher had to say, it points up a situation faculty should be careful about - avoid *demanding* that students support particular causes. See *Hudson v. Craven*, 403 F. 3d 691 (9<sup>th</sup> Cir. 2005).

In summary, faculty are free to attend and participate in protests or participate in civil disobedience. Should they be arrested, they are likely immune from discipline. If convicted, they will most likely be protected from disciplinary action.

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<sup>6</sup> *Anderson* involved the dismissal of a probationary faculty member, but the statutory language about judicial review is identical for probationary and temporary faculty. The underlying dismissal violated district policy, because the requisite personnel evaluations had not been conducted.