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IN THE SUPREME COURT OF THE STATE OF IDAHO

HABIB SADID,

Claimant/Appellant,

vs.

IDAHO STATE UNIVERSITY,

Employer/Respondent,

and

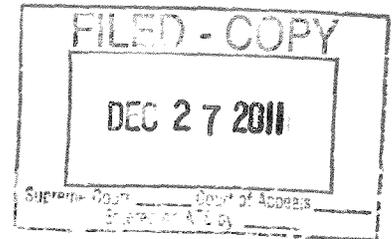
IDAHO DEPARTMENT OF LABOR,

Respondent.

)
)
) Supreme Court No. 38549-2011

)
) Industrial Commission #1777-2010

)
) REPLY BRIEF OF APPELLANT



REPLY BRIEF OF APPELLANT

APPEAL FROM THE JANUARY 20, 2011 DECISION OF THE IDAHO INDUSTRIAL COMMISSION, THE HONORABLE THOMAS LIMBAUGH, THOMAS BASKIN, AND R.D. MAYNARD, COMMISSIONERS, PRESIDING

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STATEMENT OF THE CASE

Nature of the Case

Appellant Dr. Habib Sadid Ph. D., P.E. (hereinafter “Professor Sadid” or “Appellant”) appeals from the Idaho Industrial Commission’s Decision and Order Case No. 1777-2010 in this case of January 20, 2011 which reversed the Appeals Examiner’s Decision of January 27, 2010.

Statement of the Facts and Course of Proceedings

(a) Statement of Facts

The relevant facts of this case were previously set forth in Appellant’s brief filed with the Court on September 22, 2011; therefore, they are only briefly summarized herein and modified in reply to the representation of the facts as delineated in the Respondent’s Brief in Response to Appellant’s Brief (hereinafter referred to as “Response”).

Professor Sadid obtained tenure in 1994 and he became a Full Professor at ISU in 1999. Professor Sadid was a distinguished member of the Department of Civil Engineering at Idaho State University (ISU). Professor Sadid received numerous awards for his service to ISU and its students including but not limited to being named a Distinguished Master Teacher and receiving the Distinguished Public Service, and Excellence in Engineering Education for Idaho Professional Engineers. However, Professor Sadid had at times vocally, and in writing become publicly critical of ISU, which is by statute a public entity and governmental agency. As a result of Dr. Sadid’s being openly critical of ISU, he incurred the disapproval of the ISU administration which lead to among other slights, Dr. Sadid not being appointed as the chair of the Department of Engineering at ISU. As a result of his treatment by ISU, on September 29, 2008, Professor

Sadid filed a complaint in Idaho state court against ISU alleging a violation of Title 42, Section 1983 of the United States Code, and Article 1, Sections 9 and 10 of the Constitution of the State of Idaho in that ISU unlawfully retaliated against Professor Sadid in violation of Professor Sadid's First Amendment Rights.¹ Even after the filing of his lawsuit, Professor Sadid continued his vocal and written criticism of ISU which virtually made Dr. Sadid persona non grata among the ISU Administration, and in particular, Dr. Richard Jacobsen.

On April 21, 2009, Professor Sadid attended an ISU College of Engineering faculty/staff meeting (faculty meeting). At this faculty meeting, Professor Sadid did not shy away from expressing his opinion and his displeasure with the ISU administration and the Dean of the College of Engineering, Dr. Jacobsen. However, Professor Sadid did so in a manner that could be expected of an academic who was passionate about his position. At the meeting's conclusion, Dr. Jacobsen commented that the meeting had been a good one and he welcomed the discussion that had taken place. Nevertheless, On May 6, 2009, Dr. Jacobsen issued a Notice of Contemplated Action (NOCA) based on Dr. Sadid's comments at the April 21, 2009 faculty meeting. Of particular note, the NOCA stated in relevant part the following:

I am writing to notify you that this office considers your conduct at the April 21 2009 College of Engineering Faculty/Staff Meeting unprofessional, non-collegial disruptive and insubordinate. ***Because that conduct represents a continued pattern of behavior by you at this University, I am considering recommending your dismissal for adequate***

¹ ISU filed a motion for summary judgment which was granted by the district court. Professor Sadid appealed the decision of the District Court, and ISU filed a cross-appeal requesting attorney fees for defending the breach of contract claim which the District Court did not allow. The appeal was argued on November 2, 2011 and the decision was announced on November 30, 2011. The Idaho Supreme Court awarded attorney fees to ISU in defending the breach of contract claim at the District Court as well as attorney fees for ISU in pursuing its cross-appeal. However, and of significance herein, the Idaho Supreme Court held that Professor Sadid was speaking as a private citizen on matters of public concern. The decision meant that although ISU was convinced that Professor Sadid's speech had no First Amendment protection, Professor Sadid's speech was indeed constitutionally protected. *Sadid v. Idaho State University*, 2011 WL 5966883 (Idaho, 2011)

cause, as further described below... It is my understanding that at the April 21 , 2009 meeting you received - as did each other attendee - a published agenda that prominently featured an introduction of and comments from the University's new Provost, Dr Gary Olson. However, before Dr. Olson arrived, you disrupted the meeting, In complete disregard for that agenda by revisiting personnel issues that you previously have brought to my attention including , without limitation: your recent personnel evaluation and an alleged retaliation. Although I then reminded you that the meeting is not a proper forum for that discussion, you persisted with that disruption...It is also my understanding that you have taken a position ***that all of your University-related speech is legally-protected.*** However, the University has been advised that speech rights under U S law are by no means absolute. ***Exceptions to these rights include statements made under official University duties. Including your disruptions as described above. In a scheduled University meeting, a University faculty member does not speak as an ordinary citizen,*** but Instead as the University's representative and employee. Furthermore, no aspect of U S or Idaho law insulates your communications from employer discipline, nor does the law protect you from the consequences of slanderous statements. (Emphasis added)

As a result of Professor Sadid's requesting to participate in the grievance process, a grievance hearing was conducted between September and October of 2009. On October 23, 2009, by a vote of 4 to 1, the Faculty Grievance Appeals Board, in their role as the "finder of fact", found insufficient evidence to conclude that Professor Sadid warranted dismissal for cause. The Faculty Grievance Appeals Board considered all the allegations brought by ISU to include the allegations cited in the Response at page 4 in coming to their decision. Further, the Faculty Grievance Appeals Board made it known that a significant factor influencing the majority opinion was the lack of due process afforded Professor Sadid. On October 26, 2009, in a resolution passed 19 to 5, the ISU Faculty Senate, requested in the strongest terms that Professor Sadid be restored to his position as Professor of Engineering. Nevertheless, on October 29, 2009, ISU President Vailas issued a ten-page letter wherein he disagreed with the findings of the majority and terminated Dr. Sadid's employment with ISU effective October 30, 2009. The

principal reason cited for Professor Sadid's dismissal by the ISU Administration was that Dr. Sadid posed a safety threat to the students and faculty of ISU.²

(b) Course of Proceedings

1. The procedural history of this case was previously set forth in Appellant's brief filed with the Court on September 22, 2011 and is adopted herein by reference. Appellant would only point out the obvious that Appellant disagreed with the findings of the Industrial Commission as to its decision regarding the April 21, 2009 faculty meeting as emphasized in the Response under the heading of "Post-termination Facts" (Response., pp. 5-7). On February 17, 2011, Professor Sadid timely filed an appeal of the Industrial Commission's final order of January 20, 2011. The preliminary statement of issues which the Appellant asked the Court to review at a minimum were:

- (a) The Industrial Commission erred when it concluded that appellants behavior at the April 21, 2009 faculty meeting fell below a standard of behavior reasonably to be expected by the employer; and
- (b) In finding that the appellant engaged in misconduct, the Industrial Commission erred in concluding that the concept of academic freedom as recognized and

² Respondents assert the following to further substantiate a finding of misconduct by Professor Sadid in their Response, while *failing to inform the Court that the Faculty Grievance Appeals Board considered these allegations when arriving at its 4-1 decision in Dr. Sadid's favor*, and concluding that there was insufficient evidence for a finding that Dr. Sadid warranted dismissal for cause:

Notably, while the decision on the Dean's recommendation was pending, Sadid continued to engage in behavior contrary to the university's stated and reasonable expectations. In June of 2009, in comments to College of Engineering staff members, he accused the Dean of lying under oath in proceedings related to a lawsuit that he had filed. He then distributed to the entire College of Engineering faculty defamatory cartoons on the subject. (Ex. 3, pp. 12-15). He also engaged in unauthorized purchases in violation of university policies and procedures, which he had also twice previously been warned against making. (Ex. 6, pp. 15-25) (Response, p. 4)

protected by the First Amendment has no bearing in determining whether or not appellant's speech was misconduct.

ISSUES

1. Did the Industrial Commission Err 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?
2. Did the Industrial Commission Err in Concluding that 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 had no Bearing in Determining Whether or Not Appellant's Speech was Misconduct?

ARGUMENT

- 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, Reversed the Decision of the Appeals Examiner, and Denied Appellant Unemployment Benefits.

As previously briefed, 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. In regard to a termination, the pivotal issue for determination 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). Misconduct is defined as a willful, intentional disregard of the employer's interests; a deliberate violation of the employer's rules; or a disregard of the standards of behavior which the employer *has a right to expect of its employees*. (Emphasis added)

Under the “standards of behavior” test, ISU had to prove by a preponderance of the evidence that (1) Professor Sadid’s conduct fell below the standard of behavior expected by ISU; and (2) that ISU's expectations were objectively reasonable. *See Gunter v. Magic Valley Regional Medical Center*, 143 Idaho 63, 137 P.3d 450, 453 (2006) citing *Johns v. S.H. Kress & Co.*, 78 Idaho 544, 548, 307 P.2d 217, 219 (1957) and *Harris v. Elec. Wholesale*, 141 Idaho 1, 4, 105 P.3d 267, 270 (2004). Respondent, citing *Davis v. Howard O. Miller Co*, 107 Idaho 1092, 1094, 695 P.2d 1231, 1233 (1984) correctly points out that the Industrial Commission “does not decide what the standard should be, but what it is [are]” that “flow normally from an employment relationship. However, Respondent fails to mention that an employer's expectation, “even if it flows naturally from the employment relationship, is not objectively reasonable if it is contrary to an established course of conduct.” *Adams v. Aspen Water, Inc.*, 150 Idaho 408, 414, 247 P.3d 635, 641 (Idaho,2011) citing *Davis v. Howard O. Miller Co.*, 107 Idaho 1092, 1095, 695 P.2d 1231, 1234 (1984).

1. To Be Reasonable, The Employer’s Expectations Cannot be Motivated by An Erroneous Belief that the Observed Behavior by the Employee Lacked Constitutional Protection Under the First Amendment; Thereby, Allowing the Employer to Unlawfully Establish Boundaries Wherein the Employee Could Exercise His Rights.

Just as an employer's expectations, even if they flow from the employment relationship, are not objectively reasonable if the expectations are contrary to an established course of conduct, the employer’s expectations cannot be reasonable if those expectations were based on assumptions that would deprive an employee of protection guaranteed under the Constitution of the United States. The latter is precisely what occurred in this case and went unrecognized by

the Industrial Commission. In the NOCA given to Professor Sadid by Dean Jacobsen, the Dean specifically stated the following:

I am writing to notify you that this office considers your conduct at the April 21 2009 College of Engineering Faculty/Staff Meeting unprofessional, non-collegial disruptive and insubordinate. ***Because that conduct represents a continued pattern of behavior by you at this University, I am considering recommending your dismissal for adequate cause, as further described below...*** It is also my understanding that you have taken a position ***that all of your University-related speech is legally-protected.*** However, the University has been advised that speech rights under U.S. law are by no means absolute. ***Exceptions to these rights include statements made under official University duties. Including your disruptions as described above.*** (Emphasis added)

As noted herein, Professor Sadid had established a pattern of criticizing the administration of ISU. As a result of Dr. Sadid's being openly critical of ISU, he incurred the disapproval of the Administration. Indeed not only was Professor Sadid vocal in his criticism of the ISU administration, During the period from 2001 through 2008, professor Sadid "publically criticized successive University administrations in guest columns, printed comments, a letter to the editor, and a paid advertisement, all of which were published in a local newspaper." *Sadid v. Idaho State University*, 2011 WL 5966883, 1 (Idaho, 2011) It is clear from the language of the NOCA that Dr. Jacobsen and ISU were of the opinion that Dr. Sadid was speaking and writing as an ISU employee and therefore his speech was not protected. However, Professor Sadid's speech was done as a private citizen and not made under any official duty thought to exist by Dean Jacobsen and the ISU administration. *Id.* at 5.

It is evident from the NOCA that Dr. Jacobsen, and by extension, ISU felt that Professor Sadid's speech was unprofessional, non-collegial, disruptive, insubordinate and concerned matters which were purely personal in nature and did not involve matters of interest to the public. ISU believed that as Professor Sadid's speech was not that of a private citizen, and Professor Sadid could not possibly be speaking on matters of public interest, none of his speech either on campus or off could be protected by the First Amendment. However, it has been

established as a matter of law that Professor Sadid was not only speaking as a private citizen, but also that he merited constitutional protection because he was also speaking on matters of public concern. On November 30, 2011, the Idaho Supreme Court opined as follows:

In determining whether any of Plaintiff's speech at issue concerns a matter of public concern, the inquiry is not his motivation for the comments or the general tone of his comments (e.g. venting personal grievances). *Connick v. Myers*, 461 U.S. 138, 148–49, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). ***Although much of the communications certainly express Plaintiff's dislike for the former University President, disappointment in the current President, and dislike for members of the administration, the appropriate analysis is whether any of his comments involve matters of public concern.*** *Id.* at 149. In his paid advertisement published on March 9, 2003, Plaintiff speculated that Idaho State University and the University of Idaho were conspiring to shift engineering to the University of Idaho so that Idaho State University could create a medical school. The issue of a creating a medical school at Idaho State University was a matter of public concern. ***Having concluded that there was at least one matter of public concern*** in his comments, we need not address whether there were others because the district court correctly granted summary judgment on an alternative ground.³ (Emphasis added)

Sadid v. Idaho State University, 2011 WL 5966883, 6 (Idaho, 2011)

Respondent and Appellant are in agreement that Professor Sadid's lengthy criticism of the ISU administration was seen by ISU as purely, "job related disagreements with administrators in the form of accusations of unethical or criminal misconduct against those ISU officials with whom he disagreed" which were not matters of public concern.⁴ (Response., p. 3).

³ It is Appellant's position that the majority of Professor Sadid's speech which infuriated the administration of ISU addressed matters of public concern where Professor Sadid had no duty to address these issues.

⁴ In this respect, ISU shared the same erroneous opinion as the District Court; *see Sadid v. Idaho State University*, 2011 WL 5966883, 6 (Idaho, 2011) citing the opinion of the District Court, which erroneously held the following:

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

Respondent and Appellant are also in agreement that but for Professor Sadid's speech, Professor Sadid would not have received an April 15, 2009 letter of reprimand warning Professor Sadid that if he failed to regulate his speech as directed by Dr. Jacobsen, that such a failure would be cause for disciplinary action. Yet this proscription on constitutionally protected speech was not only unwarranted and borne from Dr. Jacobsen's frustration with Professor Sadid, it was also unlawful. It has been established that Professor Sadid was engaged in constitutionally protected activity which by definition cannot be construed as misconduct. Therefore, the Industrial Commission's "Post-termination Facts" as delineated in the Response are fatally flawed. Respondent's reliance on "two separate warnings" in April of 2009 is also misplaced. The Industrial Commission failed to recognize that Professor Sadid's history of speech with ISU was constitutionally protected. The Industrial Commission failed to recognize that ISU's expectations, and ISU's proscription on Professor Sadid's conduct, with the establishment of protocols for behavior were not objectively reasonable as the expectations and protocols were based on assumptions that would deprive Professor Sadid of protection under the First Amendment of the Constitution of the United States. As a result, the decision of the Industrial Commission was not supported by substantial and competent evidence. *See Chapman v. NYK Line North America, Inc.*, 147 Idaho 178, 182, 207 P.3d 154,158 (2009) As the subject behavior of Professor Sadid enjoyed constitutional protection, Respondents varied arguments in the Response are fatally flawed. As Professor Sadid's speech was constitutionally protected, his ignoring a protocol designed to restrain his exercise of his constitutional rights cannot not be, as

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.

a matter of law, defined as misconduct. As stated earlier herein, an employer's expectations, even if they flow from the employment relationship, are not objectively reasonable if the expectations are contrary to a lawful and established course of conduct by an employee, and the employer's expectations were based on assumptions that would deprive an employee of protections guaranteed under the Constitution of the United States.

B. The Industrial Commission Erred When It Concluded that the First Amendment Protections of Academic Freedom Had No Bearing In Making Their Determination That Appellant Had Engaged in Misconduct At the April 21, 2009 Engineering Faculty Staff Meeting.

In April of 2009, ill advised as to the protected nature of the Professor Sadid's speech, ISU provided Professor Sadid with two letters, each proscribing the protocol Professor Sadid was to follow in expressing his personal concerns about ISU. These letters came with the warning to Professor Sadid *that failure to follow the protocol could lead to disciplinary action.* (Emphasis added) (R., p. 133) The Protocol was established as a result of ISU's frustration with Professor Sadid's protected speech which caused the ISU administration extreme discomfort. ISU felt Professor Sadid's speech was unwarranted, exposed Professor Sadid's colleagues to public hatred, and endangered ISU's administration's fund raising efforts. (Response, pp. 3 and 10) The prohibition and established protocol were designed to have a chilling effect on Professor Sadid's constitutional rights. The combination of ISU's desire to suppress Professor Sadid's speech and Professor Sadid's unwavering commitment to challenge the administration of ISU led to the unfortunate and inevitable events of the April 21, 2009 faculty meeting.⁵

⁵ The words "inevitable" and "unfortunate" are used herein and are appropriate. Professor Sadid held a strong belief in the First Amendment and would never shy away from expressing his opinion on any topic. Dr. Jacobsen believed, and he had been wrongly advised, that Professor

Respondent's analysis of the April 21, 2009 faculty meeting would have the Court believe that Professor Sadid's protected speech when placed in its proper context was one long diatribe wherein Professor Sadid was only interested in matters of a personal nature. Respondents further characterized Professor Sadid's behavior at the faculty staff meeting as disruptive, and unnecessarily argumentative. Respondents assert that Professor Sadid's behavior at the faculty meeting confirmed the Industrial Commission's determination that Professor Sadid's behavior fell below the standard of behavior that could be reasonably expected by ISU. (Response, pp. 12-19)

However, it is Appellant's continued position that a critical analysis of the meeting, which is reflected in Appellant's brief pages 8 through 14, is appropriate, and reasserts the following:

[T]he 2 hour, 17 minute, and 21 second Meeting reveals that Professor Sadid's behavior was that which could be expected of an academic, who was fully aware of the intellectual freedom inherent in a university setting. Professor Sadid was fully engaged in discussions of significant importance in a precise, forceful, professional and appropriate manner. Professor Sadid was candid but in no way was Professor Sadid engaged in behavior that could be in anyway described as misconduct especially in light of the academic setting in which the meeting took place. In a faculty meeting discourse and contention are to be expected and is important to the intellectual freedom and exchange of ideas inherent in an academic environment. (Appellant's Brief., pp. 14 and 15)⁶

Therefore without applying the protections afforded by the First Amendment as expressed in the concept of academic freedom, Professor Sadid's speech, and therefore his

Sadid's previous speech was not protected speech. Given the restraint on protected speech established by ISU's protocols, it was inevitable that Professor Sadid could not and would not conform the exercise of his First Amendment rights to satisfy the restraints imposed by the unreasonable protocols.

⁶ The entire April 21, 2009 faculty staff meeting was recorded and included as part of the appellate record in this case. Appellant is confident that when the Court reviews this recording in its entirety, that the Court will conclude that Professor Sadid's behavior was in keeping with what should be expected in an environment where members of academia, in a closed meeting, are free to express their views unimpeded by the any restrictions on their First Amendment rights embodied in the cherished and recognized tradition of academic freedom.

conduct, was that which met and even exceeded a standard of behavior that could be expected of a tenured professor at ISU fully engaged in the faculty meeting. “[I]t makes no sense to expect professors to engage in critical inquiry and simultaneously to allow punishment for its exercise.” David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, Law and Contemporary Problems 242 (Summer, 1990).

In its decision to deny Professor Sadid unemployment benefits, the Industrial Commission failed to apply or recognize the concept of academic freedom in making its misguided determination that Professor Sadid’s behavior amounted to misconduct as defined by law. Incredulously, the Industrial Commission dismissed the academic freedom argument with the following without providing any legal analysis to support its position:

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... 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.*** (R., pp. 306-307) (Emphasis added)

Through the above statement, the Industrial Commission unequivocally maintained that as a matter of law, ISU, a state entity, had the authority to restrict the rights of an employee granted 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. Such a stance is contrary to the Supremacy Clause, Article VI, Section 2 of the United States Constitution, ***and common sense***. The Industrial Commission’s decision ignores the fact that the concept of academic freedom is directly applicable in any decision which may characterize an academic’s exercise of his First Amendment Rights as misconduct. Further, the Industrial Commission failed to grasp the significance of the unique setting of the April 21, 2009 faculty meeting. It was a meeting

attended only by the College of Engineering faculty and staff. While there was a published agenda that was not followed by the Dean of the College of Engineering, it can be readily gauged that faculty input was expected.

Because academic speech under the First Amendment is neither governed by *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006) nor susceptible to the “official duties” analysis reflected in *Garcetti*, the scope of First Amendment protection for academic speech should be governed by more than a half-century of decisions, beginning with *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), that recognize the vital role that academic speech by college and university professors plays in our society and the First Amendment interest in that speech. Academic Freedom is a freedom that is “of transcendent value to all of us and not merely the teachers concerned.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Contrary to Respondent’s assertions, the Industrial Commission was not asked to make new law, rather the Industrial Commission was expected to recognize the facts and apply over fifty years of legal precedent to the relevant facts of this case. ISU in its narrow interpretation of academic freedom jurisprudence fails to address the case law and articles cited in Appellant’s brief addressing the intellectual freedom afforded academia. (Appellant’s Brief, pp. 23, 24-25, and 28) When advised by Appellant of the relevant and developing law about the concept of academic freedom as applied to a meeting of faculty, the Industrial Commission could rightfully be expected to not proceed as if the final note concerning academia in the *Garcetti* decision was irrelevant. Had the Industrial Commission even acknowledged to some degree how the present case invited a discussion and application of the academic freedom issue reserved in *Garcetti*, it could have addressed head-on whether Professor Sadid’s conduct fell below a standard of behavior which ISU had a right to expect in an academic environment. Rather, in its decision, the Industrial

Commission made the incorrect assumption that an academic's expression in a faculty forum, within the context of academic freedom, was inapplicable in its determination of misconduct in the present case. Contrary to the Respondent's assertions, the Appellant does not expect the Industrial Commission to decide whether or not ISU wrongfully terminated Professor Sadid. (Response, pp. 26-28) However, what was expected was for the Idaho Industrial Commission to recognize that Professor Sadid's actions were protected by the First Amendment. Therefore, Professor Sadid's behavior could not be misconduct as defined by law.

On October 20, 2011, the Federal District Court of Louisiana, in a case with some striking similarities to the case at bar, decided the wrongful termination case of *Van Heerden v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 2011 WL 5008410 (M.D.La., Oct. 20, 2011) Mr. Van Heerden had been employed by Louisiana State University and Agricultural and Mechanical College (LSU). He was initially employed to work at the Louisiana Geological Survey and later at the College of Engineering. In the wake of hurricane Katrina, Mr. Van Heerden was tasked to head a team of scientists charged with researching what caused the extensive flooding in New Orleans. After Katrina, Mr. Van Heerden published statements that suggested that the Army Corps of Engineers had failed to properly engineer and maintain the New Orleans levee. The LSU administration as well as some LSU faculty members did not approve of Mr. Van Heerden's statements. The LSU administration and faculty feared that because of Mr. Van Heerden's criticism, LSU would lose federal funding. LSU established a restrictive protocol that prohibited Mr. Van Heerden from making public statements or testifying in front of the Louisiana Legislature. In breaking the established protocol, in May of 2006, Mr. Van Heerden published an article in which he was again critical of the Army Corps of Engineers' role in the levee failures and exposed LSU's attempts to silence his

criticism. On April 13, 2009, Mr. Van Heerden, who had worked under a series of one-year contracts was informed by LSU that his contract would not be renewed. On February 10, 2010, Mr. Van Heerden filed suit against LSU alleging among other claims a violation of 42 U.S.C. § 1983 in that he was retaliated against for an expression of his First Amendment Right to Free Speech. Defendants successfully moved for summary judgment. On appeal, the Court found that Mr. Van Heerden was speaking as a private citizen, the Court recognizing the importance of the academic freedom exception to the *Garcetti* analysis, on its own initiative, stated the following:

Finally, the Court pauses a moment to make a final comment about *Garcetti*. ***The concerns about academic freedom raised, but not answered, in that decision are quite relevant here.*** “Academic freedom is not an easy concept to grasp, and its breadth is far from clear. It has generally been understood to protect and foster the independent and uninhibited exchange of ideas among teachers and students and the serious pursuit of scholarship among members of the academy.” *Emergency Coalition to Defend Educational Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 15 (D.C.Cir.2008) (Edwards, J., concurring). While van Heerden has not argued for an academic's exception to *Garcetti*, neither have defendants pointed the Court to a decision of the Fifth Circuit applying *Garcetti* to an academic. ***The Court here shares Justice Souter's concern that wholesale application of the Garcetti analysis to the type of facts presented here could lead to a whittling-away of academics' ability to delve into issues or express opinions that are unpopular, uncomfortable or unorthodox. Allowing an institution devoted to teaching and research to discipline the whole of the academy for their failure to adhere to the tenets established by university administrators will in time do much more harm than good.*** *Van Heerden v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 2011 WL 5008410, 6 (M.D.La., Oct. 20, 2011) (Emphasis added)

As stated herein, it is Appellant's position that without applying the protections afforded by the First Amendment as expressed in the concept of academic freedom, Professor Sadid's speech, and therefore his conduct, was that which met and even exceeded a standard of behavior that could be expected of tenured professor at ISU fully engaged in the faculty meeting.

However, the facts of the present case are similar to the facts that were before the Court in *Van Heerden*. Unlike Mr. Van Heerden, Professor Sadid has argued in the alternative for an application of the academic freedom exception to *Garcetti*. It is not only proper but also timely

for this Court to address Justice Souter's concern that the wholesale application of the *Garcetti* analysis to the type of facts presented in Professor Sadid's case could lead to a whittling-away of an academic's ability to "delve into issues or express opinions that are unpopular, uncomfortable or unorthodox." *Id.* When this Court addresses the issue, Appellant is confident that the Court will conclude that allowing ISU to discipline Professor Sadid for failure to adhere to unlawful and unwarranted protocols established by ISU administrators have in time done much more harm than good and flies in the face of academic freedom, a cherished concept with First Amendment protection.

CONCLUSION

The conclusion set forth in Appellant's brief filed with the Court on September 22, 2011 is adopted in whole in this conclusion. Further, in light of the decision in *Sadid v. Idaho State University*, 2011 WL 5966883 (Idaho, 2011) it has been established that the very speech of Professor Sadid that infuriated ISU and led to the issuance of the April 2009 protocols was protected under the First Amendment of the United States. It has been demonstrated that given the constitutional protections afforded Professor Sadid's speech, the Industrial Commission lacked substantial and competent evidence to deny Professor Sadid unemployment benefits. Professor Sadid, unlike the Plaintiff in *Van Heerden* has also argued in the alternative, that his speech and actions in the April 21, 2009 faculty meeting was in keeping with the established concept of academic freedom. Professor Sadid enjoys First Amendment protection under the concept of academic freedom; and, as a matter of law, his speech cannot be misconduct. This Court, unlike the court in *Van Heerden*, is compelled to address the alternative argument brought by Professor Sadid. This Court must find that the First Amendment protects those who toil in

academia and “delve into issues or express opinions that are unpopular, uncomfortable and unorthodox” and are contrary to the established tenets of a college or university.

FINAL NOTE

Professor Sadid has been unemployed since October 30, 2009. Professor Sadid has been unable to obtain gainful employment since his termination and has not had the benefit of receiving unemployment benefits. Professor Sadid respectfully requests the Court to schedule this case for oral argument at the Court’s earliest convenience.

DATED this 27th day of December, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December, 2011, I caused to be served a true and correct copy of the foregoing by the following method to:

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