



OFFICE OF THE ACADEMIC SENATE
ONE SHIELDS AVENUE
DAVIS, CALIFORNIA 95616-8502
TELEPHONE: (530) 752-2231

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WILLIAM JACOB, CHAIR

UC Academic Council
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200

RE: Systemwide Review of Proposed Revised University of California Policy on the Protection of Whistleblowers from Retaliation and Procedures for Reviewing Retaliation Complaints, (Whistleblower Protection Policy) and Academic Personnel Manual (APM) Section 190, (APM – 190), Appendix A-2

The proposed revised policy was forwarded to all Davis Division of the Academic Senate standing committees and Faculty Executive Committees from the Schools and Colleges. Responses were received from the Committees on Elections, Rules and Jurisdiction and Faculty Welfare, Graduate Council, and from the Faculty Executive Committee from the College of Letters and Science.

The Whistleblower Protection Policy provides that if someone makes a timely claim of retaliation, the complaint will be investigated and the results of the investigation forwarded to the Chancellor for action. Overall, the feedback received indicates that the proposal is supported by the Davis Division. However, the Committee on Elections, Rules & Jurisdiction (CERJ) provided extensive commentary and suggestions to the proposed revised policy. CERJ identified a number of issues and divided them into substantive concerns, questions, and drafting issues, as follows:

1. Substantive Concerns
 - a. III.D1-2. Timeframes. A complaint must be brought within 12 months of the alleged retaliation. But the complainant has a reasonable time to cure a complaint that is deficient because it lacks a sworn statement or does not contain the required allegations. It is not clear how this cure period interacts with the 12-month rule: Does the filing of a deficient complaint on Day 364 count if the complaint is deficient but the deficiencies are cured in a reasonable time that is after Day 365? Relatedly, it seems that the time frame for notification of the accused employee (III.D.2) should be specified, even if it is just within a "reasonable time." That does not appear to be specified.
 - b. III.D.4: Accused Employee's Right to Review Documents. Although the accused employee has the right to respond in writing to the complaint, the accused employee is apparently only allowed to see the complaint and not the documents on which the investigator proposes to rely in making factual findings. In civil litigation, a defendant is entitled to see and respond to the plaintiff's evidence. Although internal investigations may employ more streamlined processes and although part of the point of this revision is to streamline the process, it still seems strange that the accused does not see the evidence against him/her. There may be valid reasons (confidentiality) not to allow the accused to see certain evidence, but those can be handled separately.
 - c. III.E. Burdens of Proof. There are two concerns here. The first is that the discussion is unclear. The provision states that if certain conditions are met, the complainant shall have "a complete affirmative defense to the Adverse Personnel Action that was the subject of the complaint." It is not clear that the term "affirmative defense" applies to all, or even most, adverse personnel actions. If you're accused of murder, and you prove an affirmative defense such as self-defense, you're found not guilty. We are not

aware that most adverse personnel actions arise from litigated proceedings where your accuser has to prove a case against you. You can simply not be hired because someone else is better qualified. There is no proceeding where a tribunal hears a case against you and decides not to hire you only if that case is made. There is no need to prove a case against you to deny you tenure, so the concept of an “affirmative defense” doesn’t seem to make sense. Moreover, with exceptions for newly discovered evidence and the like, affirmative defenses are typically raised before the conclusion of the proceeding, and certainly before the completion of the sanction. If you have already served your sentence, finding out that you have an affirmative defense does not do you any good unless it is coupled with some other right to relief. In situations covered by the personnel policy, the adverse personnel action has already happened, so something beyond an “affirmative defense” is needed to correct the problem.

Second, the complainant bears the initial burden of proof, but the evidence is assembled in an investigation that the complainant does not control. In civil litigation, the plaintiff bears the burden of proof and has the right to investigate his/her claim through the discovery process. In criminal litigation, the state bears the burden of proof and conducts the investigation. It seems that at a minimum, the policy should expressly advise the complainant to make sure the complaint references any evidence that s/he wants the investigator to consider.

2. Questions

- a. Just what are the boundaries of “this policy”? Part I states that “complaints alleging interference with an employee’s right to make a Protected Disclosure” will be dealt under the Whistleblower Policy rather than this policy. But Part III.A (“Purpose of Policy”) states that a university employee may not interfere with an employee’s right to make a protected disclosure. As a result, it is not entirely clear what the references to “this policy” throughout the document cover, as in III.F, providing that the Chancellor may provide relief for violations of “this policy” as appropriate. Relatedly, it’s plausible that retaliation could also be interference. In that case, it would not be clear whether the WPP or the WP would apply.
- b. How are issues that may span multiple campuses or multiple Chancellors handled? (III.B.5)
- c. Section II. Definitions. Should failure to promote be an example of an Adverse Personnel Action?
- d. III.D.4. “The investigator” is supposed to conduct the investigation. How does this interact with the concept of the “Investigations Workgroup”?
- e. III.J. Reporting Requirements. Annual reporting is eliminated. The reporting requirement is now very open-ended. It is not clear why this change is justified, beyond providing flexibility.
- f. In the same section, should there be a deadline for adoption of local procedures?

3. Drafting Issues

- a. I. Policy Summary. This process is available to employees (or applicants) who “allege” or “believe” that they have been subjected to retaliation. However, the document currently reads as though the process is available to employees who “have” been subjected to retaliation.
- b. Certain capitalized terms are not included in the “Definitions” section. These include “LDO,” “RCO,” “Investigations Workgroup” (III.B.6), “Evidentiary Standards” (III.E).
- c. III.D.4.c: Duty to cooperate. The policy states that witnesses have a “duty to cooperate” with the investigation. It seems unlikely that the University can impose a duty on people who are not employees, or possibly contractors. Should the statement be clarified to reflect this? Also, no consequences are mentioned for a failure to cooperate.
- d. III.G: “in” the Academic Senate vs. “a member of” the Academic Senate.

In conclusion, while the Davis Division of the Academic Senate is in favor of treating whistleblowers efficiently and fairly, consideration must be given to the above concerns before the policy is adopted.

Sincerely,



Bruno Nachtergaele, Chair
Davis Division of the Academic Senate
Professor: Mathematics