

1 LOUIS A. LEONE, ESQ. (SBN: 099874)  
2 KATHLEEN L. DARMAGNAC, ESQ. (SBN: 150843)  
3 KATHERINE A. ALBERTS, ESQ. (SBN: 212825)

**STUBBS & LEONE**

4 A Professional Corporation  
5 2175 N. California Blvd., Suite 900  
6 Walnut Creek, CA 94596  
7 Telephone: (925) 974-8600  
8 Facsimile: (925) 974-8601  
9 leonel@stubbsleone.com  
10 darmagnack@stubbsleone.com  
11 albertsk@stubbsleone.com

12 Attorneys for Defendants

13 BILBIR DHILLON, MARIA FUENTES,  
14 AUTUMN GUTIERREZ, RICHARD HOBBS,  
15 RONALD J. LIND, RANDY OKAMURA,  
16 RICHARD K. TANAKA, ROSA G. PEREZ,  
17 ANITA L. MORRIS, MICHAEL L. BURKE,  
18 AND LEANDRA MARTIN

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

21 JUNE SHELDON,

22 Plaintiff,

23 vs.

24 BILBIR DHILLON, MARIA FUENTES,  
25 AUTUMN GUTIERREZ, RICHARD  
26 HOBBS, RONALD J. LIND, RANDY  
27 OKAMURA AND RICHARD K. TANAKA,  
28 and in their individual and official capacities;  
ROSA G. PEREZ, in her individual and  
official capacities; ANITA L. MORRIS, in  
her individual and official capacities;  
MICHAEL L. BURKE, in his individual and  
official capacities; LEANDRA MARTIN, in  
her individual and official capacities;

Defendants.

Case No.: C08 03438 RMW

**DEFENDANTS' NOTICE OF MOTION  
AND MOTION TO DISMISS;  
MEMORANDUM OF POINTS &  
AUTHORITIES; [PROPOSED]  
ORDER (Fed.R.Civ.Pro. 12(b)(6))**

Date: November 21, 2008

Time: 9:00 a.m.

Courtroom: 6, 4<sup>th</sup> Floor

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1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on November 21, 2008 at 9:00 a.m. or as soon  
3 thereafter as the matter may be heard in Courtroom 6 of the above-entitled court, located at 280  
4 South 1<sup>st</sup> Street, San Jose, California, Defendants the Trustees of the San Jose/Evergreen  
5 Community College District (“District”): Balbir Dhillon, Maria Fuentes, Autumn Guitierrez,  
6 Richard Hobbs, Ronald J. Lind, Randy Okamura and Richard K. Tanaka, all in their official and  
7 individual capacities; the District’s Chancellor, Rosa Perez, in her individual and official  
8 capacities, the District’s Vice Chancellor of Human Resources, Anita L. Morris, in her  
9 individual and official capacities; College President, Michael L. Burke, in his individual and  
10 official capacities; and the College’s Dean of the Division of Math and Science, Leandra  
11 Martin, in her individual and official capacities (collectively “Defendants”) will and do hereby  
12 move this Court to dismiss Plaintiff’s Complaint, pursuant to Federal Rule of Civil Procedure  
13 12(b)(6) for failure to state a claim upon which relief may be granted.

14 The Motion is based on this Notice of Motion and Motion and Memorandum of Points  
15 and Authorities, contained herein, all pleadings in this action, as well as any evidence and  
16 arguments that may be offered at a hearing upon this Motion.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. INTRODUCTION**

19 Plaintiff June Sheldon is a former temporary faculty employee of San Jose City College  
20 (“College”), owned and operated by the District. Effective February 13, 2008, Plaintiff’s  
21 employment with the District was terminated following a student complaint, which stated that  
22 during a lecture in a Human Heredity class, Plaintiff presented the following “facts” as  
23 scientific truths:

- 24 1) stress during pregnancy causes male homosexuality as proven by a German study;  
25 2) there are hardly any gay men in the Middle East because the women are treated very  
26 nicely;  
27 3) there are not any real lesbians rather women simply get tired of relationships with  
28 4) if the men in the class wanted a nice and strong son, they should treat their wives  
very nicely, like open the door for them, and if they wanted a “sensitive” son, they  
should abuse their wives.

1 (See Complaint at Exhibit 8.) Plaintiff's employment with the District was terminated after an  
2 investigation substantiated the student's complaint. According to Plaintiff, she has a right to  
3 teach her students that this is the origin of homosexuality. However, the District, not Plaintiff,  
4 has the right to determine what is and what is not part of its curriculum on this topic.

5 Plaintiff has filed this lawsuit pursuant to 42 U.S.C. §1983 alleging that she was  
6 wrongfully terminated in contravention of her First Amendment Rights and her rights under the  
7 Collective Bargaining Agreement ("CBA") between the District and the Faculty Association, to  
8 which Plaintiff is a member. Plaintiff has filed this lawsuit against the Trustees of the District:  
9 Balbir Dhillon, Maria Fuentes, Autumn Guitierrez, Richard Hobbs, Ronald J. Lind, Randy  
10 Okamura and Richard K. Tanaka, all in their official and individual capacities; the District's  
11 Chancellor, Rosa Perez, in her individual and official capacities, the District's Vice Chancellor  
12 of Human Resources, Anita L. Morris, in her individual and official capacities; College  
13 President, Michael L. Burke, in his individual and official capacities; and the College's Dean of  
14 the Division of Math and Science, Leandra Martin, in her individual and official capacities  
15 (collectively "Defendants").

16 Plaintiff's Complaint consists of four claims brought pursuant to 42 U.S.C. §1983: 1)  
17 First Amendment Retaliation; 2) Violation of Plaintiff's First Amendment Rights; 3) Violation  
18 of Plaintiff's Fourteenth Amendment Right to Equal Protection; and 4) Violation of Plaintiff's  
19 Fourteenth Amendment Right to Due Process. Defendants hereby move to dismiss each of  
20 these claims with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) as Plaintiff  
21 cannot state a claim for the following reasons:

- 22 1) Plaintiff cannot state a First Amendment claim as she was not engaging in  
23 protected speech;
- 24 2) Plaintiff cannot maintain an Equal Protection claim as a "class of one" because  
25 this is a public employment dispute; and
- 26 3) Plaintiff cannot state a claim for violation of her due process rights because she  
27 does not have a property right to her employment with the District as an at will  
28 employee. Moreover, Defendants afforded her due process as required by the  
Constitution, thus extinguishing any claim of lack of due process.

## II. BACKGROUND

### A. FACTUAL BACKGROUND

During the Summer 2007 semester, Plaintiff was employed as an adjunct faculty member by the District. (Complaint at ¶¶15, 24.) An adjunct faculty member is a part-time temporary employee who teaches less than 60% of the hours per week assigned to full-time faculty. (Complaint, Ex. 6 at Article 9.12.1; see also Cal. Educ. Code §87482.5.) Plaintiff was hired to teach the Human Heredity course at the College during the Summer 2007 semester, an introductory level course for students who were not science majors. (Id. at ¶¶ 24-25.) On or about June 21, 2007, while teaching a Human Heredity class, Plaintiff answered a student's question about the heredity and homosexual behavior in males and females.<sup>1</sup> (Id. at ¶28.) According to Plaintiff, she answered the student's question by discussing the complexity of the issue and referring to the textbook and to a study by a German scientist that found a link between maternal stress during pregnancy, male androgens and male homosexual orientation at birth that is not contained in the textbook. (Id. at ¶¶ 29-30.) As for female homosexuality, Plaintiff claims she stated that she did not know if the German scientist found a link between female homosexuality and maternal stress. (Id. at ¶ 30.) Moreover, Plaintiff claims that she told the students that the German scientist's views were just one set of theories on the topic. (Id.)

Approximately one month later, a student sent a letter to the College detailing a complaint about this lecture. This student complaint is attached to Plaintiff's Complaint as Exhibit 8. The student's description of the contents of the lecture varies substantially from the allegations of Plaintiff's Complaint. The student states that during the June 21, 2007 lecture Plaintiff said:

- 1) stress during pregnancy causes male homosexuality as proven by a German study;
- 2) there are hardly any gay men in the Middle East because the women are treated very nicely;

---

<sup>1</sup> For the purposes of the Motion to Dismiss, Defendants and the Court must treat all of Plaintiffs well pled allegations as true. Defendants' use of the facts as pled in Plaintiff's Complaint is not an admission of their truthfulness.

- 1 3) there are not any real lesbians, rather women simply get tired of relationships with
- 2 men and pursue them with women; and
- 3 4) if the men in the class wanted a nice and strong son, they should treat their wives
- 4 very nicely, like open the door for them, and if they wanted a "sensitive" son, they
- 5 should abuse their wives.

6 The student said that Plaintiff's comments were given as hard science and were highly

7 offensive. (Complaint, Exhibit 8.)

8 Upon receiving this student complaint, the Dean of the Math and Science division,

9 Defendant Martin, contacted Plaintiff to schedule a meeting to discuss the complaint.

10 (Complaint at ¶36.) This meeting took place on or about September 6, 2007. (Id. at ¶63.)

11 Plaintiff and two union representatives, Barbara Hanfling and Deborah DeLaRosa, met with

12 Defendant Martin and Lois Lund, the Dean of the Division of Language Arts. (Id.) Defendant

13 Martin gave Plaintiff a copy of the student complaint. (Id. at 65.) During the meeting, Plaintiff

14 agreed to meet with full-time faculty to discuss teaching controversial topics and mainstream

15 scientific thought. (Id. at ¶¶74 & 75.) The scheduling of this meeting with the full time faculty

16 was confirmed by Plaintiff's union representative in an email to Defendant Martin on

17 September 10, 2007. (Id. at ¶4; Exhibit 9.) However, Plaintiff later refused to meet with the

18 other faculty members and on her own decided that a diversity workshop could substitute for the

19 meeting. (Id. at ¶78; Exhibit 10.)

20 On December 6, 2007, Defendant Martin issued a letter on her investigation of the

21 student complaint. (Id. at ¶83.) In this letter, attached as Exhibit 13 to the Complaint,

22 Defendant Martin wrote:

23 I have concluded an investigation on a student complain[t] filed against June

24 Sheldon on July 25, 2007. I met with June and the FA on September 6, 2007.

25 During this meeting, June admitted stating in her Human Heredity course that

26 mistreatment to pregnant women at a certain point in the pregnancy can cause

27 male homosexuality. She also stated that there was no such thing as true

28 female homosexuality. She stated that she believed her opinions were

consistent with mainstream scientific thought by the biology community.

(Complaint, Exhibit 13.) Defendant Martin went on to note Plaintiff's cancellation of the

meeting to discuss these issues with the biology faculty and her discussions with the biology

faculty regarding mainstream scientific thought on the nature versus nurture question of



1 homosexuality. (Id.) In regards to male homosexuality, all four professors stated that  
2 mainstream scientific thought was that “a combination of genetic and environmental factors  
3 were involved in homosexuality.” (Id.) And three of the four professors stated that they  
4 “strongly felt that the scientific community was in agreement that there were female  
5 homosexuals,” while the fourth professor refrained from commenting because she had not done  
6 any reading on the topic. (Id.) Defendant Martin concluded that Plaintiff was “teaching  
7 misinformation as science in a science course” and that “these statements were grievous enough  
8 to warrant withdrawing [Plaintiff’s] SRP<sup>2</sup> status and Spring ‘08 assignment.” (Id.)

9 On December 18, 2007, Defendant Anita Morris, the District’s Vice Chancellor for  
10 Human Resources, sent Plaintiff a letter, which is attached as Exhibit 16 to the Complaint. (Id.  
11 at ¶95.) In the letter, Defendant Morris informed Plaintiff that Plaintiff was removed from the  
12 SRP list and was terminated, pursuant to California Education Code §87665, subject to final  
13 board approval. (Id., Exhibit 16.) The District’s Board heard the matter at its February 12,  
14 2008 Board Meeting. After notice thereof, Plaintiff exercised her right to have the Board hear  
15 the complaint against her in open session. (Id. ¶¶105, 107, 111; Exhibits 18, 20 21.) At the  
16 hearing, Plaintiff’s counsel spoke on her behalf and Plaintiff presented the Board with a packet  
17 of information, which the Board accepted. (Id. at ¶¶111, 112 & 116; Exhibits 21 & 23.) The  
18 Board deliberated in closed session with regards to the complaint against Plaintiff and voted to  
19 terminate Plaintiff effective February 13, 2008. (Id. at ¶112; Exhibit 21.)

## 20 B. PROCEDURAL BACKGROUND

21 On March 20, 2008, Ms. Sheldon began grievance proceedings pursuant to the  
22 Collective Bargaining Agreement (“CBA”) and filed a Level I Grievance. (Id. at ¶118, Exhibit  
23 24.) The Grievance Procedures are set forth in Article 3 of the CBA, Exhibit 6 to the  
24 Complaint, and include three levels or steps to be taken by a faculty member to challenge a  
25 violation or misapplication of the terms of the CBA. Plaintiff alleges that she filed Level I and  
26 Level II grievances, which were both rejected by the District. (Complaint at ¶¶ 118, 123, 128 &  
27

28 <sup>2</sup> “SRP” refers to the Seniority Rehire Preference List established by Article 9, Section 9.12 of the Collective Bargaining Agreement between the District and the Faculty Association. This SRP lists establishes the order of preference for the rehiring and assignment of qualified adjunct faculty. (Complaint, Exhibit 6 at Art. 9, §9.12.1.)

1 129.) Article 3, Section 3.9.4 of the CBA states that “Failure by the Faculty Association or  
2 grievant to appeal a decision within the specified time limits shall be deemed as acceptance of  
3 the decision.” (Complaint, Exhibit 6 at §3.9.4.) Moreover, Section 3.9.10 states “Nothing in  
4 this article shall be interpreted to preclude a faculty member from seeking remedies provided by  
5 law after the exhaustion of this procedure.” (Complaint, Exhibit 6 at §3.9.10.) Plaintiff does  
6 not allege nor did she file a Level III grievance

7 On July 16, 2008, Plaintiff filed the Complaint at issue, which the Defendants now move  
8 to dismiss.

9 **III. ARGUMENT**

10 Plaintiff’s Complaint consists of four claims brought pursuant to 42 U.S.C. §1983: 1)  
11 First Amendment Retaliation; 2) Violation of Plaintiff’s First Amendment Rights; 3) Violation  
12 of Plaintiff’s Fourteenth Amendment Right to Equal Protection; and 4) Violation of Plaintiff’s  
13 Fourteenth Amendment Right to Due Process. Defendants hereby move to dismiss each of  
14 these claims with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) as Plaintiff  
15 cannot state a claim for the following reasons:

- 16 1) Plaintiff cannot state a First Amendment claim as she was not engaging  
17 in protected speech, because when she was teaching a class, she was not  
18 speaking as a citizen but as an employee of the District performing part of  
19 her official duties. Additionally, the District’s rights to establish its  
20 curriculum outweighed any interest Plaintiff had in teaching her own  
21 opinions to students;
- 22 2) As this is a public employment dispute, Plaintiff cannot maintain an  
23 Equal Protection claim as a “class of one;” and
- 24 3) Plaintiff cannot state a claim for violation of her due process rights as she  
25 does not have property right to her employment with the District, because  
26 she was a temporary employee. Additionally, or in the alternative,  
27 Defendants afforded her due process.

28 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint.  
*Ileto v. Glock Inc.*, 349 F.3d 1191, 1199 (9th Cir. 2003). In other words, a motion to dismiss  
under Rule 12(b)(6) requires a determination of whether the facts alleged in a complaint, if  
proven, would or could support a claim for relief. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th  
Cir. 1998). Dismissal of a claim or claims for relief pursuant to such a motion is proper where  
the complaint suffers from either a “lack of a cognizable legal theory” or “the absence of

1 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*,  
 2 901 F.2d 696, 699 (9th Cir.1990). As such, the issue on a motion to dismiss for failure to state a  
 3 claim is not whether the claimant will ultimately prevail, but whether the claimant is entitled to  
 4 offer evidence to support the claims asserted. *Gilligan v. Jamco Development Corp.*, 108 F.3d  
 5 246, 249 (9th Cir. 1997). When evaluating a Rule 12(b)(6) motion, the Court must accept all  
 6 material well pled allegations in the complaint as true and construe them in the light most  
 7 favorable to the non-moving party. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir. 1994).  
 8 However, the Court is not required to accept “conclusory legal allegations cast in the form of  
 9 factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.”  
 10 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Nor must the Court  
 11 accept as true allegations that are contrary to the documents attached to the complaint. *In re*  
 12 *Fortune System Sec. Litig.*, 604 F. Supp.150, 159-160 (N.D. Cal. 1984) (citing *Olpin v. Ideal*  
 13 *National Insurance Co.*, 419 F.2d 1250 (10th Cir. 1969).

14 **A. Plaintiff Was Not Engaged In Protected Speech And Therefore Cannot State A**  
 15 **Claim For Retaliation in Violation Of Her First Amendment Rights.**

16 In her First Cause of Action for Retaliation in Violation of her First Amendment Rights,  
 17 Plaintiff claims that “[b]y subjecting Ms. Sheldon to a lengthy and intrusive investigation and  
 18 terminating her employment based on her protected expression in answering a student’s in-class  
 19 question on a matter of public concern, among other things, Defendants, by policy and practice,  
 20 have retaliated against Plaintiff because of her free expression and deprived her of the ability to  
 21 freely express her ideas on issues of public concern at [the College].” (Complaint at ¶138.)  
 22 Based on this alleged violation, Plaintiff seeks monetary and punitive damages and declaratory  
 23 and injunctive relief reinstating her employment and returning her SRP List position. (Id. at  
 24 ¶¶140 & 141.) Plaintiff’s claim, however, is legally deficient because Plaintiff was not engaged  
 25 in protected speech when she answered a student’s question in class.<sup>3</sup> Therefore, the District  
 26 could not and did not violate her First Amendment rights by terminating her employment and  
 27 removing her from the SRP List.

28 <sup>3</sup> “The inquiry into the protected status of speech is one of law, not fact.” *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983) (internal citations omitted).

1                   **1. The District, as a public employer, can regulate Plaintiff's in-class**  
2                   **teaching.**

3                   In order to establish a claim for retaliation in violation of the First Amendment,  
4 Plaintiff must allege and prove that: 1) she engaged in protected speech; 2) she suffered an  
5 adverse employment action; and 3) her speech was a substantial or motivating factor for the  
6 adverse employment action. *Marable v. Nitchman*, 511 F.3d 924, 929 (9<sup>th</sup> Cir. 2007). At issue  
7 in this Motion, is the first prong of the test – Did Plaintiff engage in protected speech when she  
8 answered a student's in-class questions regarding issues that were part of the subject matter of  
9 the class she was hired to teach? The simple answer is No.

10                   Although public employees do not surrender all their constitutional rights when they  
11 accept employment with a public entity, it is clear that the First Amendment protects a public  
12 employer's right to regulate an employee's speech in certain circumstances. *Garcetti v.*  
13 *Ceballos*, 547 U.S. 410, 417 (2006). Specifically, the First Amendment protects a public  
14 employee's right to speak as a citizen on matters of public concern. *Id.* Current Supreme Court  
15 precedent sets forth a three part test for determining whether a public employee has engaged in  
16 protected speech.

17                   First, the court must look to whether the employee was speaking as a citizen or as an  
18 employee performing part of his or her job-related duties. *Id.* at 418. "When employees make  
19 statements pursuant to their official duties, the employees are not speaking as citizens for First  
20 Amendment purposes, and the Constitution does not insulate their communications from  
21 employer discipline." *Id.* at 421. However, if the employee is not speaking as part of his or her  
22 job duties, then his or her statements could be afforded First Amendment protection if they meet  
23 the last two parts of the test – whether the statements address a matter of public concern and  
24 whether the employee's interest in making those statements outweigh the public employer's  
25 interests in regulating the speech. *Id.* at 418. If both conditions are met, then the employee's  
26 speech has First Amendment protection. If not then the employee has no First Amendment  
27 speech protection and is subject to employer discipline for that speech. *Connick v. Myers*, 461  
28 U.S. 138, 146, 154 (1983).

1 Plaintiff's statements fail this test in two ways. First, her statements were made pursuant  
2 to her official duties. She was teaching a class the District had hired her to teach. Therefore,  
3 she was not speaking as a citizen, but as an employee of the District and was subject to the  
4 District's regulation and reaction to her statements. Second, the District's interest in  
5 establishing the content of the approved curriculum, i.e. the District's academic freedom to  
6 make curricular choices free from interference by outside forces, such as the judiciary,  
7 outweighs Plaintiff's right to teach her own opinions regarding a curricular subject.

8 Clearly, Plaintiff was speaking in the role of an employee, and not as a citizen, when she  
9 answered the student's questions during a class in a course that she was hired to teach. On this  
10 issue the Ninth Circuit focuses on whether the employee was required as part of his or her  
11 official duties to make the statements at issue. *Marable*, 511 F.3d at 932. It is undeniable that  
12 Plaintiff was hired to teach students and answer their questions during a class period. "[T]he  
13 school system does not "regulate" teachers' speech as much as it *hires* that speech. Expression  
14 is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary."  
15 *Mayer v. Monroe County Community School Corporation*, 474 F.3d 477, 479 (7<sup>th</sup> Cir. 2007)  
16 (emphasis in original) (applying *Garcetti* to an elementary school teacher's in class response to  
17 a student's question). Therefore, Plaintiff was speaking as part of her official duties as an  
18 employee of the District at the time she made the statements at issue. As such, according to the  
19 Supreme Court's ruling in *Garcetti*, Plaintiff's statements are not entitled to First Amendment  
20 protection, and Plaintiff cannot state a claim based on the District's reaction to those statements.  
21 *Garcetti*, 547 U.S. at 421.

22 Plaintiff may argue that the Court should not apply in *Garcetti* in this situation, because  
23 the Supreme Court in *Garcetti* expressly declined to determine whether the "employee-official  
24 duty" test would apply to "teaching and scholarship."<sup>4</sup> *Garcetti*, 547 U.S. at 425. The *Garcetti*  
25 court did not hold that the "employee-official duty" test does not apply in the area of "teaching  
26 and scholarship", but rather recognized that the issue required additional consideration, because  
27

28 <sup>4</sup> The Ninth Circuit has not addressed the applicability of *Garcetti* to the public education setting. However, the  
Seventh Circuit has already applied *Garcetti* to the elementary and secondary level of education for a teacher's in  
class statements. See *Mayer*, 474 F.3d at 479.

1 neither teaching nor scholarship were implicated in the facts before it. *Id.* This Court, however  
 2 is squarely presented with the issue and clearly *Garcetti* should apply here.<sup>5</sup> Therefore,  
 3 Defendants had the right to regulate what Plaintiff said in class while teaching –i.e. while  
 4 performing the task she was hired to perform. Plaintiff in this situation is an employee and does  
 5 not have a First Amendment cause of action for the Defendants’ regulation of her in-class  
 6 speech.

7 **2. Even if Plaintiff was not speaking as an employee, Plaintiff cannot meet**  
 8 **the third prong of the test for protected speech and therefore, has no**  
 9 **First Amendment claims.**

10 Even if it was determined that Plaintiff was not speaking as an employee, she still would  
 11 not be able to state a claim for violation of her First Amendment rights. The Court would still  
 12 have to apply the second and third prongs of the test for protected speech. *Garcetti*, 457 U.S. at  
 13 418. Therefore, Plaintiff must prove that she was speaking on a matter of public concern<sup>6</sup> and  
 14 that her right to teach her own personal view point outweighs the District’s right to control the  
 15 content of its curriculum and education its students receive. *Id.* If the government’s interest in  
 16 functioning efficiently and effectively requires the ability to limit the employee’s speech, even  
 17 one speaking as a citizen on a matter of public concern, more than it could limit the speech of a  
 18 general citizen, then the public employee does not have First Amendment protection. *Id.* at 419  
 19 (citing *Connick*, 461 U.S. at 147). Indeed, the First Amendment does not empower public  
 20 employees to “constitutionalize the employee grievance.” (*Id.* at 420) Plaintiff cannot meet this  
 21 last requirement as a matter of law. The ability of an academic institution to regulate in class  
 22 speech has always been found to outweigh a teacher’s ability to teach whatever they want.  
 23 *Urofsky v. Gilmore*, 216 F.3d 401, 414 (4<sup>th</sup> Cir. 2000).

24  
 25 <sup>5</sup> Indeed, the area of teaching by public employees provides a stronger basis for application of the *Garcetti* rule than  
 26 the actual facts of *Garcetti*. As the Seventh Circuit noted in *Mayer*, a teacher is hired to speak – to teach the  
 27 curriculum the District has prescribed; “the school system does not regulate speech it hires it.” *Mayer*, 447 F.3d at  
 28 479. If a school district were not able to control what its employees taught to its students, then the established  
 curriculum would be meaningless, and teachers would be free to ignore such curriculum and teach whatever they  
 wanted. See *Pelozo v. Capistrano Unified School Dist.*, 782 F.Supp. 1412, 1417 (C.D.Cal. 1992) *rev’d in part on*  
*other grounds by Pelozo v. Capistrano Unified School Dist.*, 37 F.3d 517 (9<sup>th</sup> Cir. 1994).

<sup>6</sup> This Motion does not address the second prong, because Plaintiff has alleged that the subject matter was of public  
 concern. However, the Defendants do not intend for this to imply that they agree with Plaintiff’s allegations in this  
 regard.

1 Here, the District's substantial interests in regulating what is taught in its classrooms and  
2 how it is taught outweigh Plaintiff's interests in this situation. First the District, and not  
3 Plaintiff, is charged with and has the right to determine the content of the curriculum taught at  
4 the College. Secondly, the District has a compelling interest as an employer in the efficient  
5 operation and teaching of that curriculum. On the other hand, Plaintiff, by accepting a job  
6 teaching at the College, surrendered her right to speak her mind in the classroom and took on  
7 the duty to speak as and for the District and the College as directed by the District and the  
8 College. As such, Plaintiff has not alleged, nor can she, that she possesses an interest in  
9 teaching her class as she sees fit that trumps the well established rights of the District.

10 In terms of in-class speech, the Ninth Circuit has stated that universities and post-  
11 secondary institutions have the authority to determine for themselves on academic grounds who  
12 may teach, what may be taught, how it shall be taught, and who may be admitted to study.  
13 *Brown v. Li*, 308 F.3d 939, 951 (9<sup>th</sup> Cir. 2002) (emphasis added). "In summary, under the  
14 Supreme Court's precedents, the curriculum of a public educational institution is one means by  
15 which the institution itself expresses its policy, a policy with which others do not have a  
16 constitutional right to interfere." *Id.* (citation omitted). Moreover, in *Brown v. Li*, the Ninth  
17 Circuit said that in terms of a university's regulation of curricular speech versus an elementary  
18 or secondary school's regulation of curricular speech, in its precedents, the Supreme Court has  
19 implied that a university's control may be broader. *Id.* (citing *Bd. of Regents of Univ. of Wis.*  
20 *Sys. v. Southworth*, 529 U.S. 217 (2000); *Bd. of Regents of Univ. of Mich. v. Ewing*, 474 U.S.  
21 214 (1985); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)).

22 In fact, after a review of the history of academic freedom in case law, the Fourth Circuit  
23 in *Urofsky v. Gilmore* concluded that the Supreme Court has "never recognized that professors  
24 possess a First Amendment right of academic freedom to determine for themselves the content  
25 of their courses and scholarship, despite opportunities to do so." *Urofsky*, 216 F.3d at 414  
26 (denying claims that as professors plaintiffs were entitled to greater constitutional protection  
27 than regular citizens). As such, the District's right to establish and regulate the content of its  
28 curriculum outweighs any interest Plaintiff may have in espousing her own views of curricular  
subjects while teaching. *See Lee v. York County Sch. Dist.*, 484 F.3d 687, 695 (4<sup>th</sup> Cir.

1 2007)(“Courts have generally recognized that the public schools possess the right to regulate  
2 speech that occurs within a compulsory setting, and that a school board’s ability in this regard  
3 exceeds the permissible regulation of speech in other governmental workplaces or forums”);  
4 *Mayer*, 474 F.3d at 480-81 (“The Constitution does not entitle teachers to present personal  
5 views to captive audiences against the instructions of elected officials.”); *Cockrel v. Shelby*  
6 *County Sch. Dist.*, 270 F.3d 1036, 1054 (6<sup>th</sup> Cir. 2001)(school board’s interest in regulating  
7 curriculum outweighed teacher’s interest in selecting supplemental materials and teaching  
8 methods); *Edwards v. California Univ.*, 156 F.3d 488, 491 n.1 (3d Cir. 1998) (recognizing that  
9 public school teachers must follow school policy and dictates when choosing curriculum and  
10 public school teacher’s in class speech is not protected by the First Amendment); *Bishop v.*  
11 *Aronov*, 926 F.2d 1066, 1073 (11<sup>th</sup> Cir. 1991) (holding that “Where the in-class speech of a  
12 teacher is concerned, the school has an interest . . . in scrutinizing expressions that the public  
13 might reasonably perceive to bear its primatur”) (internal quotations omitted); *Bradley v.*  
14 *Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990) (holding a teacher’s in-class  
15 conduct is not protected speech -- “Although a teacher’s out-of-class conduct, including her  
16 advocacy of particular teaching methods, is protected, her in-class conduct is not.”) (internal  
17 citations omitted); *Webster v. New Lenox School District*, 917 F.2d 1004, 1007 (7<sup>th</sup> Cir. 1990)  
18 (“The First Amendment is not a ‘teacher license for uncontrolled expression at variance with  
19 established curricular content.” quoting *Palmer v. Board of Education*, 603 F.2d 1271, 1274 (7<sup>th</sup>  
20 Cir. 1980)).

21 The District’s public function is to educate its students. It does this by setting a  
22 curriculum and hiring teachers to teach that curriculum to its students. To carry out this public  
23 function effectively and efficiently, it must be able to control the in class conduct and speech of  
24 those teachers. Otherwise, “if every teacher chose to teach the areas he or she personally  
25 believed in and omitted those topics which are different from beliefs they hold, a curriculum  
26 compiled by the state and the local district would be useless.” *Pelozo v. Capistrano Unified*  
27 *School Dist.*, 782 F.Supp. 1412, 1417 (C.D.Cal. 1992) *rev’d in part on other grounds by Pelozo*  
28 *v. Capistrano Unified School Dist.*, 37 F.3d 517 (9<sup>th</sup> Cir. 1994). Therefore, the District and  
Defendants’ have a substantial interest in effectively achieving its public function, the education



1 of its students, that requires the ability to limit Plaintiff's in-class speech, even if she was  
2 speaking on a matter of public concern.

3 On the other hand, the burden on Plaintiff's free speech in this case was limited to her in  
4 class statements made in the context of teaching a class she was hired to teach. Plaintiff was  
5 and is free to advocate for the inclusion of her theories in the curriculum and discuss them with  
6 colleagues or in public forums. See *Hudson v. Craven*, 403 F.3d 691, 699 (9<sup>th</sup> Cir. 2005)  
7 (restriction by college of professor's speech and associational rights limited and therefore, not  
8 burdensome.) Plaintiff's rights as a citizen to discuss her views on the origins of homosexuality  
9 are not burdened by the Defendants' regulation of her in-class speech. Basically, Plaintiff is  
10 free to speak her mind as long as she is not speaking pursuant to her job duties at the time. The  
11 issue before the Court is limited to Plaintiff's in class curricular speech. It is that speech that the  
12 District hired and that it has the ability to regulate. *Brown*, 308 F.3d at 951; *Mayer*, 447 F.3d at  
13 479. Consequently, Plaintiff's interests in deciding for herself what she should be teaching are  
14 slight and greatly outweighed by the District's substantial interest in determining for itself what  
15 is to be taught and how it is to be taught. Therefore, Plaintiff did not engage in constitutionally  
16 protected speech and cannot state a claim for violation of her First Amendment rights.

17 **B. Plaintiff's Second Cause of Action Mirrors Her First Cause of Action and Is**  
18 **Likewise Meritless.**

19 Plaintiff's Second Cause of Action for "Violation of Plaintiff's First Amendment Rights  
20 to Freedom of Speech and Academic Freedom (42 U.S.C. §1983)" is based verbatim on  
21 identical word for word allegations and requests for relief as her First Cause of Action.  
22 (compare Complaint at ¶¶142-146 with Complaint at ¶¶137-141.) Therefore, this Cause of  
23 Action is duplicative of the First Cause of Action and should be dismissed for the same reasons  
24 as set forth above.

25 **C. "Class of one" Equal Protection claims are not recognized in the employment**  
26 **context as matter of law.**

27 Plaintiff's third cause of action is for violation of her right to Equal Protection, wherein  
28 Plaintiff alleges that "by subjecting her to a lengthy and intrusive investigation and terminating  
her employment based on her answer to a student's in class question on a matter of public  
concern, Defendants, by policy and practice, have treated Plaintiff differently from similarly

1 situated teachers and professors at the District and deprived Plaintiff of her ability to freely  
2 express her ideas on issues of public concern at SJCC.” (Complaint at ¶148.) Moreover,  
3 Plaintiff alleges that “[o]n information and belief, other adjunct lecturers and faculty in the  
4 District have not been investigated and terminated for answering a student’s question about  
5 class material.” (Complaint at ¶117.) As such, Plaintiff claims she is the only one who has  
6 been treated differently than her similarly situated teachers and professors.

7 The Equal Protection clause prohibits the government from arbitrarily singling out  
8 persons or groups and intentionally treating them differently than others similarly situated  
9 without any rational basis for doing so. *Engquist v. Oregon Dept. of Agriculture*, 128 S.Ct.  
10 2146, 2153 (2008). However, equal protection jurisprudence like First Amendment  
11 jurisprudence has long since recognized the difference between the state as a lawmaker and the  
12 state as an employer. *Id.* at 2153. In fact the Supreme Court in *Engquist* looked to the First  
13 Amendment cases of *Connick* and *Waters v. Churchill* to explain how the government’s role as  
14 an employer changes the constitutional analysis. *Id.* “The government as employer indeed has  
15 far broader powers than does the government as sovereign.” *Id.* (quoting *Waters v. Churchill*,  
16 511 U.S. 661, 671 (1994) (plurality opinion)). “The extra power the government has in this area  
17 comes from the nature of the government’s mission as employer. Government agencies are  
18 charged by law with doing particular tasks. Agencies hire employees to help do those tasks as  
19 effectively and efficiently as possible.” *Id.* (quoting *Waters*, 511 U.S. at 674-675). The  
20 government has a legitimate interest “in promoting efficiency and integrity in the discharge of  
21 official duties, and in maintaining proper discipline in public service.” *Id.* (quoting *Connick v.*  
22 *Myers*, 461 U.S. 138, 150-151 (1983) (citation omitted). Given that “government offices could  
23 not function if every employment decision became a constitutional matter,” *Connick*, 461 U.S.  
24 at 143, the constitutional analysis of the government’s actions as an employer regarding  
25 employees has to be different than that of its actions as sovereign regarding citizens. *Engquist*,  
26 128 S.Ct. at 2151 (citing *Waters*, 511 U.S. at 674).

27 Therefore, the Supreme Court held that with respect to the Equal Protection clause and  
28 the government as public employer, a claim based on a class-of-one – that an employee was  
treated differently than all other employees, but without allegations of differential treatment due

1 to the plaintiff's membership in a protected class – is not a cognizable claim. *Id.* at 2155-56.  
 2 Otherwise, the Supreme Court noted that almost all personnel decisions involved treating an  
 3 individual differently from the other employees. *Id.* at 2156. Therefore, “any personnel action  
 4 in which a wronged employee can conjure up a claim of differential treatment will suddenly  
 5 become the basis for a federal constitutional claim.” *Id.* “The Equal Protection clause does not  
 6 require ‘[t]his displacement of managerial discretion.’” *Id.* at 2157 (quoting *Garcetti*, 547 U.S.  
 7 at 423).

8 This is exactly the type of Equal Protection claim that Plaintiff alleges – she was the  
 9 only adjunct lecturer or faculty singled out for termination as a result of answering a student's in  
 10 class question. (Complaint at ¶117.) Moreover, she does not allege that she was treated  
 11 differently because she is a member of a protected class. Therefore, her claim falls squarely  
 12 into the holding of *Engquist*, is not cognizable as a matter of law and should be dismissed with  
 13 prejudice.

14 **D. As an at will employee, Plaintiff has no recognizable property right in her**  
 15 **continued employment with the District, and therefore cannot maintain a Due**  
 16 **Process claim.**

17 In her last cause of action, Plaintiff alleges that Defendants violated her constitutional  
 18 right<sup>7</sup> to due process by “by failing to explain the basis for terminating Plaintiff, disabling  
 19 Plaintiff from defending herself and confronting the allegedly ‘offended’ student prior to  
 20 termination, and failing to properly entertain and respond to Plaintiff's Level II grievance under  
 21 the Collective Bargaining Agreement.” (Complaint at ¶154.) In order to state a claim for  
 22 violation of due process rights, Plaintiff must have a property right in her continued  
 23

---

24 <sup>7</sup> Plaintiff's Fourth Cause of Action also mentions alleged violations of procedures she claims to have been  
 25 contractually entitled to, i.e. her contractual due process rights. (See Complaint at ¶154.) As discussed below, the  
 26 Constitutional right to due process only requires certain procedures, which in this case were met. Therefore, any  
 27 alleged right to more than what Plaintiff was entitled to under the Constitution, is not based on the Constitution and  
 28 therefore can only be based on the CBA. As such, by claiming she is entitled to the additional due process required  
 by the CBA and that that process was not fully afforded, Plaintiff's claim is really a breach of contract claim based  
 on the CBA. Not only has Plaintiff not alleged a claim for breach of contract, but before filing a lawsuit based on a  
 breach of a collective bargaining agreement, an employee must exhaust the grievance procedures set forth in the  
 CBA. *Vaca v. Sipes*, 386 U.S. 171, 186 (1967); *Stupy v. U.S. Postal Service*, 951 F.2d 1079, 1082 (9<sup>th</sup> Cir. 1991).  
 Plaintiff failed to do so prior to filing this lawsuit as she did not file a Level III grievance to arbitrate the matter and  
 she has not alleged an excuse for failure to do so. Therefore, all claims based on her rights pursuant to the CBA are  
 barred and must be dismissed.

1 employment with the District. *Bd. of Regents v. Roth*, 408 U.S. 564, 569-570. If she has a  
2 property right, then she is entitled to notice and opportunity to respond prior to her termination  
3 and post termination administrative procedures as determined by California law. *Cleveland Bd.*  
4 *of Educ. v. Loudermilk*, 470 U.S. 532, 547-548 (1985). Here, taking all allegations in Plaintiff's  
5 Complaint as true, she cannot state a claim for relief pursuant to the Due Process clause on two  
6 grounds: 1) she was an at-will employee and therefore, did not have a property right to  
7 continued employment; and 2) even if she did have some property right, she was afforded due  
8 process through a pre-termination hearing before the Board of Trustees and the post-termination  
9 grievance process under the CBA. As such, her fourth cause of action should be dismissed with  
10 prejudice.

11 **1. Plaintiff was an at-will employee and therefore, did not have a property**  
12 **right to her continued employment.**

13 In order to state a claim for violation of her due process rights, Plaintiff must have a  
14 property interest in her continued employment. *Roth*, 408 U.S. at 567. To have a property  
15 right, Plaintiff must have a legitimate claim to entitlement to her continued employment, not  
16 just a unilateral expectation of it. *Id.* Property interests are not created by the Constitution, but  
17 rather arise from independent sources, such as state law. *Id.* at 577. Looking to California law,  
18 it is clear that Plaintiff had no entitlement to continued employment and therefore, no property  
19 right to her job. In California, public employment is not held by contract but rather by statute.  
20 *Miller v. State of California*, 18 Cal.3d 808, 813 (1977). As to the duration of such  
21 employment, "no employee has a vested contractual right to continue in employment beyond  
22 the time or contrary to the terms and conditions fixed by law." *Id.*

23 In this case, Plaintiff was employed by the District as an adjunct faculty member.  
24 (Complaint at ¶15.) An adjunct faculty member is a part-time temporary employee who teaches  
25 less than 60% of the hours per week assigned to full-time faculty. (Complaint, Ex. 6 at Article  
26 9.12.1; see also Cal. Educ. Code §87482.5.) California law states that as a temporary employee  
27 of a community college district – i.e. one carrying less than 60% of a full-time load – Plaintiff's  
28 employment was at-will: "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

1 terminate the employment is not subject to judicial review except as to the time of termination.”  
2 Cal. Educ. Code §87665. When employment is at-will under California statutory law “the  
3 claimant has no property interest in the job” and an action pursuant to the Due Process clause  
4 cannot lie for Plaintiff’s termination. *Portman v. County of Santa Clara*, 995 F.2d 898, 904-905  
5 (9<sup>th</sup> Cir. 1993). Therefore, Plaintiff’s Fourth Cause of Action should be dismissed with  
6 prejudice.

7 To the extent that Plaintiff claims her statutory at-will status was altered by the terms of  
8 the CBA, such as by the SRP list provisions, this argument is legally and factually without  
9 merit. First, the California Supreme Court has held that “the statutory provisions controlling the  
10 terms and conditions of civil service employment cannot be circumvented by purported contract  
11 in conflict therewith.” *Miller*, 18 Cal.3d at 813. Therefore, the Education Code trumps any  
12 provision in the CBA that attempts to change the at-will status of Plaintiff’s employment.  
13 Moreover, the very terms of the CBA SRP provisions belie any pre-emption of statutory law.  
14 Section 19.12.1 specifically states that “SRP status does not . . . provide tenure, permanent  
15 status or related rights” (Complaint, Ex. 6 at §9.12.1.) Therefore, the terms of the CBA facially  
16 do not alter the at-will nature of Plaintiff’s employment. See *Lawson v. Umatilla County*, 139  
17 F.3d 690, 693 (9<sup>th</sup> Cir. 1998) (interpreting similar state law and contractual language and  
18 holding that the contract retained the at-will status of the employment). Consequently, the CBA  
19 cannot and does not alter Plaintiff’s at-will status, and must be dismissed with prejudice.

20 Plaintiff is without a property interest in her employment and therefore, Plaintiff’s Due  
21 Process claim must be dismissed with prejudice.

22 **2. The District afforded Plaintiff sufficient Due Process despite her lack of**  
23 **entitlement to it.**

24 Additionally, or alternatively, should the Court find some sort of property interest, the  
25 District afforded Plaintiff with the level of due process required by the Constitution. Once a  
26 property right has been established, the Supreme Court has held that a public employee is  
27 entitled to two types of procedures: 1) a pre-termination provision of notice and an opportunity  
28 to respond; and 2) post-termination administrative procedures. *Loudermilk*, 470 U.S. at 547-  
548. In this case, Plaintiff, by the very allegations of her Complaint, was given both.

1 In terms of the pre-termination “hearing,” it need not be elaborate or a full evidentiary  
2 hearing. *Id.* at 545. But rather, all that the Constitution requires is notice and an opportunity to  
3 respond. *Id.* at 546. “The tenured public employee is entitled to oral or written notice of the  
4 charges against him, an explanation of the employer’s evidence and an opportunity to be heard.”  
5 *Id.* Here, Plaintiff admits that Defendant Martin presented her with a copy of the student  
6 complaint at their September 6, 2007 meeting. (Complaint at ¶¶65; Exhibit 8.) Then on  
7 December 18, 2007, Defendant Morris sent Plaintiff a letter indicating that the District’s  
8 investigation of the student complaint had been sustained and that Plaintiff was being removed  
9 from the SRP list and terminated pending final Board Approval. (Complaint at ¶¶95-97, 100;  
10 Exhibit 16.) Then prior to the Board meeting at which her termination would be discussed,  
11 Plaintiff received two notices of her right to have the complaint against her discussed during the  
12 open session of the Board Meeting. (Complaint at ¶¶105, 107-108; Exhibits 18 & 20.)  
13 Therefore, it can hardly be argued that Plaintiff did not receive notice of the charges against her.

14 Moreover, she exercised her right to have the complaint against her heard by the Board  
15 in open session, and on February 12, 2008, was given the opportunity to address the allegations  
16 of the student complaint and present her side of the story – both through the presentation of  
17 documents and argument of counsel. (Complaint at ¶¶111-112, 116.) Thus, Ms. Sheldon was  
18 given notice and the opportunity to be heard prior to her termination and was afforded her pre-  
19 termination due process rights, even though she was not constitutionally entitled to them.

20 Additionally, Plaintiff also had post-termination administrative procedures at her  
21 disposal that met the minimum requirements for constitutional post-termination due process.  
22 Pursuant to the CBA, Plaintiff was entitled to file a grievance regarding her alleged violations of  
23 the terms of the CBA and allegedly improper removal from the SRP list and termination.  
24 (Complaint, Exhibit 6, at Article 3.) The Ninth Circuit has held that grievance procedures  
25 pursuant to a collective bargaining agreement that end in arbitration, even when as here the last  
26 arbitration step requires union representation, satisfies the requirements for post-termination due  
27 process. *Armstrong v. Meyers*, 964 F.2d 948, 951 (9<sup>th</sup> Cir. 1992). Therefore, the District  
28 afforded an administrative process to Plaintiff that met the requirements of due process.  
Consequently, any due process rights Plaintiff may claim to have were met by the District both

1 before and after her termination, as established by the very allegations of her Complaint, and her  
2 fourth case of action should be dismissed with prejudice.

3 **IV. CONCLUSION**

4 As discussed above, Plaintiff's Complaint should be dismissed with prejudice in its  
5 entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) as Plaintiff cannot state a cause of  
6 action upon which relief can be granted for the following reasons:

- 7 1) Plaintiff cannot state her First Amendment claims as she was not engaging in  
8 protected speech;
- 9 2) because this is a public employment dispute, Plaintiff cannot maintain her "class  
10 of one" Equal Protection claim; and
- 11 3) Plaintiff cannot state a claim for violation of her due process rights because she  
12 does not have a property right to her employment with the District as an at will  
employee. Moreover, Defendants afforded her due process as required by the  
Constitution, thus extinguishing any claim of lack of due process.

13 Dated: October 2, 2008

**STUBBS & LEONE**



LOUIS A. LEONE, ESQ.  
Attorneys for Defendants  
BILBIR DHILLON, MARIA FUENTES,  
AUTUMN GUTIERREZ, RICHARD HOBBS,  
RONALD J. LIND, RANDY OKAMURA,  
RICHARD K. TANAKA, ROSA G. PEREZ,  
ANITA L. MORRIS, MICHAEL L. BURKE,  
AND LEANDRA MARTIN