

# Scenario #1

## Underperforming Tenure-Track Faculty Member



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Professor Tenure-Track (TT) has submitted her materials for the mid-tenure (3<sup>rd</sup> year review). This review is being done in the fourth year of her appointment as she was granted a one-year tenure clock extension.

According to your unit's promotion and tenure guidelines, and as articulated in all faculty PD's, faculty are expected to publish at least one peer-reviewed journal article a year to be evaluated as "satisfactory" in their research/scholarship assignment. Professor TT has had one article appear in print, and has two others currently under review.

With respect to teaching, your explicit expectations are for faculty to be at or above department averages in SET scores and to be actively mentoring at least one Ph.D. student. Professor TT's SET scores are not quite at the school average, and she has not yet taken on a Ph.D. student.

Assistant Professors are expected to be actively engaged in departmental service and Professor TT has engaged sufficiently.

You are a new unit head and are sitting down to do her mid-tenure review. You are also considering best options for her career and for the unit moving forward.

# Scenario #1

## Key Points



- Understand the position description as the underlying metric against which faculty are measured.
- Conduct annual reviews. Be honest and forthright in reviews.
- Non-renewal during the probationary period is an option with non-performing untenured faculty.

# Scenario #2

## Only Nice Guys Get Tenure?



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See handout.

# Scenario #2

## Key Points



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1. Not all unpleasant behavior in an academic setting can be prevented. Being an administrator in a university involves developing people skills to deal with unpleasant colleagues in a marketplace of ideas.
2. Establish clear expectations about professionalism and collegiality in the Department.
3. Be mindful of academic freedom and first amendment concerns, as well as the limits of those freedoms. Context matters.

# Scenario #2

## Key Points, cont.



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4. If you see behavior that might rise to the level of unlawful harassment or if someone lodges a complaint with you that particular behavior constitutes unlawful harassment, contact the Office of Equal Opportunity and Access (EOA).
5. Particularly severe or pervasive behavior that is *not* based on a protected class may still be addressed through OSU's Bullying Policy. Contact EOA.
6. Take advantage of available resources, such as the Ombuds Office, Human Resources, Academic Affairs, and General Counsel. And, if matters escalate and safety is a concern, the Department of Public Safety.

# Scenario #2

## Key Points, cont.



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7. Process is your friend!
8. Retaliation is interpreted broadly. Mishandling a claim of discrimination could lead to a credible retaliation claim even if the original claim of discrimination is not credible. Stray comments matter!
9. Timely, honest and forthright performance evaluations are the best defense to a claim of retaliation or discrimination, as well as best practices.

# Scenario #2

## Key Points, cont.



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10. Anonymous or confidential input from any source may not be used to evaluate faculty, except for tabulated reports of SET's.
11. Post-Tenure Review (PTR) serves both to rehabilitate underperforming tenured faculty and to ensure that the university's commitment, in the form of tenure, is reciprocated by the faculty member through continued excellence.
12. Except in cases of serious malfeasance, PTR should normally precede any sanction for cause, greater than a reprimand, against a tenured faculty member.

# Scenario #2

## Key Points, cont.



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13. During the term of the annual appointment, “cause” and a full-blown administrative hearing would be required for termination (as opposed to non-renewal). The process takes a long time and is not likely to be invoked by the President without a serious incident of misconduct.
  - In this scenario, the process would take longer than the time remaining in TT’s appointment.
  
14. Reassignment as a disciplinary sanction requires the same “cause” and administrative hearing that is required for mid-term or post-tenure terminations. The University has discretion to reassign for “business need.”
  - Consult with Academic Affairs and General Counsel in this scenario.

# Scenario #3



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## Professor who can't or won't perform?

Professor is a tenured faculty member with a national reputation as a researcher. In recent interactions with colleagues, she has been rude, contentious, and unpredictable. She now refuses to attend department meetings, claiming they are beneath her. Many on the faculty refer to her as "Nuts!," and lately her behavior seems to have changed: she dresses more and more eccentrically, leaves inappropriate notes and photos in colleagues' offices, and dismisses class frequently, often without presenting any material/lecture at all.

You were recently preparing for the upcoming merit raise evaluations and noticed that Professor had not submitted the required self-evaluation this year or last year. You have sent out a reminder to all of the faculty members whose evaluations are missing, and all but two faculty members (Professor and one other) have responded to that reminder by submitting the missing evaluations.

You are not sure whether Professor is unable or unwilling to cooperate. A third colleague did report that Professor told him that she "stopped taking her meds because they made it hard for her to concentrate."

# Scenario #3 – Key Points



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1. Employee rights and employer obligations under the Americans with Disabilities Act are complicated and should involve University resources and expertise beyond your own.
2. Think possible disability for any significant impairment or illness and get guidance early on (even if the employee isn't using the terms "disability" or "accommodation").
3. Refer employees to the units on campus that can address their concerns: Office of Equity and Inclusion (ADA) and Human Resources (FMLA leave).

# Scenario #3 – Key Points, cont.



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4. Not all complaints by faculty members are grievable under the OSU grievance procedures, but those that are grievable must be handled in accordance with those procedures.
5. If you receive something that looks like a grievance, contact the Office of the General Counsel for guidance going forward.
6. Complaints to the Office of Equal Opportunity and Access claiming discrimination may also be grievable, but the complainant has to choose which course to follow and may not pursue both simultaneously.

# Scenario #3 – Key Points, cont.



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7. If you receive a summons/complaint, immediately forward it to Office of General Counsel (OGC).
8. If you are named party, OSU will indemnify you provided you were acting within the course and scope of your employment.
9. If you are involved in litigation, OGC will send you a Preservation Notice (PN), instructing you to preserve all records, including emails.

# Scenario #3 – Key Points, cont.



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10. The attorney-client privilege protects from disclosure certain communications between attorneys and clients. For the privilege to attach, communication must be:
- To/from OSU’s attorney (OGC or OGC-contracted outside counsel);
  - To/from client or client representative;
    - OSU and OSU employees seeking/receiving legal advice in the course/scope of their OSU employment duties
  - Made in confidence (to another OSU employee in scope of duties or another OSU attorney); and
  - For the purpose of facilitating legal advice.

# Scenario #3 – Key Points, cont.



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It is very important that you maintain OSU's attorney-client privilege, which is destroyed when the privileged material is no longer held in confidence.

- **Common example** - Forwarding a privileged email to a non-OSU employee (including friends, family members, community members, other state agency or city employees, police or court system).