

Southern Illinois University Sexual Harassment Policy
Report and Recommendations from the Sexual Harassment Working Group
January 14, 2009

Introduction

Sexual harassment is a topic receiving priority attention at both the campus and system levels of Southern Illinois University. And well it should as our institutional response to sexual harassment is one of the ways we collectively commit to ensuring the success of our students, faculty and staff. Sexual harassment is real and harmful and is not only illegal, but violates our values of inclusiveness, respect and civility as the foundations of a vibrant, pluralistic and productive community of scholars, educators, students, and employees.

In order to promote an informed and civil review and discussion of our policies and procedures, we need to have a common understanding of sexual harassment: that it is harmful to our educational mission and that it is a form of sexual discrimination prohibited by law. Sexual harassment is prohibited in the workplace under Title VII of the federal Civil Rights Act of 1964, and in educational institutions under Title IX of the Education Amendments of 1972. In Illinois, we are additionally governed by the Illinois Human Rights Act. Educational institutions also benefit from the language and implementation guidelines set forth by the federal Equal Employment Opportunity Commission (EEOC) and the Office of Civil Rights (OCR) of the Department of Education. As with all laws in our country, our understanding of the law and our obligations under the law become clarified over time as courts set precedents by which we can craft our workplace and educational policies and procedures. It is the obligation and legal mandate of employers and educational institutions to update their policies and procedures to reflect the most recent court rulings in tandem with the guidance language and expectations set forth by the EEOC and OCR.

Various groups within our SIUC campus community have had long-term and ongoing concerns and discussions regarding the current sexual harassment policy and procedures. The Faculty Senate, the Faculty Association and the University Affirmative Action Advisory Committee have each called at various times for a review of the current policy and procedures that were approved in 2000 by the SIU Board of Trustees (BOT). Suggested policy and procedure revisions as well as recommendations for expanded prevention programming from various groups have been submitted but have not been shared with the campus as a whole nor vetted through the constituency group process.

In spring 2008, a separate group of individuals came together on an ad hoc basis, facilitated by the office of University Women's Professional Advancement (UWPA). The group was made up of individuals who possess substantive expertise and professional experience on sexual harassment as scholars in social science and law and as practitioners. Key concerns of the group were similar to those of others: the need not only to review on a regular basis the University's policy and procedures, but also to improve the general education and training of SIUC employees and supervisors on issues related

to sexual harassment and to develop a website that efficiently provides information on policies and procedures, along with related scholarly and legal resources. In June 2008 Dr. Seymour Bryson, Associate Chancellor (Diversity), authorized the group “To review current policies and procedures and make recommendations regarding clarification, transparency and appropriateness” to his office.

Media reports of sexual harassment cases, changes in campus leadership and a new policy draft put forth by the General Counsel of the system at the request of the BOT in Fall 2008 reinforced the priority for transparency and participation in the development of a revised sexual harassment policy. As our campus experienced, the issue of sexual harassment generates, at times, a great deal of emotional intensity. The ad hoc working group, with its sexual harassment expertise, is accustomed to navigating the many perspectives, emotions and legal aspects of the issue. In particular, the group is well versed in the legal standards the University has to meet and the guiding language provided by the EEOC and OCR. Therefore, the group volunteered and was subsequently appointed by President Poshard to be a conduit for the campus wide constituency based review of the proposed General Counsel draft revision of the sexual harassment policy.

The fundamental and critical goal of the ad hoc group, now referred to as the Sexual Harassment Working Group (SHWG), was diligently to solicit input from all sectors of the campus. Transparency, full participation of the campus community, on-going communication with all involved, and the integrity of the constituency based governance process were the tenets framing the facilitation process of the SHWG. The group scheduled multiple public forums, advertised by email blasts, newspaper ads and campus mailings. Direct outreach was made to the heads of each constituency group. The SHWG encouraged input by whatever means individuals preferred, which included the public forums, email, regular mail, and phone. The Faculty Senate developed and administered a survey, and subsequently its Executive Council approved the *Resolution to Revise the Draft SIUC Sexual Harassment Policy and Sexual Harassment Complaint and Investigation Procedures [as amended]* on November 18, 2008. The qualitative survey results were forwarded to the SHWG and are appended to this document.

Led by Dr. Michelle Hughes Miller, Director of UWPA, the SHWG collected and reviewed all public forum and written comments and the quantitative and qualitative Faculty Senate survey results and engaged in an extensive line by line review of the policy, incorporating the input received as well as the expertise of the individuals of the SHWG. The resulting proposed version of the sexual harassment policy, set forth below, is a culmination of this gathering and summarizing process while at the same time grounded in federal case law and regulation. The SHWG is ever mindful that the University has an obligation and a right to prohibit the conduct described in the policy, and the policy reflects the standards the Courts will apply if a sexual harassment claim were to proceed to litigation. Each section of the document is accompanied by an annotation describing the SHWG’s recommendations and the legal, social scientific, best practices and community input bases for these changes. Comments received via email, the public forums and the Faculty Senate survey are in the Appendices.

It is important to note that the University has chosen to separate policy and procedure. This Policy is a system policy that outlines the prohibition of unlawful sexual harassment and utilizes the terms, definitions and legal standards current to date. In addition, issues of due process, freedom of speech, academic freedom, false reporting, and retaliation are further highlighted and explicated in response to the issues raised during the information gathering process. Many other issues raised during the vetting process will be addressed in the upcoming SHWG Procedures report and recommendations.

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SOUTHERN ILLINOIS UNIVERSITY
BOARD OF TRUSTEES

SEXUAL HARASSMENT POLICY
-as recommended by the Sexual Harassment Working Group
January 2009

I. Policy Statement

Southern Illinois University is committed to maintaining a community in which students, faculty, and staff can work and learn together in an atmosphere free of all forms of harassment, including sexual harassment, exploitation, intimidation or retaliation. Such actions violate the dignity of the individual and the integrity of the University as an institution of higher learning. The University will take the steps necessary to ensure an environment free from all forms of harassment including sexual harassment and retaliation. This policy specifically addresses sexual harassment.

Sexual harassment in any form will not be tolerated at this University. All University employees are responsible for taking reasonable and necessary action to prevent sexual harassment, and all members of the University community are expected to contribute to an environment free of harassment and encouraged to report promptly any conduct that could be in violation of this policy. Each SIU campus shall adopt specific procedures for reporting, investigating and resolving harassment claims.

Disciplinary action for violation of this Sexual Harassment Policy may include, but is not limited to, oral or written warnings or reprimands, mandatory training, demotion, transfer, suspension, or dismissal for cause.

This policy shall not abridge any individual's speech and due process rights under the First and Fourteenth Amendments; nor shall it abridge principles of academic freedom or the University's educational mission. Prohibited harassment and discrimination in general is not expression protected as a matter of academic freedom.

This policy:

1. Prohibits sexual harassment, related retaliation, certain consensual relationships, and knowingly making a false sexual harassment complaint or providing false information during the investigation of a sexual harassment complaint;
2. Provides a definition for sexual harassment; and
3. Requires each campus to develop procedures to implement this policy.

***Annotation:** The most significant change to this section is the addition of the fourth paragraph, proposed in part by the Faculty Senate and by numerous respondents. This is a revised version of Section II.E. Policy Violations. from General Counsel's original*

draft. This revised paragraph does two things: First, it explicitly notes the relationship between the policy and existing rights of campus employees, including faculty. These rights include rights of free speech contained in the 1st amendment along with its higher education counterpart, academic freedom, and due process rights associated with civil penalties as addressed in the 14th Amendment. While important, it should be noted that this paragraph only articulates that which already exists, creating no new rights for members of our campus community.

Second and more importantly, by placing this paragraph in Section I we have elevated these rights as guiding framework for the policy and the procedures that are thus derived. Its original location seemed less effective in this regard.

A slight modification of the second sentence in paragraph 2 clarifies the levels of responsibility expected by the policy. This modification addresses concerns expressed at the open forums and in direct correspondence with the SHWG about mandatory reporting of “any conduct that could be in violation” by substituting the word “encouraged” for “expected.”

We also reordered paragraphs 2 and 3, which serves to highlight the prohibition and expectations now clarified in paragraph 2.

Finally, the list that concludes this section has been amended to reflect the movement of sections in latter parts of the document, which are explained, below.

II. Specific Prohibitions and Policies

A. Sexual Harassment

It is a violation of this policy to engage in acts of sexual harassment, as defined in Part III (Sexual Harassment Definition) of this policy. Sexual harassment may involve the behavior of a person of either sex toward a person of the opposite or same sex. Sexual harassment in violation of this policy can occur on or off campus. The harasser may be a member of the University community, including the student body, or an outside individual involved in University business, or visiting campus for another purpose.

***Annotation:** This section makes explicit that sexual harassment is prohibited. The definition of “sexual harassment” is left to a later section. The original draft of the revised policy did not explicitly make engaging in acts of sexual harassment a violation of the policy.*

*To make clear to all constituents the scope of the policy, we have placed here the acknowledgement that either sex may engage in harassing behavior or be the recipient of it. This is consistent with U.S. Supreme Court precedent, including **Oncale v. Sundowner Offshore Services**, 523 U.S. 75 (1998).*

Case law has also recognized that in some circumstances sexual harassment can occur away from the work premises. See, e.g., **Burlington Industries, Inc. v. Ellerth**, 524 U.S. 742 (1998) (part of the allegations concerned remarks made at a hotel lounge during a business trip); **Meritor Savings Bank, FSB v. Vinson**, 477 U.S. 57 (1986) (actionable allegations included statements made by a supervisor to an employee during a dinner date).

Courts have recognized that an employer may be liable for harassment in the workplace even when that harassment is perpetrated by a non-employee. See, e.g. **Lockard v. Pizza Hut**, 162 F.3d 1062 (10th Cir. 1998). It is therefore essential that the policy cover harassment by others on campus as well as by members of the university community.

B. Consensual Relationships that Create a Conflict of Interest

Consensual amorous or sexual relationships between faculty and students or between a supervisor and an employee may result in claims of sexual harassment, even when both parties appear to have consented to the relationship. The power differential inherent in such relationships may compromise the subordinate's free choice. When those in authority abuse or appear to abuse their power in a relationship, trust and respect in the University community are diminished. Moreover, others who believe they are treated or evaluated unfairly because of such a relationship may make claims of harassment.

No faculty, staff, or graduate assistant shall become involved in an amorous relationship, consensual or otherwise, with a student for whom that person currently has any teaching responsibility, including counseling and advising, coaching, supervision of independent studies, research, theses, and dissertations. In all cases in which an amorous or sexual relationship exists or develops, it is the obligation of the faculty member, staff member, or graduate assistant whose University position carries the presumption of greater power to disclose the relationship immediately to the appropriate supervisor who will contact the Office of the Provost for assistance in avoiding an appearance of impropriety and a potential conflict of interest.

In cases in which a consensual sexual or amorous relationship exists or develops between a supervisor and a directly reporting employee, it is a violation of this policy for the supervisor to fail to disclose the relationship immediately to his or her supervisor. That supervisor will consult with the Office of Institutional Compliance for assistance in how to avoid an appearance of impropriety and a potential conflict of interest.

Annotation: *Previously, the SIUC policy on Consensual Relationships was a separate University policy and not included under Sexual Harassment. The SHWG is unclear as to the reasoning of Counsel's Office for moving policy related to consensual relationships under Sexual Harassment rather than having it as a free standing policy. Related, we viewed the current SIUE policy on consensual relationships, in general, to be better suited to the needs of SIUC (see below).*

Various concerns were expressed with the draft language. First, in both the SHWG and in Open Forum settings, the point was made that the chief concern of the policy should be with consensual relationships in which there is a power difference and a potential conflict of interest – not all consensual relationships. Second, it was noted that the draft language did not make room for reasonable and appropriate exceptions. Of particular concern to the SHWG was the lack of an exception for pre-existing consensual relationships, as in the case of one member of an existing couple moving into a supervisory role over the other, and of hires of dual career couples in which one person would be in a supervisory position over the other. A sexual harassment policy should not discourage dual career hires or limit professional advancement of current employees. Third, there was concern voiced in responses to the Faculty Senate survey that the language drafted by the Counsel’s Office was overstepping privacy rights. These individuals stressed that the most critical concern was with power differentials, context, and conflict of interest. Finally, it was noted that in a community as small as ours, it is not unusual to find amorous or sexual relationships among members of the University community and therefore we need to be sure that we are only targeting consensual relationships where there is a potential conflict of interest.

Because the Sexual Harassment policy is intended to cover both SIUC and SIUE, with separate procedures for each campus, the SHWG examined the SIUE policy on consensual relationships. The SHWG preferred the SIUE policy language on consensual relationships to the language drafted by the Counsel’s Office. However, the SWHG suggested modifications of the SIUE policy as follows:

- 1) Regarding student-staff relationships in paragraph 2: We omitted a redundant sentence from the SIUE policy that says “it is a violation of this policy if faculty members become involved in amorous or sexual relationships with students who are enrolled in their classes or subject to their supervision, even when both parties appear to have consented to the relationship.” We retained the SIUE policy’s language and prohibition against student-staff relationships that involve a power differential and require the individuals with more institutional power in such relationships to report potential conflicts of interest.*
- 2) Regarding supervisor-staff relationships in paragraph 3: We eliminated a sentence in the SIUE policy that read “Additionally, it is a violation of this policy for a supervisor and a directly reporting employee to have a consensual amorous or sexual relationship with each other.” Instead, because the point is conflict of interest, not amorous or sexual relationships per se, the violation results from failure of the supervisor “to disclose the relationship immediately to his or her supervisor.”*
- 3) Under the SHWG revisions, unlike the Counsel’s Office draft, the policy on consensual relations that create a conflict of interest includes both the obligation to report and directions on where (or to whom) potential conflicts of interest should be reported. For faculty, staff, or graduate students and relationships with students that would produce a conflict of interest, the matter should be reported to the Office of the Provost “for assistance in avoiding an appearance of impropriety and a potential conflict of interest.”*

For a supervisor and a directly reporting employee, the supervisor is obligated to consult with the Office of Institutional Compliance.

C. Retaliation

It is a violation of this policy to engage in any retaliatory acts against an employee or student who reports an alleged incident of sexual harassment, or any employee or student who testifies, assists, or participates in a proceeding, investigation, or hearing relating to an allegation or complaint of sexual harassment.

Retaliation is defined as any act of reprisal, including negative or otherwise unwarranted treatment, related to the reporting of, or participation in a complaint of sexual harassment. Retaliation may include, but is not limited to:

- Taking negative tangible employment actions against a person;
- Failing to provide assistance, instruction or mentoring that would otherwise be provided;
- Failing to fairly and/or objectively evaluate an employee or student's performance;
- Failing to record an appropriately earned grade for a student; or
- Otherwise sabotaging an employee or student's performance or evaluation.

Annotation: *Retaliation against individuals who take or aid those who take assertive action against sexual harassment is expressly prohibited by Title VII of the Civil Rights Act as amended, Title IX of the Education Amendments of 1972 and by the Illinois Human Rights Act. Social science research has found that fearing retaliation is an important reason why victims fail to report instances of sexual harassment to authorities (Fitzgerald, Swan & Fischer, 1995). Further research finds that these fears are not unfounded as reporting or confronting the harasser often leads to retaliation and other negative consequences (Bergman, Langhout, Palmieri, Cortina & Fitzgerald, 2002; Hesson-McInnis & Fitzgerald, 1997; Stockdale, 1998). It is imperative, to have a strong policy against retaliation and to vigorously protect University citizens against any acts of retaliation.*

The section on retaliation was originally in Part III. Definitions. The SHWG moved it to Part II.C. so that it is specifically listed as a prohibition. The wording has not changed, although we rearranged the original text so that the paragraph declares retaliation as a violation of the policy. This is followed by the definition of retaliation and then by examples of retaliation.

D. Duty to File in Good Faith

Employees, students, and contractors who make reports of alleged sexual harassment or provide information during the investigation of a complaint are presumed to have participated in good faith in the investigatory process. Individuals who make complaints that they know to be false or provide information that they know to be false during an investigation, however, are in violation of this policy.

***Annotation:** The changes in this section originate from three central concerns. First, according to Robert Gregg, a trainer at the American Association for Affirmative Action, EEO and AA Law training in October 2008, including a section prohibiting false reporting of sexual harassment may make potential legitimate complainants fearful of the policy, creating a chilling climate for individuals who are unsure if their experiences rise to the level of a sexual harassment complaint. Second, this section of the policy, as proposed, appeared to contradict the affirmative recommendation of reporting in Section I of the policy and in the proposed procedures. In particular, the proposed policy encourages individuals “to report promptly any conduct that could be in violation of this policy.” Third, studies within academe, government, and the private sector have found significant underreporting rates for sexual harassment. Estimates of the percent of cases that are formally reported include 2% for students and academic staff (Cochran et al. 1997) and 6% for government employees (US Merit System Protections Board 1995). The number of false reports, while difficult to identify, are suggested to be even rarer. Two recent studies conducted in Canadian corporations and the US Military show very low numbers of false reports. Schell’s (2003) sample of 46 Canadian corporations reported a total of 12 false reports of sexual harassment from 1995-2000.*

*The SHWC also noted that under Title VII law, employers cannot discipline employees who report what they reasonably believe to be discriminatory conduct. The language of this policy must be careful not to suggest to employees that they will be subject to discipline merely because what they report turns out not to meet the legal standard. **Crumpacker v. Kansas Dep’t of Human Resources, 338 F.3d 1163, 1172 (10th Cir. 2003)***

The SHWG concurs with the many written and forum respondents who expressed concern about false reports and their potential damaging effects on respondents. Distinctions between valid and false reports must be made to have a viable sexual harassment policy. Nevertheless, while our campus must respond effectively and directly to individuals who make false reports, we have no interest in punishing or silencing complainants who would or do file in good faith. We therefore recommend that differentiating between false and good faith reports must be a component of our sexual harassment procedures.

In the wording we have added here, we have tried to reduce the possibility of a chilling climate but maintain our strong community expectation that complainants must participate in the reporting and investigatory process with honesty and integrity. And in the revised title of the subsection, we have reiterated the community expectation that

individuals should report conduct they believe is in violation of the sexual harassment policy.

To be consistent with the rest of Section II, which does not reference punishment, we have also removed that statement from this section, transferring it to the procedures for explication.

E. Applicable Statutes

Violations of this policy may also constitute violations of Title VII of the Civil Rights Act of 1964 as amended, Title IX of the Education Amendments of 1972, the Illinois Human Rights Act, and any applicable criminal laws. Violation of this policy may subject the University and the harasser to legal liability under one or more of these statutes or other law.

***Annotation:** We have added the phrases “under one or more of” and “or other law” to clarify differences in statutory legal liability for the harasser. While Title VII and Title IX violations would not subject the harasser to liability, the Illinois Human Rights Act does impose individual liability on a sexual harasser. Further, acts which constitute sexual harassment may lead to other tort liability such as liability for the intentional infliction of emotional distress.*

In addition, as pointed out by Todd Sigler, SIUC Director of Public Safety, in email correspondence, sexual harassment may include sexual assault which is also a criminal violation. Hence, we have incorporated here an acknowledgement that some sexually harassing behaviors may also be punishable through criminal laws.

III. Definition of Sexual Harassment

A. Definition with regard to employment

Sexual harassment in Employment means any unwelcome sexual advances, requests for sexual favors, or any conduct of a sexual nature, when:

1. Submission to or toleration of such conduct is made, either explicitly or implicitly, a term or condition of an individual’s employment;
2. Submission to or rejection of such conduct by an individual is used as a basis (or threatened to be used as a basis) for employment decisions or assessments affecting such individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

Annotation: *This language is from the EEOC’s regulation defining sexual harassment. (29 C.F.R. 1604.11) The original draft of the policy used this same language, but including opening comments that described sexual harassment as “inappropriately assert[ing] sexuality over status as a student or employee. . . .” We deleted this language because, quite frankly, we didn’t quite understand what was meant and believed it would cause unnecessary confusion to keep it in. The language is not from any official guidance that we were able to determine. We also believed it would be clearer to include separate employment and educational sections.*

Some comments received from the open forums and from the Faculty Senate inquired why the language of the Illinois Human Rights Act wasn’t simply cut and pasted as the definition. (775 ILCS 5/2-101) The most significant difference between the ILHA and the EEOC language is found in paragraph 3, in that the ILHA uses the term “substantially interfering” and the federal regulation uses “unreasonably interfering.” The Illinois Courts have indicated they follow Title VII standards, and we do not think the two versions create different standards when viewed in the totality of the definition, as further discussed below. Since federal law sets the minimum that must be maintained and there is no present indication from the Illinois courts that state law creates a more expansive standard, we incorporated the EEOC’s Title VII language.

B. Definition related to students

Sexual harassment in Higher Education means any unwelcome sexual advances, requests for sexual favors, and any other conduct of a sexual nature when

1. Submission to or toleration of such conduct is made, either explicitly or implicitly, a term or condition in connection with the student’s participation in or benefit from any of the academic, educational, extra-curricular, athletic, or other programs of the University; or
2. Such conduct is sufficiently serious to interfere with a student’s academic performance or create an intimidating, hostile, or offensive academic environment.

Annotation: *The Illinois Human Rights Act (Higher Education) contains a list of twelve aspects of a student’s relationship to an education institution, interference with which on the basis of sex can constitute sexual harassment. (775 ILCS 5/5A-101.E) Per the comments received, we considered cutting and pasting the language from this statute into the policy. The result was unwieldy. In addition, the University must comply with federal law (Title IX), and the Office of Civil Rights has indicated Title VII standards are relevant in determining what constitutes hostile environment sexual harassment in education. We, therefore, included the language used by the OCR in its Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 2-3, 5 (Jan. 2001).*

C. Totality of the Circumstances

In determining whether alleged conduct constitutes sexual harassment, the record as a whole and the totality of the circumstances will be considered. For conduct to be considered sexual harassment, it need not be direct or explicit; it can be implied from the conduct, circumstances, and/or the relationship of the individuals involved.

In evaluating the circumstances, the relevant considerations are the characteristics of the behavior and how that behavior is perceived by a reasonable person in the circumstances of the victim. The fact that someone did not intend to sexually harass another individual is not a defense to a complaint of sexual harassment.

For purposes of hostile work or academic environment harassment as set forth in Section III A.3. and III.B.2., circumstances may include the frequency of the conduct, its severity, its duration, whether it was physically threatening or humiliating, and whether it unreasonably interfered with the complainant's work performance or academic environment. No single factor is required.

Harassment does not include verbal expressions or written material that is relevant and appropriately related to academic subject matter or curriculum.

Annotation: *The language used in this section comes from the United States Supreme Court's interpretation of Title VII. The elements of the totality come from the Court's decision in **Harris v. Forklift Systems**, 510 U.S. 17, 22-23 (1993):*

This is not, and by its nature cannot be, a mathematically precise test. . . . But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

*The "reasonable person" standard used to judge behavior takes into account the circumstances of the person experiencing the alleged harassment, and this standard comes from the Supreme Court's decision in **Oncale v. Sundowner Offshore Services, Inc.**, 523 U.S. 75, 81 (1998).*

*We recognize that some believe the standard is vague and would prefer something more definite. As Justice Scalia noted in his concurrence in **Harris**, however, there is "no basis for such a limitation in the language of the statute. . . . [T]he test is not whether work has*

been impaired, but whether working conditions have been discriminatorily altered. I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts.” (Harris, 510 U.S. at 24-25) For purposes of this policy, we agree with the OCR’s observation that “schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.” (Revised Guidance vi.)

We strongly encourage the University to devote appropriate resources to developing training materials and sessions on what constitutes sexual harassment in employment and education, because it is in that context that greater understanding of the line between proper and improper conduct can be gained.

D. Examples

Examples of conduct that may be considered sexual harassment if they meet any of the criteria outlined in sections III.A or III.B above include, but are not limited to:

- Physical sexual assault;
- Unwelcome physical contact, such as touching of a person’s body, hair or clothing;
- Direct or implied threats that submission to sexual advances will or could be a condition of employment, work status, promotion, grades, letters of recommendation, or other work or educational benefit;
- A pattern of unwelcome verbal, physical, or other expressive conduct that is offensive or humiliating in a sexual way. Such conduct may include comments of a sexual nature and/or sexually explicit statements, questions, jokes, anecdotes, gestures, or facial expressions that would offend or humiliate a reasonable person in the circumstances of the individual experiencing this conduct. Conduct need not be in person but can be any form of communication including but not limited to written, telephonic, or electronic communication such as electronic mail and/or comments sent via the internet.
- Sexually explicit materials in the workplace or learning environment that have no relationship to the mission of the university. Such materials may be in the form of music, documents, objects, photographs, film or electronically generated materials. Individuals who plan to present or discuss content that may be considered sexualized but in an academic context (such as research or teaching) are encouraged to disclose the nature of the content to the audience before commencing with the presentation or discussion.
- Any unwanted, inappropriate behavior that is targeted to a person or person(s) because of their sex, for example repeatedly telling women (or men) that they are not capable of doing this kind of work.

Annotations: *Because of its personally sensitive and often ambiguous interpretation, examples of sexually harassing behavior are essential to a proper policy against sexual harassment. The examples serve an educative function, should illustrate a reasonable*

range of action that could be construed as harassment, and should be consistent with the law. Considerable concern was raised among University constituents that the examples provided in the original draft of the revised policy were too liberal and could lead to disciplinary actions taken against University members for acts that do not fall within the legal definition of sexual harassment. Members of the SHWG noted this concern and concluded that, as is true of all policies, they should be broad enough to reflect the legal standards and ensure that unlawful conduct is reported. For this reason, we have added language that indicates that none of the examples listed above exist in a vacuum, but rather violate the policy only when they rise to the appropriate level in the totality of the circumstances. The policy must be read as a whole.

The specific revisions are as follows:

- a. A new subsection to section III “Definitions” was added to specifically list examples of harassing conduct and not to confuse the examples with the definition of sexual harassment per se. The examples are preceded with a statement that the examples may be considered sexual harassment if they meet any of the criteria outlined in sections III.A or III.B above (emphasis added). Specifically, these criteria state that in order for the conduct to be considered sexually harassing, it must be used explicitly or implicitly as a term or condition of employment or participation in any form of academic or University activity; used or threatened to be used as a basis of employment or academic decisions affecting the individual; or unreasonably interfere with the individual’s work or academic performance by creating an intimidating, hostile or offensive working environment.*
- b. In addition to physical sexual assault, we added other forms of prohibited physical behavior, such as unwelcome physical contact, such as unwanted touching of a person’s body, hair or clothing.*
- c. The third example in the original draft, which began “A pattern of conduct, annoying or humiliating in a sexual way,” raised considerable concern among University constituents, especially because it seemed to apply than any untoward glance or gesture could lead to a complaint of sexual harassment and subsequent disciplinary action. The word “annoying” was perceived as particularly problematic because it doesn’t convey the degrading, humiliating nature of sexually harassing conduct that the policy (and law) is designed to abolish. Similarly, the prohibition against “gestures and facial expressions” was seen as overreaching. The SHWG agreed with this concern but also sought to retain the essence of this example because it clearly addresses an important and unfortunately frequent type of harassing behavior, namely Hostile Work Environment. Therefore we made the following substantive changes as well as wording changes to improve the readability of the example: (a) removed the word “annoying” and replaced it with “unwelcome verbal, physical or other expressive conduct that is offensive or humiliating in a sexual way.” (b) moved the phrase “gestures, facial expressions” to the list of other behaviors (including explicit statements, questions, jokes, etc.) that may be considered harassing if it “would offend or humiliate a reasonable person in the circumstances of the individual experiencing this conduct.” Note that the addition of the “reasonable person”*

- standard is made explicit in this definition so it is clear to University members that gestures, facial gestures, jokes, etc., are not prohibited per se, but prohibited if they would be offensive or humiliating to a reasonable person.*
- d. *The prohibition against sexually explicit materials that have no relationship to the mission of the university was originally listed in Section II. Policy Violations. Several people raised concerns that free speech and academic freedom would be violated with this prohibition because it could be interpreted that the recipient or perceiver (e.g., student) could be the judge of whether or not the materials have an appropriate purpose in the University. Faculty members, for example, could be charged with sexual harassment for showing a film or discussing a book that has sexual material if a student took offense to the material. The SHWG recognized this concern but also believed that it would be detrimental to the University to remove inappropriate sexually explicit materials from the policy because the display of such materials has been recognized in the law as sexually harassing (See for example **Robinson v. Jacksonville Shipyards, Inc.** 760 F.Supp. 1486, (M.D.Fla.,1991). The Group, however, believed that the discussion of sexually explicit materials was inappropriately placed in the Prohibitions section of the original draft. We moved it to the Examples section (III.D.) because it is, in fact, an example of sexually harassing behavior (also, by moving it to the examples section, is it held to the same criteria as the other examples – see above). Furthermore, the Group added the statement that “individuals who plan to present or discuss content that may be considered sexualized but in an academic context... are encouraged to disclose the nature of the content to the audience before commencing with the presentation or discussion.” This statement is only a suggestion and not a requirement.*
- e. *Finally, people often mistakenly believe that sexual harassment is limited to acts based on sexual attraction and procreation. In fact, under Title VII and related laws, sexual harassment is any form of harassment because of sex. Therefore, behavior that is directed at a person because of his or her gender (that meets the definitional criteria set forth in sections III.C and III.D) may also be considered sexually harassing. To address this issue, we added the final example which reads, “Any unwanted, inappropriate behavior that is targeted to a person or person(s) because of their sex, for example repeatedly telling women (or men) that they are not capable of doing this kind of work.”*

IV. Implementing Procedures

This Sexual Harassment Policy is to be implemented throughout the University, and procedures for such implementation are to be established on each campus consistent with this policy. The President is authorized to delegate to each Chancellor the authority to develop procedures for the implementation of this Sexual Harassment Policy.

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