

**Discrimination & Harassment  
- Complaint & Investigation  
Procedure : P-080**

ETSU Senior Administrator Briefing



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EAST TENNESSEE STATE  
UNIVERSITY

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# Cast of Characters

- Mary Jordan
- Tracy Berry
- Jeff Howard
- Michelle Byrd
- Office of Legal Counsel



# Why?

- “Orderly resolution of complaints of discrimination or harassment on the basis of :



# Categories

- Race
- Color
- Religion
- Creed
- Ethnic or national origin
- Sex
- Sexual orientation
- Gender identity/expression



# Categories (cont.)

- Disability
- Age
- Veteran Status
- Genetic Information
- “Any other category protected by federal or state civil rights law related to the institution.”



# Relevant Federal Law

1. Executive Order 11246, as amended;
2. The Rehabilitation Act of 1973, as amended;
3. The Americans with Disabilities Act of 1990, as amended;
4. The Vietnam Era Veterans Readjustment Act of 1974, as amended;
5. The Equal Pay Act of 1963, as amended;
6. Titles VI and VII of the Civil Rights Act of 1964, as amended;
7. Title IX of the Educational Amendments of 1972, as amended;
8. The Age Discrimination in Employment Act of 1967;
9. The Age Discrimination Act of 1975;
10. The Pregnancy Discrimination Act;
11. The Genetic Information Nondiscrimination Act of 2008; and
12. Regulations promulgated pursuant thereto.



# Guidelines

- Processes to be **fair** and **prompt**.
- May be used by employee, applicant, or student who believes she or he has been subject to discrimination or harassment.
- Former employee or student may complain regarding conduct which took place during the time of employment or enrollment provided the complaint is timely filed. (*within 300 days of the last incident of discrimination or harassment and reasonable connection with institution.*)



# Duty to Report

- Supervisory (Chair, Director, Dean, VP,) has a duty to report.
- Supervisory employees must promptly report, to the appropriate institutional contact, any complaint or conduct which might constitute harassment, whether the information concerning a complaint is received formally or informally.
- Failure can result in **personal liability** and/or **discipline**.





# Duty to Report

All faculty and staff members are required to cooperate with investigations of alleged discrimination or harassment.

1. Failure to cooperate may result in disciplinary action up to and including termination.
2. Students are also required to cooperate with these investigations; failure to do so may result in disciplinary action up to and including expulsion.



# Duty to Cooperate

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# Training

- Required
- Documented
- Used as evidence to protect the individual
- Failure to complete is considered in an investigation



# Discrimination

- Discrimination may occur by:
  - Treating individuals less favorably because of their race, color, religion, creed, ethnic or national origin, sex, sexual orientation, gender identity/expression, disability, age (as applicable), status as a covered veteran, genetic information, or any other category protected by federal or state civil rights law; or,
  - Having a policy or practice that has a disproportionately adverse impact on protected class members. Unless such policy or practice is necessary to achieve policy/practice’s legitimate ends (“necessity defense”).



# Harassment

– based on a protected class

- Harassment is unwanted and objectively offensive conduct that is based on a person's race, color, religion, creed, ethnic or national origin, sex, sexual orientation, gender identity/expression, disability, age (as applicable), status as a covered veteran, genetic information, or any other category protected by federal or state civil rights law that;



# Harassment

- Adversely affects a **term or condition of an individual's employment, education, participation in an institution's activities or living environment;**
- Has the purpose or effect of **unreasonably interfering with an individual's employment or academic performance** or creating an **intimidating, hostile, offensive or abusive environment of the individual; or**
- Is used as a basis for or a factor in decisions that **tangibly affect that individual's employment, education, participation in an institution's activities or living environment.**



# Examples

## Objectively offensive:

- verbal or physical conduct relating to an employee's national origin, race, surname, skin color or accent;
- offensive or derogatory jokes based on a protected category;
- racial or ethnic slurs;
- pressure for dates or sexual favors;
- unwelcome comments about a person's religion or religious garments;
- graffiti, cartoons or pictures; or
- remarks about a person's age.



- **Not every act that might be offensive to an individual or a group will be considered harassment.**
- In addition to being objectively offensive, whether the alleged conduct constitutes harassment depends upon the record as a whole and **the totality of the circumstances**, such as the nature of the conduct in the context within which the alleged incident occurs. Harassment does not include verbal expressions or written material that is relevant and appropriately related to course subject matter or curriculum.





# Examples

- Examples of sexual harassment - Examples of sexual harassment include, but are not limited to, the following;
  - Refusing to hire, promote, or grant or deny certain privileges because of acceptance or rejection of sexual advances;
  - Promising a work-related benefit or a grade in return for sexual favors;
  - Suggestive or inappropriate communications, email, notes, letters, or other written materials displaying objects or pictures which are sexual in nature that would create hostile or offensive work or living environments;
  - Sexual innuendoes, comments, and remarks about a person's clothing, body or activities;
  - Suggestive or insulting sounds;
  - Whistling in a suggestive manner;
  - Humor and jokes about sex that denigrate men or women; or
  - Sexual propositions, invitations, or pressure for sexual activity;



# Examples of Sexual Harassment

- Use in the classroom of sexual jokes, stories, remarks or images in no way or only marginally relevant to the subject matter of the class;
- Implied or overt sexual threats;
- Suggestive or obscene gestures;
- Patting, pinching, and other inappropriate touching;
- Unnecessary touching or brushing against the body;
- Attempted or actual kissing or fondling;
- Sexual violence, including rape, sexual assault, sexual battery, and sexual coercion; or
- Suggestive or inappropriate acts, such as comments, innuendoes, or physical contact based on a person's actual or perceived sexual orientation, gender identity/expression.



# Criminal Acts

Please note that incidents of sexual violence may constitute criminal acts and as such, investigation and processing by the criminal justice system, local police, campus security and crisis intervention centers may occur in addition to the process developed under this Guideline.

- Complainant must be notified of his/her right to file a criminal complaint.



# Consensual Relationships

- Intimate relationships between supervisors and their subordinates and between faculty members and students are strongly discouraged due to the inherent inequality of power in such situations.
- Note that this policy is under review and possible revision.



# Consensual Relationships

- These relationships could lead to **undue favoritism** or the perception of undue favoritism, **abuse of power**, **compromised judgment** or **impaired objectivity**.
- Engaging in a consensual relationship with a student over whom the faculty member has either grading, supervisory, or other evaluative authority (i.e., member of dissertation committee, thesis director, etc.) constitutes a **conflict of interest**.
- The faculty member must take steps to remove the conflict by assigning a different supervisor to the student; resigning from the student's academic committees; or by terminating the relationship at least while the student is in his/her class.
- Likewise, it is a conflict of interest for a supervisor to engage in a consensual relationship with a subordinate over whom he or she has evaluative or supervisory authority.
  - The supervisor must take action to resolve the conflict of interest by, for example, assigning another individual to supervise and/or evaluate the subordinate.



# Process & Procedures

- Intended to protect the rights of the aggrieved party (hereinafter, "the Complainant") as well as the party against whom a complaint of discrimination or harassment is lodged (hereinafter "the Respondent"), as required by state and federal laws.



# Process & Procedures

- Each complaint must be **properly and promptly investigated.**
- When warranted, appropriate disciplinary action taken against the Respondent.
- University Counsel consulted at outset.
- The institution may take any administrative action which is appropriate, e.g., administrative leave with pay pending the outcome of the investigation.



# Timeline

- Title VI- 180 days
- Title IX- 300 days
- Timeliness issues resolved in consultation with University Counsel





# Complaint

- Preferably in writing.
- Preferably signed by Complainant.
- However, where Complainant does not provide or sign a complaint the matter must still be investigated and appropriate action taken.
- Anonymous or third party complaints must also be investigated.



# Complaint

- If the complaint does not rise to the level of discrimination or harassment the investigator may dismiss after consultation with University Counsel.
- Complainant should be informed of other available processes, e.g. grievances or academic complaint or appeal processes.



# Investigation

- Investigation takes place under the direction of University Counsel.
- All notes and documents are attorney work product.
- Investigator shall notify President that complaint is being investigated.
- When a student is involved the Office of Student Affairs will investigate.
- When the matter is between employees the Diversity Office will conduct the investigation.



# Investigation

- Sanctions consistent with institution's applicable disciplinary process.
- FERPA may apply to student records
- TCA 10-7-504 (a) (4) requires certain disciplinary records to be subject to disclosure pursuant to a public record request.



# Investigation Process

- Investigator interviews both the Complainant and the Respondent unless either declines.
- Investigator shall also include interviews with relevant witnesses named by Complainant and Respondent.



# Retaliation

- “Second Shoe” in Sexual Harassment Cases
- Can be an independent violation
- Can involve people in addition to Respondent
- The Investigator must warn all parties regarding ETSU’s policy against Retaliation.



# Credibility

- To be weighed by Investigator:
  - Internal consistency
  - Timeliness of complaint
  - Corroboration
    - Witness
    - Timeline
    - Totality of Circumstance



# Standard of Proof

- Dear Colleague Letter
- “Preponderance of the Evidence”





# Confidentiality

- **Cannot Guarantee**
  - Need to interview witnesses
  - Legal proceedings
  - Possible FOIA issue
  - May need to be revealed to potential witnesses
  - Should relate that information will be shared only on a “need to know” basis.



# Advice

- Where any party needs to speak privately they should confer with a party (attorney, licensed counselor, therapist or clergy person) who has a privilege.



# Investigator

- Notifies the Respondent within five days of the complaint.
- If either party is a student, the person is notified of the possible application of FERPA.



# Informal Resolution

- Investigator may invoke if appropriate and acceptable to both parties.
- Either party may end the process.
- Not used where there is sexual assault.
- Resolution reviewed and approved by University Counsel.



# Report

- Prepared by Investigator.
- Submitted to Legal Counsel within 60 calendar days after receipt of complaint. Can be extended for cause.
- Contains summary of complaint, discussion of evidence, including statements of parties and witnesses, findings of facts, conclusion and recommendation.



# President

- Investigator transmits to President.
- President reviews and makes a final written determination as to whether the violation has occurred and what the resolution should be.
- Investigator submits to both parties.
- President must take immediate and appropriate action.
- Except in cases of sexual assault may include a meeting with Respondent and Complainant at President's discretion.



# Storage

- All documentation in the Office of University Counsel.
- Office of Diversity maintains a copy.
- Records may subject to Public Records Act.
- Some documents protected by FERPA, attorney client privilege, or attorney work product.



# Malicious or False Complaint

- A complaint found to have been intentionally dishonest or maliciously made will subject Complainant to appropriate disciplinary action.





# Appeal

- The Complainant and Respondent have the opportunity to appeal the President's decision concerning Respondent's responsibility for the alleged conduct.
- The Appeal will not be a de novo review of the decision.
- Parties will not be allowed to present the Appeal in person unless permitted by President.
- The parties are notified of the Appeal process at the same time they are advised of the outcome.



# Appeal

- May be sent to President within 10 working days of receipt, absent evidence of good cause.
- Must explain why the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied and how that would change the determination.
- President must issue a written response as promptly as possible. His decision is final.



# Discipline

- Must follow Discipline procedures such as employee complaint procedure, student disciplinary policies, and academic affairs policies.



# Other Complaint Options

- EEOC
- Tennessee Human Rights Commission
- Office of Civil Rights
- State or Federal Courts

