

PPM 3-32, Discrimination,
Harassment, and Sexual
Misconduct (including Title IX)
Decision-Maker Training

Forms of Prohibited Discrimination

- Disparate Treatment
- Harassment
- Adverse Impact
- Failure to provide reasonable accommodation
- Retaliation

Protected Classifications

Race, color, national origin, pregnancy, and pregnancy-related conditions such as childbirth, false pregnancy, miscarriage, abortion, or related conditions, (including recovery), genetics, disability, religion, sex, sexual orientation, gender identity/expression, veteran, active military status, age (over 40 in employment discrimination), and other classifications protected by law.

Disparate Treatment

- **Adverse employment or educational actions (intentional)**
 - Hiring, firing, promotion, demotion, discipline
 - Excluding, evaluating upward or downward
 - Based on membership in a protected class
 - No legitimate, non-discriminatory reason for the action
- **Denial of benefits or privileges of education or employment (intentional)**
 - Based on membership in a protected class
 - No legitimate, non-discriminatory reason for the denial

Sexual Harassment

- Tangible Employment/Education (Quid Pro Quo)
- Hostile Educational or Work Environment
- Sexual assault, dating violence, domestic violence, stalking

Tangible Employment/Education Action (Quid Pro Quo)

- Terms or conditions of employment is conditioned upon, either explicitly or implicitly submission to or rejection of unwelcome sexual advances or requests for sexual favors, or such submission or rejection is a factor in decisions affecting that individual's employment.
- An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct. (Title IX 2020)

Tangible Employment or Educational Action (Quid Pro Quo)

Power relationship is not balanced.

Examples:

- If you sleep with me, I'll make sure you get into that coveted summer research program.
- Your chances of getting a good grade will improve if you come and talk with me about the class in my hot tub some evening.

Hostile Work or Educational Environment

- PPM 3-32/Title VII: Unwelcome conduct that is based on protected classifications that creates a hostile work or learning environment. A hostile environment exists when conduct is so severe, persistent or pervasive, as determined by analyzing the totality of the circumstances, that it denies or limits a person's ability to participate in or benefit from the University's programs or activities or the conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creates an intimidating, or offensive work environment. Both subjective and objective factors shall be considered when evaluating whether a hostile environment exists. Conduct is considered unwelcome if the person did not request or invite it and considered the conduct to be undesirable or offensive.
- Title IX: Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity. Also - sexual assault, dating violence, domestic violence, and stalking.

Consent

- Consent is affirmative and freely given permission to engage in sexual activity. A person can affirm consent, or lack of consent, through words or conduct. Consent can be withdrawn at any time, irrespective of the consent which may have been given previously. Silence or absence of resistance does not, necessarily, imply consent. A complainant has not consented when the complainant is under the age they can legally consent; unconscious; unaware that the act is occurring; physically unable to resist; overcome by force, violence, concealment or surprise; lacks the understanding to make rational decisions or engage in responsible actions due to alcohol or other drugs, or because the complainant is temporarily or permanently impaired by a disability.
- Being intoxicated or incapacitated does not diminish one's responsibility to obtain consent and will not be an excuse for sexual harassment and misconduct.
- The University adopts other circumstances identified in Utah law as standards for determining consent as in Utah Code Ann. §76-5-406. However, criminal prosecution of offenses is subject only to standards in applicable law.
- The University considers unconsented conduct as unwelcome conduct although consent, alone, does not, necessarily indicate that conduct was welcomed.

Recognizing Harassing Conduct

Examples:

- **Verbal**
 - Jokes, innuendos, whistles, comments focused on physical features or to ridicule personal characteristic, pressure for dates.
- **Written**
 - Letters, e-mails
- **Physical**
 - Unwanted touching, too close to personal space
- **Pictorial**
 - Posters, graffiti, cartoons

Recognizing Harassing Conduct

- **Sexual**
 - Sexual comments, jokes, innuendo, pressure for dates, sexual touching, sexual violence
- **Race, Color, National Origin (ethnicity)**
 - Epithets, “jokes”, comments focused on physical features, ridicule
- **Age**
 - Comments, cartoons, “jokes”
- **Religion**
 - Coercing employees to participate or not participate in religious activities, “jokes”
- **Disability**
 - Comments about ability to perform, comments reflecting resentment of “special status” of a disabled person, refusal to assist or provide accommodation, slurs

Jurisdiction PPM 3-32

- Title IX – Occurring within education program or activity. Includes locations, events, or circumstances over which school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the school.
- Non-title IX - also requires redressing a hostile environment that occurs on campus even if it relates to off-campus activities, when the results of such conduct create a hostile work or learning environment in University courses, activities or employment.

Stalking

Includes engaging in a course of conduct that would cause a reasonable person to fear for their own safety, or the safety of a third person, or to suffer substantial emotional distress.

- Course of conduct - two or more acts, including, but not limited to, acts which the stalker directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property
- Substantial emotional distress - Significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling
- Reasonable person - Person under similar circumstances and with similar identities to the complainant

Sexual Assault

Rape, fondling, incest, or statutory rape, as defined in PPM 3-32.

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship shall be determined based on the reporting party's statement with consideration of the length and type of relationship and the frequency of interaction with the persons involved in the relationship. It includes, but is not limited to, sexual or physical abuse or the threat of such abuse. It does not include acts covered under the definition of domestic violence.

Domestic Violence

A felony or misdemeanor crime of violence committed against a complainant by: (i) a current or former spouse or intimate partner; (ii) a person with whom the complainant shares a child in common; (iii) a person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner; (iv) a person similarly situated to a spouse of the complainant under applicable domestic or family violence laws; or (v) any other person against an adult or youth victim whom the complainant is protected under applicable domestic and family violence laws.

Retaliation

- People are protected from reprisal
 - For opposing discriminatory practices
 - For participating in a discriminatory complaint process
 - Includes actions against helpful bystanders, witnesses, complainants
 - Action is generally deemed retaliatory if it would deter a reasonable person in the same circumstances from engaging in activities protected by this policy, such as filing a complaint or participating in an investigation.



Role of the University

Discrimination and harassment are prohibited by numerous federal and state laws and regulations, including, but not limited to the

- 1964 Civil Rights Act,
- Title IX of the Education Amendments of 1972,
- Clery Act, 20 U.S.C. § 1092(f),
- Rehabilitation Act of 1973,
- Americans with Disabilities Act of 1990,
- Pregnancy Discrimination Act,
- Age Discrimination Act of 1975, the Equal Employment of Veterans Act,
- Genetic Information Non-Discrimination Act of 2008,
- Immigration and Nationality Act,
- Lilly Ledbetter Fair Pay Act of 2009,
- Uniformed Services Employment and Reemployment Rights Act (USERRA),
- Equal Pay Act of 1963,
- Veterans Readjustment Benefits Act,
- Utah Fair Housing Act,
- Nursing Mothers in the Workplace and
- the Utah Anti-Discrimination Act.



Role of the University – Title IX

- Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities which receive Federal financial assistance. Title IX states that:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

- The United States Department of Education (DOE) maintains an Office for Civil Rights (OCR).
- Deliberate indifference – clearly unreasonable in light of the known circumstances.
- Burden of proof and burden to gather evidence on university

Discrimination Procedures

- Provide a prompt and equitable resolution for complaints of discrimination
- Reports are initially made to the Equal Opportunity/Title IX Office
- Even if the alleged discrimination might also be a crime, regardless of whether it goes through a criminal process, the University process proceeds separately.
- Complainant: the individual alleging a violation of policy
- Respondent: the individual alleged to have violated policy

Discrimination Procedures

- The AA/EO office conducts or oversees a fair and impartial investigation of the alleged policy violation.
- Respondents have the opportunity to review and respond to evidence considered against them.

Non Title IX - Discrimination Grievance Committee

After AA/EO issues a final investigation report, and review by parties, it is sent to the Appropriate Administrator

- Appropriate Administrator reviews and determines whether to close the complaint, investigate further, attempt informal resolution between the parties, or impose disciplinary sanction(s) and notifies both parties.
- Either party may appeal the decision to the committee.

Title IX Discrimination Grievance Committee

- After AA/EO issues a report investigation, non-binding findings
- After review by parties, sent to hearing committee
- Hearing committee holds live hearing – see PPM 3-32 Appendix A

Standard of Review

For all cases the standard of review is whether there is a **preponderance of the evidence** to believe that an individual engaged in a policy violation. This means that individuals are presumed not to have engaged in alleged conduct unless a “preponderance of the evidence” supports a finding that the conduct has occurred. This “preponderance of the evidence” standard requires that the evidence supporting each finding be more convincing than the evidence in opposition to it.

Discrimination Grievance Committee

Conflict of Interest

As soon as you recognize that you might have a conflict of interest in a particular case, you must disclose that to the Chair and the Chair will disclose it to both parties.

- Outside affiliation with parties

Confidentiality

- The parties and witnesses have privacy rights and reasonable expectations of confidentiality in the proceedings.
- Members of the committee have the same strict obligations to keep all information they learn confidential.
- If you are unsure about what you can disclose or discuss outside of regular committee deliberations, you should not disclose or discuss it without first seeking guidance from the Office of Legal Counsel.

Discrimination Policy – PPM 3-32 (including Title IX)

- Always refer to the policy and follow the policy
- Pay particular attention to **definitions** in policy
- Read it again each time you have a new case

The Hearing

- Recording and minutes
- May be held electronically where parties and witnesses may see each other (FM will provide training prior to the hearing for the specific technology used)
- Security measures
- Each person may have one advisor who may be an attorney; in Title IX cases, the university will supply an individual to ask questions on behalf of the party if the party does not have an advisor
- A hearing is not to be an adversarial process. The hearing committee may determine the structure of the hearing and may require the parties to communicate their positions in accordance with reasonable rules of procedure, decorum, and respect.

The Hearing – General Procedure

- Procedural matters (recording, explanation of rules, etc.)
- Opening statement by Complainant
- Testimony of Complainant's witnesses
- Proffer of evidence
- Questions from the Committee/Responding Party.
 - Questions should be focused on helping you determine whether University policy was violated.
 - Don't ask questions to satisfy your curiosity.
- Repeat above for Responding Party
- Closing statements

The Hearing – Evidence

- The Committee may determine the relevance of any evidence received, and may limit evidence, including scope, nature, duration, when in the discretion of the hearing Committee it is deemed unduly repetitious or irrelevant.
- Hearsay – non-Title IX – credibility assessment – do not base your decision on
- Title IX Exclusionary Rule – in person statements
- Cannot draw inferences based on absence
- Relevance: Does the proposed information support a fact of consequence to the outcome and does it make more or less likely that the fact occurred
- Credibility determinations
- Neutral decision-maker

The Hearing – Evidence

- When ruling on evidence, including relevance, state it for the record
- Take your time
- Ask the parties/questioners to take their time in asking and pause before responding

The Hearing – Evidence

- Exclude questions or evidence about the complainant(s)' sexual predisposition or prior sexual behavior as not relevant unless 1) questions or evidence of the complainant(s)' prior sexual behavior are offered to prove that someone other than respondent(s) committed the conduct alleged by complainant(s), or 2) questions or evidence concern specific incidents of the complainant(s)' prior sexual behavior with respect to respondent(s) and are offered to prove consent.

The Hearing - General

- Pay attention
- Do not simply defer to previous reports or recommendations
- If you did not hear something, say so and ask for it to be repeated
- Ask participants not to talk over one another

The Hearing – Decision

- Written decision
 - Allegations
 - Procedural review (notifications, interviews, site visits, methods used to gather evidence, hearing)
 - Findings of fact that support the determination regarding responsibility
 - Conclusion about application of facts to policy
 - Decision of violation or no violation and rationale regarding each allegation
 - Sanction/remedies – designed to restore and preserve equal access
 - Appeal options
- Make it clear and simple

Title IX Appeals

- Grounds
 - Procedural irregularity affecting outcome
 - New evidence not available prior
 - Bias or conflict of interest affecting outcome
- Decision-maker reviews all reports, evidence, recordings, written statements
- Preponderance of the evidence
- Options:
 - Affirm
 - Substitute action with hearing committee
 - Recommend reconsider
 - Remand for specific purpose
 - No alteration

Special Considerations in Discrimination/Harassment/Sexual Misconduct

Beware of Myths/Stereotypes

- Sexual misconduct can happen in all types of dating (or not dating) relationships; it does not have to be a stranger to be sexual assault
- Sexual misconduct is not always between members of the opposite sex
- Remember the definitions of consent and unwelcome behavior
- You may expect someone who experiences sexual assault to behave a certain way – report, not contact the person after, etc. But there are many reasons a person may behave they way they do

Do not rely on stereotypes or how you think you would have behaved.

You must assess the current case and the evidence being presented to you – given the statements and evidence, what happened in this particular case?

Special Considerations in Discrimination/Harassment/Sexual Misconduct

Individuals experiencing trauma may react in different ways. Traumatic experiences may result in:

- Hormone driven response might be fight, flight, freeze, or other
- May impact memory recollection
- May impact affect or presentation

Not all inconsistencies and counterintuitive behaviors are necessarily driven by trauma-related hormones or trauma-related memory issues

Existence of behaviors should be reviewed and assessed – not categorically accepted or dismissed

Try to understand and make your best assessment

Special Considerations in Discrimination/Harassment/Sexual Misconduct

- Avoid judgmental or blaming questions:
 - *Why did you wait so long to report this?*
 - *How did the respondent get your clothes off without a struggle?*
 - *Did they say “no” like they meant it?*
 - *Was the accuser flirting with the respondent that evening?*
 - *What was the accuser wearing that evening?*

*Think about what information you need and why – reframe if necessary.
Discussion of secondary victimization.*