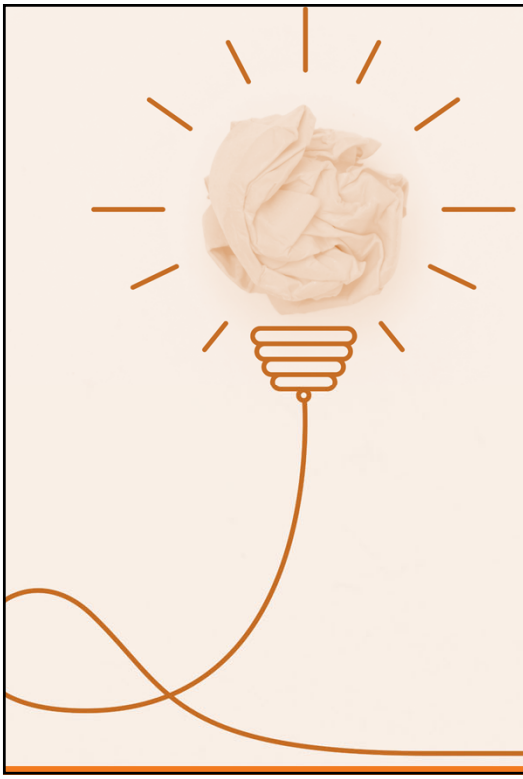
Sexual Misconduct Free Speech, Academic Freedom, & Retaliation

Krista Anderson, Systemwide Title IX Coordinator
Sean Flammer, Assistant General Counsel

Spring 2022

The University of Texas System
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

1

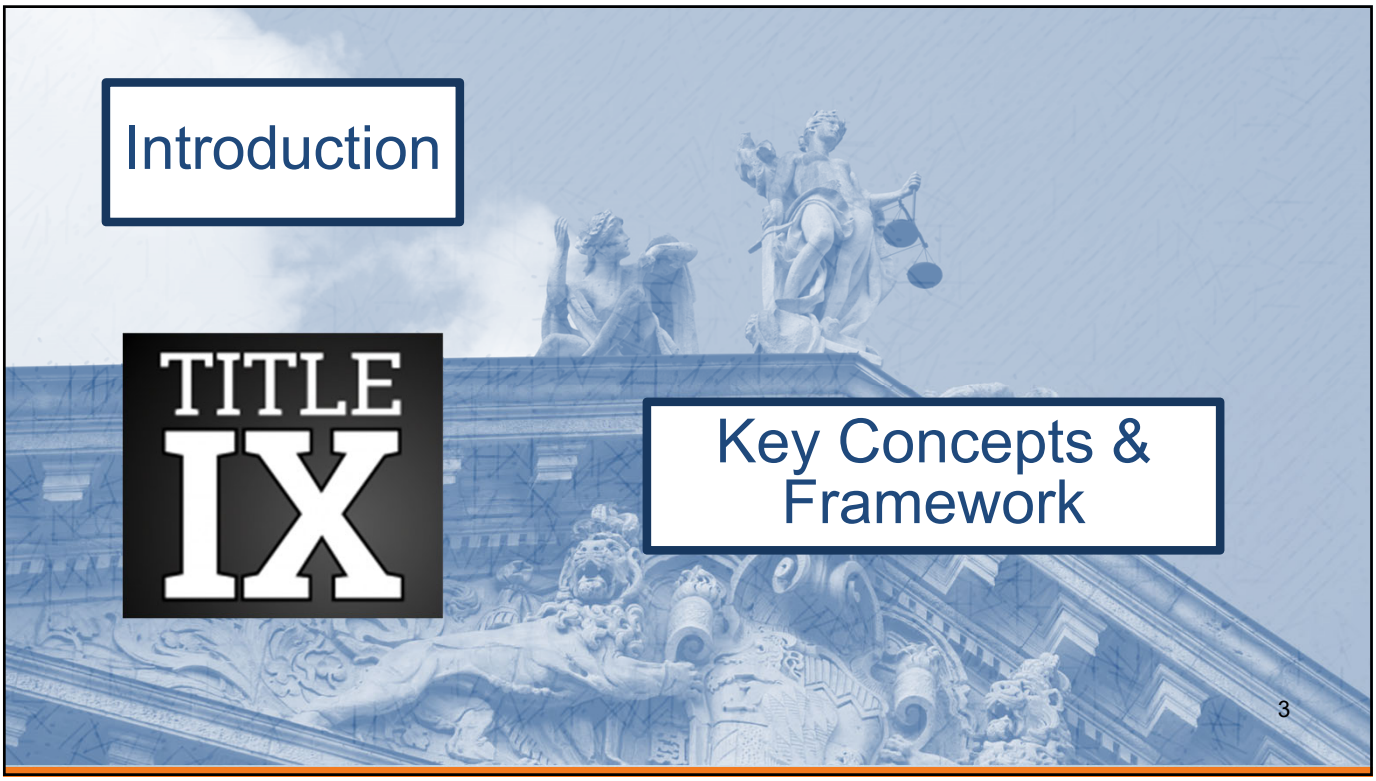


Agenda

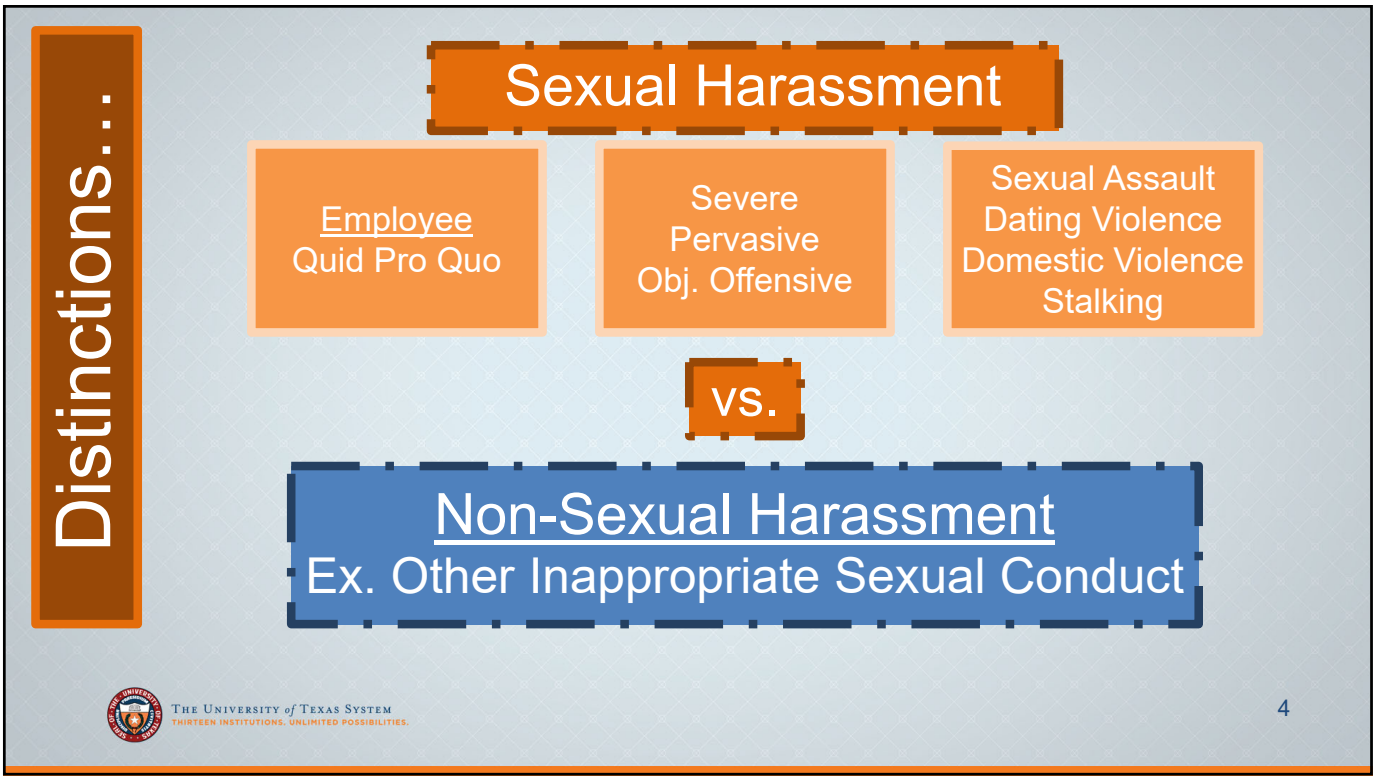
1. Title IX Intro
2. Resolution Options & Rights/Options for Both Parties
3. Protected Speech:
   - Free Speech
   - Academic Freedom
4. Formal Complaint Dismissals
5. Protected Activity & Retaliation
6. Examples & Scenarios

2

2


Introduction
TITLE IX
Key Concepts & Framework
3

3


Distinctions…
Sexual Harassment
Employee
Quid Pro Quo
Severe
Pervasive
Obj. Offensive
Sexual Assault
Dating Violence
Domestic Violence
Stalking
vs.
Non-Sexual Harassment
Ex. Other Inappropriate Sexual Conduct
The University of Texas System
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.
4

4

Definition of "Sexual Harassment" under Title IX

Conduct on the basis of sex that satisfies <u>one or more</u> of the following:

1. An **<u>employee</u>** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (Quid Pro Quo);
2. Unwelcome conduct determined by a reasonable person to be **<u>so severe, pervasive, and objectively offensive</u>** that it effectively denies a person equal access to the institution's education program or activity; or
3. "**Sexual assault**," "**dating violence**," "**domestic violence**," or "**stalking**" as defined under Clery/VAWA.

Source: Title IX Regulations (2020)

5

5

Definition of "Other Inappropriate Sexual Conduct"

Conduct on the basis of sex that does not meet the definition of "sexual harassment" (under the Model Policy), but is

1. Verbal conduct (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **<u>severe or pervasive</u>** that it created a Hostile Environment, as defined in the Model Policy.
2. Physical conduct…

Source:
UT System Model Policy for Sexual Misconduct (2021)

6

6

"Other Inappropriate Sexual Conduct" Cont.

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual's sexual activities or speculation about an individual's sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.

Source:
UT System Model Policy for Sexual Misconduct (2021)

7

7

Institutional Sexual Misconduct Policy (Example)

Prohibits sex discrimination, sexual harassment, retaliation, and other prohibited conduct under the policy, including:

- Sex Discrimination
- Sexual Harassment
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking
- Retaliation
- Sexual Exploitation
- Other Inappropriate Sexual Conduct
- False Information & False Complaints
- Interference with the Grievance Process
- Failure to Report (for Responsible Employees)

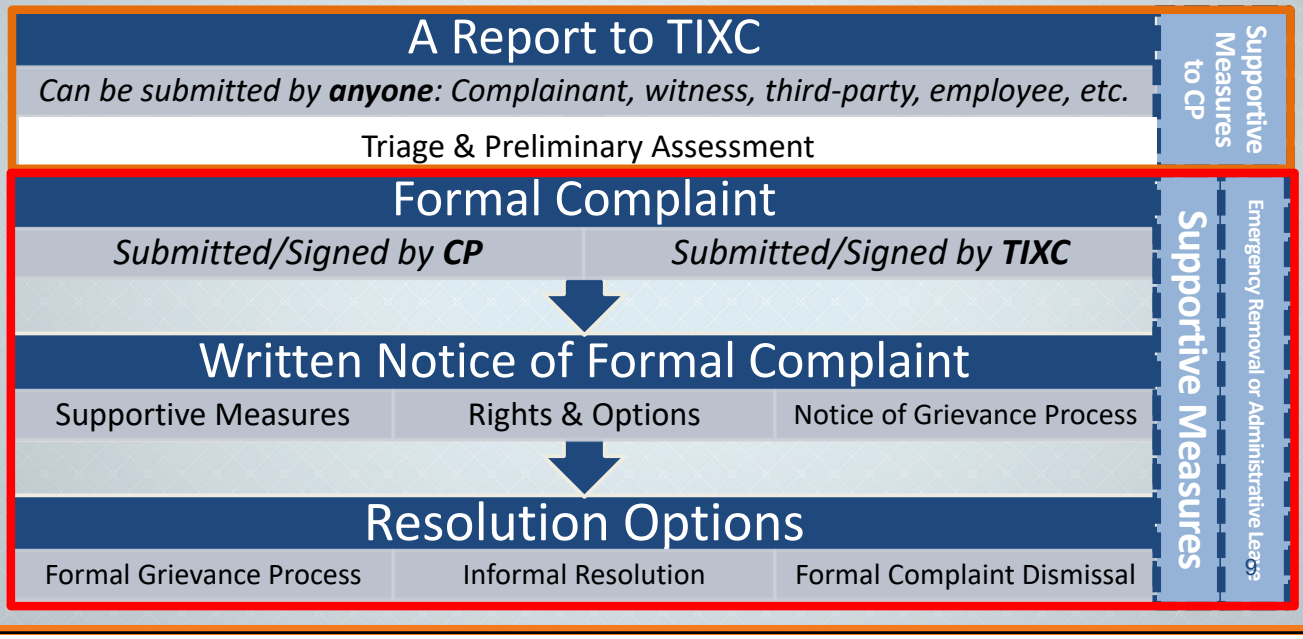
Policy Differences Note: For the purposes of this training, the UTS Model Policy for Sexual Misconduct will be the primary policy reference. UT Institutional policies may have some differences.

Source:
UT System Model Policy for Sexual Misconduct (2021)

8

8

Resolution Flowchart



9

Party's Rights (Summary)

A **Complainant** and **Respondent** have the following rights during a grievance process:

- To be informed of and have access to counseling, medical, academic, and other applicable **support services**, including **confidential resources**.
- To be informed of the importance of a victim going to a **hospital for treatment** and the **preservation of evidence**, if applicable, as soon as practicable after an alleged incident.
- To be informed of a **notice of formal complaint** to the University, whether filed by a CP or the TIXC.
- To receive a **prompt, fair, equitable,** and **impartial grievance process**.
- To receive information and ask questions about the **formal** and **informal processes**.

The University of Texas System
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

10

10

Party's Rights (Cont.)

- To be given **equal chance** to participate in a grievance process, including the opportunity to identify witnesses and other relevant evidence.
- To choose **not** to actively participate in the grievance process, if desired.
- To have an **advisor of choice** present during all meetings and grievance proceedings.
- To have an **advisor provided** for a party at a **hearing** under the Title IX/SH grievance process, if an advisor of choice is not present.

Party's Rights (Cont.)

- To have access and equal opportunity to **inspect** and **review any evidence obtained** as part of the investigation, and to receive a copy of the completed investigation report.
- To be **equally informed** of any **determinations** regarding responsibility, dismissals of formal complaints, and/or a party's filing of an appeal.
- To **appeal** a determination regarding responsibility and/or dismissals of formal complaints.
- To file a report with **local** and/or **campus law enforcement** authorities.

Complainant's Rights
(related to the Grievance Process)

- To **report** an incident and/or **file a formal complaint** with the University.
- To **request** in writing that the University **not investigate** a reported incident and be **informed** of the **University's decision** whether or not to investigate.
- To **request** in writing a **dismissal** of a formal complaint (e.g. withdraws the formal complaint or any allegations therein).

13

14

First Amendment Rights:
Free Speech & Academic Freedom

Constitutionally protected expression cannot be considered Sexual Misconduct (e.g. “sexual harassment,” “other inappropriate sexual conduct”) under the institution’s Sexual Misconduct policy.

Note: Neither party may be restricted from discussing allegations or from gathering evidence in a grievance process.

15

15

Free Speech & Academic Freedom on Campus

- Allows individuals to invite speech they wish to hear, debate speech with which they disagree, and protest speech they find offensive.
- An instructor’s choice of course material, content, and pedagogy, creating assignments, and assessing student performance (germane to the curriculum and subject matter).
- Students & instructors engaging in intellectual debate, expressing views on or off campus, and/or making comparisons or contrasts between course subject matter.

The University of Texas System
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

16

Academic Freedom Analysis

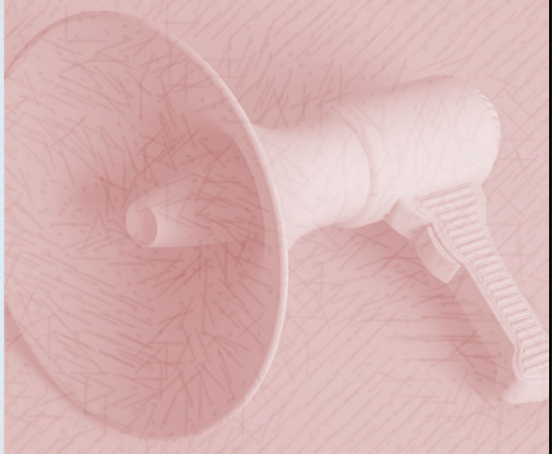
Possible questions and/or issues to consider further:

a. Is there a sufficient pedagogical nexus to the curriculum and expression at issue?
b. Does the expression at issue conflict with policies or standards of conduct?
c. Is the expression at issue being addressed (e.g. investigated, examined) because of its **disruptive effect**?
d. Is the expression at issue being addressed (e.g. investigated, examined) because of the **content of the speech**?
e. Any mitigating action by the faculty, such as giving trigger/content warnings of the possibly provocative content?

17

What Free Speech & Academic Freedom is Not:

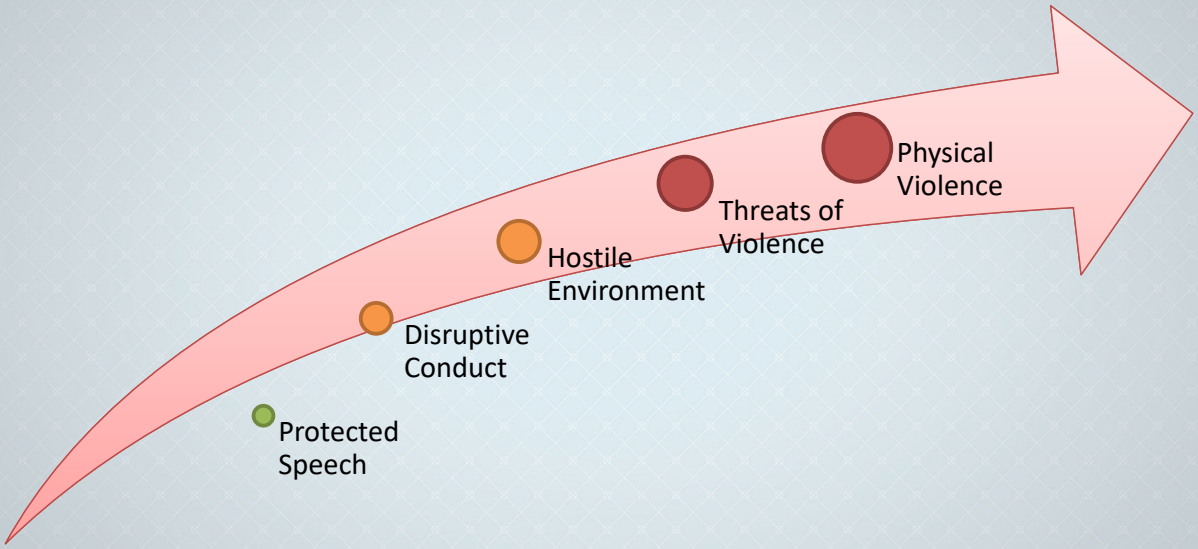
- Targeted threats (or implied threats) of violence
- Creates a clear and present danger
- Likely incites imminent lawless action
- Creates a substantial disruption to the educational environment
- Obscene speeches at school-sponsored events or distributes obscene material (which satisfies the three-pronged *Miller* test*)



*Three-pronged *Miller* test on "obscene" material: https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity

18

Escalation of Impact?



The University of Texas System
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

19

19

Crisis/Threat Continuum

LEVEL OF CONCERN

LOW	MODERATE	HIGH
• 1st time seeing a concern • Makes you or others uncomfortable but nothing specific • No direct threats made	• Not the first time seeing a concern • Continuation (persistence) of low-level behaviors • Threat implied or issued in a vague manner • Threat through verbal or electronic medium • Quick change in disposition or behavior	• Any serious/severe incidents • Multiple incidents in short time frame • Multiple concerns (pervasive) or escalating from the "low" to "moderate" continuum • Access to or potential to access weapons • Clear direct and specific threat and/or plan

EXAMPLES OF BEHAVIORS

- Excessive eye rolling
- Constant interruptions
- Disruptive to others
- Crying, sad, angry
- Insults, derogatory language
- Apathy, lack of energy
- Delayed responses
- Distracted or difficulty concentrating
- Impulsive
- Interference in your or other's learning or work duties
- Seeking "revenge"
- "You'll be sorry" or "You'll pay for this"
- "You are incompetent & stupid"
- "I don't care if I live anymore" or "No one will miss me"
- Feelings of hopelessness
- Repeated insults or derogatory language toward others
- Threatening or posturing in intimidating manner
- Violent statements
- Weapon present, or intentionally exposed
- Physically violent

Adapted from Student Emergency Services & the Behavior Concerns & COVID Advice Line (BCCAL), UT Austin

The University of Texas System
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

20

20

Terminology Examples

- **"Threat":** Threat of…physical violence or harm, safety, exploitation, damages (implicit or explicit), or possible emotional or mental harm
- **"Severe":** Physically threatening or humiliating; effects of the alleged conduct to a reasonable person (using a "reasonable person" standard)
- **"Pervasive"**: Frequency, duration of the alleged conduct
- **"Objectively offensive"**: To a reasonable person (using a "reasonable person" standard)
- **"Reasonable person" standard**: An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.
- **"Totality of the circumstances":**

  Examples: the degree of the alleged conduct's interference with a person or effects in an educational or work setting, type of alleged conduct, frequency and duration of the conduct, knowingly unwelcome in nature

21

21

22

Hypothetical 1

- A responsible employee submits a **report** to the TIXC.
- Student A discloses to the responsible employee being victim of "sexual harassment" by Student B:
  - Student A says that Student B "made serious and offensive comments directed specifically toward Student A on social media about Student A's sexual encounters with Student B." Specifically, Student B made public comments that "[Student A] is a rapist" and "[Student A] sexually assaulted me!"
- Student A says they have received "death threats" and "harassing comments" on social media due to Student B's social media posts, and is now "scared" to go to class or be on campus.

23

23

Hypothetical 2

- A responsible employee submits a **report** to the TIXC.
- Student X discloses to the responsible employee being victim of possible "sexual harassment" by Instructor Y:
  - Student X says that Instructor Y implied "romantic advances" directed toward Student X in one-on-one appointments & office hours, and Instructor Y asked Student X about their "sexual experiences." Student X said these interactions made them feel uncomfortable and Student X doesn't know how these interactions will affect Student X's grade in the class.
- There are no previous reports or complaints about Instructor Y on file.
- Class: "Gender and Sexuality"
  - The instructor has a reputation for provocation & controversial gender-based pedagogical opinions. Discussions in class can be "heated" at times, with "lively" debates being very common.
  - Instructor Y is the most popular among students, with the highest enrollment and most positive course evaluations compared to any other instructor in the department.

24

24

Hypothetical 3

- CP files a **formal complaint** to the TIXC and initiates a Title IX/SHSM investigation.
- CP (student) alleges being the victim of "sexual harassment" by RP (student):

  CP says that the RP "made objectively offensive comments directed specifically toward the CP about the CP's gender in class." (CP identifies as gender non-binary, and uses "they/them" pronouns.) Specifically, the RP used "gender-based stereotypes" that can be perceived as hetero-normative to argue certain laws and healthcare-related policies (e.g. child adoption, marriage rights, and spousal rights "should be exclusive between men and women couples only"). The RP also argued that using "they/them" pronouns are confusing when referring to a "singular person," and prefers to avoid using those specific pronouns to avoid confusion. These debates and arguments have occurred multiple times since the start of the semester. CP says they feel "humiliated and insulted" since the comments occur in front of the entire class (30 students) & the CP is the only gender non-binary person in class. CP says the instructor hasn't addressed the conduct in class, and the comments felt "intimidating." CP said they didn't feel safe returning to class.
- Class: "Politics and Ethics"
  - The class has a reputation for provocation & controversial debates and discussions that involve gender at times.
  - The instructor & other students say there is amble opportunity for all of the students to debate any concepts, arguments, or opinions that someone disagrees with.

25

25

Academic Freedom Analysis

Possible questions and/or issues to consider further:

a. Is there a sufficient pedagogical nexus to the curriculum and expression at issue?

b. Does the expression at issue conflict with policies or standards of conduct?

c. Is the expression at issue being addressed (e.g. investigated, examined) because of its **disruptive effect**?

d. Is the expression at issue being addressed (e.g. investigated, examined) because of the **content of the speech**?

e. Any mitigating action by the faculty, such as giving trigger/content warnings of the possibly provocative content?

26

26

27

Resolution Flowchart

A Report to TIXC

*Can be submitted by **anyone**: Complainant, witness, third-party, employee, etc.*

Triage & Preliminary Assessment

Formal Complaint

*Submitted/Signed by **CP*** | *Submitted/Signed by **TIXC***

Written Notice of Formal Complaint

Supportive Measures | Rights & Options | Notice of Grievance Process

Resolution Options

Formal Grievance Process | Informal Resolution | Formal Complaint Dismissal

Supportive Measures to CP

Supportive Measures

Emergency Removal or Administrative Leave

28

28

Mandatory Formal Complaint Dismissals under Title IX

Mandatory Dismissals are required when the **definitional** or **any** element of the **jurisdictional** framework under Title IX is not met.

The University of Texas System
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

29

29

Mandatory Formal Complaint Dismissals under Title IX

Under Title IX regulations, universities are **required** to distinguish between prohibited conduct that is "under Title IX" and prohibited conduct that is a violation of university policy. Under Title IX, the University **must dismiss** a Formal Complaint or the part of the allegations in a Formal Complaint, if applicable, where:

Sexual Harassment is alleged and where:

- The conduct alleged does not meet the definition of Sexual Harassment;
- The alleged conduct did not occur in the University's education program or activity; or
- The alleged conduct did not occur against a person in the United States.

Note: A dismissal under this provision only applies to allegations of Sexual Harassment under Title IX. In such an instance, the University may still investigate a Formal Complaint for allegations of Sexual Harassment under this Policy. The University may also investigate allegations of prohibited conduct under this Policy but it will not technically be "under Title IX."

The University of Texas System
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:
UT System Model Policy for Sexual Misconduct (2021)

30

30

If **Mandatory Dismissal** is required, then are additional **discretionary reasons** for a dismissal applicable to the specific circumstances?

- CP expressly **prefers to dismiss** the formal complaint or requests to not investigate the matter.
- RP was an employee and is **no longer employed** by the institution at the time the formal complaint is filed.
- Any **specific circumstances** that prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.
- The conduct alleged does not meet the definition of **any** prohibited conduct under the institution's Sexual Misconduct Policy.

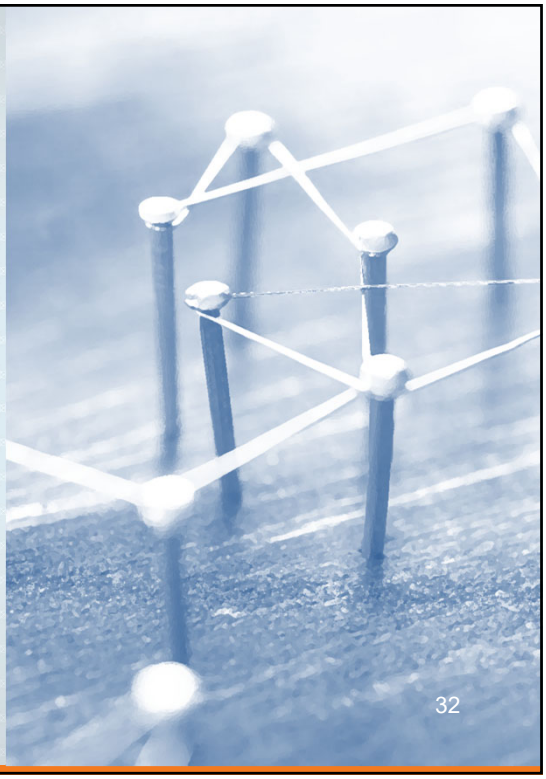
Additional Considerations

31

Triage Again

Consider if there are compelling reasons:

1. The **nature**, **circumstances,** & **seriousness** of the alleged conduct;
2. The **safety** & **risk of harm** to others;
3. Any **pattern evidence**, other similar conduct or allegations of the **RP**;
4. **RP's affiliation** with the institution & **applicable options** for institutional action; and/or
5. Other relevant factors in the specific matter?



32

Notice of Formal Complaint Dismissal

1. Note the reasons for the mandatory dismissal "under Title IX" (if applicable).
2. Explain the **basis/rationale** for the following:
   - Additional discretionary reason(s) for dismissing the formal complaint under the institution's policy and closing the case; **or**
   - Additional compelling reason(s) for continuing a grievance process under the institution's policy (e.g. the allegations still apply to the policy).
3. Option to Appeal the F.C. Dismissal
4. Outline next steps in the process (if applicable) **or** note the conclusion/end of the process with this formal complaint dismissal.

33

33

Formal Complaint Dismissal (Free Speech Example)

34

Formal Complaint (Signed by CP)/Notice Issued

Allegation(s): Alleged harassing statements toward CP (on the basis of the CP's sex/gender), multiple incidents, alleging serious (e.g. humiliating effects), and offensive in nature to the CP

Initiate Formal Grievance Process (Investigation Stage)

Formal Complaint Dismissed (Close Case)

Basis (example): Conduct alleged does not meet any definition of prohibited conduct under the SHSM Policy

Specifically (example): RP made statements of opinion about the use of pronouns, and in general about a specific sex/gender that the CP identifies with (policy discussion).

Notice of F. C. Dismissal Issued (Close Case): Option to Appeal

Procedural Irregularity	New Evidence	Bias/Conflict of Interest

Appeal Resolution Options

Affirm F.C. Dismissal (Close Case)	Remand back to Investigation Stage

34

35

Retaliation Prohibited under Title IX

No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of *interfering with* any right or privilege secured by Title IX; or *because* an individual has made a report or formal complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

36

36

Responsible Employee Reporting Requirements

Under the institution's Sexual Misconduct Policy, **Responsible Employees** have a duty to report incidents and information reasonably believed to be sexual misconduct (prohibited conduct defined) under the Policy.

All employees are Responsible Employees (except Confidential Employees or police officers when a victim uses a pseudonym form). Responsible Employees include **all** administrators, faculty, and staff.

Responsible Employees must report all known information concerning an alleged incident of sexual misconduct to the **Title IX Coordinator**.

Source:
UT System Model Policy for Sexual Misconduct (2021)

37

37

Definition of "Failure to Report" for **Responsible Employees**

If a Responsible Employee knowingly fails to report all information concerning an incident the employee reasonably believes constitutes stalking, dating violence, sexual assault, or sexual harassment committed by or against a student or employee at the time of the incident, the employee is subject to disciplinary action, including termination.

Source:
UT System Model Policy for Sexual Misconduct (2021);
Tex. Edu. Code Section 51.252-51.259

The University of Texas System
Thirteen institutions. Unlimited possibilities.

38

38

Definition of "Retaliation"

Any **adverse action** (including, but is not limited to, intimidation, threats, coercion, harassment, or discrimination) taken against someone *because* the individual has made a report or filed a Formal Complaint; or who has supported or provided information in connection with a report or a Formal Complaint; participated or refused to participate in a Grievance Process under this Policy; or engaged in other legally protected activities.

Note: Any person who retaliates against (a) anyone filing a report of Sexual Misconduct or Formal Complaint, (b) the parties or any other participants (including any witnesses or any University employee) in a Grievance Process relating to a Formal Complaint, (c) any person who refuses to participate in a Grievance Process, or (d) any person who under this Policy opposed any unlawful practice, is subject to disciplinary action up to and including dismissal or separation from the University.

Source:
UT System Model Policy for Sexual Misconduct (2021)

39

39

Examples of Work-Related Adverse Action

- **Demotion:** Losing status, responsibilities or seniority privileges associated with your position, or being assigned a lower-ranking position
- **Termination:** Being terminated from your position, or threats to terminate your employment.
- **Salary reductions or loss of hours:** Receiving a pay cut or losing regularly scheduled hours
- **Exclusion:** Being intentionally kept out of staff meetings, trainings, or other activities made available to fellow employees
- **Reassignment:** Being reassigned duties or rescheduled in a way that causes you undue hardship
- **Unwarranted negative implications:** Such as refusal to hire, negative performance reviews, warnings, or performance improvement plans

40

40

Examples of School-Related Adverse Action

- **Failing grades:** Failing grades on assignments, exams, or overall failing course grade
- **Suspension/Expulsion:** Threats of disciplinary sanctions, such as suspension or expulsion
- **Exclusion:** Being intentionally kept out of student activities that otherwise would have the right to access
- **Reassignments:** Being reassigned or moved to different courses or an on-campus housing location (if applicable) without a legitimate reason

41

Retaliation Analysis

Possible questions and/or issues to consider further:

a) Did the complaining party participate in **protected activity** that is covered under a retaliation provision?

b) Did the complaining party experience a form of **adverse action**?

c) If yes to (A and B), was the adverse action taken **BECAUSE OF** protected activity in which the complaining party was engaged in? (Causal connection?)

d) Did the person of concern offer a non-retaliatory or non-discriminatory **reason** for the action taken?

e) If yes to (D):
- Was this reason **legitimate**; or
- Was this reason possibly **pretext** for retaliation or discrimination?

42

43

Hypothetical 4

- A **formal complaint** is being **investigated** regarding possible "sexual harassment" or "other inappropriate sexual conduct":
  - CP (student) alleged that RP (instructor) implied "romantic advances" directed toward CP in one-on-one appointments & office hours, and RP asked CP about their "sexual experiences." CP says these interactions made them feel uncomfortable at the time.
- The CP has been reassigned a proctor (graduate student in the same department) to grade CP's assignments and exams. In addition, the RP has been placed on temporary administrative leave for the remainder of the semester.

44

Hypothetical 4 (Cont.)

- While the investigation is ongoing, CP files a **formal complaint** against the graduate student proctor claiming the following:
  - The proctor is grading the CP's assignments unfairly compared to the other students in class, intentionally assigning lower grades that CP previously was earning in the course. CP alleges that the proctor is retaliating against the CP for filing a formal compliant against Instructor Y. CP says that they've heard from other students in the class that the proctor has made statements that they "don't believe Instructor Y could ever 'hit on' students from the class." CP says that the proctor's alleged comments directly implicates the proctor's unfair grading of CP's work.

45

Hypothetical 4 Updates

- In the course of the **"retaliation" investigation**, the following facts emerge:
  - An independent reviewer confirms a grading discrepancy from the proctor where a grade was assigned to the CP that was one letter grade lower than comparable work from other students in the class. Two students from class confirm that the proctor made a comment that [they] didn't think that the instructor would "hit on" another student from class. The proctor admits saying the "hit on" comment, but denies taking retaliatory action against the CP. The proctor explained making the "hit on" comment because they've never seen the instructor act inappropriately with students, and they admire the instructor's academic integrity. The proctor says that CP's lower letter grade was just a grading error on their part.

46

Retaliation Analysis

Possible questions and/or issues to consider further:

a) Did the complaining party participate in **protected activity** that is covered under a retaliation provision?

b) Did the complaining party experience a form of **adverse action**?

c) If yes to (A and B), was the adverse action taken **BECAUSE OF** protected activity in which the complaining party was engaged in? (Causal connection?)

d) Did the person of concern offer a non-retaliatory or non-discriminatory **reason** for the action taken?

e) If yes to (D):
- Was this reason **legitimate**; or
- Was this reason possibly **pretext** for retaliation or discrimination?

47

Hypothetical 5

- A **formal complaint** is being **investigated** regarding possible "sexual harassment" or "other inappropriate sexual conduct":
  - CP (student) alleged that RP (staff) made sexist and sexually-related jokes while CP was receiving services from the RP (e.g. during an academic advising appt). CP says the RP was inappropriate and unprofessional in their role that can create a hostile environment for others (students and staff).
- The RP has retained their academic advising position but alleges being assigned "extra" work (e.g. filing and records management) and is not permitted to meet with students one-on-one during this time.
- The staff coordinates "monthly office lunches" and the RP has not been invited since the start of the investigation.

48

Hypothetical 5 (Cont.)

- While the investigation is ongoing, the RP files a **formal complaint** against the Department supervisor claiming the following:
  - The RP is experiencing adverse action from the Department supervisor, alleging that the supervisor has forced undue hardship on the RP with the additional filing and records management that other academic advisors are not assigned. The RP says that this work is a "demotion" in their position status. The RP also alleges being excluded intentionally from Department activities, such as the "monthly office lunches." This adverse action is allegedly directly in connection with this investigation, and the RP says they are protected from retaliation as a party and participant in the investigation.

49

Hypothetical 5 Updates

- In the course of the **"retaliation" investigation**, the following facts emerge:
  - The Dept supervisor explains that the RP was assigned modified job tasks, such as advising sessions with students in which another advisor is present, while an investigation against the RP alleging "sexual harassment" and/or "other inappropriate sexual conduct" is ongoing. The other job task at issue is being assigned "extra" work, such as filing and records management. The Dept supervisor and staff confirm that this task is part of all academic advisors' responsibilities. The Dept supervisor and staff also confirm that the "monthly office lunches" are not Dept official activities; instead, some of the staff initiate the lunches independently on their own. One of staff members says they stopped inviting the RP because they didn't feel comfortable "hanging out with the RP" and having to "listen to the RP complain about the Dept supervisor."

50

Retaliation Analysis

Possible questions and/or issues to consider further:

a) Did the complaining party participate in **protected activity** that is covered under a retaliation provision?

b) Did the complaining party experience a form of **adverse action**?

c) If yes to (A and B), was the adverse action taken **BECAUSE OF** protected activity in which the complaining party was engaged in? (Causal connection?)

d) Did the person of concern offer a non-retaliatory or non-discriminatory **reason** for the action taken?

e) If yes to (D):
- Was this reason **legitimate**; or
- Was this reason possibly **pretext** for retaliation or discrimination?

51

Other Considerations

- How can the institution **prevent** retaliation from occurring?
- Is **"fear"** of retaliation protected activity? Any options available?
- If the elements of "retaliation" cannot be fully established, institutional **due diligence**:
  - Other possible SHSM policy violation(s) implicated?
  - Other institutional action applicable to the conduct/allegations at issue?

52

53

Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Assistant General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu

The University of Texas System
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

54

54