

Sexual Misconduct Free Speech, Academic Freedom, & Retaliation

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

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Agenda

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

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Introduction

TITLE IX

Key Concepts & Framework

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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)

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Definition of “Sexual Harassment” under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** 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 **so severe, pervasive, and objectively offensive** 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)

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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 prohibited inappropriate or unprofessional sexual conduct.

Such conduct 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 **severe or pervasive** that it created a Hostile Environment.
2. **Physical conduct** that is objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.



Source:
UT System Model Policy for Sexual Misconduct (2022)


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“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;
- Deliberate physical interference with or restriction of movement; or
- Consensual sexual conduct that is unprofessional and inappropriate, and created a Hostile Environment.

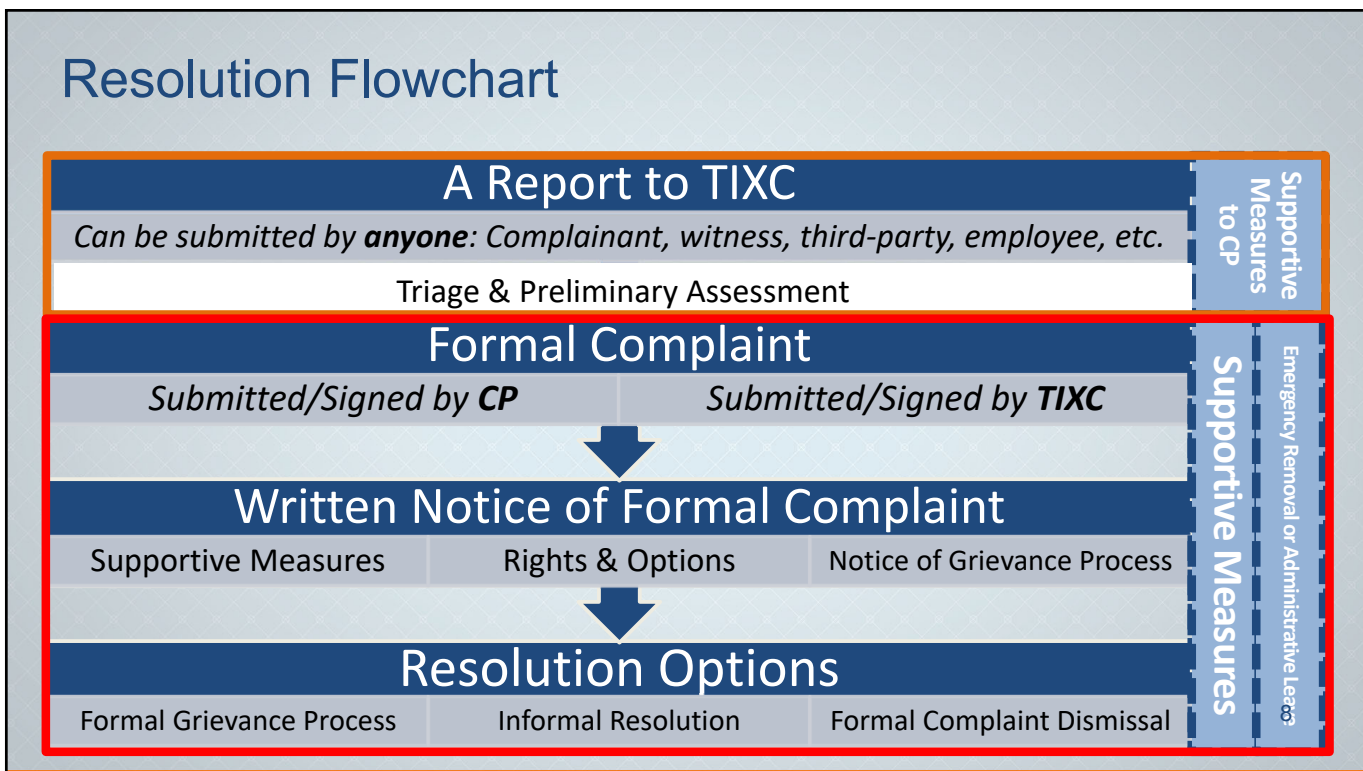


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Source:
UT System Model Policy for Sexual Misconduct (2022)

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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**.



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).





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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.

The **subjective offensiveness of speech**, alone, is not sufficient to create a hostile environment.

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

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Examples of Protected Speech under Title IX

- **Asking witnesses** about what they remember seeing or hearing regarding the alleged incident in question.
- Asking witnesses to **participate** in the University's grievance process.
- Posting on social media about one's **opinions** or **personal experiences** of sexual harassment, the University's grievance process, or how the University handles sexual misconduct matters.
- Telling others that they are **accused** of sexual harassment, or a **victim/survivor** of sexual harassment; and they are currently going through the University's grievance process.



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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.



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Academic Freedom Analysis

Possible questions and/or issues to consider further:

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



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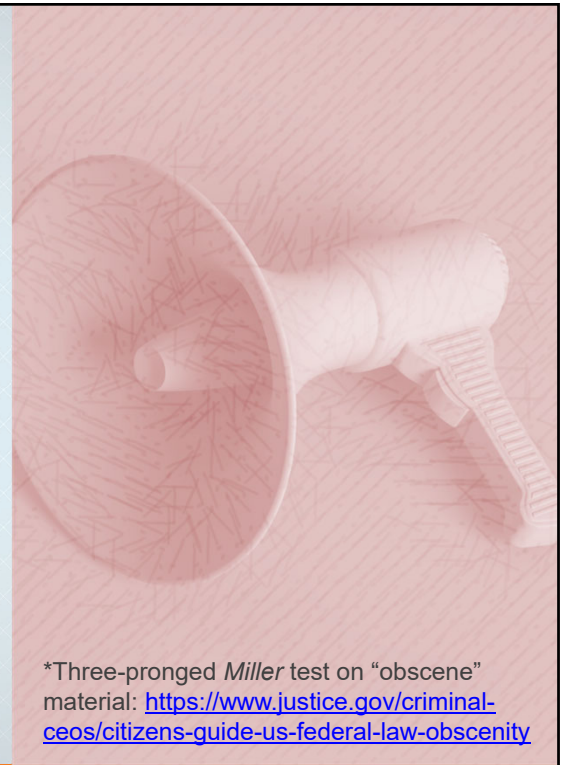
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What Free Speech & Academic Freedom is **Not**:

- 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*)



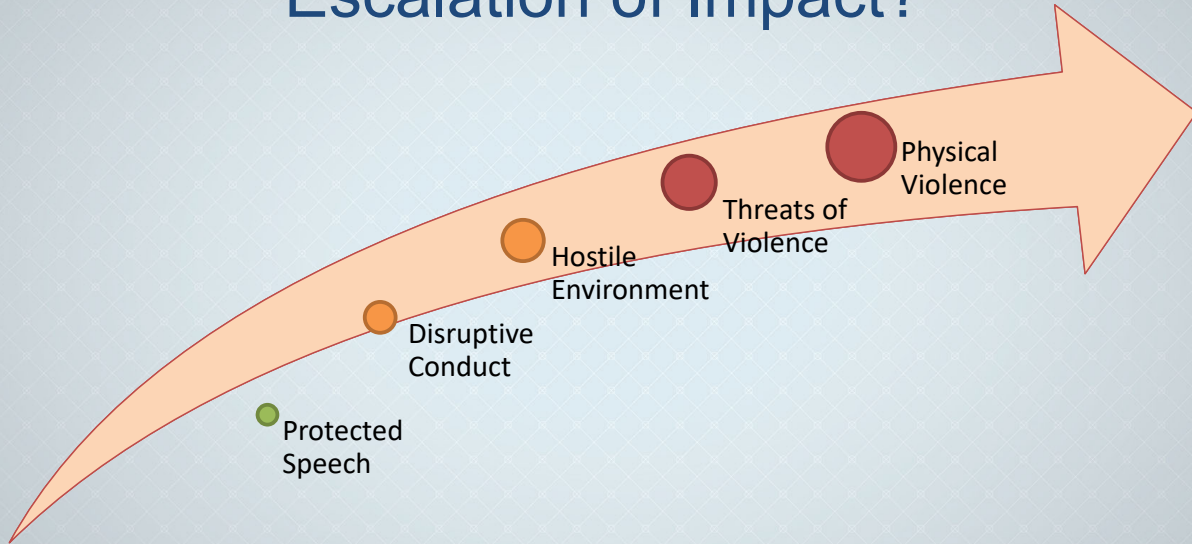
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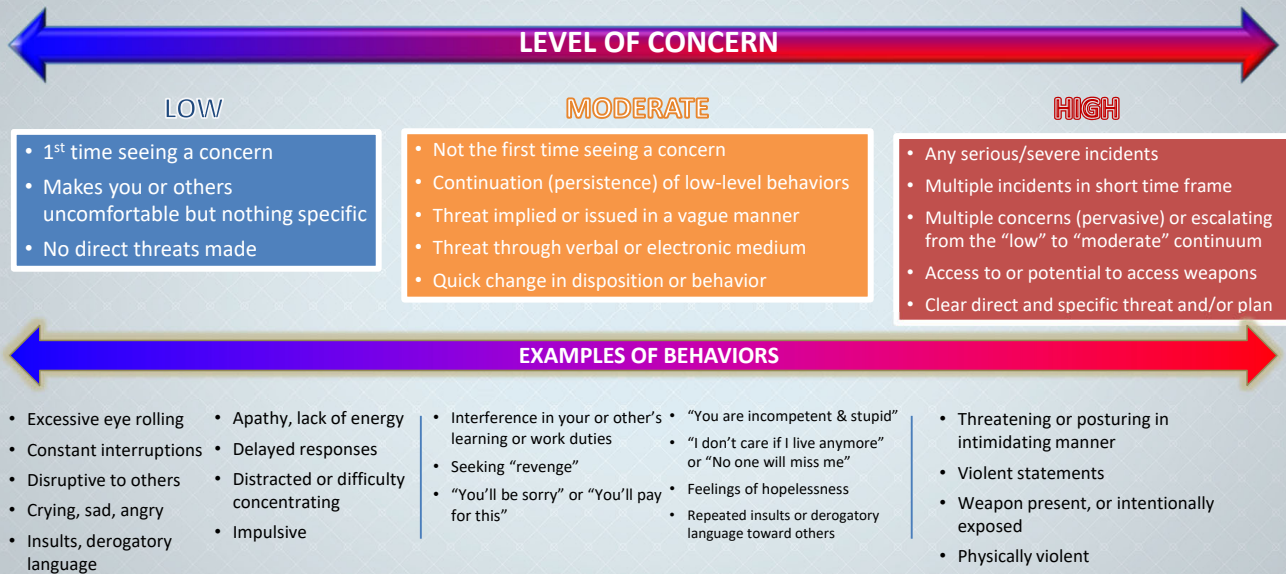
*Three-pronged *Miller* test on "obscene" material: <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity>

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The Speech in Question: Escalation of Impact?



Crisis/Threat Continuum





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Hypothetical 1



- A responsible employee submits a **report** to the TIXC.
- Student A discloses to the responsible employee being victim of “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.



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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.



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Hypothetical 3

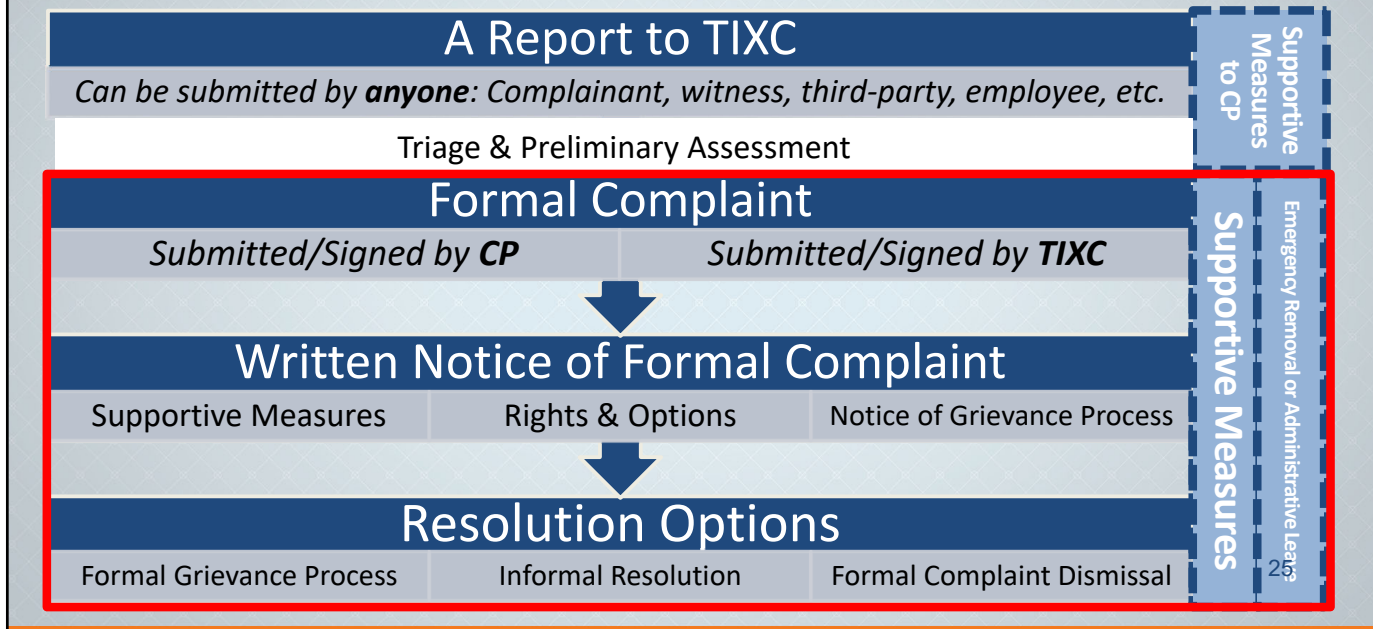


- CP (student) alleges in a **formal complaint** of being the victim of “sexual harassment” by RP (student):
 - CP says that the RP “made objectively offensive comments directed specifically toward the CP about the CP’s gender in class.” (CP identifies as gender non-binary, and uses “they/them” pronouns.) 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 argued in class that using “they/them” pronouns are confusing when referring to a “singular person,” and prefers not using “they/them” pronouns to avoid confusion, and instead uses CP’s preferred name. 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 ample opportunity for all of the students to debate any concepts, arguments, or opinions that someone disagrees with.

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Resolution Flowchart



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Academic Freedom Analysis

Possible questions and/or issues to consider further:

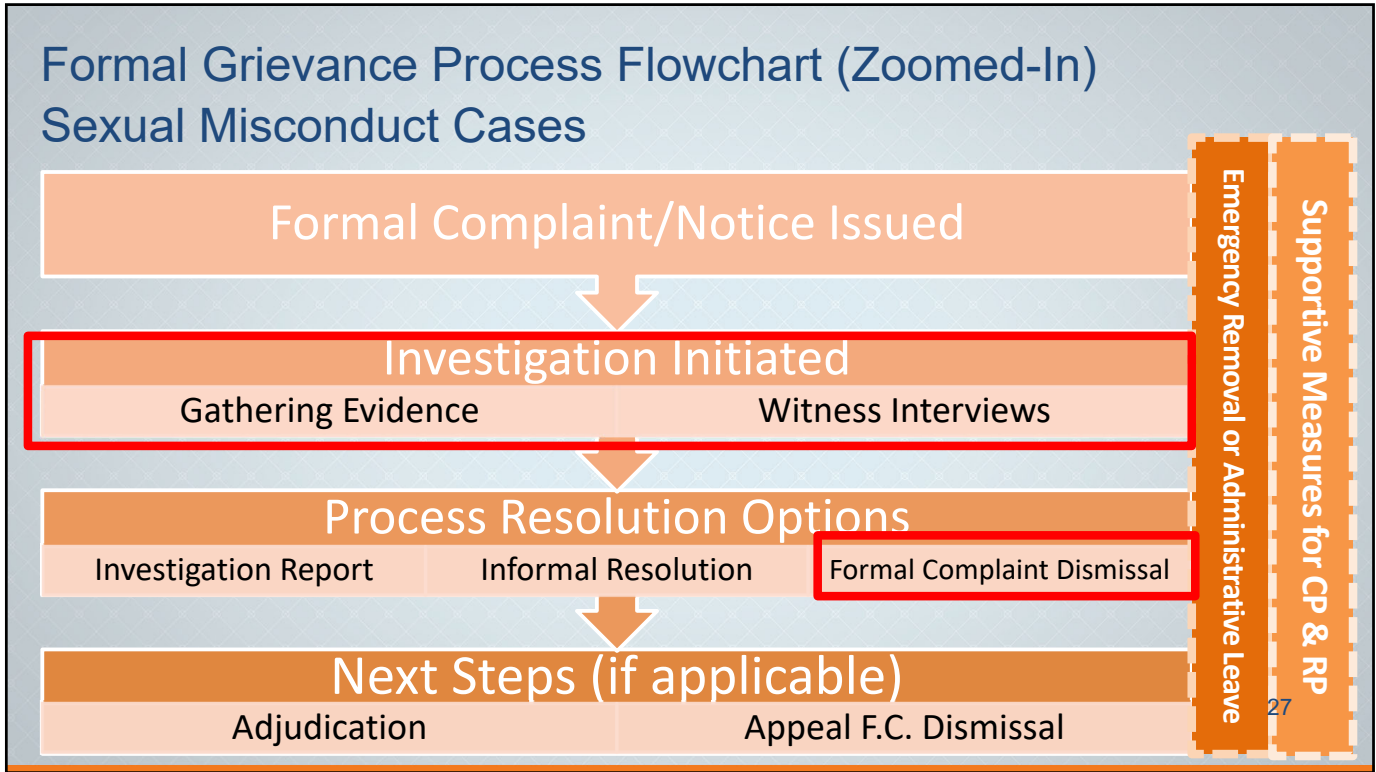
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- Is the expression at issue being addressed (e.g. investigated, examined) because of the **content of the speech**?
- Any mitigating action by the faculty, such as giving trigger/content warnings of the possibly provocative content?



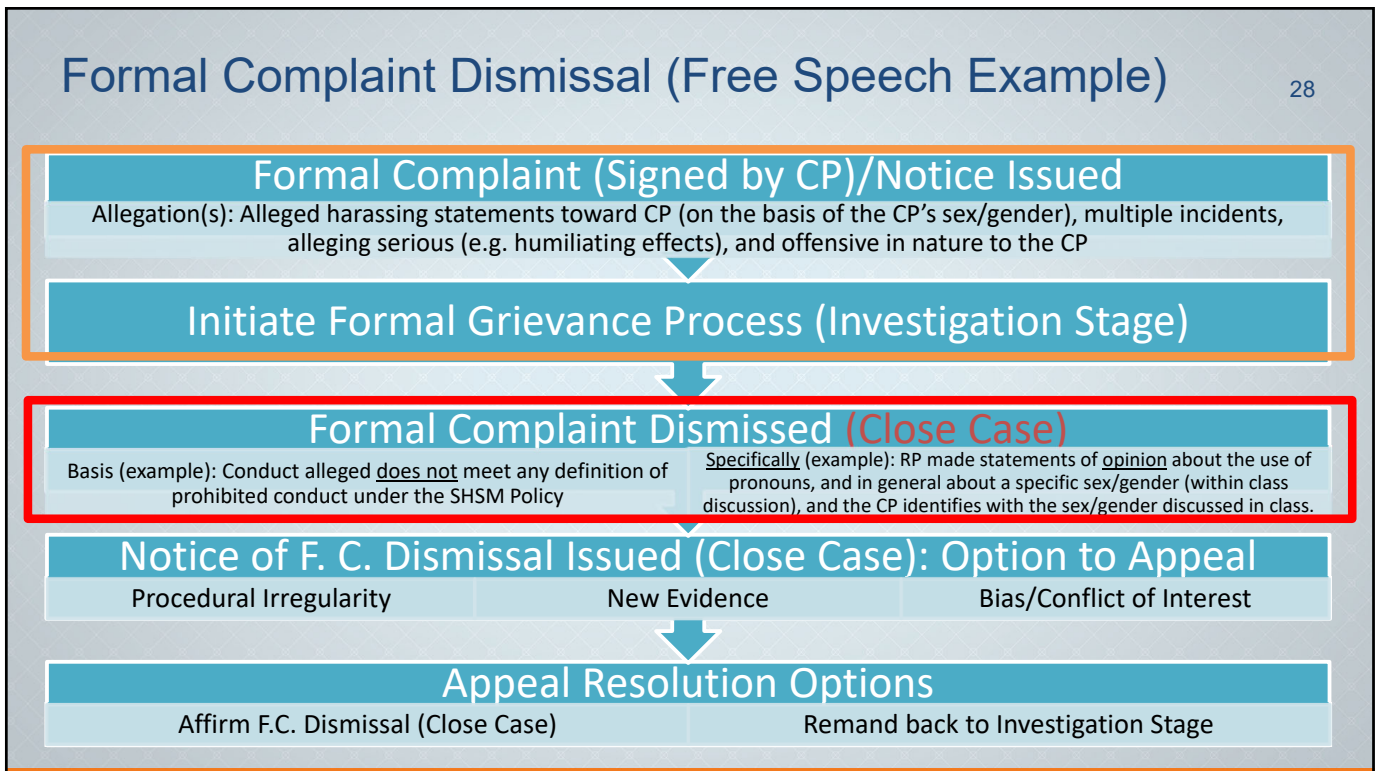
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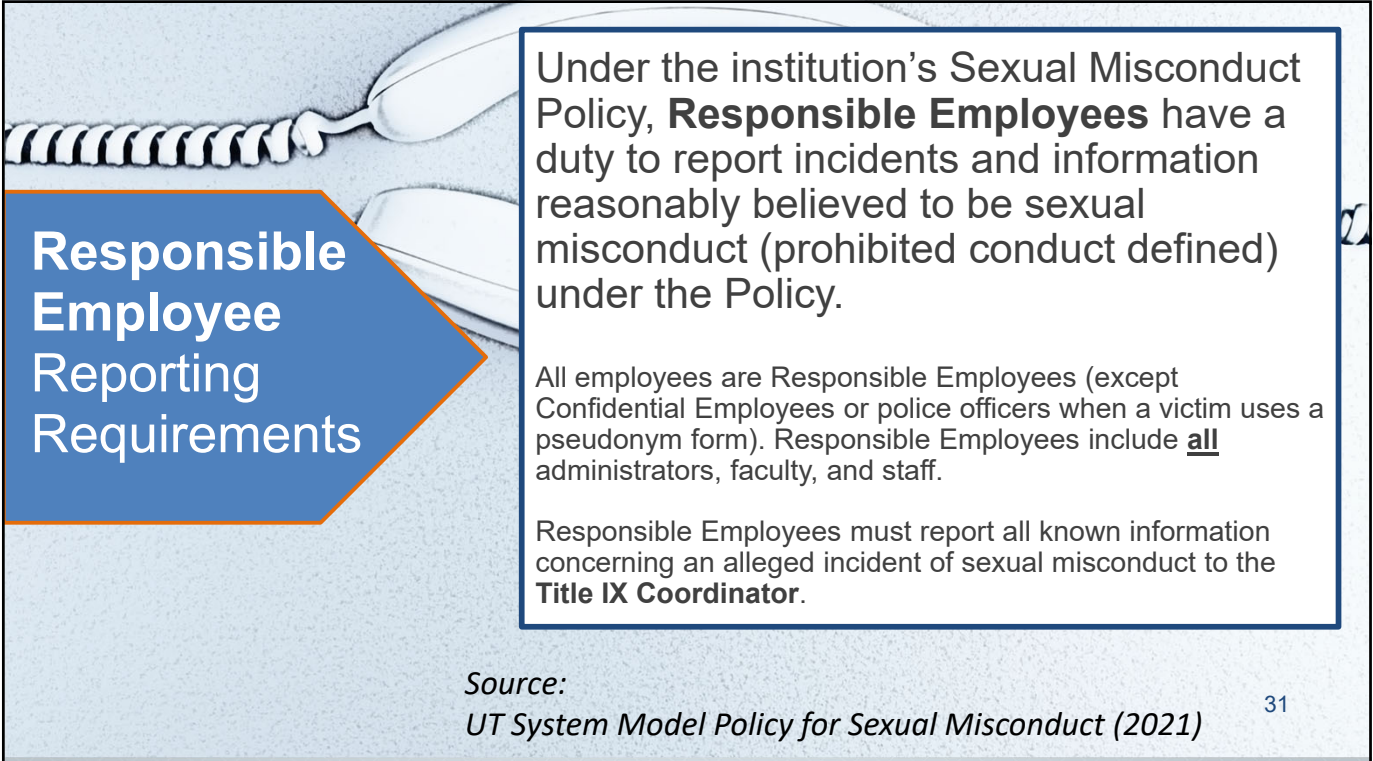


Retaliation Prohibited under Title IX

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.

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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) 31

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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 Sexual Misconduct (including 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;
Tex. Edu. Code Section 51.252-51.259 32



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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)

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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



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- **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

Examples of School-Related Adverse Action



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Retaliation Analysis

Possible questions and/or issues to consider further:

- Did the complaining party participate in **protected activity** that is covered under a retaliation provision?
- Did the complaining party experience a form of **adverse action**?
- 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?)
- Did the person of concern offer a non-retaliatory or non-discriminatory **reason** for the action taken?
- If yes to (D):
 - Was this reason **legitimate**; or
 - Was this reason possibly **pretext** for retaliation or discrimination?



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Retaliation Scenarios

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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.



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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 complaint 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.



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.





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?



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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.



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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.



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.”





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?

- 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?

Other Considerations



Q & A



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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



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