

Policy 1-012 Appeals Training

*University of Utah
Office of General Counsel
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The Role of the OEO/AA

- OEO investigates all Formal Complaints of discrimination and sexual harassment that state a claim; if doesn't state a claim, dismissed
- A neutral investigations office required by federal law
- Timely investigates facts (parties, witnesses, documents)
- Prepares and provides to parties a summary report of findings and recommendations
- Parties given opportunity to respond/supplement
- If OEO recommends "CAUSE" finding, discipline/sanction by others



The Policy 1-012 Committee

- Hearing body for sexual misconduct complaints
- After OEO/AA Investigation and Recommendations
 - Information independently evaluated, no deference
- Committee's decision may be appealed to the Cognizant VP
 - For faculty, appeal to President

Bias/Conflict of Interest

- Any person involved in decision-making/appeals process must recuse him/herself if:
 - He/she has first hand knowledge of the facts and circumstances
 - He/she is unable to consider facts in unbiased fashion (personal circumstances)
 - He/she is biased for/against a party (e.g. best friends with a party)
 - Bias does not include developing an opinion after review of the evidence

What are Hearings

- Adversarial proceedings
- Parties present evidence and arguments to the committee
- A neutral unbiased committee considers the evidence and reaches factual conclusions
- The committee applies the proper legal standard to the facts as found and makes finding of “Cause” or “Insufficient Evidence.”

Due Process

- Students and faculty/staff are entitled to due process
- Due process requires basic fairness (appropriate notice, the right to respond, the right to be heard, no ex-parte communications, sharing of documents, presentation of witnesses, cross-examination (through chair), etc.)
- For students, OCR demands same rights for both parties

Presumption

- The respondent is presumed to not be responsible for the alleged conduct until the OEO Committee has heard all of the evidence presented by the parties and makes its own determination at the conclusion of the grievance process.



The Hearing Process

- Process within the discretion of the chair and the committee
- All sexual misconduct complaints now virtual
- No direct cross-examination, rather each party's advisor presents questions through chair
- Hearing is recorded
- Hearing Coordinator keeps time

Advisors to the Parties

- Parties are entitled to an advisor of their choice (including lawyers)
 - If parties do not have their own advisor, University appoints party an advisor for cross examination
- University appointed advisor's only role is cross examination



Evidence

- Parties may submit to the hearing committee for consideration any information they consider relevant
- The committee may consider all evidence submitted
 - Hearsay and other less reliable evidence may be considered
 - The committee determines the relevance/import of evidence
- Witnesses excluded except when testifying
- Committee may reject new/late evidence
 - Committee may adjourn so parties can respond to surprising new evidence admitted at a hearing



Issues of Relevance

- Prior to any party or witness answering a question, the Committee Chair must first determine whether such question is relevant and explain any decision to exclude a question as not relevant. Only the person to whom a question is directed may answer (i.e., an advisor shall not be permitted to answer the Committee's questions on a party's behalf).
 - Questions and evidence about the Complainant's sexual predispositions or prior sexual behavior are not relevant, unless such questions and evidence are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant;
or
 - if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove Consent.

Standard of Proof

- PREPONDERANCE OF THE EVIDENCE: It is more likely than not that the testimony or other evidence on one side of a particular issue is true
 - > 50%
 - Less stringent than the “beyond a reasonable doubt” standard used in criminal cases because, unlike criminal prosecutions, these investigations do not result in incarceration or other criminal penalties
- For Sanctions: Are they reasonable in light of the circumstances



Permissible Bases for Appeal

- Procedural Irregularity that Affected the Outcome
- New Evidence
 - Not reasonably available in the hearing
 - That could affect the outcome
- Conflict of Interest by the OEO or Committee that Affected the Outcome
- Findings or Sanctions that are Arbitrary or Capricious

The Appeal Process

- Only consider the information presented at the hearing.
 - No Independent investigation
 - OEO report, submissions of parties, recording of hearing
- Can consult with legal advisor to the hearing committee
- Decision must describe the result and provide the rationale
- Decision due within ten (10) calendar days of appeal
- Provide decision to hearing coordinator for distribution



Confidentiality

- Hearings are closed to the public
- Individuals involved in the process should not discuss with anyone the facts/information learned during the process
- Deciders should only consider facts as presented in the hearing-no independent investigation

The Governing Law

● TITLE VII (employees)

- Prohibits discrimination in employment on basis of sex, race, color, national origin and religion

● TITLE IX (students): “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.”

- Applies to all students
- Applies to employees

University Policy

Nondiscrimination & Accessibility Statement

- The University of Utah does not discriminate against individuals on the basis of race, ethnicity, color, religion, national origin, age, disability, sex, sexual orientation, gender, gender identity, gender expression, pregnancy, pregnancy-related conditions, genetic information, or protected veteran status (“protected class”), in employment, treatment, admission, access to educational programs and activities, or other University benefits or services. Additionally, the University provides reasonable accommodations to ensure equal access to qualified persons with disabilities.

Retaliation

- Retaliation against individuals for engaging in activities protected under this Policy is prohibited. No person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege protected under this Policy or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation proceeding or hearing under this Policy or its associated Regulations.

University Policy

- Policy 1-012, Sexual Misconduct
 - **Sexual Misconduct** is a broad term used to encompass a range of behaviors. It includes Sexual or Gender-Based Harassment (and the forms of such harassment included as that is defined in Part II), and also Intimate Partner Violence, Sexual Exploitation, Sexual Violence, Stalking, Nonconsensual Sexual Contact, and Nonconsensual Sexual Penetration (as each is defined in Part II). Sexual Misconduct is a type of Sex or Gender-Based Discrimination.
 - **Sexual Violence** means any physical sexual act perpetrated against a person's will or when a person is incapable of giving Consent (e.g., due to age, or use of drugs or alcohol, or because an intellectual or other disability prevents the person from having the capacity to give Consent).



Policy-1-012: Consent

- Individuals may not be subject to any sexual contact without consent.
- “Consent” means **affirmative, unambiguous, and voluntary agreement.**
- A victim can express consent, or lack of consent, **through words or conduct.**

<https://www.youtube.com/watch?v=fGoWLWS4-kU>



Sexual/Gender Based Harassment

Sexual or Gender-Based Harassment means conduct, on the basis of sex/gender, that satisfies either of the following:

- (Quid Pro Quo) An employee conditioning the provision of an aid, benefit, or service on an individual's participation in otherwise unwelcome sexual conduct;
- (Hostile Environment) Unwelcome conduct which a reasonable person would determine to be:
 - so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's Programs or Activities (Title IX); or
 - sufficiently severe or pervasive that it has the purpose or effect of interfering with or creating an intimidating, hostile or offensive environment in a University Program or Activity (Title VII or University Policy); or
- (Crimes) Conduct which constitutes Sexual Assault/Sex Offenses (Rape, Fondling, Incest, Statutory Rape), Dating Violence, Domestic Violence or Stalking, as defined in Part II (these are forms of Sexual or Gender-Based Harassment).

Sexual/Gender Harassment – Key elements

- Conduct must:
 - Be sexual in nature; or gender-based
 - Be unwelcome/unwanted
 - Such conduct would be determined by a reasonable person to be:
 - so severe that it effectively denies a person access to the University Programs or Activities; or
 - Sufficiently severe that it has the purpose or effect of interfering with a University activity



Myths and Stereotypes about Sexual Assault

- A “true victim” of sexual assault will complain immediately to family, friends, or police
- Sexual assault usually occurs outdoors, at night, between strangers and the perpetrator has a weapon and leaves the victim physically injured
- False reports of sexual misconduct are common
- If someone previously consented to intercourse with a partner, the partner may assume consent in later sexual encounters
- If a person doesn’t say “no,” or otherwise object, then they have consented
- Through attire, behavior, drug or alcohol use, or being in the wrong place at the wrong time, a victim invites sexual assault or deserves it



Questions?