

Guideline P-080

Subject: Discrimination and Harassment - Complaint and Investigation Procedure

IMPORTANT: Other Available Complaint Procedures

An aggrieved individual may also have the ability to file complaints with external agencies such as the Equal Employment Opportunity Commission (EEOC), the Tennessee Human Rights Commission (THRC), the Office of Civil rights (OCR), and the courts. Please note that the deadlines for filing with external agencies or courts may be shorter than the deadline established for filing a complaint under this Guideline. Examples of shorter deadlines include, but are not limited to 180 days to file a complaint under Title VI & Title IX, as well as 300 days to file a complaint under Title VII.

I. Purpose

The purpose of this Guideline is to supplement Board Policies 2:02:10:01 and 5:01:02:00 relative to the orderly resolution of complaints of discrimination or harassment on the basis of 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, and any other category protected by federal or state civil rights law related to the institutions, technology centers, and office of the Tennessee Board of Regents. Fair and prompt consideration shall be given to all complaints in accordance with the procedures set forth below. These procedures may be utilized by any faculty, staff, applicants for employment, students, applicants for educational programs and other activities, and third-party beneficiaries of programs or activities receiving Federal financial assistance who believe they have been subjected to discrimination or harassment. Former employees or students may file complaints concerning conduct which took place during the time of employment or enrollment provided the complaint is timely filed pursuant to Section IV.B of this Guideline, and the conduct has a reasonable connection to the institution.

All employees, including faculty members, are to be knowledgeable of policies and guidelines concerning discrimination and harassment. Using the procedures outlined in Section IV below, 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 to do so may result in disciplinary action up to and including termination.

All faculty members, students and staff are subject to this Guideline. Any faculty member, student or staff found to have violated this Guideline by engaging in behavior constituting discrimination or harassment will be subject to disciplinary action which may include dismissal, expulsion or termination, or other appropriate sanction.

All faculty and staff members are required to cooperate with investigations of alleged discrimination or harassment. Failure to cooperate may result in disciplinary action up to and including termination. Students are also required to cooperate with these investigations; failure to do so may result in disciplinary action up to and including expulsion.

Because the courts have imposed strict obligations on employers with regard to discrimination and harassment, institutions must take measures to periodically educate and train employees regarding conduct that could violate this Guideline. All employees, including faculty members, are expected to participate in such education and training. Further, all faculty members, students and staff are responsible for taking reasonable and necessary action to prevent and discourage all types of discrimination and harassment.

II. General Statement

It is the intent of the Tennessee Board of Regents that the Board and all of the institutions within the Tennessee Board of Regents System shall fully comply with the applicable provisions of federal and state civil rights laws, including but not limited to, Executive Order 11246, as amended; the Rehabilitation Act of 1973, as amended; the Americans with Disabilities Act of 1990, as amended; the Vietnam Era Veterans Readjustment Act of 1974, as amended; the Equal Pay Act of 1963, as amended; Titles VI and VII of the Civil Rights Act of 1964, as amended; Title IX of the Educational Amendments of 1972, as amended; the Age Discrimination in Employment Act of 1967; the Age Discrimination Act of 1975; the Pregnancy Discrimination Act; the Genetic Information Nondiscrimination Act of 2008; and regulations promulgated pursuant thereto. The Board of Regents will promote equal opportunity for all persons without regard to 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, and any other category protected by federal or state civil rights law.

Campuses and the Central Office affirm that they will not tolerate discrimination against any employee or applicant for employment because of race, color, religion, creed, ethnic or national origin, sex, sexual orientation/gender identity/expression, disability, age as applicable, status as a covered veteran, or genetic information, nor will they tolerate harassment on the basis of these protected categories or any other category protected by federal or state civil rights law.

Similarly, the campuses shall not subject any student to discrimination or harassment under any educational program and no student shall be discriminatorily excluded from participation nor denied the benefits of any educational program on the basis of 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.

A. Discrimination

Discrimination may occur by:

1. 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,
2. Having a policy or practice that has a disproportionately adverse impact on protected class members.

B. Harassment

1. Harassment based on a protected class

Harassment is 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

- 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 of such conduct include, but are not limited to 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, offensive graffiti, cartoons or pictures, or offensive remarks about a person's age.

Not every act that might be offensive to an individual or a group will be considered harassment. 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.

2. 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;
- Sexual propositions, invitations, or pressure for sexual activity;
- 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;
- Suggestive or inappropriate acts, such as comments, innuendoes, or physical contact based on one's actual or perceived sexual orientation and/or gender identity/expression.

The examples listed above are not exclusive, but simply represent types of conduct that may constitute sexual harassment. Campus policies may delineate additional examples.

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.

III. 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. 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.

IV. Procedures

A. General

1. The following procedures are 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. Each complaint must be properly and promptly investigated and, when warranted, appropriate disciplinary action taken against the Respondent.
2. The Office of General Counsel shall always be consulted prior to investigation. If institutions have on-campus legal counsel, that office must be consulted. Hereinafter, references to "Legal Counsel" shall mean either the Office of General Counsel or on-campus legal counsel, as appropriate.
3. In situations that require immediate action because of safety or other concerns, the institution may take any administrative action which is appropriate, e.g., administrative leave with pay pending the outcome of the investigation. Students may be placed on interim suspension under the appropriate circumstances pending the outcome of the investigation. Legal Counsel should be contacted before any immediate action is taken.
4. Each employee, applicant for employment and student shall be notified of the name, office, and telephone number of the designated EEO/AA, Student Affairs, Title VI or Title IX officer(s) responsible for assuring compliance with this Guideline, Board policy, and federal law.

B. Filing Complaints

1. Any current or former student, applicant for employment, or current or former employee who believes he or she has been subjected to discrimination or harassment at an institution or technology center or who believes that he/she has observed discrimination or harassment taking place shall present the complaint to the designated EEO/AA, Student Affairs, Title VI or Title IX officer (hereinafter "the Investigator") responsible for compliance with this Guideline.
2. Complaints must be brought within 365 days of the last incident of discrimination or harassment. Complaints brought after that time period will not be pursued absent extraordinary circumstances. The determination of whether the complaint was timely or whether extraordinary circumstances exist to extend the complaint period must be made in conjunction with Legal Counsel.
3. Every attempt will be made to get the Complainant to provide the complaint in writing. The complaint shall include the circumstances giving rise to the complaint, the dates of the alleged occurrences, and names of witnesses, if any. Appendix A is a sample complaint form. The complaint shall be signed by the Complainant. However, when the Complainant chooses not to provide or sign a written complaint, the matter will still be investigated and appropriate action taken. Complaints made anonymously or by a third party must also be investigated to the extent possible.
4. If the complaint does not rise to the level of discrimination or harassment, the Investigator may dismiss the complaint without further investigation after consultation with Legal Counsel. The Complainant should be informed of other available processes such as the employee grievance/complaint process, or a student non-academic complaint process.

C. Investigation

1. Legal Counsel shall be notified of the complaint, whether written or verbal, as soon as possible after it is brought to the attention of the Investigator and the investigation will be under the direction of Legal Counsel. All investigatory notes and documents shall be attorney work product. The Investigator shall notify the President/ Director that an investigation is being initiated.
2. When the allegation of discrimination or harassment is against the EEO/AA Officer, Student Affairs Officer, Title VI or Title IX Officer, the President/Director will identify an individual who has been trained in investigating such complaints to investigate the complaint and carry out the responsibilities assigned pursuant to this Guideline. When the allegation of harassment is against the President/TTC Director of the institution, the EEO/AA Officer shall notify the Office of the General Counsel who will assign an investigator who will make his/her report to the Chancellor.
3. When the Respondent is a student, the Student Affairs Office will investigate the complaint in compliance with the procedures outlined in this Guideline. If a finding of violation is made, any resulting disciplinary action will be undertaken in compliance with the institution's or technology center's student disciplinary procedures.
4. When a student is involved as the Complainant, the Respondent or an individual interviewed, all documentation referring to that student shall be subject to the provisions and protections of the Family Educational Records and Privacy Act (FERPA) and Tennessee Code Annotated Section 10-7-504(a) (4) which requires that certain student disciplinary records are subject to disclosure pursuant to a public records request.
5. Investigation of complaints against employees of a Tennessee Technology Center (TTC) shall be initiated by the Vice Chancellor for Tennessee Technology Centers or his/her designee. In certain circumstances, the lead institution for the technology center may be asked to conduct the investigation. Investigations of complaints made against TTC students will be undertaken by TTC Student Services personnel. The TTC Directors are responsible for notifying the Vice Chancellor whenever a verbal or written complaint is made.
6. In consultation with and under the direction of Legal Counsel, the Investigator shall conduct an investigation of the complaint. This investigation shall include interviews with both the Complainant and the Respondent, unless either declines an in-person interview. The investigation shall also include interviews with relevant witnesses named by the Complainant and Respondent. The purpose of the investigation is to establish whether there has been a violation of the Guideline. It is the responsibility of the Investigator to weigh the credibility of all individuals interviewed and to determine the weight to be given information received during the course of the investigation.
7. To the extent possible, the investigation will be conducted in such a manner to protect the confidentiality of both parties. However, the Complainant, Respondent and all individuals interviewed shall be informed that the institution has an obligation to address harassment and that, in order to conduct an effective investigation, complete confidentiality cannot be guaranteed. Information may need to be revealed to the Respondent and to potential witnesses. However, information about the complaint should be shared only with those who have a need to know about it. The Complainant and Respondent shall also be informed that a request to inspect documents made pursuant to the Public Records Act may result in certain documents being released.

A Complainant may be informed that if he or she wants to speak privately and in confidence about discrimination or harassment, he or she may wish to consult with a social worker, counselor, therapist or member of the clergy who is permitted, by law, to assure greater confidentiality.

Additionally, the Complainant shall be given assurances that measures will be taken against the Respondent should there be retaliation against him or her. Retaliation is prohibited and should be reported to the investigator immediately. Allegations of retaliation must also be investigated pursuant to the procedure set out in this Guideline.

8. The Investigator shall notify in writing the Respondent within five (5) working days of receipt of the complaint. The Respondent may respond in writing to the complaint within five (5) working days following the date of receipt of the Investigator's notification.
9. If either the Complainant or the Respondent is a student, the Investigator should communicate the prohibition against disclosure of personally identifiable information with regard to the student, based on FERPA.
10. The Complainant, the Respondent and all individuals interviewed shall be notified that any retaliation engaged in connection with the complaint or its investigation is strictly prohibited regardless of the outcome of the P-080 investigation and may, in itself, be grounds for disciplinary action.
11. At any time during the course of the investigation, the Investigator may meet with both the Complainant and the Respondent individually for the purpose of resolving the complaint informally. Either party has the right to end informal processes at any time. Mediation will not be used in cases involving sexual assault. If informal resolution is successful in resolving the complaint, a report of such, having first been reviewed and approved by Legal Counsel, shall be submitted to the President/Director.
12. If informal resolution is unsuccessful, the Investigator shall draft a report summarizing the investigation which shall be sent to Legal Counsel for review. Each report shall outline the basis of the complaint, including the dates of the alleged occurrences, the response of the Respondent, the findings of the Investigator, whether there were any attempts made to resolve the complaint informally, a determination of whether there was a violation of the Guideline, and recommendations regarding disposition of the complaint.

After review and approval by Legal Counsel, the report shall be submitted to the President/Director within sixty (60) calendar days following receipt of the complaint, absent cause for extending the investigation timeline. If the complaint involves a technology center, a copy of the final report should also be sent to the Vice Chancellor for Tennessee Technology Centers. No working papers, statements, etc. generated in the investigation should be attached to the report. In situations where more time is needed to complete the investigation, for reasons such as difficulty in locating a necessary witness, or complexity of the complaint, additional time may be taken, but only following notice to Legal Counsel and written notice to both the Complainant and the Respondent.

13. If, after investigation, there is insufficient evidence to corroborate the complaint or, in any situation in which the Complainant refuses to cooperate in the investigation, it may be appropriate to discuss the complaint with the Respondent, informing him or her that he or she is not being accused of a P-080 violation, but that the conduct alleged, had it been substantiated, could be found to violate this Guideline. Any investigation and subsequent discussion should be documented and a report submitted as set forth in this procedure. It should also be noted that conduct which does not rise to the level of legally actionable discrimination or harassment may, nevertheless, provide a basis for disciplinary action against the Respondent.
14. The President/Director shall review the Investigator's report, and shall make a final written determination, within a reasonable time as to whether a violation has occurred and, what the appropriate resolution should be. After the President/Director has made this determination, the Investigator shall, absent unusual circumstances and after consultation with Legal Counsel, provide both the Complainant and the Respondent with a copy of the determination, along with a copy of the Investigator's report.
15. If the investigation reveals evidence that a violation of the Guideline has occurred, the President/Director must take immediate and appropriate corrective action. Such action may include meeting with the Respondent and/or the Complainant and attempting to resolve the problem by agreement, except in the case of sexual assault. Appropriate steps must be taken to ensure that the discrimination or harassment will not reoccur.
16. After completion of the investigation and any subsequent disciplinary proceedings, all documentation shall be forwarded to Legal Counsel. However, copies of the President's/ Director's determination, the Investigator's report, the complaint (if it concerns an employee) and documentation of any disciplinary action taken against the Respondent should be placed in a file maintained on campus. This file shall be maintained in a location designated by the President. If such action was taken, copies of documentation establishing disciplinary action taken against the Respondent, whether an employee or student, shall also be maintained in the Respondent's personnel or student record, as appropriate.

Some documents involved in a P-080 matter may be subject to the Public Records Act and thus open to public inspection. Other documents may be protected under FERPA, the attorney/client privilege, or attorney work product and would not be releasable. If a Public Records request is received, Legal Counsel must be consulted prior to the release of any documents.

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

D. Appeal of Decision

Because TBR institutions are committed to a high quality resolution of every case, each institution must afford the Complainant and Respondent an opportunity to appeal the President's/Director's decision concerning Respondent's responsibility for the alleged conduct. The appeal process shall consist of an opportunity for the parties to provide information to the institution's attention that

would change the decision. The appeal process will not be a *de novo* review of the decision, and the parties will not be allowed to present their appeals in person to the President/Director unless the President/Director determines, in his/her sole discretion, to allow an in-person appeal.

1. The institution shall provide written notice of the appeal process to the parties at the time that the parties are advised of the outcome of the investigation.
2. Either party may send a written appeal to the President/Director within ten (10) working days, absent good cause, of receipt of the President's/Director's determination. The appealing party(ies) must explain why her or she believes the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, *and* how this would change the determination in the case. Failure to do so may result in a denial of the appeal.
3. The President/Director will issue a written response to the appeal as promptly as possible. This decision will constitute the institution's final decision with respect to President's/Director's determination.

V. Other Applicable Procedures

If the President's/Director's decision includes disciplinary action, the procedures for implementing the decision shall be determined by the applicable policies relating to discipline (e.g., employee grievance/complaint procedure, student disciplinary policies, academic affairs policies).

APPENDIX A

Source Presidents Meeting: November 14, 1984 and November 16, 1984 AVTS Sub-Council meeting; August 16, 1988; February 14, 1989; November 10, 1992; August 13, 1996; February 13, 2001; August 16, 2005; November 8, 2005; February 13, 2008; February 14, 2012