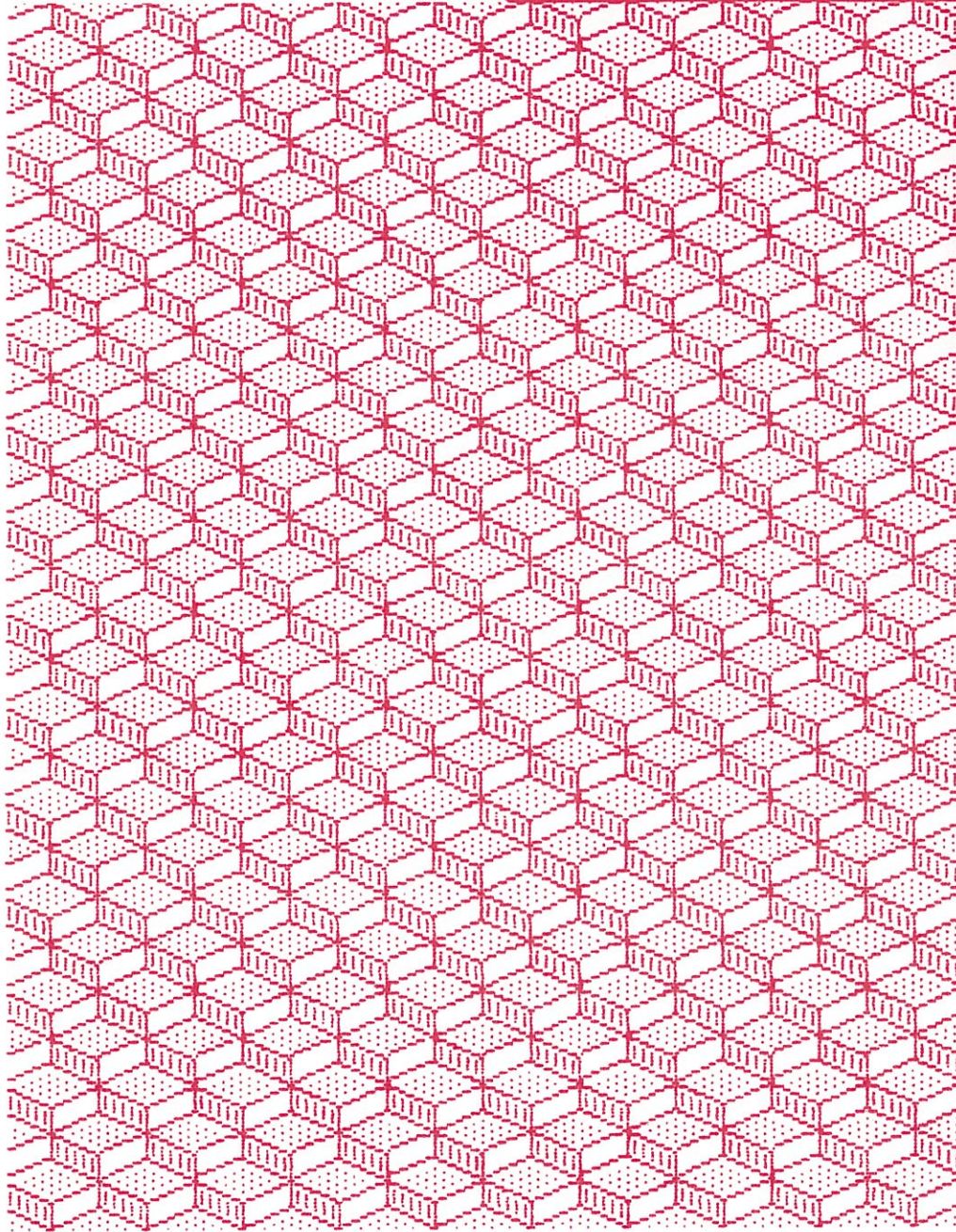


POLICY ON SEXUAL HARASSMENT

AND GUIDELINES FOR SEXUAL HARASSMENT
COMPLAINT RESOLUTION
JANUARY, 1986



UNIVERSITY
OF CALIFORNIA
IRVINE

Table of Contents	
UC and UCI Policy on Sexual Harassment	1
UCI Nondiscrimination Statement	1
Letter from Chancellor Peltason	2
Historical and Legal Overview	2
Policy Definition	3
Duties and Responsibilities of Managers and Supervisors	3
Role and Function of Advisors	4
Procedural Guidelines for Addressing Complaints	4
Informal Complaints	4
Formal Complaints	5
Resolution	5
Confidentiality	6
Rights of the Person Charged	6
Training & Education	6
Glossary	7
Title VII Sexual Harassment Guidelines	8
Footnotes	11
Title IX and Sexual Harassment Complaints	13

COMPLIMENTARY COPY

Prepared by Carla R. Espinoza
Assistant Vice Chancellor,
Office of Affirmative Action and Equal Opportunity
for the University of California, Irvine

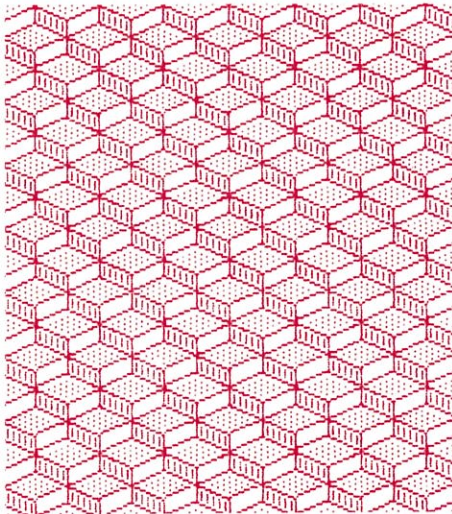
January 1986

Special thanks to the Chancellor's Advisory Committee
on the Status of Women for its contributions to and
support of this project.

University of California, Irvine Policy on Sexual Harassment

President's Statement of Policy

The University of California is committed to creating and maintaining a community in which students, faculty, administrative, and academic staff can work together in an atmosphere free of all forms of harassment, exploitation, or intimidation, including sexual. Specifically, every member of the University community should be aware that the University is strongly opposed to sexual harassment and that such behavior is prohibited both by law and by University policy. It is the intention of the University to take whatever action may be needed to prevent, correct, and, if necessary, discipline behavior which violates this policy.



University of California, Irvine Policy on Sexual Harassment

Sexual harassment is a form of sex discrimination. Consistent with State and Federal Law and University Policy, the Irvine campus forbids sexual harassment. UCI will take preventative, corrective, and disciplinary action for any act that violates this policy or the rights and privileges it is designed to protect.

University of California, Irvine Nondiscrimination Statement

The University of California, Irvine, in compliance with Titles VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Sections 503 and 504 of the Rehabilitation Act of 1973, does not discriminate on the basis of race, color, national origin, religion, handicap, or sex in any of its policies, procedures, or practices. In accordance with sex discrimination laws, the University of California forbids acts of sexual harassment. The University, in compliance with the Age Discrimination in Employment Act of 1967, Section 402 of the Vietnam Era Veterans' Readjustment Act of 1974, and Section 12940 of the State of California Government Code, does not discriminate against any employees or applicants for employment on the basis of their age, or because they are disabled veterans or veterans of the Vietnam era, or because of their medical condition (as defined in Section 12926 of the California Government Code), their ancestry, or their marital status; nor does the University discriminate on the basis of citizenship or sexual orientation, within the limits imposed by law or University policy. This nondiscrimination policy covers admission, access, and service in University programs and activities, and application for and treatment in University employment.

In conformance with University policy and pursuant to Executive Orders 11246 and 11375, Section 503 of the Rehabilitation Act of 1973, and Section 402 of the Vietnam Era Veterans Readjustment Act of 1974, the University of California is an affirmative action/equal opportunity employer.

Inquiries regarding the University's equal opportunity policies may be directed to Carla R. Espinoza, Assistant Vice Chancellor, Office of Affirmative Action and Equal Opportunity, 117 Administration, University of California; Irvine; California 92717, telephone (714) 856-5594.

January 10, 1986

TO: ALL EMPLOYEES AND STUDENTS
RE: Sexual Harassment Policy and Procedures

The University of California, Irvine extends its compliance with nondiscrimination laws to include laws forbidding sexual harassment in accordance with Title VII of the 1964 Civil Rights Act, as amended, and Title IX of the Education Amendment of 1972. The University policy and the Irvine campus procedures are intended to be 1) a policy directive, which will be enforced by this administration, 2) an outline of our commitment to training and education for the purpose of prevention, and 3) guidelines regarding the investigation and resolution of complaints of sexual harassment.

Sexual harassment is a form of illegal sex discrimination. Like other forms of discrimination it has the potential to corrupt values and destroy lives and careers. This campus will not tolerate acts of sexual harassment.

It is imperative that each employee and student of the University of California, Irvine, become familiar with the attached document. It addresses this very sensitive issue, describes the various rights and responsibilities of individuals regarding sexual harassment, and presents a systematic approach to actions this institution will take in such matters.

J.W. Peltason
Chancellor

Lists: 8 & 9
ASUCI
AGS
STUDENT ORGANIZATIONS

On August 31, 1982, the U.S. Department of Education issued its own sexual harassment guidelines under Title IX of the Educational Amendments; these guidelines extend sexual harassment regulations to cover educational institutions which are recipients of federal funds.

The EEOC guidelines establish several basic principles:

- 1) Sexual harassment is a form of sex discrimination. Complainants should no longer be burdened with proving this connection as they were in early cases.
- 2) Employers are responsible for the actions of their supervisors and agents. Title IX guidelines extend this responsibility to cover actions of staff and teachers who are in a position to "serve, aid, or benefit" students. Thus, under principle of third party liability, employers, supervisors, agents or officials of the institution, not just the harasser may be named when a sexual harassment suit is brought.
- 3) An employer or educational institution must do more than respond to complaints once they are raised. An active effort must be made to raise issues, express strong disapproval, and to inform employees and students of their rights and avenues of complaints and redress.

The EEOC Guidelines on Discrimination Because of Sex (29 CFR 1064.11(f) recommend:

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

Following the EEOC guidelines and recommendations, in 1981, the University of California took an official position against sexual harassment of students and employees. Each campus was directed to develop complaint investigation and resolution procedures for sexual harassment complaints and to educate its students and employees about the issue of sexual harassment, their rights and responsibilities. Early education and training in the subject of sexual harassment has proven to be a significant deterrent. This document is designed to serve in part as UC Irvine's ongoing process of education and prevention.

University of California, Irvine Policy on Sexual Harassment

Historical and Legal Overview

Over the past decade, sexual harassment has gained recognition as a legitimate and significant social concern. While not a new problem, sexual harassment began to attract popular and political attention in the mid-1970's, spurring research, governmental policy and administrative regulations, and legal action. The Civil Rights Act of 1964 addressed questions of both race and sexual discrimination, but it was not until the 1970's that sexual harassment was named and specific court cases began to be heard. In November 1980, the Federal Equal Employment Opportunity Commission (EEOC) issued guidelines under Title VII of the 1964 Civil Rights Act (as amended) which made illegal the sexual harassment of employees in businesses (including educational institutions) employing 15 or more people.

University of California, Irvine Policy on Sexual Harassment

Policy Definition

Sexual Harassment: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- 1) submission to such conduct is made either explicitly or implicitly a term or condition of instruction, employment, or participation in any other University activity;
- 2) submission to or rejection of such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions affecting that individual; or
- 3) such conduct has the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, or offensive University environment.

Policy Implementation

The Chancellor's Office, through the Office of Affirmative Action and Equal Opportunity, will promulgate the *University of California, Irvine Policy on Sexual Harassment and Guidelines for Sexual Harassment Complaint Resolution*.

Notices providing general information about the policy and procedures and where to get more detailed information will be published and widely distributed, as will schedules for training and education.

Upon promulgation of the policy, each vice chancellor, dean, associate hospital director, administrative department head and academic department chair will proceed to formally implement this policy and procedure by doing the following:

1. Meet with employees and support personnel, which may include students, to advise them of the campus policy on sexual harassment.
2. Make a strong statement that unprofessional behavior that creates a hostile work environment will not be tolerated.
3. Consult with colleagues in each of their respective units (by academic schools and administrative control points), and recommend an individual who will act as the representative of their respective dean, vice chancellor, and the Director of Clinical Services in the receipt and dissemination of information regarding this policy.
4. Participate in educational seminars and programs provided by the campus.
5. Advise all support staff who have supervisory responsibilities to thoroughly examine *Duties and Responsibilities for Supervisors and Managers*, page 3.

The Irvine Campus policy on sexual harassment will be further implemented through the process of training and education and complaint investigation and resolution.

University of California, Irvine Policy on Sexual Harassment

Duties and Responsibilities of Managers and Supervisors

Sexual harassment is illegal. It is behavior that is perceived as offensive. It is important for managers of people and functions to understand their responsibilities. Managers and supervisors are:

- Responsible for acting to prevent sexual harassment by all available means. Some of the available means include training, counseling, and communicating the University's policy on this issue. It is the manager's responsibility to make sure new employees are informed about UCI's policy on sexual harassment, to express strong disapproval of inappropriate behavior, and to enforce sanctions for violations of acceptable behavior.
- Responsible for the actions of subordinate employees with regard to sexual harassment when the manager knew or reasonably should have known about the conduct. Managers may be exempted from personal liability, however, if they take immediate action, which could be to refer the matter to their superior or to the Office of Affirmative Action and Equal Opportunity.
- Responsible for any employment action or decision regarding an individual when these actions or decisions can be shown to be a result of sexual favors that were granted or denied by the individual(s) effected.
- Responsible for acts of sexual harassment from non-employees (e.g., contractors, vendors, consultants) if the manager knew or reasonably could have been expected to know about the offensive conduct and failed to take immediate action.

If managers are unable to demonstrate that they have satisfied the above responsibilities, they may be subject to one or more of the following:

1. Named in a complaint and subjected to administrative investigations or civil proceedings.
2. Could, as an individual, be made liable for part or all of the monetary damages assessed to the defendant(s) by the court.

Managers should undertake the following when they receive a complaint or suspect that a situation of sexual harassment exists:

1. Informally counsel the individuals involved.
2. Involve the Office of Affirmative Action and Equal Opportunity as soon after the informal counseling as possible, and provide any written documentation.
3. Establish a strategy with the Office of Affirmative Action and Equal Opportunity that will allow for early and confidential resolution of the situation.
4. If the informal resolution process has not terminated the sexual harassment, consult with the Office of Affirmative Action and Equal Opportunity and the parties involved so that all parties understand the formal process, which may be engaged at this time.

University of California, Irvine Policy on Sexual Harassment

The Role and Functions of Sexual Harassment Advisors

Advisors are appointed by the Chancellor based on their duties and responsibilities at the Irvine campus. Individuals are selected from those positions and offices that would be expected to hear questions and concerns regarding University policy, and personal issues effected by sexual harassment.

The positions and offices looked to for Advisors include the following:

- Academic Counselors
- Office of Affirmative Action and Equal Opportunity Staff
- AGS Representative
- ASUCI Representative
- College of Medicine Administration
- UCI Counseling Center Psychologists
- Employee Relations Office Staff
- Faculty
- Library
- Medical Student Council Representative
- Ombudsperson
- Personnel Office Staff
- Police Officers
- Rape Prevention and Education Program Staff
- Women's Resource Center Staff

The individuals selected are trained by UCI to serve as informational resource personnel to the campus regarding general issues of sexual harassment, University policy and the procedure for complaint resolution. Advisors do not perform an investigative or dispute resolution function except as requested by the Assistant Vice Chancellor for Affirmative Action in situations with unusual circumstances.

The training includes applicable law, University policies and procedures, and record keeping and confidentiality requirements. The training will also address elements of sensitivity and awareness. This training is available at least once a year but may be given more often, depending on changes or additions to the list of Advisors, changes in sexual harassment law or policy or the expressed needs of Advisors.

The Advisor's functions and responsibilities will include the following:

1. Serve as a resource person to individuals with questions or complaints involving sexual harassment.
2. Advise individuals regarding applicable University policies and procedures for complaint handling and outline alternatives for complaint resolution.
3. Ask the advisee if she/he wishes to file a complaint.
4. Advise the advisee about whom to contact if she/he wishes to file a complaint of sexual harassment.

5. Based on whether the individual is asking for "confidential counseling" as described on page 6, or securing preliminary information regarding the filing of a complaint, advise the individual of how the events should proceed based on the kind of action they want and what the Advisor's role is.
6. Document meeting times, advice given, and people present during the meetings.
7. If the individual has met with the Advisor and elects to file a complaint, the Advisor, if other than a certified counselor, must provide records of the meeting(s) to the Office of Affirmative Action and Equal Opportunity upon request, and should, therefore, inform the advisee of this element of the process.
8. Consult with a professional in the Office of Affirmative Action and Equal Opportunity regarding reported incidents of sexual harassment, even if such incidents are not to be filed as complaints.

Advisors may maintain confidential, written records which would identify the complainant or the person charged in a complaint. Advisors may also record information regarding the frequency of complaints, the number of advisees or victims. While this information frequently serves to protect the Advisor, it is discoverable in an investigation and must be made accessible. This is true of the internal processes and for external processes, which include civil suits.

Only those Advisors who are certified counselors, as in counseling or clinical psychologists or physicians, have the right of client privilege and are, therefore, exempt from the responsibility of advising the Office of Affirmative Action and Equal Opportunity, unless specifically requested to do so by the advisee.

Under special circumstances, the Office of Affirmative Action and Equal Opportunity may ask that an Advisor investigate, arbitrate, or mediate with an alleged harasser. For an Advisor to initiate such action without the prior approval or authorization of the Office of Affirmative Action and Equal Opportunity constitutes a violation of policy and a breach of confidentiality.

University of California, Irvine Policy on Sexual Harassment

Procedural Guidelines for Addressing Complaints of Sexual Harassment

The Irvine campus of the University of California prohibits sexual harassment in accordance with University Policy and applicable state and federal law. Furthermore, it is our intent to promptly investigate and respond to complaints of sexual harassment.

Informal Complaint Process:

The informal complaint resolution process shall be available to all students, faculty, other academic appointees, and staff employees. Its primary purpose is to attempt resolution of the complaint at the earliest possible time. The investigative findings and the resolution in this process will not be part of a formal written record. That

is, no written documents will be held by or forwarded to any office other than the Office of Affirmative Action and Equal Opportunity.

Supervisors and Advisors should document the receipt of a complaint and any counseling or other action taken to refer or resolve the complaint.

If the complainant has elected to proceed with the informal complaint resolution process, the complainant may do so by directly contacting the Assistant Vice Chancellor for Affirmative Action or through counselors, Advisors, or supervisors.

The Office of Affirmative Action and Equal Opportunity is responsible for advising the parties of their rights and responsibilities and for investigating the facts surrounding the allegations. The first step in the investigative process will be to notify the charged party that an informal complaint has been filed.

It must be noted that the intent of the informal process is to attempt immediate resolution of the situation and provide a reasonable remedy for the complainant. In light of the absence of a written record, the informal process cannot generate a disciplinary action.

Formal Complaint Process:

The individual may elect the formal complaint process. A formal grievance is based on an allegation that discrimination on the basis of sex has occurred in the form of sexual harassment.

A formal complaint differs from an informal complaint in that the findings of the investigation, the statements of the complainant, of the charging party and witnesses become part of a written record, which would be used by the Office of Affirmative Action and Equal Opportunity in the presentation of the finding to the appropriate dean, director, vice chancellor, supervisor, or the Chancellor, and as documentation for disciplinary action. The existence of such documentation and its review by a potentially varied number of officials, reduces the Office of Affirmative Action and Equal Opportunity's ability to protect the identity of the parties involved and may require that the documentation be provided to outside agencies or as evidence in court proceedings.

There may be instances when a pattern of sexual harassment is suggested through various different incidents reported to the Office of Affirmative Action and Equal Opportunity. This pattern of sexual harassment will require the Office of Affirmative Action and Equal Opportunity to file a charge in the Chancellor's Office and submit any facts substantiating this charge to the Chancellor for further investigation.

The Chancellor is responsible for notifying the charged party that the Office of Affirmative Action and Equal Opportunity has filed a complaint against him/her.

All of the above will be effected with the intent of restoring the rights and dignities of the complainant, protecting the complainant from retaliation, assuring all parties of a fair and impartial investigation, applying appropriate disciplinary action, and achieving resolution.

Charges of sexual harassment filed by a UCI employee or student against non-university personnel, such as vendors, contractors, or individuals from other UC campuses, must be handled through the formal complaint process. Joint investigation of the allegations will be the preferred method of complaint handling in these instances, but UCI will pursue independent investigations and submit recommendations to company or University officials to protect the rights and privileges of individuals within the UCI campus community.

Furthermore, the following conditions will apply to and be recorded in the documentation of the formal complaint:

1. *Request:* The complainant must request the formal process.
2. *Representation:* The complainant may be self-represented or may be represented by another person of the complainant's choice. Any person who serves as Advisor or Assistant Vice Chancellor for Affirmative Action shall not represent the complainant in the formal proceeding.
3. *Time Limits:*
 - A. Thirty (30) days from the time the last incident of alleged harassment occurred; OR
 - B. Thirty (30) days from the time the complainant could be expected to know of an action alleged to have been taken as a consequence of refusing a sexual advance is the time limit for filing; OR
 - C. An exception to the deadline may be granted under unusual circumstances.
4. *Remedy:* The remedy cannot exceed restoring the pay, benefits, or rights lost as a result of the act of sexual harassment.

Applicability of Existing Grievance Procedures: As a result of the informal and/or formal complaint process, the Assistant Vice Chancellor for Affirmative Action will issue a report, which may provide a basis for management action. If the complainant is not satisfied that management action has resolved the complaint, or if there has been no action, a formal grievance may be filed under the applicable grievance policy, depending on the status of the grievant: Staff Personnel Policy 280/290 for non-represented staff; grievance procedures contained in the memoranda of understanding for staff with exclusive representation. Academic Personnel Manual 140 for non-Senate academic appointees; the Title IX Student Grievance procedure for non-academic complaints of discrimination (or other non-academic student grievance procedure approved by the President)*; or the Academic Senate By-laws 113 for Academic Senate members.

Resolution—Remedy and Disciplinary Action:

If there has been a finding of sexual harassment and the victim(s) can be shown to have suffered some loss, a remedy may consist of a reassignment, transfer, back pay, or letter of apology.

*See *University of California Policies Applying to Campus Activities, Organizations, and Students.*

Where there has been a finding of sexual harassment, the resolution may include some form of disciplinary action. Depending on the individual circumstances of each case, disciplinary action could include one or any combination of the following: letter of warning, suspension, reassignment, and termination.

In the case of staff personnel or students** who are supervisors in a staff function, the Chancellor may initiate discipline against the harasser or may delegate the responsibility for taking disciplinary action to the appropriate dean, vice chancellor, director, or associate hospital director.

In the case of evidence supporting a charge of sexual harassment against a member of the faculty through the formal complaint procedure, the disciplinary proceedings against faculty may be in By-law 113 of the Irvine Division of the Academic Senate. (The informal complaint procedure will not engage the Academic Senate.)

In those instances when an individual who is not an employee of UCI, i.e., a contractor, vendor, or an agent from another UC campus the responsibility for imparting appropriate disciplinary action will lie with the official designated to have such authority by that organization's policies. UCI's continued or future relationships with those organizations could be conditional to an equitable resolution of the complaint.

Confidentiality:

The informal complaint process discussed earlier in this document places strict requirements on the documentation prepared by Advisors, supervisors, counselors, and the Office of Affirmative Action and Equal Opportunity. Confidentiality is one of the primary considerations in the informal process. Furthermore, every reasonable effort shall be made to protect the privacy of the parties.

Supervisors, counselors, and Advisors are responsible for confidentiality in the recording of allegations, the facts presented by the complainant, and action taken. In the interest of limiting the liability of supervisors, counselors, or Advisors, the records they prepare should be forwarded immediately to the campus Office of Affirmative Action and Equal Opportunity which will constitute "immediate action" on their part. If the "complainant" expresses a preference that no action be taken, the individual's discussion with supervisors, counselors, or Advisors will be viewed as "confidential counseling" with no corrective action possible on the part of the administration. UCI administration cautions that records of "confidential counseling" must not be kept by other than counselors, whose licensure or employment at UCI carries client privilege.

**Some circumstances that involve a student who is the harasser will require that the Chancellor initiate disciplinary proceedings pursuant to Section 50.00 in Part A of the *Policies Applying to Campus Activities, Organizations, and Students*.

Rights of the Person Charged:

The person charged has a right to due process, which ensures immediate notification that a complaint has been filed, the name of the charging party and the circumstance(s) which precipitated the filing of the complaint, if there has been a finding of sexual harassment.

The person charged is to be advised by the Office of Affirmative Action and Equal Opportunity, in writing, in the case of formal complaints, how the investigation proceeded, the date on which the investigation was completed, and the person's right to offer evidence and the names of witnesses or any other support documentation to the investigative process.

The person charged will be notified of the findings that support the allegations filed and will be given an opportunity to respond to or refute those findings.

The person charged has a right to elect self-representation or to select someone to represent his or her interests. If the person charged retains an attorney, the complainant is notified and UCI Administration will secure the services of the Office of General Counsel.

University of California, Irvine Policy on Sexual Harassment

Training and Education

The Irvine Campus administration, through the Office of Affirmative Action and Equal Opportunity, will provide extensive training and education to the campus community. There will be three (3) types of training and education.

The first type of training will be provided to managers, supervisors, and Advisors. It will include detailed examination of this policy, the responsibilities and liabilities of UCI and its agents, under the law and University procedures. Legal and subject matter experts will provide training regarding the process of receiving complaints and counseling complainants. Specialized consultants will provide awareness training and education. The training will be provided at least once during the academic year, but as often as reasonable to accommodate recently hired or promoted individuals with managerial and supervisory responsibilities and new Advisors. Training for Advisors is mandatory in order for the appointment of Advisors to be confirmed.

The second type of training will provide information to the campus community regarding rights and privileges under the policy, procedures for reporting incidents of sexual harassment, and filing complaints. Awareness training is a critical element of this type of training and education. This training will be conducted in a format of educational seminars at least once each quarter.

The third type of training will consist of ad hoc presentations by the Assistant Vice Chancellor for Affirmative Action to individuals or groups as individuals requesting such training in light of job duties or responsibilities. This type of presentation is also available to students and to individuals involved in a complaint.

Each consultant contracted to provide training and education services will be provided with a copy of the *University of California, Irvine Sexual Harassment Policy, and Guidelines for Sexual Harassment Complaint Resolution*. Litigated cases, related University Policy, research findings, books, films, and hypothetical situations will be used as highlighting training instruments for purposes of illustration and impact.

In the procedure and liability training sessions, preference will be given to managers, supervisors, representatives appointed by the control point, counselors, and Advisors.

The Office of Affirmative Action and Equal Opportunity will publicize the various training and education seminars and workshops it sponsors and coordinates. When the consultant's style of presentation and expressed preference limit the number of possible participants, the Office of Affirmative Action and Equal Opportunity will accept applications for reservations on a first-come-first-served basis.

In the process of publicizing the training and education seminars, the publicity will include a biography of the consultant(s), a summary of the proposed agenda, date(s), and whether or not attendance is limited or open to the public.

Questions regarding the consultant or the program may be directed to the Office of Affirmative Action and Equal Opportunity or the Chancellor's Office. Similarly, any recommendations of consultants or topics to be added or deleted to programs may be forwarded to the Chancellor's Office or the Office of Affirmative Action and Equal Opportunity.

University of California, Irvine Policy on Sexual Harassment

Glossary

Advisors. Individuals who, as a consequence of their paid or elected duties or responsibilities, would reasonably be expected to hear preliminary questions and concerns about sexual harassment. These individuals are appointed by the Chancellor and trained by UCI on sexual harassment policy and procedures for complaint investigation. They provide information, direction, and assistance based on this training and the needs of the advisee. Advisors will be drawn from the following:

- Academic Counselors
- Office of Affirmative Action and Equal Opportunity Staff (UCI & UCIMC)
- AGS
- ASUCI
- College of Medicine Administration
- Counseling Psychologists (UCI Student Services Center)
- Employee Relations Office Staff (UCI & UCIMC)
- Faculty (Academic Senate, Irvine Chapter)
- Library
- Medical Student Council Representative
- Ombudsperson

- Personnel Office Staff (UCI & UCIMC)
- Police Officers (UCI & UCIMC)
- Rape Prevention and Education Program
- Women's Resource Center Staff

Assistant Vice Chancellor for Affirmative Action. UCI administrative officer responsible for the investigation and resolution of sexual harassment complaints.

Alleged Offender. A person perceived or accused by another person of engaging in actions which the accuser perceives as sexual harassment.

Department of Fair Employment and Housing (DFEH). The California state agency responsible for investigating complaints of employment and housing discrimination.

Employer. The organization or institution formally responsible for employment. Here, the University of California, Irvine.

Equal Employment Opportunity Commission (EEOC). The Federal agency which, under the Civil Rights Act of 1964, administers federal law and regulations which relate to discrimination in employment. The enforcement agency for Title VII.

Formal Complaint. A written complaint filed in the Office of Affirmative Action and Equal Opportunity which asks for formal action.

Grievance. A formal complaint which is filed under applicable grievance policy or procedures contained in the appropriate Memorandum of Understanding or applicable University grievance policy.

Informal Complaint. A verbal allegation of objectionable behavior by another which the complainant perceives as sexual harassment. The complainant may be received by Advisors, supervisors, department chairs, and others but should be referred to the Office of Affirmative Action and Equal Opportunity for investigation and resolution.

Sexual Harassment. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- 1) submission to such conduct is made either explicitly or implicitly a term or condition of instruction, employment, or participation in other University activity;
- 2) submission to or rejection of such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions affecting that individual; or
- 3) such conduct has the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, or offensive University environment.

Supervisor. Any staff employee, manager, faculty member, or student who is responsible for directing the work of others and/or the authority to effect academic or personnel actions regarding these individuals. Supervisors are responsible for assisting in preventing and prohibiting sexual harassment in their areas of supervision.

Third Party Action. A concept by which an individual, a group of individuals, or an organization can be brought into a civil or criminal action as a defendant or defendants at one time and by the same jury or trier of fact as the defendant.

Example: An employee files a complaint of sexual harassment by a supervisor and names the University official as a third party. The third party may be individually liable for court costs, damages, etc.

Title VII. Section of the Federal Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act (1972) which forbids discrimination in employment on the basis of race, color, religion, sex, or national origin. (42 U.S.C. Sections 2000 et. seq.) EEOC administers Title VII, receiving and investigating charges of employment discrimination (see 29 C.F.R. Chapter XIV Part 1604).

Title IX. Section of the Federal Education Amendments of 1972 which prohibits discrimination on the basis of sex in any federally assisted education program. (20 U.S.C. 168 et. seq.) U.S. Department of Education administers Title IX.

U.S. Department of Education, Office of Civil Rights (DOEd/OCR). The office within the U.S. Department of Education which investigates complaints of discrimination filed against an institution receiving DOEd contract funding. UCI qualifies as such an institution.

U.S. Department of Labor, Office of Civil Rights (DOL/OCR) OFFCP. The office within the U.S. Department of Labor which investigates complaints of discrimination in employment filed against institutions which are employers and receive Federal contract funding. UCI qualifies as such an institution.

Title VII Sexual Harassment Guidelines and Educational Employment

Introduction

On November 10, 1980 the Equal Employment Opportunity Commission (EEOC) issued final interpretive guidelines on sexual harassment¹ under Title VII of the Civil Rights Act of 1964² which state that:

- Title VII prohibits sexual harassment of employees;
- employers are responsible for the actions of their agents and supervisors; and
- employers are responsible for the actions of all other employees if the employer knew or should have known about the sexual harassment.

What is Title VII?

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, national origin, and sex.

Who is covered by Title VII?

Title VII covers all employers who employ 15 or more employees. Title VII covers all educational institutions, and the guidelines cover all of their employees.

Who enforces the guidelines?

The Equal Employment Opportunity Commission which issued the guidelines is the enforcement agency for Title VII.

Why were the guidelines issued?

Sexual harassment in the workplace is a continuing and widespread problem. EEOC has stated, "Sexual harassment like harassment on the basis of color, race, religion, or national origin has long been recognized by the EEOC as a violation of . . . Title VII of the Civil Rights Act of 1964. . . However, despite the position taken by the Commission, sexual harassment continues to be especially widespread. . . Therefore, EEOC (amends) its Guidelines on Discrimination because of Sex."³

An example of the breadth of this problem is shown by a 1975 study conducted by Working Women's Institute in which 70 percent of the respondents reported that they had experienced sexual harassment on the job. In another study, conducted by *Redbook Magazine*, almost one half of employed women surveyed said that they—or a woman they knew—had quit a position or been fired because of sexual harassment on the job.⁴

Do the guidelines have the force of law?

Strictly speaking, no. The guidelines are advisory and courts take them into account. Moreover, the guidelines closely parallel already existing court decisions in which the courts have held that sexual harassment violates Title VII and that employers are responsible for the actions of their employees. Thus, the guidelines are consistent with current case law.

Do the guidelines prohibit personal relationships between employees?

No. The guidelines address themselves to unwelcome conduct and clearly distinguish sexual harassment from a "particular action or incident (which is) a purely personal, social relationship without a discriminating employment effect."⁵ In determining whether conduct constitutes sexual harassment, the commission "will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis."⁶

What is sexual harassment?

The guidelines define sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a nature which constitute harassment when:

- submission to the conduct is either explicitly or implicitly a term or condition of an individual's employment;
- submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; and/or
- such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.⁷

Do the guidelines give specific examples of activities that constitute sexual harassment?

No. The guidelines simply offer a flexible and very broad definition of sexual harassment with no specific examples.

Specific examples, however, that *may* constitute sexual harassment under the guidelines are:

- subtle pressure for sexual activity;
- unnecessary patting or pinching;
- constant brushing against another employee's body;
- "friendly" arms around the shoulder;
- "accidental" brushes or touches;
- deliberate assaults or molestations;
- demanding sexual favors accompanied by implied threats concerning an individual's employment status;
- demanding sexual favors accompanied by implied or overt promises of preferential treatment with regard to an individual's employment status; and
- explicit offers of money for sex.⁸

Are sexual jokes, slurs, and insults directed at members of one sex prohibited by the guidelines?

The answer to this question is unclear. Though the guidelines state that sexual harassment can be "physical" or "verbal," the guidelines also state that the conduct must be "of a sexual nature." Thus, it is unclear whether derogatory and degrading comments or jokes directed at members of one sex constitute sexual harassment.

The Circuit Court of the District of Columbia, however, has found that activity need not have a sexual content in order to constitute sexual harassment. Though the cases involved activity that was sexual in content, the court said that the content of the activity was "immaterial." The activity need only to be directed at members of one sex.

"... (R)etention of her job was conditioned upon submission to sexual relations—an extraction which the supervisor would not have sought from any male."

"... The vitiating sex factor thus stemmed not from the fact that what appellant's supervisor demanded

was sexual activity—which of itself is immaterial—but from the fact that he imposed upon her tenure in her then position a condition which he would not have fastened upon a male employee." (italics added) [*Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1972)].

In a later case the same court said:

"It was and is sufficient to allege a violation of Title VII to claim that the rule creating an artificial barrier to employment has been applied to one gender and not to the other." *Barnes v. Costle*, 561 F. 2d. 983 (1977).

The National Advisory Council on Women's Educational Programs⁹ has urged that the guidelines be expanded or interpreted by EEOC so as to prohibit activity of a "gender-charged" nature. In a letter to EEOC, the Council stated:

"An atmosphere charged with such anti-woman (or anti-man) bias is as potentially harmful to employees as is an atmosphere charged with racist sentiment, and constitutes 'sexual' harassment in a very real manner."

The "atmosphere" that the council refers to is created by "behavior (which) may include denigration of women (or men) through sexist humor, remarks, or other activities which create an 'intimidating, hostile, or offensive working climate,' but which do so without any suggestion that sexual activity take place between the principles."¹⁰

EEOC and, ultimately, the courts will settle this question.

What must institutions do to comply with the guidelines?

The guidelines state that an employer *should* take all necessary steps to prevent sexual harassment such as:

- affirmatively raising the subject;
- expressing strong disapproval;
- developing appropriate sanctions;
- informing employees of their right to raise and how to raise the issue of harassment under Title VII; and
- developing methods to sensitize all concerned.¹¹

Is an employer responsible for the actions of its agents and supervisors?

Yes, the guidelines hold employers fully responsible for the actions of their agents and supervisors "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."¹² (italics added)

Is an institution responsible for the actions of its employees?

Yes. The guidelines, however, impose a less strict standard by which to measure the employer's responsibility if the harasser is simply an employee and not an agent or a supervisory employee. The employer is responsible for the actions of such employees *only* if the employer (or its agents or supervisory employees) "knows or should have known of the conduct and fails to take immediate and appropriate corrective action."¹³

In addition, an employer may also be responsible for the actions of *non-employees* who sexually harass employees in the workplace where the employer (or its agents or supervisory employees) "knows or should have known of the conduct and fails to take immediate and appropriate corrective action."¹⁴

Why should institutions be interested in prohibiting sexual harassment?

As a booklet published by AFSCME¹⁵ argues, "Probably the majority of offenders are supervisors, so sexual harassment should be considered a problem for management to resolve. Work environments in which sexual harassment is sanctioned are not the most productive, and personnel decisions may be made without regard to the job performance."¹⁶ The booklet notes "sexual harassment undermines the integrity of the workplace,"¹⁷ and therefore, "it is good management practice to have a strong policy against sexual harassment."¹⁸

In addition, employers will also want to avoid charges of sexual harassment. In such cases, EEOC can ask for an award of front pay, back pay, reinstatement, promotion, or any other type of relief that will rectify the situation. Both EEOC and the courts have wide discretion in correcting situations where sexual harassment has or is occurring. If an employer refuses to settle a complaint through the conciliation process, EEOC can file suit and ask a federal judge for relief.

Do the guidelines prohibit sexual harassment of students?

The guidelines apply only to employees. Students who are employees, however, are covered by the guidelines in the same manner as other employees.

Is there any other law that protects students from sexual harassment?

Title IX of the Education Amendments of 1972¹⁹ may prohibit sexual harassment of students.²⁰ In the case of *Alexander et al v. Yale* [631 Fed. 2d. 178 (2nd Cir. 1980)] a federal magistrate said, in a preliminary hearing which permitted the case to go to trial, "...academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education." The case involved a claim by a former Yale College student that her political science professor had offered her an "A" for sex. (The case lost on appeal because of failure to prove that an improper advance was made or that the student was adversely affected as a consequence.)²¹

The Office of Civil Rights (OCR) at the Department of Education is the primary enforcement agency for Title IX, and has not yet issued any guidelines about whether Title IX covers sexual harassment. The National Advisory Council on Women's Educational Programs, however, has submitted to OCR a legal memorandum which concluded that Title IX prohibits sexual harassment of students, faculty, and staff.²²

Will institutions be informed if a sexual harassment complaint is filed against them?

Yes. EEOC notifies institutions of complaints within 10 days.

Who can file a complaint against an institution?

Individuals and/or organizations on behalf of aggrieved employee(s) or applicant(s). Organizations also may file class or pattern complaints without identification of individuals. Members of the Commission may also file charges.

Is there a time limit for filing complaints?

Yes. A complaint must be filed within 180 days of the alleged incident.

How is a complaint made?

By a sworn complaint form, obtainable from the Equal Employment Opportunity Commission, 2401 E St., NW, Washington, D.C. 20508, or the District area EEOC office.

Are the names of complainants kept confidential?

The complainant's name is divulged to the institution when an investigation is made. Charges, however, are not made public by EEOC, nor can any of its efforts during the conciliation process be made public by EEOC or its employees. The aggrieved party, however, and the respondent are not bound by the confidentiality requirement. If court action becomes necessary, the identity of the parties becomes a matter of public record.

Can investigations be made without complaints?

No. EEOC can conduct investigations *only* if charges have been filed.

Are there recordkeeping requirements? Does the government have access to records?

No specific recordkeeping requirements have been promulgated. EEOC, however, has the power to require that specified records be kept relevant to the determination of whether or not violations under Title VII have occurred. EEOC also is empowered to review all relevant records, such as records of grievance procedures relating to sexual harassment.

Are grievance procedures required?

Grievance procedures are not required under Title VII, nor is EEOC required to give weight to findings under such procedures. Thus, individuals are not required to file complaints with the institution before filing with EEOC.²³

Do the guidelines apply to labor organizations?

Yes. Labor organizations are subject to the same requirements and sanctions as employers.

Is retaliation for filing complaints illegal?

Yes. Employers are prohibited from discharging or discriminating against any employee or applicant for employment because he or she has made a complaint, assisted with an investigation, or instituted proceedings.

What can an institution do?

An institution can make people more aware about the problem of sexual harassment by the following activities:

- developing a specific policy against sexual harassment;
- disseminating the policy in memos, posters, flyers, radio spots, etc.;
- developing a procedure to inform new employees;
- surveying the workplace to find out the extent of the problem at the institution;
- developing and disseminating information about grievance procedures to handle sexual harassment complaints. (The grievance procedure may or may not be the same as other existing grievance procedures. Sexual harassment complaints are often initially handled more appropriately by informal procedures followed by more formal procedures if the complaint is not resolved. Individuals who wish to pursue a grievance are likely to go to court if the institution has no procedure for them to use.);
- developing a union grievance procedure, where appropriate; and
- developing a code of conduct for all employees.

These guidelines add strength to the growing commitment among institutions and the academic community that sexual harassment will no longer be tolerated.

FOOTNOTES

¹29 C.F.R. Chapter XIV, Section 1604.11, Federal Register, Vol. 45, No. 219, p. 74676-74677. (See guidelines on page 12.)

²42 U.S.C. Sections 2000e et seq. (1964).

³Memo to public interest groups from Eleanor Holmes Norton, chair, EEOC, 3/11/80.

⁴*Redbook Magazine*, November 1976.

⁵Memo to public interest groups from Eleanor Holmes Norton, chair, EEOC, 3/11/80.

⁶29 C.F.R. Section 1604.11(b).

⁷29 C.F.R. Section 1604.11(a).

⁸See, for example, the order issued by the Mayor of the District of Columbia concerning sexual harassment, and the list compiled by the American Federation of State, County and Municipal employees in *Sexual Harassment, On the Job: What the Union Can Do*, available from AFSCME, Research Department, 1625 L St., NW, Washington, D.C. 20036.

⁹The Council is a federally mandated body whose members are appointed by the President.

¹⁰Letter to EEOC from National Advisory Council on Women's Educational Programs. 6/10/80.

¹¹29 C.F.R. Section 1604.11(f).

¹²29 C.F.R. Section 1604.11(c).

¹³29 C.F.R. Section 1604.11(d).

¹⁴29 C.F.R. Section 1604.11(e).

¹⁵*Sexual Harassment, On the Job: What the Union Can Do*, American Federation of State, County, and Municipal Employees, 1625 L St., NW, Washington, D.C. 20036.

¹⁶*ibid.*, p. 11.

¹⁷*ibid.*, p. 32.

¹⁸*ibid.*, p. 11.

¹⁹20 U.S.C. Sections (68) et seq (1972).

²⁰Title IX prohibits sex discrimination in any educational program or activity that receives federal financial assistance. Almost all educational institutions receive federal assistance and are therefore covered by Title IX.

²¹In addition, several institutions have used university procedures, without the use of Title IX, to discipline faculty members for sexual harassment of students.

At San Jose State University (CA), a tenured associate professor of philosophy was fired for fondling and propositioning five of his female students.

At the University of California at Berkeley, a professor was suspended without pay for one quarter for fondling, and propositioning 13 students, offering a good grade for sex, and writing an unfavorable letter of recommendation for one student who refused his sexual advances.

At Harvard University (MA), a government professor was formally reprimanded after a student contended that he had tried to kiss her.

²²The issue of whether Title IX protects employees, as well as students, is currently being litigated in the courts. The U.S. Supreme Court will probably soon rule on this question. If the Court finds that Title IX covers employment discrimination it is likely that Title IX will incorporate the Title VII sexual harassment guidelines or that the courts will find the guidelines incorporated implicitly. See Romeo and North Haven.

²³Title IX, on the other hand, requires grievance procedures, although individuals may bypass them and file charges directly with OCR.

Equal Employment Opportunity Commission

29 CFR Part 1604

Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Final Interpretive Guidelines

Agency: Equal Employment Opportunity Commission.

Action: Final Amendment to Guidelines on Discrimination Because of Sex.

Summary: On April 11, 1980, the Equal Employment Opportunity Commission published the Interim Guidelines on sexual harassment as an amendment to the Guidelines on Discrimination Because of Sex, 29 CFR part 1604.11, 45 FR 25024. This amendment will reaffirm that sexual harassment is an unlawful employment practice. The EEOC received public comments for 60 days subsequent to the date of publication of the Interim Guidelines. As a result of the comments and the analysis of them, these Final Guidelines were drafted.

Effective date: November 10, 1980.

For further information contact: Karen Danart, Acting Director, Office of Policy Implementation, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506, (202) 634-7060.

[*Supplementary Information* concerning comments received on the Interim Guidelines, and relevant case law is omitted.]

Accordingly, 29 CFR Chapter XIV, Part 1604 is amended by adding § 1604.11 to read as follows:

Part 1604—Guidelines on Discrimination Because of Sex

§ 1604.11 Sexual harassment

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.* Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and

the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee, or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

(Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e et seq.))

(FR Doc. 80-34981 Filed 11-7-80; 8:45 a.m.)

Billing Code 6570-06-M

*The principles involved here continue to apply to race, color, religion, or other origin.

Title IX and Sexual Harassment Complaints

I. Introduction

Office for Civil Rights regional offices have received and investigated a relatively small number of complaints concerning sexual harassment. OCR reviewed a number of these cases and benefited greatly from the experience, research, and opinions of regional investigators and attorneys who have worked on this type of case. It appears that OCR is receiving an increasing number of complaints concerning sexual harassment. Moreover, OCR has received numerous inquiries on this from representatives of recipient institutions and other interested parties.

II. Title IX Jurisdiction over Sexual Harassment

OCR's jurisdiction over sexual harassment is based on the fact that such conduct constitutes differential treatment on the basis of sex. Accordingly, OCR's basic jurisdiction is established by Section 106.31(b) of the Title IX regulation which provides in relevant part:

Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person any such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- * * *
- (8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

Accordingly, OCR has adopted the following working definition of sexual harassment:

Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services, or treatment protected under Title IX.

III. Investigation Procedures

Investigations of complaints of sexual harassment in the context of a possible Title IX violation will generally focus on a substantive determination, a procedural determination, or both. These determinations, as discussed below, are: (1) Has the complaining party been subject to sexual harassment in the provision of, the denial of, or the enjoyment of any aid, benefit, service, or treatment in violation of Section 106.31(b) (or any other section) of the Title IX regulation; and (2) Have the requirements of Section 106.8 of the Title IX regulation been met by the recipient?

A. Substantive Determination

1. Has the complaining party been subject to sexual harassment in the provision of, the denial of, or the enjoyment of any aid, benefit, service, or treatment in violation of Section 106.31(b) (or any other section) of the regulation?

a. If the facts alleged are true, would they constitute sexual harassment?

(1) Is the person who allegedly sexually harassed the complainant an employee or an agent of a recipient institution?

(2) Does the complaint allege that the person who sexually harassed the complainant engaged in verbal or physical conduct of a sexual nature, imposed on the basis of sex, that would condition, deny, limit, or differentiate any aid, benefit, service, or treatment protected under Title IX?

b. Did sexual harassment occur?

(1) Was there verbal or physical conduct of a sexual nature by an employee or an agent of a recipient institution?

(2) Was the verbal or physical conduct of a sexual nature imposed on the basis of the sex of the complainant?

(3) Was the provision of an aid, benefit, service, or treatment protected under Title IX:

a. denied in connection with the imposition of such verbal or physical conduct;

b. limited in connection with the imposition of such verbal or physical conduct;

c. provided differently in connection with the imposition of such verbal or physical conduct; or

d. conditioned upon the acceptance of such verbal or physical conduct?

The investigation should include a review of the institution's factual determination of the complaint, if a report or a statement of findings is available.

Proving sexual harassment frequently is difficult because investigations of complaints often result in evidence that consists solely on one person's word against another's. A determination of sexual harassment should be based on the facts of the case; inconclusive evidence would result in a no cause finding. Determining whether there are additional complaints of sexual harassment against the same person may help to corroborate the complainant's allegation. If additional complainants or witnesses who allege that they have experienced similar treatment from the same person are identified, there is still a problem as to corroboration if there were no witnesses to the additional claimed incident(s). However, the weight of the numbers of individuals who come forward to corroborate can be persuasive.

Sexual harassment is distinct from acceptable friendly behavior; however, on occasion the line between acceptable and unacceptable behavior may prove difficult to recognize. In some cases the actions or words of a person against whom a complaint is filed may have been

misinterpreted by the complainant. In recognizing such a situation you should be aware that misunderstandings between individuals may result from culturally based differences in standards of appropriate behavior. Examples of where different standards may lead to miscommunication are maintaining eye contact, standing closely, or touching another person's arm or shoulder. Determination of whether certain actions or words constitute sexual harassment should be made with an awareness of First Amendment protections for free expression and academic freedom. These protections are not absolute. They can be limited by the degree to which the protected speech or activity encroaches upon the protected rights of others. If there is a question as to whether a certain action or statement constitutes sexual harassment, we recommend that you apply to the facts of the case the standard of behavior of a reasonable person in a similar circumstance. As to actions over which reasonable people might differ, if a request to stop is made known there is an expectation that the offensive behavior should cease or be modified. You should be aware of acts of perceived sexual harassment that are not sufficient to raise a Title IX violation. For example, a teaching assistant who asks one of his students for a date and is refused and makes no further overtures would not be guilty of sexual harassment.

A tangible discriminatory effect (e.g., a denial of or the provision of different or limited aid, benefits, or services based on sex) can lend support to a complaint of sexual harassment. For example, a student alleges Professor X offered an "A" in exchange for sexual favors and the student refused. A determination that the student received a "C" grade for an "A" quality paper would help corroborate the student's claim. Examples of other types of evidence that might be used to demonstrate a discriminatory effect include the fact that, following the incident complained of, the student was given inappropriate academic assignments, was given less access to faculty assistance, failed to receive a warranted research appointment, received unjustifiably poor recommendations, failed to receive job referrals, received less financial aid than he/she was entitled to receive, was given a poor office or desk assignment, or any other reprisal.

Investigations of complaints of sexual harassment involve inquiries into interpersonal relations, professional ethics and behavior and academic judgment. These investigations can affect the careers of both individuals involved as well as the institution's reputation. The possibility for legal actions involving defamation issues exists. Consequently, the investigation should be conducted with sensitivity and an awareness of these considerations.

2. Discussion

It is possible, depending on the benefit, aid, treatment, or service involved, that other provisions of the Title IX regulation may provide additional jurisdiction. For example, if a situation involved a financial aid administrator who conditioned the award of financial aid on a student's acceptance of physical conduct of a sexual nature, Section 106.37(a) would provide specific jurisdiction.

The denial, limitation, or change in any aid, benefit, or service as a result of acts of sexual harassment is covered under subparagraphs (2), (3), and (8) of Section 106.31(b). However, an actual denial, limitation, or change in an aid, benefit, or service is not essential because in any case in which acts of sexual harassment constitute differential treatment on the basis of sex, the acts themselves may constitute violations of subparagraphs (1), (2) in part, (4), and (8) of Section 106.31(b). For example, a professor could offer a student an "A" grade on a paper in exchange for sexual favors. The student refuses and the professor awards the student a "B" grade, the appropriate grade in this case. Notwithstanding the difficulty of providing the actual sexual harassment, the student has been treated differently on the basis of sex in violation of the Title IX statute.

The only Title IX case addressing this point is *Price v. Yale*, No. 77-277 (D. Conn. July 2, 1979), *aff'd sub. nom. Alexander v. Yale*, 63 F.2d 178 (2nd Cir. 1980). Pamela Price claimed to be sexually harassed by her professor. She alleged that she received a diminished grade on a paper and a final grade in the course which was lower than she deserved because she refused to respond to the professor's sexual overtures. The unpublished opinion of the court stated:

On the basis of all the evidence the court finds that the alleged incident of sexual proposition did not occur and that the grade of "C" which Miss Price received on the paper submitted to Professor Duvall and the grade of "C" which she received in his course did not reflect consideration of any factor other than academic achievement.

The court attempted to clarify:

This court does not accept the proposition pressed by defendant that the correctness of the grade received in a case where sexual harassment is proved would itself be dispositive of a claim of discrimination.

If a plaintiff shows a term or condition has been imposed in a sexually discriminatory fashion she will have stated a claim. Cf. *Tomkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977), sex discrimination in employment. Proof that the grade is correct in such a case would not mean the student had not suffered educational detriment. Her performance might be adversely affected by emotional trauma or she might forego other courses taught by the offending instructor despite their importance to her education plans.

The holding that mere treatment in a sexually discriminatory fashion is sufficient to constitute sexual harassment has been more definitively expressed in a recent Title VII employment case. The Court of Appeals for the District of Columbia held that an employer violates Title VII merely by subjecting an employee to sexual harassment, even if the employee's resistance to the harassment does not cause the employer to deprive the employee of any tangible job benefits. *Bundy v. Jackson*, 24 FEP 1155, No. 79-1693 (D.C. Cir., January 12, 1981). This principle is equally applicable to situations that involve students.

The Title IX regulation covers acts of sexual harassment, as defined previously, that are directed at students. Inasmuch as OCR does not yet have a conclusive determination on the validity of Subpart E of Title IX regulation, complaints by employees of sexual harassment under Title IX should be dealt with in the same manner in which Title IX employment complaints are handled. Establishing a nexus will be difficult in this type of case because sexual harassment usually occurs in the context of private interactions between two parties.

Any employee attempting to file this type of complaint should be advised to contact the EEOC. The EEOC amended its *Guidelines on Discrimination Because of Sex* to include the issue of sexual harassment and published the guidelines in final form on November 10, 1980.

In some situations, a recipient may be liable under Title IX for the sexual harassment acts of one student perpetrated upon another student under an agent/principal theory. Under the law of agency, where the institution has delegated some responsibility to a student to act in an authoritative position with respect to another student, the institution is responsible for the acts of that student acting in the delegated capacity. For example, a recipient would be responsible for the sexual harassment acts of a graduate student acting in the capacity of a teaching assistant. This graduate student with delegated authority would be in a position of power over a student in his or her class. Should the teaching assistant sexually harass a student, the recipient institution would have responsibility under Title IX for those acts.

B. Procedural Determination

1. Have the requirements of Section 106.8 of the Title IX regulation been met by the recipient?

- a. Are there established and published grievance procedures that encompass complaints of sexual harassment?
- b. Do the procedures provide for prompt and equitable resolution of complaints of sexual harassment?
- c. Were these procedures available to and used by the complainant? (Please note that a complainant is required to use the grievance procedure.)

Inasmuch as the Title IX regulation provides protection against acts of sexual harassment, recipients are required to have available grievance procedures called for by Section 106.8 for allegations of sexual harassment. Section 106.8 of the Title IX regulation requires that the recipient designate an employee to coordinate its responsibilities under Title IX, including the investigation of any allegations of violation of Title IX. This Section also requires that the recipient notify students and employees of that individual's name, address, and telephone number and that the recipient adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part.

The investigation should determine how the recipient institution responded procedurally to the complaint of sexual harassment and whether the grievance proce-

cedure, if used, provided for a prompt and equitable resolution. OCR has not issued standards defining the requirements of prompt and equitable resolution. If an investigation raises questions you are unable to answer, as to how to evaluate whether a grievance procedure is prompt or equitable, please forward this issue with your recommendation to headquarters for policy guidance.

2. Discussion

Institutions may choose to investigate and resolve sexual harassment complaints that would constitute a violation of Title IX under their general grievance procedures. However, a number of institutions have adopted specific sexual harassment grievance procedures. Their reasons for adopting separate grievance procedures are that allegations of sexual harassment frequently raise sensitive issues and require a degree of confidentiality. If the identity of the complainant and/or the respondent and the allegations themselves were made public prior to any determination, serious problems for the individuals involved, as well as for the institution, could result. They feel these factors create situations that call for a different procedure from that used for other complaints. Accordingly, although it is permissible for an institution to operate a grievance procedure that differs from the standard grievance procedure in that it may, at least during the early stages of proceedings, protect the identity of the parties, it should be noted that any Title IX grievance procedure must meet the prompt and equitable standard called for in the regulation.

IV. Unresolved Issues

There are two unresolved issues OCR wishes to call to your attention. OCR seeks your comments and recommendations on these issues.

A. Notice Requirement

OCR has authority under 34 CFR 106.9(a) to require that institutions notify all administrators, faculty, and students that sexual harassment of students or applicants for admission is a violation of Title IX and that it is the policy of the University not to discriminate on the basis of sex in the educational programs or activities that it operates. OCR has not exercised this authority.

OCR seeks comments based upon your experience with complainants and institutions as to whether OCR should take any action to expand the general notice requirement under Title IX to encompass a specific sexual harassment notice requirement. OCR also seeks your comments as to whether they should take any actions that would put institutions on notice that Title IX covers sexual harassment. For example, an informational letter to institution presidents could be developed.

B. Effect of Preventive Measures by Recipient

In a line of Title VII cases employers were held responsible for the acts of sexual harassment by its agents and employees. This liability was based in part on the doctrine of *respondeat superior* or agency, by which an employer is liable for the discriminatory acts of its supervisory personnel (*Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976)). Employers are able to minimize liability through preventive measures which include the following actions:

- (1) raising affirmatively the subject of sexual harassment within the institution and making clear that sexual harassment is against University policy,
- (2) establishing a responsive complaint mechanism whereby harassed individuals may have their complaints resolved, and
- (3) taking effective steps to correct any harassment, including warning and appropriately disciplining the offending individual. (*Tompkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977), 15 EPD #7954, partially reversing 422 F. Supp. 533 (D.N.J. 1976), 12 EPD #11,267; *Munford v. James O. Barnes & Co.*, 441 F. Supp. 449 (E.D. Mich. 1979); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977)).

The EEOC *Guidelines on Discrimination Because of Sex* recommend at 29 CFR 1064.11(f):

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

OCR seeks your comments as to whether the Title VII theory of minimizing liability through preventive measures could be applied to educational institutions under Title IX. OCR asks that you consider whether such a theory could be legally applicable and, if so, whether the application of this theory would be beneficial or contrary to the interests of beneficiaries protected by Title IX.

C. Sexual Harassment of Students by Other Students

The other unresolved issue relates to a recipient's responsibility for the sexual harassment acts of students against fellow students in the context of the situation in which neither student is in a position of authority, derived from the institution, over the other student(s). The liability of a recipient institution for the sexual harassment acts of one student perpetrated upon another student where one student is acting as an agent of the recipient and is in a position of authority over the other student has been discussed.

A theory upon which a more expansive institutional liability would be placed is premised on a Title VII case, *Kyriazi v. Western Electric Co.*, 461 F. Supp. 894 (D. New Jersey 1978). Liability was premised on the theory that co-workers and supervisors had interfered with the

employment relationship to the degree that the work environment was not free from sex discrimination. OCR seeks your opinion of the application of this theory to Title IX and equal educational opportunity as it relates to sexual harassment acts of one student to another.

D. Instructions and Comments

OCR has outlined basic interpretation of Title IX with respect to sexual harassment. Based on its interaction with regional staff, OCR believes that this policy is already being applied correctly in the types of cases described. However, in the event that you receive a complaint regarding sexual harassment that would raise questions related to academic freedom, or any complex or unresolved issues, please forward to headquarters for approval prior to initiating an investigation, a copy of the complaint, the proposed investigative plan, and a memorandum identifying outstanding policy issues, as well as your advice on these issues. These documents should be sent to Fredrick T. Cioffi, Acting Director of Policy and Enforcement Service, 400 Maryland Ave., South West, Washington, D.C. 20202. In addition, compliance reviews should not include inquiries about sexual harassment. Any review of grievance procedures should determine whether grievance procedures are available to persons protected under Title IX who wish to have the institution resolve sexual harassment complaints.

Nondiscrimination Statement. The University of California, Irvine, in compliance with Titles VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Sections 503 and 504 of the Rehabilitation Act of 1973, does not discriminate on the basis of race, color, national origin, religion, handicap, or sex in any of its policies, procedures, or practices. In accordance with sex discrimination laws, the University of California forbids acts of sexual harassment. The University, in compliance with the Age Discrimination in Employment Act of 1967, Section 402 of the Vietnam Era Veterans' Readjustment Act of 1974, and Section 12940 of the State of California Government Code, does not discriminate against any employees or applicants for employment on the basis of their age, or because they are disabled veterans or veterans of the Vietnam era, or because of their medical condition (as defined in Section 12926 of the California Government Code), their ancestry, or their marital status; nor does the University discriminate on the basis of citizenship or sexual orientation, within the limits imposed by law or University policy. This nondiscrimination policy covers admission, access, and service in University programs and activities, and application for and treatment in University employment.

In conformance with University policy and pursuant to Executive Orders 11246 and 11375, Section 503 of the Rehabilitation Act of 1973, and Section 402 of the Vietnam Era Veterans Readjustment Act of 1974, the University of California is an affirmative action/equal opportunity employer.

Inquiries regarding the University's equal opportunity policies may be directed to Carla R. Espinoza, Assistant Vice Chancellor, Office of Affirmative Action and Equal Opportunity, 117 Administration, University of California, Irvine; Irvine, California 92717, telephone (714) 856-5594.

601-049/3M/RD