

Anti-Discrimination Policy

USER'S MANUAL

MICHIGAN STATE

U N I V E R S I T Y



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I. OVERVIEW

A. What does this Manual Address?

This Manual provides an explanation and interpretation of MSU's Anti-Discrimination Policy ("ADP") and procedures for handling complaints of violations of the ADP. Nothing in this Manual is intended to supersede or contradict the provisions of the ADP.

Questions regarding the ADP or this Manual should be addressed to the Office of Institutional Equity ("OIE") or the Office of the General Counsel ("OGC").

B. Why did the University Issue this Manual?

The Manual is intended to promote consistency in applying the ADP; assist units in addressing issues of discrimination and harassment; and provide specific examples and explanation. The Manual is intended only for these internal purposes.

C. On What Law is this Manual Based?

This Manual is based on state and federal statutes, including Title VII of the Civil Rights Act of 1964, the Michigan Elliott Larsen Civil Rights Act, Title I of the Americans with Disabilities Act, the Age Discrimination in Employment Act, Section 504 of the Rehabilitation Act, the Michigan Persons With Disabilities Civil Rights Act, Title VI of the Civil Rights Act of 1964, and Title IX of the Educational Amendments of 1972. This Manual may be updated as changes in the law dictate. To the extent that the University is subject to a rule or law that is different than what is stated in this Manual, that rule or law will be followed.

D. What is the Purpose of the Examples in the Manual?

The examples in this Manual offer more detailed guidance to University units and community members. However, each situation is fact-specific and must be examined in its own context.

E. What is the University's Obligation to Investigate Allegations of Harassment?

The University is legally required to exercise reasonable care to prevent and promptly correct prohibited harassment in both the employment and educational settings. See *Burlington Industries, Inc v Ellerth*, 524 U.S. 742 (1998); *Faragher v City of Boca Raton*, 524 US 775 (1998). This includes a legal obligation to investigate and properly respond to an a student or



employee's allegations of harassment based on numerous protected categories, including age, race, gender, sexual, national origin, disability, weight and religious. *See e.g., Ellerth, Faragher, Hawkins v Anheuser-Busch, Inc.*, 517 F3d 321 (6th Cir 2008); *Hafford v Seidner*, 183 F3d 506 (6th Cir 1999); *Boutros v Canton Reg'l Transit Auth.*, 997 F2d 198, 203 (6th Cir 1993); *Vance v Spence County Public Sch Dist*, 231 F3d 253 (6th Cir 2000) (Title IX); *Malan v General Dynamics Land Systems, Inc.*, 212 Mich App 585, 586-587; 538 NW2d 76 (1995). *See also* the U.S. Equal Employment Opportunity Commission's *Policy Guidance on Current Issues of Sexual Harassment and Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, as well as the U.S. Department of Education's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties* ("Schools have an obligation to ensure that the educational environment is free of discrimination and cannot fulfill this obligation without determining if sexual harassment complaints have merit.") Descriptions of the processes that the University utilizes to fulfill this legal obligation are included in this Manual, Section VIII, "Processes for Responding to Complaints."

F. Should I use this Manual to Analyze or Address Issues of Discrimination or Harassment on my Own?

No, these issues should be analyzed and addressed only in consultation with OIE or OGC.

G. What Should I Do When I Become Aware of a Claim of Potential Discrimination or Harassment?

Faculty, administrators, supervisors and other individuals in positions of responsibility over employees and students have specific responsibilities in terms of reporting these claims to the appropriate people / offices. Please see OIE's website, oie.msu.edu, for this information, specifically tailored to your role within the University. In addition, we can all play a role in preventing discrimination and harassment and improving the work and educational environment at MSU. See Section X of this Manual, "Proactive Prevention," for best practices. Finally, there is an expectation that all campus community members educate themselves on the ADP and the Policy on Relationship Violence and Sexual Misconduct. There is a free class on prohibited harassment for supervisory staff offered every semester through human resources. In addition, any unit can request that OIE arrange a training session specifically for their unit.



II. COVERAGE / JURISDICTION

A. To whom does the Manual Apply?

This Manual applies to those covered by the ADP. The ADP applies to “all University community members, including faculty, staff, students, registered student organizations, student governing bodies, and the University’s administrative units, and to the University’s contractors in the execution of their University contracts or engagements.” The ADP states that “[e]xcepting the President and the General Counsel, any University community member may be named in a complaint.”

B. What Types of Activities does the ADP Cover?

1. All educational, employment, cultural, and social activities occurring on the University campus;
2. University-sponsored programs occurring off-campus, including but not limited to cooperative extension, intercollegiate athletics, lifelong education, and any regularly scheduled classes;
3. University housing;
4. Programs and activities sponsored by student governing bodies, including their constituent groups, and registered student organizations; and
5. Any other activities that constitute unlawful acts of discrimination and harassment.

III. DISCRIMINATION

A. Disparate Treatment

There are two basic theories of discrimination – disparate treatment and disparate impact. Disparate treatment requires intent to discriminate based on the protected category. There are two ways to show disparate treatment – direct and indirect (or circumstantial) evidence. Disparate impact, discussed below, does not require a showing of intent; rather, a claim is based on a facially neutral policy or practice that has a disproportionate affect on a protected category.

1. Direct Evidence of Disparate Treatment

If a complainant is able to present evidence that discrimination was at least a motivating factor for the adverse decision, that evidence is direct evidence.



Example of direct evidence of discrimination:

A manager of a unit states in an email to an assistant that she purposely ignored an applicant's resume because the applicant was an international student and the manager told the assistant she does not like to work with anyone who may have language issues. The email is direct evidence of discrimination.

2. Circumstantial Evidence of Disparate Treatment

The complainant must show:

- I. He/she is a member of a protected category;
- II. He/she is subject to adverse action; and
- III. Other similarly situated individuals outside of the protected category are treated more favorably.

Adverse actions must be material. *Burlington Northern & Santa Fe Railway Co v White*, 548 US 53 (2006). They must be more than mere inconveniences and the complainant's subjective impressions about the action are not controlling. *Wilcoxon v 3M*, 235 Mich App 347, 364; 597 NW2d 250 (1999).

If the complainant shows circumstantial evidence of disparate treatment, the respondent must articulate a legitimate, nondiscriminatory reason for the decision. If the respondent meets its burden, the complainant must show pretext (that discrimination was actually a motivating factor in the reason for the decision).

The complainant may establish pretext several ways (anything showing that discrimination was a motivating factor). For example:

- I. The complainant could show that the respondent's articulated reason was false.
- II. The complainant could show that other similarly situated employees outside the protected class were treated differently because of their non-protected class status, creating an inference of discrimination.

However, there must be more than the complainant's mere subjective belief that he or she was discriminated against.



Ackerman v Diamond Shamrock Corp, 670 F2d 66 (6th Cir 1982).

B. Disparate Impact

1. The complainant must show that a policy that appeared to be neutral actually had a substantial adverse impact on a protected group.
2. The respondent must show that the negative impact was related to the job or required as a business necessity.
3. The complainant must show that there were less restrictive alternatives.

Example of disparate impact discrimination:

The Mechanics Department begins to require that all entry level mechanics have a Bachelor's degree in Mechanical Engineering. A general laborer who is denied a transfer to a mechanic position claims that the neutral policy had a substantial adverse impact on Hispanic applicants – those applicants were failing that entry requirement at twice the rate of White applicants. The department is not able to show why the Bachelor's degree is necessary to do the job and is not able to dispute why a mere Mechanic's certificate is insufficient.

IV. HARASSMENT

The University has a specific policy prohibiting sexual harassment, but not other types of harassment. Certain types of harassment that are not based on sex are nevertheless actionable under the ADP. Harassment based on each protected category listed under Article II of the ADP is prohibited (addressed individually in the Manual, section V). The analysis in determining whether harassment has occurred is similar to the analysis under the University's Policy on Relationship Violence and Sexual Misconduct.

Harassment of any kind occurs when a University community member is subject to unwelcome conduct based on a protected category that:

1. Is objectively and subjectively severe, persistent or pervasive; and
2. Creates an unreasonable interference with the individual's work or educational experience.



A. Unwelcome Conduct based on the Protected Category

The harassment must be based on the protected category, such as race. A complainant must make the connection between the protected category and the alleged conduct.

In addition, the conduct must be unwelcome. If the complainant is complicit in some of the behavior, the conduct may not be unwelcome.

B. Severe, Persistent, or Pervasive

The harassment must be severe, persistent, or pervasive. The totality of the circumstances will be considered. If conduct is sufficiently severe, it may, by itself, meet this part of the definition. If conduct is not severe, but is sufficiently frequent, it may satisfy this part of the test. Finally, if inappropriate conduct is pervading a particular workplace, classroom, or other setting (i.e., it is common knowledge that it exists), it may meet this part of the definition. The conduct must objectively satisfy the severe, persistent, or pervasive test, and the complainant must show that he/she subjectively perceived the conduct to be severe, persistent, or pervasive.

There is not an exhaustive list of the types of conduct that may amount to harassment based on the different protected categories, but examples include: offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

C. Unreasonable Interference with Work or Educational Experience

To meet this standard, the complainant must show that the conduct interfered with their ability to do their job or altered their educational experience, and that this interference was unreasonable. Thus, it must be substantially disruptive. The law did not intend to create a "general civility code;" conduct is not prohibited just because it is uncomfortable or inappropriate.

However, the conduct need not be so egregious that it causes economic or psychological injury. *Harris, supra*, 510 US at 22.

Examples:

Tim, an African American student, is taking a business course in which group projects are mandatory. After a confrontation with a White fellow group member about the project, the White student stormed out of a meeting calling Tim the "n-word." The next day, a



hangman's noose, reminiscent of those historically used for racially motivated lynchings, appeared in Tim's backpack. Given the violent, threatening, and racial nature of this symbol and the context, this incident likely would be severe enough to unreasonably alter Tim's educational experience. Tim is able to show that this conduct was based on race, was unwelcome, and that it altered his educational experience. *See eg, Spriggs v Diamond Auto Glass*, 242 F3d 179, 185-86 (4th Cir 2001). This likely would constitute a violation of the ADP.

Miyuki, of Japanese descent, gets a job as a student employee. On her first day, a White female coworker asks whether she is going to use chopsticks for lunch and laughs. Miyuki feels that this comment is offensive. Although it may violate another University policy or practice with respect to workplace conduct, this comment alone would not amount to national origin harassment under the ADP because it is not sufficiently severe or persistent.

V. DEFINING PROTECTED CATEGORIES

Discrimination and harassment based on the following categories is protected under the ADP.

A. Age

The federal Age Discrimination in Employment Act ("ADEA") protects only those who are 40 years of age or older. Michigan courts have held that Michigan's Elliott-Larsen Civil Rights Act ("ELCRA") has no age limit. This Manual adheres to the more expansive Michigan ELCRA interpretation.

Example of discrimination:

A 37 year old employee is terminated and replaced by a younger, 23 year old employee. The unit is unable to articulate a legitimate, non-discriminatory business reason for making the replacement. The unit states that the reason for hiring the 23 year old is that she has better credentials, but this assertion is discredited.

Example of harassment:

Brenda, an older student, is consistently picked on in class by other students, as well as her professor. She is called "geezer" and "old fogie" and the professor consistently asks her to give examples from her "older perspective." Throughout the semester, the student becomes so uncomfortable with this type of treatment



that she is forced to withdraw from the class and spends a great deal of time in the counseling center.

B. Color

“Color” is not defined as a protected category by Title VII of the Civil Rights Act of 1964 (“Title VII”). Courts and the Equal Employment Opportunity Commission (“EEOC”) have defined color as “pigmentation or skin tone...” See *EEOC Compliance Manual on Race and Color Discrimination*. While race and color overlap, they are not synonymous. Color is narrower, referring specifically to the appearance of a person’s skin. Discrimination based on race can include a number of different things, including, but not limited to, the appearance of a person’s skin (see the discussion of race as a protected category, below). Color discrimination could exist between two people of the same race (i.e., a light skinned African American employee could discriminate against a darker skinned African American employee). See *eg, Santiago v Stryker Corp*, 10 FSupp2d 93, 96 (DPR 1998) (dark-skinned Puerto Rican citizen replaced by light-skinned Puerto Rican citizen could establish prima facie case of color discrimination).

C. Gender

Gender is a protected category under the ADP. Gender harassment is commonly referred to as sexual harassment, although it can also include non-sexual, gender based harassment. Sexual harassment is a significant subset of gender discrimination under federal and state law. Although the basis for sexual harassment comes from the gender harassment prohibition in the ADP, the University has a stand-alone Policy on Relationship Violence and Sexual Misconduct. Gender discrimination and harassment includes pregnancy discrimination and harassment. See MCL §27.2201(d); 42 USC §2000e(k).

Examples of discrimination:

A female mail sorter earns \$1 an hour less than her male equivalent. She is performing substantially similar job duties; their jobs are in the same classification; and both jobs require the same skills and qualifications. The mail processing department does not have a good business reason for the difference, apart from gender.

The supervisor of a pregnant custodian is annoyed that the custodian is pregnant because the supervisor will need to find a replacement for the pregnant employee while she is on maternity



leave, and will likely need to assign the custodian's physically demanding tasks to another employee when the pregnant custodian gets closer to her due date. The supervisor's annoyance leads her to demote the custodian from building head to regular custodian, with a corresponding loss in pay.

Example of harassment:

A female undergraduate student is frequently approached by a male teaching assistant ("T.A.") who asks her out on dates, comments on her physical appearance, including her "rear end" and "chest." The undergraduate student consistently makes it clear that she is not interested in him, to no avail. The undergraduate student grows more and more reluctant to be around the T.A. Eventually, the T.A. starts asking her to stay late after class and during several of these after-class sessions, the T.A. makes unwanted sexual contact with her. The T.A. has sexually harassed the undergraduate student in violation of the ADP and the University's Policy on Relationship Violence and Sexual Misconduct.

D. Gender Identity

The ADP was amended in April 2007 to prohibit discrimination based on gender identity. The ADP already had barred harassment based on gender identity. The committee formed to study whether the ADP should be amended to ban discrimination based on gender identity, the Gender Identity II committee, drafted a comprehensive report. This report was consulted and relied upon in the drafting of this Manual.¹

Definitions:

Under the ADP, the term gender identity "shall be interpreted to include protection against gender stereotyping based on a person's gender expression. In other words, gender stereotyping is impermissible discrimination or harassment based on a failure to conform to stereotypical gender norms." The report of the Second Ad Hoc Gender Identity Committee, April 2007, includes the following definitions:

- I. Gender Identity: a person's internal knowledge of his or her own gender.

¹ See also Section VI of this Manual for a discussion of the interplay between gender identity discrimination and "Inappropriate Limitations" under the ADP.



- II. Gender Expression: a person's external presentation of themselves, whether through appearance or behavior, as male, female, or androgynous.

Example of discrimination:

Jan is hired to work as an administrative assistant in a unit on campus. She is married to a male staff member on campus, and has two young children, whose photos she proudly displays at her workstation. Jan is also an accomplished athlete, and regularly competes in triathlons. She wears her hair very short, and prefers men's button-down or rugby shirts, pants, and more androgynous shoes as her daily professional attire. She does not wear makeup. Her voice and mannerisms are often those associated with the male gender. The director of the office thinks that her appearance is off-putting for those that come into the office. He decides to meet with Jan and says, "It's not that you don't look professional...it's just that...this is very difficult to say, but I need to request that you present yourself as more feminine." When Jan refuses, the director tells her that he, then, has no choice but to terminate her.

E. Disability Status

The ADP prohibits discrimination and harassment against an University community member because of their disability status. While the ADP expressly addresses only discrimination and harassment, encompassed in the definition of disability discrimination, there is the affirmative obligation to accommodate a qualified individual with a disability. See the *Reasonable Accommodations Policy for University Applicants and Employees* and the *Resource Center for Persons with Disabilities' website*, www.rcpd.msu.edu, for further guidance.

Any member of the University community who is a qualified individual with a disability shall not be discriminated against.

A qualified individual with a disability is an individual who, with or without reasonable accommodations, can perform the essential functions of the academic program or job.

An individual has a disability if he or she has a physical or mental impairment that substantially limits one or more major life activities; that individual has a record of having such impairment; or that individual is regarded as having such impairment.



Example of a disability accommodation analysis:

An employee is confined to a wheelchair due to the employee's Parkinson's disease. The employee has had his disability certified by the University's Resource Center for Persons with Disabilities. The employee is a ticket collector at a residence hall. Nothing about the job duties require the employee to do anything he cannot physically do while confined to his wheelchair. The employee is a qualified individual with a disability.

Example of discrimination:

An employee who is blind works in an office on campus and performs his job with the assistance of certain computer software and other assistive devices. Other employees in his position are consistently promoted, but he is not because his supervisor thinks that he may not want a more difficult job due to his disability.

F. Height

The ADP prohibits discrimination and harassment based on a community member's height.

G. Marital Status

The ADP prohibits discrimination and harassment based on marital status, i.e., whether a person is married.

Examples:

An applicant is asked in an interview whether she is married and has children. She responds that she is not married and does not have any children. The unit decides, based on the interviewer's recommendation, not to offer the applicant a job because, as the interviewer tells the search committee, he thinks that married people are generally more stable than single people. This is marital status discrimination.

A student offers that her spouse is a faculty member on campus in the area in which she will be studying. The student is told that her spouse will not be permitted to have educational responsibility over her. The student is not being discriminated against based on her marital status. The law does not protect someone based on *who* they are married to; rather, only on *whether* the person is married. Instead, in this case, the University is following its policy on Conflict of Interest in Educational Responsibilities Resulting from Consensual or Amorous Sexual Relationships.



H. National Origin

National origin refers to the country where a person is born or the country from which a person's ancestors came. 42 USC §2000e-2.

Example of harassment:

A Mexican American student (born and raised in the United States) is consistently called derogatory names associated with her national origin by suitemates in the residence hall. She also frequently sees graffiti of slurs against Mexican American individuals in her residence hall and on her room door. The student is so upset by this treatment that she is not able to concentrate on her studies and is fearful she will have to withdraw or transfer.

I. Political Persuasion

Political persuasion is a protected category under the ADP. However, through the ADP and other policies and statements, the University recognizes that free speech is fundamental to the University's philosophy. Specifically, the ADP states that its prohibitions "are not intended to abridge University community members' right of free expression or other civil rights."

Examples:

An undergraduate student is a member of the Green Party. He makes his party affiliation clear in class. The student's instructor in his political science class is a staunch Republican. The two have heated exchanges in class. The instructor believes that the Green Party is not a "real" party and anyone voting for a Green Party candidate is making a mockery of the American democratic process. The instructor gives the student a lower grade on a paper solely for espousing such ideals. The instructor is discriminating against the student based on political persuasion.

Students from a socialist student organization are handing out flyers on campus promoting their ideals. One student who passes is wearing a t-shirt that endorses a conservative Republican for president. The socialist student group, even after seeing the t-shirt, offered the student a flyer telling him he should really "get with the program" and consider the values of socialism. The student from the socialist organization did not harass the other student based on political persuasion. Rather, he was exercising



his free speech right to attempt to influence others by using means short of disruption.

J. Race

The ADP prohibits discrimination and harassment based on race. This Manual adopts EEOC guidance for the definition of “race,” which includes ancestry, physical characteristics, race-linked illness, cultural characteristics (such as grooming practices or manner of speech), perception of an individual's race, association with someone of a particular race, "race plus" another factor, and reverse race discrimination. EEOC Compliance Manual on Race and Color Discrimination (4/19/06).

K. Religion

Like Title VII and the ELCRA, the ADP prohibits discrimination and harassment based on religion. Further, the ADP, like section 701(j) of Title VII (and the ELCRA), requires the reasonable accommodation of the religious practices of a University community member, unless the accommodation would result in an undue hardship.

Example of religious accommodation discrimination:

A manager of a retail store terminates a Somali sales representative for refusing to remove her head scarf during the Muslim holy month of Ramadan. The store must establish that permitting the representative to wear the head scarf constitutes an undue burden.

L. Sexual Orientation

Sexual orientation is not a protected category under state or federal law. The ADP, however, provides that that “the University community holds itself to certain standards of conduct more stringent than those mandated by law,” and includes sexual orientation as a protected category.

Example of discrimination:

A male student is interested in getting involved in MSU's Club Soccer. The student signs up for the team and is picked to play regularly in intramural games. Midway through the student's first semester on campus, he is spotted on Grand River holding hands with another male student. Word gets out on the team that the



student is gay and he confirms the rumor. He is kicked off the team because of it.

M. Veteran Status²

Example of discrimination:

A faculty member who served in Iraq is shunned within his department for his part in this “unpopular war.” The other faculty members let their feelings about the war influence their decisions regarding the faculty member’s potential promotion which results in his failure to be promoted. The faculty member was discriminated against based on his veteran status.

N. Weight

Consistent with Michigan’s ELCRA, the ADP bans discrimination and harassment based on a person’s weight.

Example of harassment:

An overweight student has problems fitting into lecture hall chairs and is teased incessantly by fellow students because of this. When they see her coming, people make noises like “boom, boom, boom” and say “here comes the beached whale.” This goes on all semester in one form or another. The student is so upset by this consistent conduct that her grades slip and she rarely leaves her dorm room. The student suffers harassment on the basis of her weight.

VI. WHAT IS AN “INAPPROPRIATE LIMITATION”?

The ADP states that “even if not illegal, acts are prohibited under this policy if they. . . [d]iscriminate against any University community member(s) through inappropriate limitation of employment opportunity, access to University residential facilities, or participation in educational, athletic, social, cultural, or other University activities” on the basis of any of the protected categories. ADP, art II.1. (Emphasis added).

The ADP states that “[l]imitations are inappropriate if they are not directly related to a legitimate University purpose.”

² The Uniformed Service Employment and Reemployment Rights Act (“USERRA”) prohibits employers from discriminating against employees based on their membership in, or application to be a member of, the uniformed services. USERRA’s coverage is broader than the ADP. For questions regarding USERRA coverage and issues, please contact human resources.



The University must be able to articulate a legitimate purpose for the limitation. These purposes could include, but are not limited to, providing for the safety of University community members or the public, furthering the business of the University, complying with a legal mandate or another University policy, or furthering an educational objective or a core value or the mission of the University. The limitation must be **directly** related to such a University purpose.

“Employment opportunity” is defined as “job access and placement, retention, promotion, professional development, and salary.”

Examples:

Employment opportunity:

A biologically male mentor who identifies and appears as female requests a residence hall assignment to an all female floor. Rejecting this request and assigning this mentor, instead, to an all male or mixed gender floor is permissible because: (1) to do so is not an unlawful act because it is not an adverse employment action (it is only an assignment change within the same job classification and pay level); and (2) assigning a biological male mentor to a male or mixed gender floor is an appropriate limitation of an employment opportunity (assuming the assignment would be considered a limitation on the mentor’s job placement) because the presence of a biological male on an all female floor may impinge on the privacy of those that have requested an all female floor. Because protecting these privacy concerns of students is a legitimate University purpose and because this action was directly related to the legitimate University purpose, rejecting the assignment request would not be considered an inappropriate limitation. See the Report of the Second *Ad Hoc* Gender Identity Committee, April 2007.

- A faculty member is feeling as though she will not be granted tenure. Colleagues do not talk to her and she generally feels as if she is just not fitting in. She complains that her predicament is caused by her controversial political ideas – that she will not make tenure because she has been vocal with respect to these ideas. Under the ADP, the faculty member is not being discriminated against because of an inappropriate limitation of an employment opportunity. There has not been a limitation of her employment opportunity. She has had no adverse action taken against her due to retention, salary, or promotion.



Participation in athletic or other University activities:

- A student is kicked off of an MSU club sports team for being gay. The team states that the decision is directly related to a legitimate University purpose – safety. They argue that they are keeping an all men’s team safe from unwanted advances while participating in sports and changing in the locker room. This is not an appropriate limitation. There is no basis for assuming safety will be compromised because a player is gay. While safety is a legitimate University purpose, banning the student from the team is not directly related to this purpose.

VII. RETALIATION

The ADP does not specifically address retaliation. However, the laws that prohibit discrimination and harassment, and form the basis for the ADP, contain anti-retaliation provisions (*see, e.g.*, Title VII, Title IX and ELCRA). The University will not tolerate retaliation against a community member because they made a good faith claim of discrimination or harassment or because they participated in an investigation of such a claim.

A person may show retaliation by establishing that there was an adverse action taken against him or her because of his or her protected activity. Protected activity includes making a claim or participating in an investigation. For example, if a University community member takes an adverse action against another member because of their claim or participation in an investigation into the claim, that person has engaged in prohibited retaliation. This is true even if the adverse action is in the form of further harassment. *See Burlington Northern & Santa Fe Railway Co v White*, 548 US 53 (2006).

Example: George is a friend of both Larry and Sally. Sally reports to management that Larry is sexually harassing her and tells the investigator that George witnessed some of the conduct. George confirms that he witnessed Larry sexually harassing Sally. Larry, a supervisor, is so mad that his friend George “ratted him out” that he transfers George to a lesser paying job within the department. Larry retaliated against George in violation of the ADP.

VIII. FIRST AMENDMENT

The ADP states that its prohibitions “are not intended to abridge University community members’ rights of free expression or other civil rights.” The University makes clear, through this and other policies and statements, that free speech is fundamental to the University’s philosophy and will be protected.



When analyzing a claim under the ADP, it is important to be mindful of the dictates of First Amendment law. If conduct does not rise to the level of discrimination or harassment, it may fall within the protections of the First Amendment. Conversely, it is important to remember that speech that rises to the level of harassing speech will not be protected.

IX. PROCESSES FOR RESPONDING TO COMPLAINTS

A. Related Offices, Policies, and Processes

The Office of Institutional Equity (“OIE”) is charged with the primary responsibility for ensuring compliance with the ADP. However, a community member may bring a complaint under the ADP in the following ways:

- Unit Director or Supervisor. Any University community member may complain of discrimination or harassment under the ADP to their supervisor or unit director. The unit may conduct an investigation of the allegations, with the assistance of OIE.
- OIE. Any University community member may complain of discrimination or harassment under the ADP directly to OIE, except that complaints in which students are the alleged harassers go to the student judicial system. OIE’s procedures are detailed in Section B below.
- Student Conduct System. The student conduct system hears complaints of alleged violations of regulations governing student conduct, but also protects students’ rights against infringement by other students, faculty members, administrators, or the University. This could include a complaint of discrimination or harassment under the ADP.
- Anti-Discrimination Judicial Board. The ADJB is composed of faculty, staff, and students, and may hear complaints filed by students, faculty members, and staff. The ADJB has jurisdiction over violations of the ADP. OIE acts as coordinator for the ADJB and can answer questions about the process. See also the ADJB Policy and the ADJB User’s Manual for further guidance.
- Union Grievance Process. An employee’s complaint may fall under the ADP and the grievance procedure contained in a collective bargaining agreement covering the employee.
- Student Affairs & Services. A Registered Student Organization (“RSO”) must provide a non-discrimination clause in its



constitution based on the protected categories in the ADP. Student Affairs & Services may suspend or deny the registration of an RSO if it is found to have violated a University policy, including the ADP.

- Faculty Grievance Policy. An employee may file a grievance complaining of discrimination or harassment with the University's Faculty Grievance Official ("FGO"). A grievance alleging discrimination or harassment in violation of the ADP will be referred to the appropriate University office for investigation and determination regarding the claim, and the grievance will be held in abeyance pending its investigation and determination.

B. OIE Procedures

The University must comply with state and federal anti-discrimination and equal opportunity laws. The University charges OIE with the role of ensuring compliance. To fulfill this legal obligation, OIE conducts, or assists with conducting, investigations of claims under the ADP.

A University community member may either meet informally with an OIE investigator or invoke a formal process that generally triggers an investigation, as explained in more detail below. However, there may be times in which OIE will proceed with a formal investigation despite the wishes of the complaining individual (for example, when a situation involves ongoing harassment).

The complaining individual will receive a copy of these procedures when they contact OIE.

1. Informal Procedures

Individuals may request that a complaint be resolved informally. The purpose of the informal process is to permit a person with a complaint to: (1) gather information regarding issues of discrimination and harassment prior to filing a complaint; and (2) explore the option of pursuing a mutually agreeable solution, without invoking formal procedures.

OIE's function in the informal process is to consult, advise, and facilitate alternative dispute resolution if applicable and possible.

- *Consulting and Advising*



OIE will consult with community members and units about issues of discrimination and harassment. OIE does not act as a representative for any party in a complaint. Rather, the office provides information and guidance regarding avenues for pursuing claims, and the requirements for proving individual claims. This generally can be accomplished on a confidential basis, with only a brief, confidential record of the meeting maintained. A complaining party may believe that they do not have access to information that would enable them to state a claim of discrimination. In such a case, OIE may decide to acquire the information. This is still considered part of the information-gathering process and this fact is communicated to the person responding to the request for information.

- *Alternative Dispute Resolution*

Parties may wish to consider alternative dispute resolution (e.g., mediation services), where appropriate, to attempt to resolve issues that arise under the ADP. OIE will assist in the conciliation of disputes where both parties agree, and may refer parties to the University's mediation service – an independent service offered for free to certain eligible individuals (those with an academic appointment and members of the Clerical Technical Union). If an informal resolution is reached, a brief, confidential record to this effect will be kept by OIE.

2. Formal Procedures

OIE's approach with respect to its formal process is to be as fair as possible to all individuals involved in the process, while providing a thorough investigation and analysis of every claim. OIE gives finality and certainty to each claim by issuing a written report in as prompt a manner as is reasonably possible. Again, OIE does not act as a representative for either side; rather, it serves as a neutral fact-finder for determining whether the ADP was violated.

If a person with a complaint wishes OIE to investigate, the following steps will be followed:

- a. The complaining individual must schedule a meeting with an OIE investigator and complete a written



complaint form, signed by the person, which states the nature of the complaint. These forms are available on the OIE website and in the OIE office.

- b. OIE makes an initial determination based on the completed form and any additional information provided by the complaining person as to whether the complaint meets jurisdictional requirements (i.e., that the claim states a violation of the ADP).
- c. If jurisdictional requirements are met, OIE will contact the individual, office, or unit against whom the complaint is filed, notifying them that OIE will begin an investigation. If appropriate, the applicable unit administrator will also be notified of the investigation.
- d. OIE will investigate the complaint by conducting interviews and reviewing records in order to determine whether the ADP was violated.
- e. OIE will issue a written report containing a summary of the investigation, analysis, and findings. The report will be shared with the complaining party, the responding individual, office or unit, and the appropriate unit administrator.
- f. If there is a finding of discrimination or harassment under the ADP, OIE may make recommendations to the unit for remedial actions. The unit responsible for the responding party is the final decision-maker on any remedial actions. The responding individual may have the right to challenge an action taken against him or her by the unit under other University procedures.

3. Assuring Fairness to all Parties

OIE conducts each investigation in an impartial, fair, and unbiased manner. OIE takes each complaint – and each response to a complaint – very seriously. All responding parties will have an opportunity to provide a full response to all allegations. Both sides will have an opportunity to provide to the investigator any documentation, names of witnesses, and other information they deem relevant. Both sides will be notified of the outcome of the investigation and will generally have an opportunity to view the report.



The expectation of confidentiality, as well as no-retaliation, is paramount to any investigation. OIE will keep all details of any complaint as confidential as possible, and will make clear to each individual with whom it interacts that the expectation of confidentiality also applies to them. OIE maintains a copy of the report in its office and only disciplinary records, to the extent that they result, are placed in a respondent's personnel file.

In addition, OIE will advise all parties that retaliation is strictly prohibited with respect to any individual participating in the investigative process.

4. Expectation of Cooperation

To preserve the integrity of the ADP and OIE's process, members of the University community are expected to cooperate in good faith during an OIE investigation by providing documents and testimony, for example, at the direction of OIE if requested.

If an individual refuses to cooperate in an investigation, OIE will be forced to proceed without their input, which may result in an adverse finding. For example, if a respondent refuses to cooperate, OIE would generally proceed based on information and evidence presented by the complainant. Without contrary evidence, there would likely be an adverse finding against the respondent. The adverse finding would be forwarded to the applicable unit administrator and may include a recommendation regarding appropriate remedial action.

5. Other options

An individual bringing a complaint should know that there are other options for pursuing complaints related to the ADP as well.

- Externally, for employment related discrimination complaints, there is:

The Equal Employment Opportunity Commission

Phone: (800) 669-4000

TTY: (800) 669-6820

www.eeoc.gov



The Michigan Department of Civil Rights
Phone: (517) 241-6300
Fax: (517) 335-3882
TTY: (517) 335-3881
www.michigan.gov/mdcr

- Externally, for education related discrimination complaints, there is:

The Office of Civil Rights, Division of the Department of Education
Phone: (800) 421-3481
Fax: (202) 245-6840
TDD: (877) 521-2172
Email: OCR@ed.gov

If an individual chooses to utilize the external agency's services in addition to a formal OIE investigation, OIE will continue with their investigation, but its response will usually be directly to the agency.

- MSU Union Represented Employees

MSU union represented employees should also consult their collective bargaining agreements and speak to a union representative about the appropriate process for bringing complaints of discrimination or harassment, or consult the MSU Office of Human Resources, Employee Relations: 1407 S. Harrison, Suite 130, East Lansing, MI 48823, 517-353-5510

X. PROACTIVE PREVENTION

The following are examples of best practices – proactive measures designed to reduce the likelihood of ADP violations and address impediments to equal opportunity.

- Become familiar with the ADP and look for potential issues; when in doubt, seek assistance from OIE, the Office of the General Counsel, and other campus offices / resources.
- Make sure the reasons for decisions affecting a University community member's employment or education are sufficiently explained to affected persons and documented where appropriate.

- If these decisions are documented, maintain records for an appropriate length of time. Consult with OGC with specific questions regarding the length of time.
- Recruit, hire, and promote with equal opportunity in mind by implementing practices designed to widen and diversify the pool of candidates considered for employment openings. Seek assistance from OIE or Human Resources if needed.
- Conduct a self-analysis to determine whether your current practices disadvantage individuals in a particular protected category. Determine whether there are patterns of discrimination within your unit. Seek assistance from OIE or Human Resources if needed.
- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination. Ensure that performance appraisals are based on employees' actual job performance. Promote consistency regarding performance appraisals, i.e., that comparable job performances receive comparable ratings regardless of the evaluator and that appraisals are neither artificially low nor artificially high.
- Review and follow the University's Policy on Relationship Violence and Sexual Misconduct and the procedures within this Manual for handling other types of harassment claims.
- The anti-retaliation provision should be followed consistently. If it is not, individuals may be reluctant to participate in the process, fearful of reprisal based on their participation.
- Protect the confidentiality of complainants to the extent possible. Share information only on a need-to-know basis.
- Work to ensure that every complaint receives a prompt, thorough, and impartial investigation.
- Take immediate and appropriate corrective action following a determination of harassment; take interim action before the determination is made, if necessary.
- Help to inculcate the University's core value of inclusion in the workplace, classroom, and living environments on campus by creating a culture of professionalism and respect for personal differences. Ensure that all University community members are able to work, learn, and live in an environment free of harassment and address conduct before it rises to that level.



Ensure that all University community members have equal access to University activities, facilities, and employment opportunities.

- Promote supervisor and administrator training (for both faculty and support staff). This may be the best way to proactively prevent issues of discrimination and harassment. There are numerous resources for training on campus. The OIE office offers customized training and regularly scheduled campus-wide workshops.