
Change to *Faculty Legislation II-303*, and Renaming to Protected and Unprotected Expression in a Work-Related Setting

The UW-Madison Faculty Senate endorses the UW-Madison Policy on Sexual Harassment and Sexual Violence (SH-SV). On a directive from the UW Board of Regents, the UW-Madison Provost's Advisory Group on Sexual Assault and Misconduct (PAGSAM) constructed this policy (attached).

SH-SV is based on the following laws, regulations and guidance:

- UW Regent Policy Document 14-2
- Title IX of the Education Amendments (1972)
- The Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act (1991)
- Violence Against Women Act (1994)
- The Violence Against Women Reauthorization Act of 2013
- UWS Chapter 17
- Wisconsin Statute § 36.11(22)(c)
- Governor's Executive Order #54

SH-SV includes:

- Definitions of conduct prohibited by the policy (sex discrimination, sexual harassment, sexual assault, dating violence, domestic violence, stalking and related retaliation)
- Options for reporting violations
- List of those designated as Title IX Responsible Employees
- Various campus and community resources including confidential resources
- Investigatory and disciplinary processes for various members of the UW-Madison community

The adoption of SH-SV necessitates the modification of *Faculty Legislation II-303* "PROHIBITED HARASSMENT: DEFINITIONS AND RULES GOVERNING THE CONDUCT OF UW-MADISON FACULTY AND ACADEMIC STAFF." The proposed modified legislation is presented below.

~~II-303 PROHIBITED HARASSMENT: DEFINITIONS AND RULES GOVERNING THE CONDUCT OF UW-MADISON FACULTY AND ACADEMIC STAFF~~ PROTECTED AND UNPROTECTED EXPRESSION IN A WORK-RELATED SETTING

~~PART I: Sexual Favors as a Basis for Actions Affecting an Individual's Welfare as a Student or Employee~~

~~A member of the university faculty or academic staff is subject to discipline if he or she behaves, while engaged in official university business, toward another university employee, student, or recipient of university services in any of the following ways:~~

- ~~1. Uses, offers to use, or threatens to use one's status as a member of the university faculty or academic staff to bring about decisions or assessments affecting an individual's welfare on the basis of submission to, or rejection of, requests for sexual favors.~~
- ~~2. Accepts an offer of sexual favors in exchange for an agreement to use one's status as a member of the university faculty or academic staff to bring about favorable decisions or assessments affecting an individual.~~

~~PART II: **Flagrant or Repeated Sexual Advances, Requests for Sexual Favors, and Physical Contacts Harmful to Another's Work or Study Performance or to the Work, Study, or Service Environment**~~
A member of the university faculty or academic staff is subject to discipline if, in a work or learning-related setting, he or she makes sexual advances, requests sexual favors, or makes physical contacts commonly understood to be of a sexual nature, and if

- ~~1. the conduct is unwanted by the person(s) to whom it is directed, and~~
- ~~2. the actor knew or a reasonable person could clearly have understood that the conduct was unwanted, and~~
- ~~3. because of its flagrant or repetitious nature, the conduct either~~
 - ~~a. seriously interferes with work or learning performance of the person(s) to whom the conduct was directed, or~~
 - ~~b. makes the university work, learning, or service environment intimidating or hostile, or demeaning to a person of average sensibilities.~~

PART III I: Expression in Instructional Settings

The University of Wisconsin-Madison endeavors to maintain an environment that challenges students, faculty, and staff to develop their critical thinking capacities to their fullest potential—an environment in which controversial, provocative, and unpopular ideas can safely be introduced and discussed. The university is, therefore, unswervingly committed to freedom of speech as guaranteed under the First Amendment to the Constitution of the United States and to the principle of academic freedom adopted by the Board of Regents in 1894, which states in part: “whatever may be the limitations which trammel inquiry elsewhere, we believe that the great state University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone truth can be found.”

Beneficial to students, academic staff and professors alike, academic freedom has special application to the classroom and has been described by U.S. Supreme Court Justice William Brennan as “...of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom....The classroom is peculiarly the marketplace of ideas.”

Adherence to the right of freedom of speech and to the principle of academic freedom requires that all thoughts presented as ideas or the advocacy of ideas in instructional settings, if they are germane to the subject matter of the course being taught, must be protected. This applies to the ideas of faculty and students alike. The maintenance of intellectual freedom through the open expression of ideas will sometimes be unavoidably hurtful. Some hurtful expressions, however, play no meaningful role in the free exchange of ideas; they may, indeed, inhibit that exchange, thereby denying some individuals full participation in the learning experience. These expressions are those that clearly derogate and debase a student or students in the class on the basis of gender, gender identity and expression, race, religion, ethnicity, sexual orientation, or disability.

Within the framework of academic freedom, the faculty and academic staff have a responsibility to foster an environment of tolerance, civility, awareness, and respect. The university community can thrive and serve its members equally only when the community recognizes the inherent worth and dignity of every human being and affirms the principle of mutual respect as an integral aspect of the pursuit of knowledge. The integrity of the University of Wisconsin-Madison rests upon its ability to guarantee freedom from intimidation or injury generated by intolerance or harassment. The freedom of all members of the university to express openly their ideas and opinions, however, must be maintained.

Accordingly, all expression germane to the instructional setting—including but not limited to information, the presentation or advocacy of ideas, assignment of course materials, and teaching techniques—is protected from disciplinary action.

A student who finds that an instructor uses expressions that are hurtful to him or her is strongly urged to discuss these concerns with the instructor. If for some reason this is not possible, or does not produce results the student finds satisfactory, he or she is urged to contact his or her advisor, the instructor's department chair, or the Dean of Students, for mediation between the student and the academic staff or faculty member. If the student still believes the expressions were not germane to the instructional setting, he or she is referred to *Faculty Policies and Procedures* Chapter 9 or *Academic Staff Policies and Procedures* Chapter 6.

PART IV II: Protected and Unprotected Expression in Non-Instructional but Work-Related Settings
Faculty and academic staff are subject to discipline for using derogating and debasing expression in a non-instructional but work-related setting according to the following definitions and rules.

1. Definitions

- a. "Expression" is communication in any format-including but not limited to oral, visual, literary, recorded, or symbolic. Expression includes the presentation of factual information and opinion, and the advocacy of ideas.
- b. A "non-instructional but work-related setting" is any situation except those described in Definition 3 below in which a member of the faculty or academic staff, while engaged in a university-related task, communicates with students, university employees or recipients of university services. Non-instructional but work-related settings include, but are not limited to, such situations as discussion about what graduate school a student might attend or what career options a student might pursue, or comments to a staff member in the Department office.
- c. An "instructional setting" is any situation in which the instructor of a course communicates about course content with one or more students enrolled in the course, or in which an instructor who has partial responsibility for communicating course content but is not the individual delegated with particular authority to record student grades communicates with the student(s) about the course content (e.g., as a member of a thesis committee; as a lecturer in a team-taught course), or in which an instructor, acting as an advisor, discusses courses taught by other instructors. Instructional settings include, but are not limited to, lecture halls, seminar rooms, laboratories, field trips, and instructors' offices. Instructional settings do not include public lectures where attendance by students is not required, published scholarship, commentary advanced in or reported via any public medium, and the like.

2. Protected and Unprotected Expression

- a. Expression is protected if it involves the presentation or discussion of any material that is appropriate to non-instructional but work-related activities.
The use, in addressing a specific student, university employee, or recipient of university services, of an epithet or a comment concerning that student, employee or recipient of services that clearly derogates and debases him or her on the basis of his or her gender, gender identity and expression, race, religion, ethnicity, sexual orientation, or disability is not appropriate and therefore is not protected.
- b. Expression can be the basis for discipline only if all of the following conditions apply:
 - i. The expression is clearly and patently not protected under ~~IV.B.1~~ II.2.a; and
 - ii. one or more student(s), university employee(s), or recipient(s) of university services have asked on one or more previous occasions that the faculty or academic staff member stop using such expression; and
 - iii. the expression is, and is commonly considered by the university community-including individuals who belong to a group targeted by the faculty or academic staff member-to be, seriously derogating and debasing; and
 - iv. the expression is likely seriously to interfere with an individual's academic or professional performance, or receipt of university services.

PART V III: Procedures for the Implementation of Part IV II

The procedures below distinguish between (a) situations in which someone believes that a member of the faculty or academic staff has engaged in prohibited expression, but there could be no violation of Part ~~IV.B.1~~ II.2.a, because there had been no prior request not to engage in that expression, and (b) situations in which the claim is that Part ~~IV II~~ has been violated, because such a request had been made and the expression was subsequently repeated.

In the first situation, the procedures deal with communication between the person who engaged in the expression and the person who objects to it. This may lead to agreement on whether the expression is or is not protected. If no such agreement emerges, the procedures provide mechanisms for obtaining clarification on whether the expression is protected.

The second situation is one in which it is claimed that unprotected expression has been repeated and constitutes a violation of these rules. Experience demonstrates that most such claims can and should be dealt with through informal processes whose goal is to enhance the understanding of those concerned and to fashion a resolution that each of them will perceive as fair and reasonable. The procedures for seeking such a resolution are set forth below. In addition, the university's formal disciplinary processes are explained, as is the grievance process available to a faculty member who believes that his or her rights have been violated by proceedings under these rules. Whether a matter is being pursued informally or through formal disciplinary proceedings, expression cannot be deemed a violation of these rules unless all of the requirements of Part ~~IVB.1~~ II.2.a are satisfied.

1. Procedure prior to a repetition of expression believed to be unprotected
 - a. A person who objects to expression and believes that, if repeated, it could be the basis for disciplinary action, should, either directly or through an intermediary of his/her choice, explain to the faculty or staff member in question why the expression is considered objectionable and request that the expression not be repeated. If the faculty or staff member considers the expression to be protected, he/she is encouraged to discuss the matter with the person who has complained. If such a discussion fails to produce agreement on whether the expression is protected, the faculty or staff member whose expression is in question, if he or she wishes, may ask, as appropriate, the secretary of the faculty to convene a panel of at least three former chairs of the Committee on Faculty Rights and Responsibilities and/or the University Committee, or the secretary of the academic staff to convene a panel of at least three former chairs of the Academic Staff Appeals Committee and/or the Academic Staff Executive Committee to provide advice on this question, or may ask his/her department to ask for such advice.
 - i. If requested by a student, the Dean of Students office shall facilitate communication between the student and the faculty or staff member, either by helping and advising a student who wishes to speak directly with the faculty or staff member or by acting as an intermediary between them.
 - ii. Oral and written communications occurring during this process between or among the person objecting to the expression of the faculty or staff member, that faculty or staff member, and an intermediary may not be used as evidence in any university disciplinary proceeding. This provision does not apply to a request that expression not be repeated.
2. Procedure following repetition of expression believed to be a violation of these rules
 - a. The Informal, Non-Disciplinary Process. A person who believes that these rules have been violated is encouraged, though not obliged, to discuss the matter with the faculty or staff member involved, either directly or through the intervention of an appropriate intermediary at the departmental, school/college, or campus level. Similarly, faculty or staff members are encouraged, though not obliged, to participate in efforts to resolve complaints in this informal manner.

Oral and written communications occurring during the informal process may not be used as evidence in any university disciplinary proceeding.

- i. When an individual believes that these rules have been violated and seeks to deal with the problem informally, he/she should be prepared to identify precisely the conduct believed to constitute the violation. Precision is often aided by expressing the complaint in writing. If the matter is not promptly resolved, and if the person complained against so requests, the complainant shall provide such a written statement.
 - ii. A complainant who believes that informal approaches are inappropriate, or that an informal process that has been invoked is not functioning satisfactorily, is entitled to invoke the formal disciplinary process.
 - iii. A faculty or staff member is entitled to refuse to participate, or cease participating, in informal processes and insist that the matter be dropped or handled through the disciplinary process.
 - iv. If a complaint about harassment is being handled informally, and there is a dispute about whether the alleged conduct constitutes a violation of these rules, the person or body handling the matter shall seek advice on this question from the Administrative Legal Services Office and inform those concerned of the advice received.
- b. The Disciplinary Process
- i. Discipline can be imposed on faculty members for violation of these rules only in compliance with the requirements of the formal processes delineated in Chapter 9 of *FPP (Faculty Policies and Procedures)*. This process is instituted by the filing of a written complaint with the provost. If the faculty conduct in question does not constitute a violation of these rules, the complaint is dismissed. If the conduct would be a violation, an investigation is conducted, including a discussion with the faculty member, if he/she wishes. Depending on the outcome of the investigation, the provost will either dismiss the case, refer it to the faculty member's department, or proceed with disciplinary action. If discipline is proposed, the faculty member is entitled to have the matter fully heard and considered by CFRR (Committee on Faculty Rights and Responsibilities), a committee of nine faculty members elected by the faculty at large. CFRR makes specific findings of fact and forwards them to the chancellor together with its recommendation as to the disciplinary action it considers appropriate. A determination by CFRR that there is adequate cause for discipline requires a majority vote with no more than two dissenting votes. *FPP* Chapter 9 should be consulted for further information concerning the details of the formal disciplinary process.
 - ii. Discipline can be imposed on academic staff members for violation of these rules only in compliance with the requirements of the formal processes of Chapters 6, 8 and 9 of *ASPP (Academic Staff Policies and Procedures)*.
3. Grievances by Faculty Members. A faculty member who believes that he/she has been treated unfairly or that his/her rights have been violated by efforts to deal with a complaint of harassment is entitled to pursue a grievance under *FPP* 8.15. Such a grievance, if not otherwise resolved to the faculty member's satisfaction, can be brought to the University Committee, which has full power to consider it and take whatever actions it deems appropriate.
 4. Grievances by Academic Staff Members. An academic staff member who believes that he/she has been treated unfairly or that his/her rights have been violated by efforts to deal with a complaint of harassment is entitled to pursue a grievance under *ASPP* Chapter 7.

No mark-up

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- b. Expression can be the basis for discipline only if all of the following conditions apply:
 - i. The expression is clearly and patently not protected under II.2.a; and
 - ii. one or more student(s), university employee(s), or recipient(s) of university services have asked on one or more previous occasions that the faculty or academic staff member stop using such expression; and
 - iii. the expression is, and is commonly considered by the university community-including individuals who belong to a group targeted by the faculty or academic staff member-to be, seriously derogating and debasing; and
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PART III: Procedures for the Implementation of Part II

The procedures below distinguish between (a) situations in which someone believes that a member of the faculty or academic staff has engaged in prohibited expression, but there could be no violation of Part II, because there had been no prior request not to engage in that expression, and (b) situations in which the claim is that Part II has been violated, because such a request had been made and the expression was subsequently repeated.

In the first situation, the procedures deal with communication between the person who engaged in the expression and the person who objects to it. This may lead to agreement on whether the expression is or is not protected. If no such agreement emerges, the procedures provide mechanisms for obtaining clarification on whether the expression is protected.

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1. Procedure prior to a repetition of expression believed to be unprotected
 - a. A person who objects to expression and believes that, if repeated, it could be the basis for disciplinary action, should, either directly or through an intermediary of his/her choice, explain to the faculty or staff member in question why the expression is considered objectionable and request that the expression not be repeated. If the faculty or staff member considers the expression to be protected, he/she is encouraged to discuss the matter with the person who has complained. If such a discussion fails to produce agreement on whether the expression is protected, the faculty or staff member whose expression is in question, if he or she wishes, may ask, as appropriate, the secretary of the faculty to convene a panel of at least three former chairs of the Committee on Faculty Rights and Responsibilities and/or the University Committee, or the secretary of the academic staff to convene a panel of at least three former chairs of the Academic Staff Appeals Committee and/or the Academic Staff Executive Committee to provide advice on this question, or may ask his/her department to ask for such advice.
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