

Protected Speech & Retaliation Related to Sexual Misconduct

Krista Anderson, Systemwide Title IX Coordinator
Sean Flammer, Associate General Counsel

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Agenda

1. Protected Speech:
 - Free Speech vs. Prohibited Conduct
 - Academic Freedom
2. Protected Activity & Retaliation
3. Examples & Scenarios

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Protected Speech

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First Amendment Rights: Free Speech & Academic Freedom

Constitutionally protected expression **cannot** be considered Sexual Misconduct (e.g. “sexual harassment,” “other inappropriate sexual conduct”) under the institution’s Sexual Misconduct policy.

The **subjective offensiveness of speech**, alone, is not sufficient to create a hostile environment.

Note: Neither party may be restricted from discussing allegations or from gathering evidence in a grievance process.

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Institutional Sexual Misconduct Policy (Example)

Prohibits sex discrimination, sexual harassment, retaliation, and other prohibited conduct under the policy, including:

- Sex Discrimination
- Sexual Harassment
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking
- Retaliation
- Sexual Exploitation
- Other Inappropriate Sexual Conduct
- False Information & False Complaints
- Interference with the Grievance Process
- Failure to Report (for Responsible Employees)

Policy Differences Note: For the purposes of this training, the UTS Model Policy for Sexual Misconduct will be the primary policy reference. UT Institutional policies may have some differences.



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Source:

UT System Model Policy for Sexual Misconduct (2021)

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Conduct on the basis of sex that satisfies one or more of the following:

Definition of
“Sexual
Harassment”
under Title IX

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the institution’s education program or activity; or
3. “**Sexual assault**,” “**dating violence**,” “**domestic violence**,” or “**stalking**” as defined under Clery/VAWA.



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Source: *Title IX Regulations (2020)*

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Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is prohibited inappropriate or unprofessional sexual conduct.

Such conduct is:

1. **Verbal conduct** (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.
2. **Physical conduct** that is objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.



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Source:

UT System Model Policy for Sexual Misconduct (2022)

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“Other Inappropriate Sexual Conduct” Cont.

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature;
- Deliberate physical interference with or restriction of movement; or
- Consensual sexual conduct that is unprofessional and inappropriate, and created a Hostile Environment.



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Source:

UT System Model Policy for Sexual Misconduct (2022)

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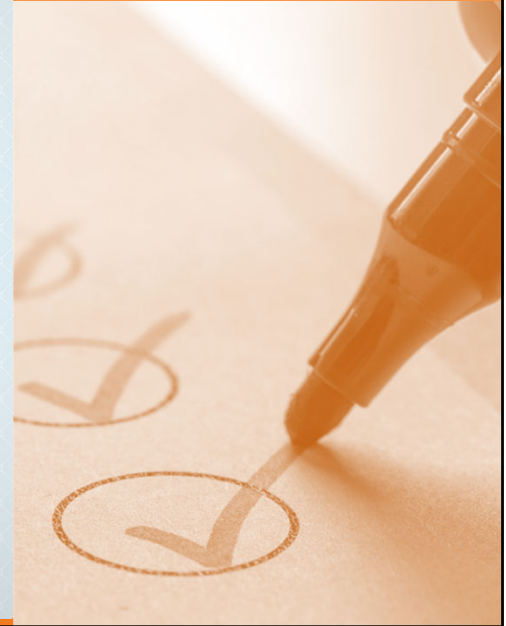
Some of the more relevant party's rights, when considering **protected speech issues**:

- To be informed of a **notice of formal complaint** to the University, whether filed by a CP or the TIXC.
- To be given **equal chance** to **participate** in a grievance process, or choose **not to participate**.
- To have access and equal opportunity to **inspect** and **review any relevant evidence obtained** as part of the investigation, and to receive a copy of the completed investigation report.
- To be **equally informed of any determinations** regarding responsibility, dismissals of formal complaints, and/or a party's filing of an appeal.



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Party's Rights



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- **Asking witnesses** about what they remember seeing or hearing regarding the alleged incident in question.
- Asking witnesses to **participate** in the University's grievance process.
- Posting on social media about one's **opinions** or **personal experiences** of sexual harassment, the University's grievance process, or how the University handles sexual misconduct matters.
- Telling others that they are **accused** of sexual harassment, or a **victim/survivor** of sexual harassment; and they are currently going through the University's grievance process.



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Examples of Protected Speech under Title IX



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Hypo 1:

A student posts on social media that the University's process is biased and flawed, and nobody should trust the University to "do the right thing."

Hypo 2:

A student makes a public statement that they were a victim of sexual assault and describes their "assailant" as someone that took advantage of them their freshman year at a XYZ Fraternity House.



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- Allows individuals to **invite speech** they wish to hear, **debate speech** with which they disagree, and **protest speech** they find offensive.
- An **instructor's choice** of course material, content, and pedagogy, creating assignments, and assessing student performance (germane to the curriculum and subject matter).
- Students & instructors engaging in **intellectual debate**, **expressing views** on or off campus, and/or making **comparisons or contrasts** between course subject matter.



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Protected Speech &
Academic Freedom on
Campus

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Academic Freedom Analysis

Possible questions and/or issues to consider further:

- a. Is the expression germane to the classroom subject matter?
- b. Does the expression at issue conflict with policies or standards of conduct?
- c. Is the expression at issue being addressed (e.g. investigated, examined) because of its **disruptive effect**?
- d. Is the expression at issue being addressed (e.g. investigated, examined) because of the **content of the speech**?
- e. Any mitigating action by the faculty, such as giving content warnings of the possibly provocative content?



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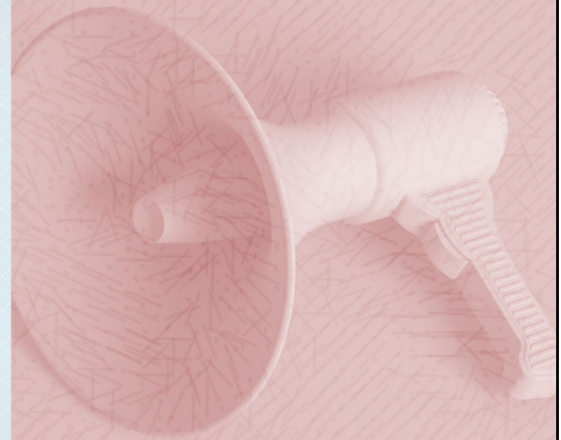
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- Defamation, slander, libel
- Targeted threats (or implied threats, “fighting words”) of violence
- Creates a clear and present danger
- Likely incites imminent lawless action
- Creates a **substantial disruption** to the **educational environment**
- Obscene speeches at school-sponsored events or distributes obscene material (which satisfies the three-pronged *Miller* test*)



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NOT Protected Speech



*Three-pronged *Miller* test on “obscene” material: <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity>

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Hypo 3:

A student makes an argument in their sociology class that *“sexual harassment is a fabricated social construct to further control and victimize men.”* The instructor encouraged others in class to debate and engage further on the matter, since it related to a relevant topic for class. But a couple of students make a complaint that it was “disruptive to the educational environment.”

Hypo 4:

Student A confronts Student B, accusing Student B of “sexual assault” against Student A’s dating partner (Student C). Student A grabs Student’s B by the shirt and says *“Don’t you ever touch Student C ever again, or you’ll be sorry!”* Student B files a complaint against Student A for threats of violence.



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Hypotheticals

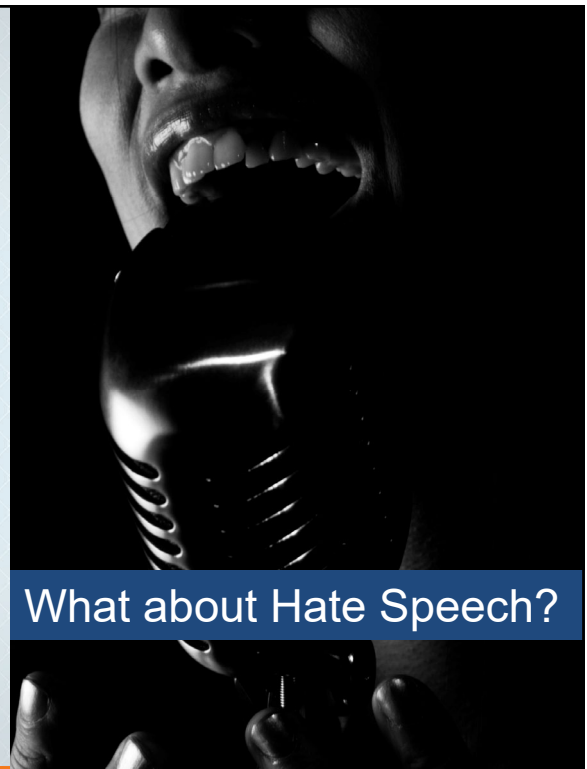
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No First Amendment exception for –

- “Hate Speech,” such as:
 - Bigotry
 - Racism
 - Sexism
 - Religious intolerance
- Ideas or matters that some individuals may find “trivial,” “vulgar,” or “profane.”
- First Amendment permits speech that is **subjectively**:
 - “Offensive”
 - “Inappropriate”
 - Subjective feelings – “feels uncomfortable,” “feels unsafe,” “feels threatening,” etc.



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What about Hate Speech?

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Hypo 5:

Student A posts on social media the following statements: *“Gun rights are human rights, and you can’t tread on me!”* and *“Women should stay in their place, and stop complaining about men!”* Students have complained about Student A’s posts, saying they “feel uncomfortable” and “feel unsafe on campus.”

Hypo 6:

In the quad, Student A and Student B are talking about their sexual experiences over lunch in an outdoor area of campus. A staff member makes a complaint about the sexually explicit nature of the conversation, and describes it “vulgar” and “profane” to hear that in public, and it created a “hostile environment” for that staff member.



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Hypotheticals

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Hypo 7:

Student X and Y were in a dating relationship, and Student X recently broke up with Student Y. They both live in the same residence hall. Student Y frequently calls Student X a “slut” and “whore” when they are passing each other in the residence halls. Student Y also posts notes on Student X’s door, alleging that Student X “sleeps around” with drawings of Student X in various sexual positions.

Hypo 8:

Student Z posts on social media *“Women are whores! One person in particular comes to mind, and she is the easiest b*tch you’ll ever meet.”*



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Hypotheticals



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Harassing Speech vs. Protected Speech



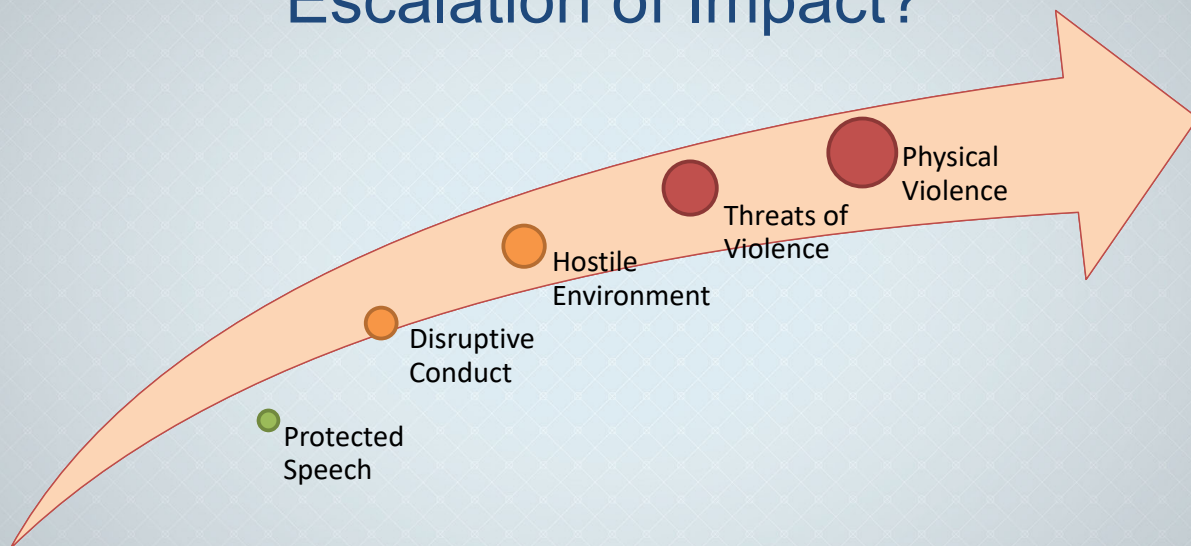
Example **factors** to consider:

- Accompanied by **conduct**?
- The **effect** is more than **subjectively offensive**?
- Targeted at a **specific** person or group?
- The **setting** of the speech?
- Of **public** concern?
- **Outside** of the context of **academic freedom**?
- The speech constitutes an **unprotected category**?

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The Speech in Question: Escalation of Impact?



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Protected Activity & Retaliation Prohibited

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Retaliation Prohibited under Title IX

No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX; or because an individual has made a report or formal complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

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Responsible Employee Reporting Requirements

Under the institution's Sexual Misconduct Policy, **Responsible Employees** have a duty to report incidents and information reasonably believed to be sexual misconduct (prohibited conduct defined) under the Policy.

All employees are Responsible Employees (except Confidential Employees or police officers when a victim uses a pseudonym form). Responsible Employees include all administrators, faculty, and staff.

Responsible Employees must report all known information concerning an alleged incident of sexual misconduct to the **Title IX Coordinator**.

Source:
UT System Model Policy for Sexual Misconduct

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Definition of "Failure to Report" for Responsible Employees

If a Responsible Employee knowingly fails to report all information concerning an incident the employee reasonably believes constitutes Sexual Misconduct (including stalking, dating violence, sexual assault, or sexual harassment) committed by or against a student or employee at the time of the incident, the employee is subject to disciplinary action, including termination.

Source:
UT System Model Policy for Sexual Misconduct;
Tex. Edu. Code Section 51.252-51.259



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Definition of “Retaliation”

Any **adverse action** (including, but is not limited to, intimidation, threats, coercion, harassment, or discrimination) taken against someone because the **individual has made a report** or filed a Formal Complaint; or who has supported or provided information in connection with a report or a Formal Complaint; participated or refused to participate in a Grievance Process under this Policy; or engaged in other legally protected activities.

Note: Any person who retaliates against (a) anyone filing a report of Sexual Misconduct or Formal Complaint, (b) the parties or any other participants (including any witnesses or any University employee) in a Grievance Process relating to a Formal Complaint, (c) any person who refuses to participate in a Grievance Process, or (d) any person who under this Policy opposed any unlawful practice, is subject to disciplinary action up to and including dismissal or separation from the University.



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Source:

UT System Model Policy for Sexual Misconduct

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Intimidation Definition

Unlawfully placing another person in reasonable fear of bodily harm through the use of threatening words and/or other conduct, but without displaying a weapon or subjecting the victim to actual physical attack.



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Source:

UT System Model Policy for Sexual Misconduct

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Coercion Definition

The use of unreasonable pressure to compel another individual to initiate or continue sexual activity against an individual's will. Coercion can include a wide range of behaviors, including psychological or emotional pressure, physical or emotional threats, intimidation, manipulation, or blackmail that causes the person to engage in unwelcome sexual activity. A person's words or conduct are sufficient to constitute coercion if they eliminate a reasonable person's freedom of will and ability to choose whether or not to engage in sexual activity.



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Source:

UT System Model Policy for Sexual Misconduct

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Examples of Work-Related Adverse Action Under Policy

Note: The policy definition of "adverse action" is broader than in the law.

- **Demotion:** Losing status, responsibilities or seniority privileges associated with your position, or being assigned a lower-ranking position
- **Termination:** Being terminated from your position, or threats to terminate your employment.
- **Salary reductions or loss of hours:** Receiving a pay cut or losing regularly scheduled hours
- **Exclusion:** Being intentionally kept out of staff meetings, trainings, or other activities made available to fellow employees
- **Reassignment:** Being reassigned duties or rescheduled in a way that causes you undue hardship
- **Unwarranted negative implications:** Such as refusal to hire, negative performance reviews, warnings, or performance improvement plans



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- **Unwarranted lowering of grades or failing grades:** Unwarranted lowering of grades or failing grades on assignments, exams, or overall failing course grade
- **Suspension/Expulsion:** Threats of disciplinary sanctions, such as suspension or expulsion
- **Exclusion:** Being intentionally kept out of student activities that otherwise would have the right to access
- **Reassignments:** Being reassigned or moved to different courses or an on-campus housing location (if applicable) without a legitimate reason

Examples of School-Related Adverse Action Under Policy

Note: The policy definition of "adverse action" is broader than in the law.



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Retaliation Analysis

Possible questions and/or issues to consider further:

- Did the complaining party participate in **protected activity** that is covered under a retaliation provision?
- Did the complaining party experience a form of **adverse action**?
- If yes to (A and B), was the adverse action taken **BECAUSE OF** protected activity in which the complaining party was engaged in? (Causal connection?)
- Did the person of concern offer a non-retaliatory or non-discriminatory **reason** for the action taken?
- If yes to (D):
 - Was this reason **legitimate**; or
 - Was this reason possibly **pretext** for retaliation or discrimination?



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Hypo 7 Continued (from earlier):

Student X and Y were in a dating relationship, and Student X recently broke up with Student Y. They both live in the same residence hall. Student Y frequently calls Student X a “slut” and “whore” when they are passing each other in the residence halls. Student Y also posts notes on Student X’s door, alleging that Student X “sleeps around” with drawings of Student X in various sexual positions.

Student X complains that they are being harassed and retaliated against by Student Y because Student X broke up with Student Y.



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Hypotheticals



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Hypo 9:

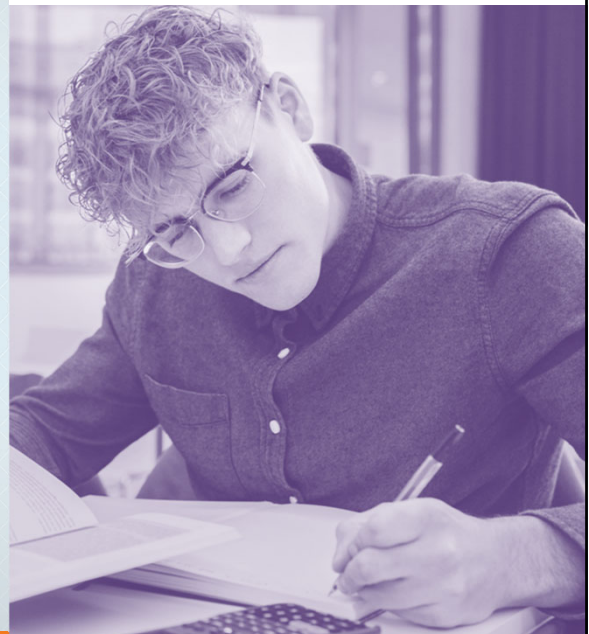
Student A and B “hooked up” one time. Student A files a formal complaint alleging that they are being “sexually harassed” by Student B, after telling Student B that they aren’t interested in a dating or sexual relationship with Student B. Student A also asks for a no contact directive (NCD) so that the alleged behavior stops.

Upon receiving the formal complaint notice and the NCD, Student B sends Student A an email, saying *“I wasn’t harassing you, geez! You are taking things way too far. This isn’t fair! If you don’t withdraw this complaint, I’m going to tell everyone about your weird sexual fetishes and humiliate the f*ck out of you!”*



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Hypotheticals



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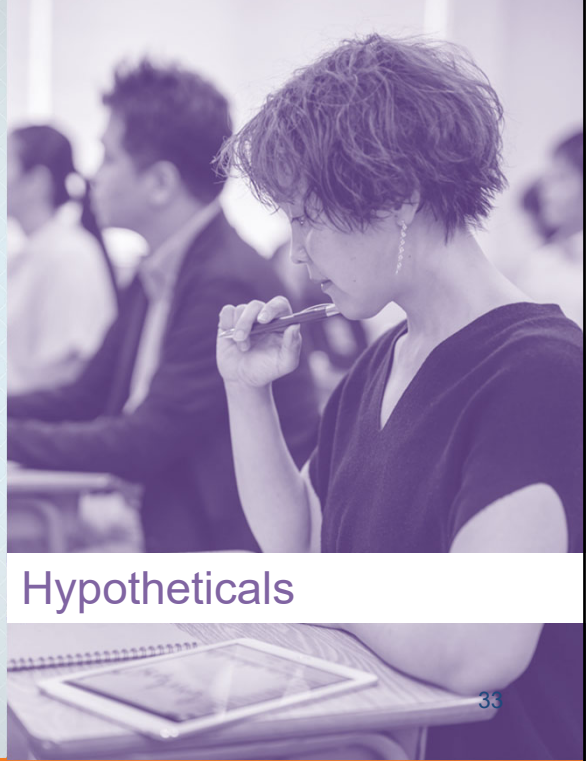
Hypo 10:

A formal complaint is filed against Professor A that alleges the professor engaged in sexually explicit jokes and comments during the professor's classes. Several students from the class participate in the investigation as witnesses corroborating the allegations as true, saying they heard the professor's jokes and comments directly while in class. As a matter of due process, Professor A is informed of all witnesses and their specific statements and evidence provided during the investigation. Professor A is found responsible for "Other Inappropriate Sexual Conduct."

Then, these same students started receiving failing grades for Professor A's class, despite keeping up with the coursework and completing all of the remaining assignments by their deadlines. The students claim they should have earned passing grades for their remaining coursework, and the grading changed once the professor was found responsible for a policy violation. The students file complaints that they were retaliated against by Professor A for participating in the investigation.



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**Hypotheticals**

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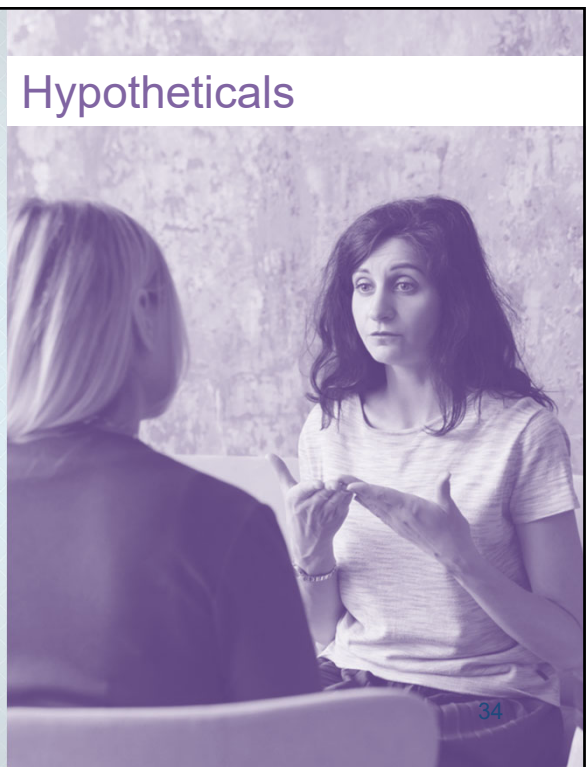
Hypo 11:

Respondent has been given notice of sexual misconduct allegations and notice of the investigation. Respondent reaches out to possible witnesses that the Respondent sees as relevant in proving the Respondent is not responsible for the allegations.

The witnesses tell the Respondent they do not want to participate, but the Respondent says the witnesses are going to be called by the investigator(s) nonetheless. The witnesses feel the Respondent's outreach and persistence in naming them as witnesses is a form of retaliation.



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**Hypotheticals**

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Hypo 12:

Respondent, an academic advisor, is alleged of making sexist and sexually-explicit jokes and comments during an advising appointment with a student. The advisor's supervisor has allowed the advisor to continue work-related duties, but the advisor is not permitted to hold 1:1 advising appointments with students while the investigation and grievance process is ongoing.

The advisor claims that the other staff in the office no longer talk to them because they are being investigated and everyone knows about it. The supervisor gives the advisor the option of going on administrative leave while the process is ongoing/pending to avoid any discomfort or issues in the office. The advisor opts to stay and continue working in the office.

The advisor then files a compliant of retaliation against the coworkers saying that their avoiding the advisor has made the advisor feel "ostracized and alienated in the work environment."



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Hypotheticals

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- How can the institution **prevent** retaliation from occurring?
- Is "**fear**" of retaliation protected activity? Any options available?
- If the elements of "retaliation" cannot be fully established, institutional **due diligence**:
 - Other possible SHSM policy violation(s) implicated?
 - Other institutional action applicable to the conduct/allegations at issue?

Other Considerations

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Q & A



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Contact Information

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Associate General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu



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