



# **FACULTY TRAINING MANUAL**

**POLICIES AND LAWS PROHIBITING  
SEXUAL AND OTHER DISCRIMINATORY  
HARASSMENT**

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## I. INTRODUCTION

It is perhaps best to begin this training manual by explaining why familiarity with this subject is a required part of your participation as a faculty member in the Law School academic community. The University of Connecticut School of Law Policy on Harassment (Appendix A) was motivated by the faculty and administration's aspiration to ensure a comfortable and productive educational and work environment for all members of the Law School community. Historically, the Law School has not been entirely free of complaints by staff and students concerning sexual and other discriminatory harassment. Fortunately, however, this faculty has consistently demonstrated a genuine concern for the welfare of all members of the community. As a result, even faculty who have been the subject of complaints have been receptive to learning how to eliminate such complaints. This manual is, therefore, aimed primarily at helping faculty to recognize and alter behavior that makes students, staff, and other faculty members uncomfortable.

Although the policies on sexual and other discriminatory harassment at this institution are based historically on a voluntary interest in creating and maintaining a comfortable working and learning environment, it should be noted that this manual and our training sessions on sexual and other discriminatory harassment also are motivated by legal requirements imposed by the State and Federal Government and by a desire to protect both the institution and individual faculty members from legal liability. See Sections III and IV.

This manual begins by presenting information on the Law School's policies on sexual and other discriminatory harassment. Following a discussion of The Law School Policy on Harassment, the remaining sections of the manual present the legal requirements concerning sexual and other discriminatory harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1981), other employment discrimination statutes, Title IX of the Civil Rights Act, 20 U.S.C. §§ 1681-1688 (2000), Connecticut statutory and tort law, and the Equal Protection Clause of the United States Constitution. Section VI of this manual considers the impact of the Supreme Court's recent 11th Amendment

cases on the Law School's obligations under federal anti-discrimination statutes. Section VI also briefly considers sovereign immunity, the personal liability of law professors, and qualified immunity.

Although some understanding of the legal background for the Law School Policy on Harassment is useful and interesting, our Policy imposes limits on faculty conduct that do not depend on external law for enforcement. The Policy is more restrictive than the prohibitions imposed by law. By understanding and complying with these restrictions, you not only will assist in creating a comfortable learning and working environment, you also will protect yourself from disciplinary action under the Policy.

In addition, by learning how to promote compliance with the Law School Policy, you can protect both yourself and the Law School from liability under federal anti-discrimination law.<sup>1</sup> Several legal principles established in cases addressing the statutory liability of employers and schools for sexual harassment have combined to highlight the importance of the Law School Policy on Harassment as the primary mechanism for compliance with the law and for maintaining a non-discriminatory atmosphere at the Law School.

First, an employer is not liable for harassment of employees by co-workers and third parties unless the employer knows or has reason to know of the harassment **and** fails to adequately respond. See Section III. The Law School Policy on Harassment, therefore, not only helps to maintain a non-discriminatory atmosphere for employees of the Law School, it also provides a defense to discrimination charges relating to co-workers and third parties, but only if the Policy is applied to respond to and remedy complaints of discriminatory harassment.

Second, the Supreme Court recently held that an employer is vicariously responsible for harassment by supervisory employees, which includes faculty when they are acting in a supervisory capacity. When no

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<sup>1</sup>See Section III for a discussion of sexual and other discriminatory harassment under Title VII of the Civil Rights Act of 1964 and other employment discrimination statutes. See Section IV for a discussion of sexual harassment under Title IX of the Civil Rights Act of 1964.

tangible employment action was taken against the complaining employee, however, the employer has an affirmative defense to liability if the employer can show “(a) that the employer *exercised reasonable care to prevent and correct promptly any sexually harassing behavior*, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington Industries v. Ellerth*, 524 US. 742, 765 (1998) (emphasis added). The Court went on to state that “[w]hile proof that an employer had promulgated an anti-harassment policy with complaint procedures is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.” *Id.* at 773.

Third, under Title IX, damages are not available for sexual harassment of students unless an official of the funded program “who has authority to address the alleged discrimination and institute corrective measures . . . has *actual knowledge of the discrimination and fails adequately to respond*. . . . [M]oreover . . . the response must amount to deliberate indifference to discrimination.” *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998) (emphasis added).<sup>2</sup>

It is clear that maintaining and enforcing the Law School’s anti-harassment policies is important, not only to promote a non-discriminatory atmosphere at the Law School, but also to protect against liability should an employee or student bring his or her complaint to court. It is important, therefore, that faculty participate in ensuring compliance with the Law School’s anti-harassment policies. A final reason for considering Law School Policy first is that this area of the law changes rapidly. Our internal policies, however, have remained the same for many years and will continue in force until we ourselves choose to change them.

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<sup>2</sup>See Section IV for a discussion of sexual harassment under Title IX of the Civil Rights Act of 1964 which prohibits sex discrimination in education by schools receiving federal funding.

## II. PROHIBITED HARASSMENT UNDER THE LAW SCHOOL POLICY

The Law School Policy on Harassment [the Policy] applies to "all student, staff and other employee relationships in which one individual has institutional authority over another . . ." The Policy also applies to "relationships between or among employees . . . regardless of whether institutional authority is implicated." The Policy can be found in Appendix A of this manual. Please read it with care.

### A. Sexual Harassment

Sexual harassment is a form of sex discrimination. The Law School Policy defines sexual harassment. The examples of sexual harassment provided in the Policy are designed to illustrate the Policy's basic definition of sexual harassment:

[A]ny unwanted sexual advance or other conduct of a sexual nature whereby (a) submission to these actions is made either explicitly or implicitly a term or condition of an individual's employment, performance appraisal, or evaluation of academic performance; or (b) these actions affect the conditions of an individual's education or employment by creating an intimidating, hostile, or offensive environment. Such conduct will constitute sexual harassment regardless of whether it is directed towards a person of the opposite or the same sex. Appendix A, at iii.

If you are familiar with the concept of sexual harassment under state and federal anti-discrimination statutes, keep in mind that the Law School Policy prohibits conduct that would not necessarily be actionable under anti-discrimination statutes. To familiarize you with sexual harassment **as defined in our Policy**, consider whether the following complaints are covered by the Policy. Following each group of hypothetical complaints there are comments concerning the application of the Law School Policy to these complaints. It will greatly facilitate your understanding of our policy if

you consider the application of the Policy to the hypothetical situations **before** you read the comments that follow.

Please understand that not all of the hypothetical complaints violate either the Law School Policy or state or federal law. Nonetheless, from the perspective of maintaining a comfortable atmosphere for students from a variety of backgrounds, it is helpful to think about the impact that our behavior has on the learning atmosphere in our classrooms and on the working and learning atmosphere at the Law School in general. Even if certain behavior does not violate either the law or the Law School Policy, it nonetheless might be appropriate to avoid for purposes of maintaining a comfortable learning and working environment.

### ***Academic Freedom and Free Speech Issues***

1. In a professor's hypothetical fact patterns presented in class, the judges, lawyers and business people always are men, while the women usually are interior decorators, sales clerks or perfume counter girls.
2. A professor uses sexually explicit hypothetical situations in class or in examinations.
3. A faculty or staff member expresses the opinion that sexual harassment laws are an intrusion on free speech and privacy and should never have been enacted.
4. A professor refers to older, married women as "rich bitches."

**COMMENTS:** The Law School Policy provides that sexual harassment includes "classroom behavior of a sexual nature, not legitimately related to the course, that creates an intimidating, hostile or offensive environment." Appendix A, at iii. With respect to statements that a professor makes in class or to fact patterns used in examinations, it is important, therefore, to determine whether the professor's remarks or fact patterns are legitimately related to the course. Even explicit sexual material may be permissible if it is related to the course (e.g. obscenity under the First Amendment, rape in a criminal law class or sexual harassment in an employment discrimination

class). The remark in number three obviously is relevant to a number of courses. Suppose, however, that comments similar to the comment in number three are made regularly in a course, such as contracts, that ordinarily does not touch on these issues? The comments may be offensive to some students, but present a legitimate point of view. Whether they are "legitimately related to the course" raises difficult questions regarding academic freedom.

Another consideration with respect to presenting material in class that is distressing to some students is the reality that many topics discussed in law school classrooms are stressful to some students despite the fact that these topics legitimately relate to the subject matter of the course. Discussions of rape in a criminal law class or obscenity in a constitutional law course are legitimately related to those courses and may not violate the Policy even if students who have experienced some form of sexual assault are upset by them. On the other hand, even sexual matters legitimately related to a course can be discussed in an unnecessarily offensive way. Our Policy explicitly prohibits teaching materials that "gratuitously emphasize sexuality or sexual stereotypes." Professors teaching courses that address these issues should plan such discussions carefully to ensure that the required information is imparted and discussed without unnecessarily disturbing students. Professors who are concerned with ensuring that their presentation of such issues is appropriate may want to invite another member of the faculty to attend a class in which sensitive issues are being discussed in order to receive advice and counsel from a colleague.

Comments made outside of the class context raise similar problems. Although professors have academic freedom and First Amendment rights, the right to speak freely has limits.<sup>3</sup> This is a workplace and even though it

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<sup>3</sup> See e.g. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992) ([S]ince words can in some circumstances violate laws directed not against speech but against conduct . . . . A particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech, Thus, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices . . . ."); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding restriction on "indecent" speech to protect the privacy of individuals in their home).

is a workplace in which debating divergent ideas is part of our mission, a faculty member who imposes on students, professors, or staff members viewpoints that denigrate their worth on the basis of gender or that expose them to sexually explicit language may violate our Policy depending on the frequency, severity, and context of the remarks. The line between prohibited behavior and legitimate “free debate of issues and ideas” (which is explicitly not prohibited) is based on whether the words or conduct create an “intimidating, hostile, or offensive environment” on the basis of sex.

In the public sector, the Supreme Court has developed First Amendment doctrine to protect both government employee’s free speech rights and government employers’ need to control their employees in the workplace. The Court has held that employees who speak on matters of public concern may not be disciplined unless the government has interests in restricting that speech that outweigh the employee’s free speech rights.<sup>4</sup> Circuit courts, including the Second Circuit, have found government employers’ interests in preventing disruption sufficient to justify restricting harassing speech even in academia. See *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) (demotion of state college professor for anti-Semitic remarks held not to violate the First Amendment because trustees reasonably believed the speech would disrupt college operations). See also *Tindle v. Caudell*, 56 F.3d 966 (8<sup>th</sup> Cir. 1995) (employee suspended for appearing in black-face at an office Halloween party not protected by the First Amendment; suspension justified to maintain harmonious working relationships).

Some of the statements listed above are sexist, but not necessarily sexual. Even though such comments may not constitute sexual advances or conduct of a sexual nature, they still may violate our Policy as “other discriminatory harassment” based on gender. See Appendix A, at v-vi.

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<sup>4</sup>See *Pickering v. Board of Education*, 391 U.S. 563 (1968) (invalidating a school board’s discharge of a teacher who wrote a letter to a local newspaper challenging a school bond proposal). Later cases have cut back on the protection provided in *Pickering* by deferring to employer’s justifications for restricting speech even when it addresses a matter of public concern. See *Connick v. Myers*, 461 U.S. 138 (1983); *Waters v. Churchill*, 511 U.S. 661 (1994) (employer’s reaction need only be reasonable when it discharges a worker to prevent disruption).

Some of the complaints that students have made at this law school have involved faculty behavior in class. Students have complained when faculty members have brought sex into the discussion of issues that are unrelated to sex. They have complained when women are referred to as sexual objects. They have complained when a professor's treatment of rape or obscenity or sexual harassment is unnecessarily explicit. Students also have complained about swearing in class and about comments that stereotype women or minority group members. Professors should be aware that using sex or stereotyping remarks to "lighten up" a class presentation not only violates our Policy, but also may have the unintended effect of alienating a substantial minority of the class.

### ***Comments on Appearance***

1. A professor critiques a student's clothing in an oral argument.
2. A female faculty member or administrator comments often on the way her secretary looks and dresses.
3. A professor tells a student that she is dressed attractively on a day that she is wearing a suit because she has an interview.
4. A professor or administrator tells a student that he is dressed attractively on a day that he is wearing shorts and a tank top.

**COMMENTS:** There has been some controversy in the Law School community over the appropriateness of commenting on the appearance of a student, professor, or staff member. It is clear that some individuals find such comments offensive even if they have no sexual overtones. The sexual harassment section of our Policy explicitly prohibits only "*suggestive* remarks about a person's clothing or body." Appendix A, at iv (Emphasis added). A single comment concerning appearance that is not suggestive does not constitute sexual harassment under our Policy.

One problem is distinguishing between *suggestive* comments regarding appearance and those that are not. In some cases the words will be suggestive. In other cases, “neutral” words may become suggestive when accompanied by gestures and/or expressions. Such comments may create a hostile environment for students and staff and may, therefore, be covered by our policy prohibiting other discriminatory harassment. In addition, appearance comments which are not suggestive, but which target only women (or only men) treat men and women differently. Such comments may create a hostile environment for female (or male) students and staff and may, therefore, be covered by our policy prohibiting other discriminatory harassment. See Appendix, at vii.

Some of the complaints that students and employees have brought to sexual harassment advisors have concerned comments on appearance. A staff member complained about a comment that her dress was “sexy.” A student complained when a faculty member made appreciative and mildly suggestive remarks about her legs when she was wearing shorts. Students have complained about being followed by a professor and subjected to “suggestive” staring.

Because some students and staff find even relatively innocuous remarks about appearance distressing, faculty members may choose to refrain from making such comments even though they do not violate our Policy. If it seems to you that students should *not* be distressed by respectful complimentary remarks, consider the plight of the attractive student who constantly receives positive remarks about his or her appearance, but rarely is asked to engage in discussions of academic or legal issues. What message is this student receiving? Perhaps the solution is to try to ensure that any comments about appearance are balanced by substantive academic discussion.

### ***Romantic or Sexual Advances and Touching***

1. A student flirts with a professor.
2. A professor flirts with a staff member who dresses in sexually attractive clothes.

3. A professor routinely touches the shoulders of other professors, staff members and students (male and female) as she talks with them.

**COMMENTS:** With respect to number one, consider the school's policy on consensual relationships (See Appendix A, at iv-v). Also, keep in mind that under Title VII of the 1964 Civil Rights Act, professors have a right to be free of a sexually hostile environment. Title VII is discussed in Section III of this manual. Ordinarily a professor has sufficient institutional power to protect himself or herself from sexual harassment by students. A professor might, however, be intimidated if approached by an aggressive student or a professor may simply feel awkward trying to ward off the sexual advances of a student. If a professor needs institutional assistance to protect against unwelcome sexual advances from a student, the professor is statutorily entitled to such assistance.

With respect to number two, “unwanted sexual advances” are expressly prohibited by our Policy. Appendix A, at iv. Dressing in attractive or provocative clothing is *not* considered an invitation to sexual remarks or advances. Consider again the school’s policy on consensual relationships. Our Policy strongly discourages even consensual relationships between any professor, administrator or staff member and any student, professor, administrator or staff member especially if one party to the relationship wields institutional authority over the other party. See Appendix A, at iv-v.

Our Policy prohibits sexually harassing conduct directed at a person of the same sex as the harassing individual. The Policy states that prohibited conduct constitutes “sexual harassment regardless of whether it is directed towards a person of the opposite or the same sex”. Appendix A, at iii. Therefore, although touching a person on the shoulder (number three) may or may not constitute sexual harassment, the gender of the parties is not necessarily a relevant consideration. Relevant considerations include the words that accompanied the gesture, what the person being touched was wearing at the time, and how frequently the professor engages in this conduct.

Students and staff have complained about sexual advances from faculty members. Faculty should be aware that serious harassment, such

as sexual advances that are accompanied by explicit or implicit threats of adverse academic or employment consequences for failing to cooperate can result in loss of employment. While ordinarily it is quite difficult to discharge a tenured professor, several of the reported cases in which universities have succeeded in discharging a tenured professor have involved sexual misconduct. See e.g. *In Re Kozy*, 371 S.E. 2d 778 (N.C. Ct. App. 1988); *Cockburn v. Santa Monica Community Coll. Dist. Personnel Commission*, 207 Cal. Rptr. 589 (Cal. Ct. App. 1984).

### ***Humor and Art?***

1. A faculty member tells off color jokes at lunch. For example:

Q: What is this: 10, 9, 8, 7, 6, 5, 4, 3, 2, 1?

A: Bo Derek getting older.

2. A faculty member sends email jokes to other faculty members that poke fun at women and men and their relationships. For Example (taken from an email on how to “sing da blues”):

Some Blues names for women:

- a. Sadie
- b. Big Mama
- c. Bessie
- d. Fat River Dumpling

Some Blues names for men:

- a. Joe
- b. Willie
- c. Little Willie
- d. Big Willie

3. A faculty member hangs a poster of Madonna on his wall.

“Jokes or anecdotes of a sexually explicit nature” are expressly prohibited by our policy against sexual harassment and jokes that denigrate men or women or any other “protected” group violate our policy against other discriminatory harassment. See Appendix A, at iv & vii. Even

if the recipient of the joke seems to appreciate it and seems to join in, this does not necessarily indicate comfort with the situation.

Recently, a complaint was lodged about offensive internet jokes that were posted on a bulletin board at the Law School. Students also have complained about professors who joke about sex in class. This is an extremely risky area. While every reference to sex or sexuality that elicits a laugh is not necessarily sexual harassment under our Policy, most jokes of that nature are discriminatory either because they denigrate women or men or because they suggest that their primary utility is sexual rather than professional. Even jokes that do not rise to the level of harassment under our Policy may cause some students, faculty or staff members to be uncomfortable. In the interest of creating a comfortable environment, it may be beneficial to simply avoid such humor.

The “examples” provided in number one and two were selected because they are *reasonably innocuous*. Finding jokes related to sex that would not be offensive or would be only mildly offensive if told or distributed in a law school classroom or workplace proved somewhat difficult. The lesson to be learned may be that most jokes that concern sex are inappropriate in this context.

With respect to number three, our Policy does not specifically address the issue of art and other wall decorations. Whether the poster violates our Policy depends on how sexually explicit it is and how easily it can be distinguished from art. Although such posters may not violate our Policy, faculty members may choose to voluntarily refrain from displaying such material in their offices on the ground that it is not worth having on the wall if it disturbs some students, faculty, or staff members.

This discussion of sexual harassment has focused primarily on borderline cases. Obvious harassment will not be difficult to identify. Faculty members who seek romantic or sexual relationships with individuals who repeatedly have said “no” clearly violate our Policy. Similarly, conditioning a job, raise, grade, promotion or good evaluation on “submission to sexual advances” violates our Policy. It should be equally obvious that grunts, whistles, and intimate touching are Policy violations. Even a single incident of unwelcome intimate touching violates our Policy and may violate federal and state law as well. Our Policy expressly

prohibits “intentional and unwanted touching, patting, hugging, or other physical contact” as well as “remarks about sexual activity or speculations about sexual experience.” Professors must understand that such behavior will not be tolerated at this institution. Tenure does not provide protection against sexual misconduct of this nature. See e.g. *In Re Kozy*, 371 S.E. 2d 778 (N.C. Ct. App. 1988); *Cockburn v. Santa Monica Community Coll. Dist. Personnel Commission*, 207 Cal. Rptr. 589 (Cal. Ct. App. 1984).

## **B. Consensual Relations**

The Law School Policy includes a separate section concerning consensual relations. See Appendix A, at iv. Please read this section with care. Notice that consensual relations, while not prohibited, are strongly discouraged. The alleged consensual nature of a relationship does not preclude a charge of harassment based on that relationship. Such relationships are, in fact, presumed to involve sexual harassment. The Law School Policy restriction on consensual relations is more stringent than the restrictions on sexual harassment imposed by anti-discrimination laws. This restriction applies to any member of the Law School community who has institutional authority over another individual in the community.

Notice that faculty are expected to avoid evaluating, supervising, instructing, or recommending any student with whom they have a relationship. Some situations make this responsibility difficult — for example, when a relationship develops in the middle of a course. Alternatives include asking another faculty member to grade the student's performance. In clinical courses in which performance other than written exams or papers must be evaluated, evaluation can be performed by another clinical faculty member. Assigning the grading process to another professor may, however, be nearly impossible if the course is taught solo and the evaluation involves oral presentations or subject matter which is unfamiliar to other faculty members. In this case a possible solution may be to provide a pass/fail grade. If this situation arises, it may be wise to consult with the Dean to determine an appropriate way to evaluate the student.

Consensual relations also are discouraged between any faculty member and any individual over whom he or she wields institutional authority. Not only are such relationships discouraged, individuals with

institutional authority are prohibited from exercising that authority over any person with whom they have a romantic or sexual relationship. Finally, such relationships are presumed to involve sexual harassment if one party complains.

### **C. Other Discriminatory Harassment**

The Law School Policy defines other discriminatory harassment as follows:

Other discriminatory harassment is conduct directed towards an individual because of that person's race, ethnicity, ancestry, national origin, religion, gender, sexual orientation, age or physical or mental disability, that creates a hostile, intimidating or offensive working or learning environment. Appendix A, at vii.

The Policy provides examples to illustrate discriminatory harassment. In order to help you familiarize yourself with the Policy, consider whether the following behavior is covered or not. Following each group of hypothetical complaints there are comments concerning the application of the Law School Policy to these complaints. Again, it will greatly facilitate your understanding of our Policy if you consider the application of the Policy to the hypothetical situations *before* you read the comments that follow. Again, not all of the hypothetical complaints violate either the Law School Policy or state or federal law. Nonetheless, from the perspective of maintaining a comfortable atmosphere for students from a variety of backgrounds, it is helpful to think about the impact that our behavior has on the learning atmosphere in our classrooms and on the working and learning atmosphere at the Law School in general.

#### ***Jokes and Labels***

1. A professor routinely tells ethnic jokes to students before and after class.
2. A professor refers to "illegal aliens" when referring to undocumented workers in class.

3. A professor makes denigrating references to the legal systems of non-European cultures.
4. A professor jokes about Chinese law.
5. A professor refers to people of color as "those people."
6. A professor refers to an individual in a hypothetical as a "fag."
7. A professor refers to someone hospitalized for mental illness as "off-the-wall" or "loony."

**COMMENTS:** Number six involves the use of an insulting term to refer to a group of individuals. It is a "discriminatory epithet" that is likely to create a hostile environment for lesbian and gay students and may violate our Policy even if it occurs on only one occasion. Appendix A, at vii.

Number two, however, raises a difficult problem. The politically correct way to refer to members of different ethnic and minority groups changes from year to year. "Colored" was replaced by "Afro-American" which was replaced by "Black" which was replaced by "African-American" or "people of color." What is the politically correct terminology for people who have entered this country illegally? "Aliens" sound like an insult, but it is a term commonly used to refer to this group of people. The use of such a term probably does not violate our Policy. On the other hand, if a student has complained, at least one student was disturbed. A professor who has been told that students are uncomfortable with this terminology may want to refer to illegal immigrants or undocumented immigrants to avoid making students uncomfortable.

Number five may occur when a professor is afraid to use any more descriptive term for fear of picking one that may be offensive. Unfortunately, however, the practice of avoiding ethnic terms altogether may be even more insulting than the terms themselves. Professors who must refer to racial and ethnic groups in the course of teaching should consider avoiding trouble by making the issue a topic for discussion. It may be helpful to point out that a variety of terms have come and gone to refer to different ethnic groups and that the professor has chosen to use a term

which, for his or her generation, is the polite and respectful reference to that group and that no insult is intended to those of an older or younger generation. Ordinarily, if a professor demonstrates a respectful attitude towards all members of the class, regardless of their group identity, the precise terms he or she uses are unlikely to create a hostile environment.

With respect to the comments in number one, ethnic jokes may be standard fare for a comedy club or late night TV. They do not, however, belong in or around the classroom. Students have complained on this campus about jokes that target minority groups. With respect to number seven, when discussing mental disabilities, people often use stigmatizing language without having any sense that it is inappropriate or offensive.

Three and four raise issues similar to those discussed under the section on Sexual Harassment. These remarks may not constitute discriminatory harassment if “legitimately related to the course.” Conversely, such statements could violate the Law School Policy if they are part of a repeated pattern of comments designed to denigrate minority ethnic groups.

### ***Different Treatment***

1. A professor does not reprimand students who exhibit racial bigotry in class.
2. A professor calls on African American students to defend political theories or judicial decisions dealing with racial issues.
3. A professor calls on students of one race or gender more often than students of another race or gender or the professor calls only students of one race or gender by name.

**COMMENTS:** Calling on one group of students more than another or calling on African American or Hispanic students to discuss racism can be characterized as “behavior based on group stereotypes.” Such behavior certainly constitutes different treatment of students on the basis of gender, race, or national origin. A professor who engages in this behavior creates a hostile environment for the disfavored group. Such conduct may, however, be unconscious. Professors should try to be sufficiently observant of their

own behavior to avoid the appearance of different treatment. Students at this institution frequently have complained about this type of behavior.

Whether the professor who allows students to express bigotry in class violates the Law School Policy on Harassment depends on the nature of the class and the nature of the comments. The subject of the discussion may require comments that could be viewed as racist or sexist by some member of the class. The question again is whether the comments are legitimately related to the course.

This section on Other Discriminatory Harassment has again dealt primarily with situations that arguably may or may not violate the Law School Policy against Harassment. There are, of course, obvious ways to violate the Policy. As was already mentioned, the use of an insulting term such as a racial epithet may violate our Policy even if it is used only on one occasion. See Appendix A, at vii. Threats against or physical assaults on members of a protected group because of membership in that group obviously violate the Policy. See Appendix A, at vii. Similarly, intimidation or “subjecting a person to abuse, humiliation or ridicule” because of his or her membership in a protected group is expressly prohibited. Appendix A, at vii. And, of course, an individual’s membership in a protected group should never affect that person’s grades, work assignments, work evaluations, or any other tangible aspect of their life as a student or employee of the Law School. Behavior such as this will not be tolerated.

#### **D. Procedures and Remedies**

The Procedures and Remedies available under the Law School Policy can be found on pages viii-xi of Appendix A. The Policy provides for informal procedures which delegate to the Dean the authority to impose remedies in consultation with the complaining party. Alternatively, the victim of harassment may request mediation. No complaining party at the Law School has ever requested mediation. In the past, the Dean has spoken to faculty members concerning behavior that has been the subject of complaints. In addition, notations have been placed in the personnel files of some faculty members who have been the subject of complaints. In one case, a member of the faculty agreed to seek a job elsewhere after a complaint was filed and verified.

More formal means of resolving complaints are available at the University. Complaints of harassment are handled by The Office of Diversity and Equity. See Appendix B and C. No complaints against any faculty member at the Law School have ever been filed with the Office of Diversity and Equity.

Informal Law School Procedures do not reach complaints filed against staff who are union members. Complaints against union members can be initiated by making complaining to a harassment advisor or directly to the Dean. See Appendix C.

### **III. SEXUAL AND OTHER DISCRIMINATORY HARASSMENT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964<sup>5</sup> AND OTHER EMPLOYMENT DISCRIMINATION STATUTES**

Title VII prohibits discrimination in employment on the basis of “race, color, religion, sex, or national origin”. Stated simply, this statute is violated whenever an employer or an employer’s agent treats an employee differently on the basis of membership in one of these protected groups. Remedies available under Title VII include attorney’s fees, reinstatement, back pay, front pay, injunctive relief, and compensatory damages, including damages for emotional distress.

Within the Law School context, Title VII protects all employees, including research assistants, from discrimination, but does not extend protection to students unless they also are Law School employees. Sexual and other discriminatory harassment is prohibited by this statute because harassment imposes different conditions of employment on individuals on the basis of their membership in a protected group. Sexual harassment, for example, imposes different conditions of employment on women because of their gender.

There are two forms of sexual harassment under Title VII: quid pro quo and hostile environment. Quid pro quo harassment occurs when sexual conduct is made a condition of tangible employment benefits such as salary or promotion. Hostile environment harassment occurs whenever

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<sup>5</sup>42 U.S.C. §§ 2000e to 2000e-17 (1981).

the discriminatory work environment is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Meritor v. Vinson*, 477 U.S. 57, 67 (1986). See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

It is not necessary for an employee to suffer any tangible economic loss in order to be a victim of hostile environment harassment under Title VII. Members of any of the groups protected by Title VII (including men) can be victims of hostile environment discriminatory harassment. In addition, discriminatory harassment of individuals with disabilities violates the Americans with Disabilities Act of 1990 (ADA)<sup>6</sup> and 42 U.S.C. §1981 protects against race discrimination in employment. The Connecticut Fair Employment Practices Act <sup>7</sup> prohibits discrimination (including workplace harassment) on the basis of race, color, religion, age, sex, pregnancy, marital status, national origin, ancestry, and physical or mental disability. In addition, Connecticut law<sup>8</sup> prohibits discrimination on the basis of sexual preference.

Although the Law School Policy on Harassment is more restrictive than Title VII, the facts of a recent Supreme Court opinion are instructive with respect to the meaning of harassment under Title VII. In *Burlington v. Ellerth*, 524 U.S. 742 (1998), the Court accepted the District Court’s finding that the threats alleged by the plaintiff created a severe or pervasive hostile environment for her. In *Ellerth*, the plaintiff alleged that her supervisor made remarks about the appearance of her breasts, told her to “loosen up”, warned her that he could make her life hard at work, rubbed her knee, asked her to tell him what she was wearing during a work-related phone conversation, and told her that her job would be a lot easier if she wore shorter skirts.

Faculty should be aware that Title VII also protects employees from discriminatory harassment by co-workers and third parties such as

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<sup>6</sup>42 U.S.C. §§ 12111-12117 (2000).

<sup>7</sup>Conn. Gen. Stat. §§ 46a-60, 46a-70 (1999).

<sup>8</sup>Conn. Gen. Stat. § 46a-81a to 81r (1999).

students. Employers are liable for such harassment if they know or should know that it is occurring.

Because faculty members are supervisory employees, your knowledge that an employee is being harassed may be imputed to the Law School. If you receive a complaint from a Law School employee that he or she is being harassed on the job, you should report the problem to the Dean or to the employee's supervisor or to a harassment advisor regardless of the source of the harassment (e.g. student, co-worker, vendor, or another faculty member). Even if the behavior does not rise to the level of a statutory violation, it should be reported because no employee at the Law School should have to endure a discriminatory work environment

Finally, faculty themselves are employees and therefore protected by Title VII from discrimination in employment, including harassment. Faculty members are entitled to protection from discrimination, including harassment, even if the perpetrator is a co-worker or a student. A faculty member who believes that he or she has been the victim of discrimination, including harassment, should seek assistance from the Dean or from a harassment advisor.

As mentioned earlier, several legal principles established in cases addressing the liability of employers for sexual harassment have combined to highlight the importance of the Law School Policy as the primary mechanism for compliance with the law and for maintaining a non-discriminatory atmosphere at the law school.

First, an employer is not liable for harassment of employees by co-workers and third parties unless the employer knows or has reason to know of the harassment<sup>9</sup> **and** fails to adequately respond.<sup>10</sup> Second, the

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<sup>9</sup> But see *Distasio v. Perkin-Elmer Corp.*, 157 F.3d 55, 63-64 (2<sup>nd</sup> Cir. 1998)(plaintiff's allegation that her supervisor threatened her with the loss of her job if she reported a co-worker's harassing behavior, if proven, would render the employer liable for unreported incidents of harassment.)

<sup>10</sup> Compare *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998)(many cases have held that actual knowledge of harassing action of subordinates and failure to respond

Supreme Court recently held that an employer is vicariously responsible for harassment by supervisory employees. When no tangible employment action was taken against the complaining employee, however, the employer has an affirmative defense to liability if the employer can show “(a) that the employer *exercised reasonable care to prevent and correct promptly any sexually harassing behavior*, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (emphasis added). The Court went on to state that “the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.” *Id.* at 765.

It is clear that maintaining and enforcing the Law School’s Policy against harassment is important, not only to promote a non-discriminatory atmosphere at the Law School, but also to protect against liability should an employee bring his or her complaint to court. It is important, therefore, that faculty participate in ensuring compliance with the Law School policies against harassment.

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renders employer liable) with *Adler v. Wal-Mart Stores*, 144 F.3d 664-676 (10<sup>th</sup> Cir. 1998)(responses that are “reasonably calculated to end the harassment” are adequate to insulate the employer from liability even if new incidents of harassment occur); *Harris v. National R.R. Passenger Corp.*, 95 F.3d 396 (5<sup>th</sup> Cir. 1996) (by taking complaints seriously, conducting prompt and thorough investigation, and referring complaints to law enforcement, railroad responded adequately to complaints about anonymous harassing calls, notes, and graffiti); *Sanchez v. Alvarado*, 101 F.3d 223, 228-229 (1<sup>st</sup> Cir. 1996)(consistent investigation and graduated disciplinary response to harassment complaints adequate even though co-worker’s harassment not immediately stopped).

#### **IV. HARASSMENT UNDER TITLE IX OF THE CIVIL RIGHTS ACT**

Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1688 (2000), prohibits sex discrimination in any education program or activity receiving federal financial assistance. The Law School is covered by Title IX because many students at the Law School receive federal financial aid. See 20 U.S.C. §1687 (2000). A private right of action is available under Title IX and money damages may be awarded for an intentional violation of Title IX. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). Damages are not available for violations of Title IX, however, unless an official of the funded program “who has authority to address the alleged discrimination and institute corrective measures . . . has *actual knowledge of the discrimination and fails adequately to respond*. . . . [M]oreover . . . the response must amount to deliberate indifference to discrimination.” *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998) (emphasis added).

Again, this statutory scheme makes it unlikely that any student will be able to prevail against the Law School in a discriminatory harassment lawsuit *as long as the Law School maintains and enforces its anti-harassment policies*. Maintaining and applying the anti-harassment Policy makes sense, not only from the perspective of promoting a non-discriminatory environment for students, but also from the perspective of limiting the Law School’s liability should a student choose to file suit.

#### **V. ALTERNATIVE REMEDIES FOR DISCRIMINATORY HARASSMENT**

Title VII and Title IX are not the only sources of remedies for sexual and other discriminatory harassment in the employment and academic setting. As already mentioned, Law School employees have rights under Connecticut’s Fair Employment Practices Law and Connecticut law prohibiting discrimination on the basis of sexual preference. In addition, Connecticut law further provides that “[a]ll services of every state agency shall be performed without discrimination based upon race, color, religious creed, sex, age, national origin, ancestry, mental retardation, learning

disability or physical disability, including, but not limited to, blindness”<sup>11</sup> and “without discrimination based upon sexual orientation.”<sup>12</sup> Connecticut anti-discrimination law tends to be interpreted consistently with law established by the federal courts under comparable federal statutes. In addition, employees and students may assert violations of their rights under the Equal Protection Clause of the United States Constitution. With respect to sexual harassment, the Equal Protection Clause generally is no more protective than Title VII. See e.g. *Jones v. Clinton*, 990 F.Supp. 657 (E.D. Ark. 1998).

Tort law provides another source of remedies for students and employees who are the victims of harassment. Victims may claim intentional infliction of emotional distress or assault. Although intentional infliction of emotional distress tends to be a difficult claim to establish in the employment setting, employees have had some success with claims based on discriminatory harassment.<sup>13</sup> In some jurisdictions, worker’s compensation provides the exclusive remedy for intentional infliction of emotional distress on the job. 1993 amendments to Connecticut’s Workers’ Compensation Act, Conn. Gen. Stat. § 31-275 et seq., limited the exclusivity of workers’ compensation as a remedy for claims of emotional distress. The amended act provides that “ ‘personal injury’ or ‘injury’ *shall not be construed to include . . . (ii) A mental or emotional impairment, unless such impairment arises from a physical injury or occupational disease; or (iii) A mental or emotional impairment which results from a*

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<sup>11</sup> Conn. Gen. Stat. § 46a-71a (1999).

<sup>12</sup> Conn. Gen. Stat. § 46a-81i (1999).

<sup>13</sup> See e.g. *Dombrowski v. Envirotech System*, 1999 Conn. Super. LEXIS 2213 (1999) (employee had a private right of action under state statute prohibiting employment discrimination based on sex or sexual orientation and her claim of intentional infliction of emotional distress was supported by enough facts to preclude dismissal); *Alcorn v Anbro Engineering, Inc.* 2 Cal.3d.493 (1970) (outrage claim based on racial epithets); *Gomez v. Hug*, 7 Kan. App. 2d 603 (1982) (outrage claim based on angry racial epithets); *Ford v. Revlon, Inc.*, 153 Ariz. 38 (1987) (emotional distress claim based on employer’s failure to respond to frequent complaints of sexual harassment and assault by supervisor); *Jackson v. Kimel*, 992 F.2d 1318 (4<sup>th</sup> Cir. 1993); *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431 (1989).

*personnel action, including, but not limited to, a transfer, promotion, demotion or termination . . .*" Conn. Gen. Stat. § 31-275(16)r(B). (Emphasis added.) In addition, state law claims that cannot be resolved without interpreting a collective bargaining agreement may be preempted by federal law.

## **VI. ELEVENTH AMENDMENT IMMUNITY, SOVEREIGN IMMUNITY, PERSONAL LIABILITY AND QUALIFIED IMMUNITY**

### **A. Eleventh Amendment Immunity**

The Supreme Court has held that statutes that are valid exercises of Congress's power under §5 of the 14th Amendment trump state sovereignty under the 11th Amendment. In order to trump state sovereignty, a federal statute must be appropriately enacted under §5 and must also unequivocally express an intent to override the states' 11th Amendment immunity. The Court also held that the Commerce Clause is not a valid basis for abrogating state 11th Amendment immunity *Seminole Tribe of Florida v. Florida et. al.*, 517 U.S. 44, 47 (1996).

Recently, in *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000), the Supreme Court decided that although Congress clearly indicated an intent to abrogate states' 11th Amendment immunity from private suits in federal court asserting rights under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621, et. seq., the ADEA was not a valid exercise of congressional power under §5 of the 14th Amendment. In addition, currently pending in the Supreme Court is a case challenging the abrogation of 11th Amendment immunity in the Americans with Disabilities Act. See *University of Alabama at Birmingham Board of Trustees v. Garrett*, 120 S.Ct. 1669 (2000)(granting certiorari). Finally, although the Supreme Court long ago held that Title VII trumps 11th Amendment immunity,<sup>14</sup> the Court's analysis in *Kimel*, if applied to Title VII, might result in a holding that some aspects of Title VII (provisions prohibiting pregnancy discrimination and disparate impact discrimination) are not valid exercises of congressional power under §5.

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<sup>14</sup>See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Even if private suits in Federal Court to enforce the ADEA, the ADA and portions of Title VII are foreclosed by the 11th Amendment, sexual and other discriminatory harassment continues to be prohibited by law at state institutions such as the University of Connecticut School of Law for a variety of reasons. Because the law in this area is changing rapidly, some of the reasons for continued application of the anti-discrimination laws that are listed in the following paragraph may be outdated shortly. The bottom line, however, is that sexual and other discriminatory harassment at the University of Connecticut will continue for the foreseeable future to be regulated by some combination of state and federal law.

First, the privilege of sovereign immunity “does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by . . . federal statutes that comport with the constitutional design.”<sup>15</sup> Second, suits by the federal government enforcing these laws would continue to be permitted.<sup>16</sup> Third, suits seeking injunctions requiring compliance with federal law may be permitted.<sup>17</sup> Fourth, the sexual and discriminatory harassment portions of Title VII (prohibiting discrimination in employment) seem clearly to be valid exercises of congressional authority under §5.<sup>18</sup>

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<sup>15</sup> Alden v. Maine, 527 U.S. 706, 754-55 (1999).

<sup>16</sup> Id. at 755-56 (“In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government.”); See Erickson v. Board of Governors, 207 F.3d 945, 952 (7<sup>th</sup> Cir. 2000)(citing West Virginia v. U.S., 479 U.S. 305, 311 n.4 (1987)). The 11<sup>th</sup> Amendment provides immunity from lawsuits by *private citizens*, not by the federal government.

<sup>17</sup> See Id. At 757 (sovereign immunity “ does not bar certain actions against state officers for injunctive or declaratory relief.”).

<sup>18</sup> The Supreme Court long ago held that private lawsuits against states under Title VII are not precluded by 11<sup>th</sup> Amendment. See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Although the recent decisions raise questions about the continued viability of that holding with respect to some portions of Title VII, the sexual and discriminatory harassment portions of Title VII when considered in light of the recent decisions seem to be valid exercises of Congressional authority under Section 5. First, they prohibit discrimination on the basis of sex, race and religion, classifications that the Supreme Court has recognized as entitled to protection under the 14<sup>th</sup> Amendment. Second, the remedies available for harassment under Title VII do not exceed the remedies available under the Constitution.

Fifth, Title IX (prohibiting discrimination in education by recipients of federal funds) and the Rehabilitation Act (prohibiting disability discrimination by recipients of federal funds) continue to be enforceable by private suit in federal court because both are based on congressional spending authority rather than on the Commerce Clause or §5 of the 14th Amendment.<sup>19</sup> Sixth, §1981 (race discrimination) clearly seems a valid exercise of congressional authority under §5 because race discrimination is covered by the Equal Protection Clause. Seventh, the Seventh Circuit has held that private anti-discrimination claims may be pursued in state court if the state has waived sovereign immunity for claims under its own laws and cannot, therefore, discriminate against federal claims.<sup>20</sup> Finally, and most importantly, all of the forms of discrimination prohibited by federal anti-discrimination statutes also are prohibited by Connecticut law. See Section V of this manual.

## **B. Sovereign Immunity**

Connecticut General Statutes § 46a-99 provides a statutory waiver of sovereign immunity for discrimination claims against the state under Sections 46a-70 to 46a-78 and 46a-81h to 46a-81o. Because there is no statute that expressly waives the State's immunity to common law tort actions, tort claims (including assault and intentional infliction of emotional distress) against the Law School will be barred by sovereign immunity unless the plaintiff obtains consent to sue from the claims commissioner.<sup>21</sup>

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<sup>19</sup> See e.g. *Davis v. Monroe County Board of Education, et. al.*, 526 U.S. 629 (1999) (private suit for damages permitted because Title IX enacted pursuant to the Spending Clause).

<sup>20</sup> *Erickson v. Board of Governors*, 207 F.3d 945, 952 (7<sup>th</sup> Cir. 2000)(citing *Howlett v. Rose*, 496 U.S. 356, 367-75 (1990), *FERC v. Mississippi.*, 456 U.S. 742, 759-69 (1982), and *Testa v. Katt*, 330 U.S. 386 (1947)).

<sup>21</sup> See *Rusk Masih v. University of Connecticut*, 1998 Conn. Super. LEXIS 2444 (1998); Conn. Gen. Stats. § 4-142(2) & (3).

### **C. Personal Liability and Qualified Immunity**

Federal appellate courts consistently have held that employees do not have personal liability to victims of discrimination under Title VII. See e.g. *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2<sup>nd</sup> Cir. 1995). Courts have reached the same result under the ADA which has the same coverage provisions as Title VII. See e.g. *Stults v. Conoco, Inc.*, 76 F.3d 651 (5<sup>th</sup> Cir. 1996). In contrast, however, employees do have personal liability to victims of discrimination under §1981 (race discrimination). See e.g. *Gierlinger v. New York State Police*, 15 F.3d 32 (2d Cir. 1994). Although faculty members as public officials are entitled to a qualified immunity, due to the settled state of the law of race discrimination, this immunity usually can be overcome.

With respect to personal liability for violations of state law, Connecticut General Statutes §4-165 provides that “no state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his duties or within the scope of his employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter.” Faculty members who are acting within the scope of their employment, therefore, are unlikely to be personally liable for employment discrimination. Faculty members, however, may be personally liable for assault or intentional infliction of emotional distress based on sexual or other discriminatory harassment if their conduct can be characterized as “wanton, reckless or malicious.” *Rusk Masih v. University of Connecticut*, 1998 Conn. Super. LEXIS 2444, 12 (1998) (defamation claim).

## **Appendix A: University of Connecticut School of Law Policy on Harassment**

The University of Connecticut School of Law is dedicated to maintaining an academic environment free of exploitation, coercion and intolerance. Discrimination because of race, national origin, ethnicity, ancestry, religion, gender, sexual orientation, age or physical or mental disability is illegal and destructive of the Law School's mission. Discrimination in any form frustrates individual achievement, a comfortable learning climate, and the integrity of the Law School.

This policy focuses on discriminatory harassment, one form of discrimination. It seeks to further understanding in the Law School community of the types of behavior that may constitute discriminatory harassment, and to make available to persons aggrieved by discriminatory harassment an informal complaint resolution procedure within the Law School. This informal procedure supplements the formal complaint procedures of the University and state and federal administrative and judicial remedies, and is not intended to discourage their use.

The purpose of this policy is to promote an academic environment in which people are free to work and learn without fear of discrimination and abuse based on membership in a protected group. This policy reflects conscious and difficult choices concerning coverage, procedures and academic freedom.-

### **Coverage**

This policy addresses all forms of discriminatory harassment that involve use of Law School institutional power or authority. Specifically, it is designed to articulate the institution's standards of conduct for faculty members in dealing with students, other employees, and colleagues. The relationship between students and faculty members is at the heart of the educational mission of the School and must be protected against misconduct and other improprieties, as well as their appearance. To

accomplish its purposes more fully, this policy also addresses all other discriminatory harassment that involve use of Law School institutional power or authority. It also is designed to provide a campus-based policy and procedure to respond to complaints of harassment against co-workers, regardless of whether the complaint involved use of institutional power or authority.

This policy is not designed to reach relationships between students where institutional power or authority is not implicated. While discriminatory harassment is possible in these relationships, complaints of harassment in this context are more appropriately addressed by policies and procedures governing student conduct.

This policy is designed to assure all members of the community that complaints will be addressed fairly and expeditiously. It also prohibits any member of the Law School community from discriminating or retaliating against an individual for having initiated an inquiry or complaint regarding an incident of discriminatory harassment.

## **Informal Procedures**

This policy establishes only informal procedures and remedies because it is intended to supplement the policies, laws, regulations and procedures of the University, the state government, and the federal government concerning discriminatory harassment. Those policies, laws, and regulations establish formal adjudicatory mechanisms and a more explicit and complete range of sanctions and other responses. This law school policy is intended to complement existing procedures and remedies; it in no way displaces or limits them. Resort to the law school's policy and procedures is not a required pre-condition to use of other procedures and remedies, and resort to the law school's policy does not limit application of other procedures and remedies.

## Scope

The relationships between students and faculty are the essence of an institution of learning and this policy specifically applies to these relationships. To more fully accomplish its objectives, this policy also applies to all student, staff and other employee relationships in which one individual has institutional authority over another, including but not limited to: student relationships with administrative and other staff, law journal editors, teaching assistants, or Moot Court Board members; and relationships between subordinate and supervisory employees. This policy further applies to other relationships between or among employees, including faculty and all staff, regardless of whether institutional authority is implicated.

## Definitions

**Sexual Harassment.** Sexual harassment is defined as any unwanted sexual advance or other conduct of a sexual nature whereby (a) submission to these actions is made either explicitly or implicitly a term or condition of an individual's employment, performance appraisal, or evaluation of academic performance; or (b) these actions affect the conditions of an individual's education or employment by creating an intimidating, hostile, or offensive environment. Such conduct will constitute sexual harassment regardless of whether it is directed towards a person of the opposite or the same sex.

Examples of conduct that constitute sexual harassment include but are not limited to:

- sexual assault;
- express or implied threats that submission to sexual advances will be a condition of a grade, a letter of recommendation, academic evaluation, employment, or work status;

- classroom behavior of a sexual nature, not legitimately related to the course, that creates an intimidating, hostile or offensive environment, including but not limited to: 1) comments of a sexual nature; 2) statements or behavior based on sexual stereotypes; 3) statements, questions, jokes, or anecdotes of a sexually explicit nature; 4) the use of teaching materials, including handouts, books, hypotheticals, lectures, and exam problems that gratuitously emphasize sexuality or sexual stereotypes.
- Any unwanted sexual advance or other conduct of a sexual nature, either in or outside the classroom, that creates an intimidating, hostile or offensive working or learning environment, including, but not limited to, the behavior enumerated in the previous section, as well as: 1) intentional and unwanted touching, patting, hugging, or other physical contact; 2) suggestive remarks about a person's clothing or body; 3) remarks about sexual activity or speculations about sexual experience; 4) repeated and unwanted staring; 5) repeated and unwanted personal notes or telephone calls; 6) a direct proposition of a sexual nature.

In determining whether behavior constitutes harassment in violation of this policy, the totality of the circumstances and the context in which the behavior occurs will be considered. This approach is intended to ensure the protection of individual rights, freedom of speech, and academic freedom. This policy is in no way intended to suggest that classroom or out-of-class discussion of sexuality or sexual stereotypes is always inappropriate. Discussion of topics having a legitimate relationship to classroom discussion or the free debate of issues and ideas is not prohibited.

## **Consensual relations**

Those who teach and supervise are entrusted with guiding students, evaluating their work, giving grades and providing job recommendations. Romantic or sexual relationships between faculty members and students create the appearance of undue advantage in an academic setting.

Professionalism requires those in positions of authority to recognize that in relationships with students or subordinates, there is always an element of power. Abuse of power, or the appearance of its abuse, through romantic or sexual involvement, diminishes the trust and respect essential to the openness and freedom from constraint that an academic community requires.

Faculty members who occupy a position of institutional power should be held accountable for abuse of that power. A sexual relationship between a faculty member and a student which occurs during a period of instructional or supervisory responsibility is presumed to involve sexual harassment should a complaint be made under this policy, subjecting the respondent to the provisions of this policy. Even when both parties have consented to romantic or sexual involvement, a complaint of sexual harassment against the faculty member is not precluded.

Romantic or sexual involvement between faculty and students in which there is no current instructional or supervisory responsibility also carries the potential for diminishing the trust and respect necessary for all faculty-student relationships. The faculty member must realize that he or she may eventually be responsible for evaluating the student's work, giving a job recommendation, or holding some other type of institutional authority over the student. If this situation arises, the faculty member is expected to make alternate arrangements by promptly finding someone else to evaluate, supervise, instruct, or recommend the student.

Romantic and sexual relationships arising between students and those exercising institutional power over them, including administrators and other staff, law journal editors, teaching assistants or Moot Court Board members; between staff and faculty; and between supervisory and subordinate employees raise similar issues involving the potential abuse of institutional authority. Such romantic and sexual relationships are also presumed to involve sexual harassment should a complaint be made under this policy, subjecting the respondent to the provisions of this policy.

## Other discriminatory harassment

Other discriminatory harassment is conduct directed towards an individual because of that person's race, ethnicity, ancestry, national origin, religion, gender, sexual orientation, age or physical or mental disability, that creates a hostile, intimidating or offensive working or learning environment.

Examples of conduct that constitutes discriminatory harassment include, but are not limited to:

- assault, intimidation or threats;
- classroom behavior, not legitimately related to the course, that creates an intimidating, hostile or offensive environment on the basis of membership in a protected group, including but not limited to: 1) use of discriminatory epithets; 2) subjecting a person to abuse, humiliation or ridicule because of their membership in a protected group; 3) statements or behavior based on group stereotypes; 4) statements, questions, jokes, or anecdotes that denigrate members of a protected group or the religion, culture, traditions, dress, sexual habits or accommodation requirements or other traits associated with a protected group; 5) differential treatment of members of a protected group; 6) the use of teaching materials, including handouts, books, hypotheticals, lectures, and exam problems that gratuitously emphasize stereotypes about a protected group;
- any behavior, either in or outside of the classroom that creates an intimidating, hostile or offensive environment on the basis of membership in a protected group, including, but not limited to, the behavior enumerated in the previous section, as well as: 1) offensive and unwelcome remarks or questions about a person's race, national origin, ethnicity, ancestry, religion, religious attire, physical or mental disability or need for accommodation, gender, sexual orientation or age; 2) repeated and unwelcome staring; 3) personal notes or telephone calls that harass, humiliate or intimidate on the basis of membership in a protected group.

As with sexual harassment, the totality of the circumstances and the context in which the behavior occurs will be considered in determining whether this policy has been violated. This approach is intended to ensure the protection of individual rights, freedom of speech, and academic freedom. Discussion of group status or stereotypes that has a legitimate relationship to classroom discussion or the free debate of ideas and issues is not prohibited. Nothing in this policy is intended to prohibit legitimate behavior or speech associated with discussing or implementing the affirmative action policies of the Law School.

## **Procedures**

**Harassment advisors.** Each year, the Dean shall appoint four members of the law school community to serve as Harassment Advisors. This group shall consist of one student, one administrator, one faculty member, and one staff member. It is the responsibility of the Advisors to be thoroughly familiar with Law School and University policies and procedures, both informal and formal, regarding discriminatory harassment, and to provide basic information on state and federal administrative procedures.

Any person who believes that she<sup>1</sup> has been discriminatorily harassed is encouraged to discuss the matter with an Advisor and is urged to do so as promptly as possible after the alleged harassment. The Advisor shall discuss with the complainant both informal and formal procedures for bringing a complaint, issues of confidentiality, retaliation, and any other relevant matters. All complainants must be advised about the possibility of disclosure of their name and the name of the person accused of harassment. Complaining parties should, however, be assured that the harassment policy protects against retaliation against individuals who complain about harassment.

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This policy is applicable to harassment against women and men. References to the complainant as she are not intended to limit the coverage of this policy.

Discussions with the Advisor will be informal and advisory, but the Advisor shall inform the complainant at the beginning of each discussion that a record of the discussion, including the names of the complainant and the identity of the alleged harasser will be forwarded to the Dean. The Advisor will also supply the complainant with a list of private and public organizations and agencies that provide information on harassment and may be able to promise confidentiality.

**Complaints.** The Advisor will prepare a report which will be submitted to the Dean and a copy of this report shall be delivered to the complainant and to the individual against whom the complaint is made.<sup>2</sup> Both of these parties will be advised of their right to submit a written response to the Dean.

Any law school employee who is the subject of a complaint under these policies will be informed of the existence of the complaint within a reasonable time after the complaint is filed.

Nothing in this policy precludes any person from reporting at any time alleged instances of harassment directly to the Dean.

**Informal procedures.** A complainant who files a complaint may:

- speak with the respondent directly;
- request the Dean to speak with the respondent or;
- propose another method of resolution.

During any of these steps, both the respondent and the complainant may be accompanied by a representative.

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<sup>2</sup>An anonymous complaint may be permitted if there is evidence of the harassing conduct beyond the complainant's report, such as when a complaint is filed concerning gratuitous sexual references in an examination problem.

The goals of these informal procedures are to discuss the complaint with the respondent, agree on changes in behavior where necessary, and arrive at a resolution acceptable to the complainant and the respondent. Informal procedures are not prerequisites to mediation, described below, or to engaging in formal resolution of the matter through University, State or Federal procedures.

**Mediation.** If the complainant is not satisfied with the result of the informal procedures described above, or if she does not wish to utilize it at all, mediation is an option. Mediation provides a forum where the complainant and the respondent can, with the aid of a neutral third party, come to a mutually satisfactory resolution. A complainant wishing to proceed to mediation shall so inform the Dean's Office, and the Dean then will attempt to arrange mediation. Both parties must be willing to participate in the mediation process and agree upon who the mediator will be. The mediator may propose solutions, but any resolution of the complaint must be acceptable to both parties. During mediation, both the complainant and respondent may be accompanied by a complaint representative. The decision of the mediator must be acceptable to both parties. Mediation is not a prerequisite to formal resolution of the matter through University, state or federal procedures.

**Records.** Documents or other records that are created in the course of informal procedures or mediation will be destroyed at the end of the proceeding, unless the Dean determines that there is a need to retain them. Parties to an informal procedure or mediation, and their representatives, may retain copies of any records or documents submitted or signed by any party.

**Additional procedures.** If a situation arises in which informal resolution is not desirable or is unsatisfactory to the complainant, formal procedures are available through the University. In addition, state and federal administrative or judicial procedures are available. The full text of documents relating to University procedures are available in the Office of the Dean, the Public Safety Office, the Communications Center, and the Library.

Once a complaint is filed, nothing in these procedures precludes the University from taking action in response to the complaint.

## **Appendix B: University of Connecticut President's Policy on Sexual Harassment**

The University of Connecticut reaffirms that it does not condone harassment directed toward any person or group within its community — students, employees, or visitors.

Every member of the University ought to refrain from actions that intimidate, humiliate or demean persons or groups, or that undermine their security or self-esteem.

Harassment consists of abusive behavior directed toward an individual or group because of race, ethnicity, ancestry, national origin, religion, gender, sexual orientation, age, physical or mental disabilities, including learning disabilities, mental retardation, and past/present history of a mental disorder. The University (a) strictly prohibits making submission to harassment either explicitly or implicitly a term or condition of an individual's employment, performance appraisal, or evaluation of academic performance; and (b) forbids harassment that has the effect of interfering with an individual's performance or creating an intimidating, hostile, or offensive environment.

The University deplors behavior that denigrates others because of their race, ethnicity, ancestry, national origin, religion, gender, sexual orientation, age, physical or mental disabilities, including learning disabilities, mental retardation, and past/present history of a mental disorder. All members of the University community are responsible for the maintenance of a social environment in which people are free to work and learn without fear of discrimination and abuse. The failure of managers at

any level to remedy harassment violates this policy as seriously as that of the original discriminatory act.

Sexual harassment is defined as any unsolicited and unwanted sexual advance, or any other conduct of a sexual nature whereby (a) submission to these actions is made either explicitly or implicitly a term or condition of an individual's employment, performance appraisal, or evaluation of academic performance; or (b) these actions have the effect of interfering with an individual's performance or creating an intimidating, hostile, or offensive environment.

Examples of sexual harassment in the work place may include all activities that attempt to extort sexual favors, inappropriate touching, suggestive comments, and public display of pornographic or suggestive calendars, posters, or signs. All forms of sexual harassment and discrimination are considered serious offenses by the University. Such behavior is particularly offensive when power relationships are involved.

The University strongly discourages romantic and sexual relationships between faculty and student or between supervisor and employee even when such relationships appear, or are believed to be, consensual. The lines of power and authority that exist between the parties may undermine freedom of choice.

Graduate students serving as teaching assistants are well advised to exercise special care in their relationships with students whom they instruct and evaluate as a power differential clearly exists although teaching assistants do not hold faculty appointments.

Any person who believes that she or he is being harassed or otherwise subjected to discrimination because of race, ethnicity, ancestry, national origin, religion, gender, sexual orientation, age physical or mental disabilities, including learning disabilities, mental retardation, and past/present history of a mental disorder, or other similar characteristics is encouraged to consult the Office of Diversity and Equity (ODE). The office

is located in the Hall Building, 2 West, Room 221, Box U-175, 362 Fairfield Rd., Storrs, CT 06269-2175. The telephone number is 486-2943.

Complaints against students are governed by the provisions of the Student Conduct Code rather than this policy. Any such complaints should be directed to the Office of the Dean of Students, Box U-62, Wilbur Cross Building, Room 221, 233 Glenbrook Rd., Storrs, CT 06269-4062; telephone 486-3426. Any person who believes he or she is a victim of, or witness to, a crime motivated by bigotry or bias should report it to the University of Connecticut Police Department at 486-4800, located at 126 North Eagleville Road, Box U-70, Storrs, CT 06269-3070.

Deans, directors, and department heads receiving complaints must alert ODE as to the nature of the incident, and may refer the inquirer to the ODE, or seek information on the inquirer's behalf to resolve the complaint. (The anonymity of complainant and accused may be maintained during the reporting and consultation.) Other sources of information include the Women's Center, the Office of the Dean of Students, the Simons African-American Cultural Center, the International Center, the Puerto Rican/Latin American Cultural Center, the Center for Students with Disabilities, the Asian-American Cultural Center, and the Rainbow Center.

Each office and person involved in advising complainants on sources of assistance must avoid comments that might dissuade victims from pursuing their rights or constitute threats of reprisal. Such behavior in itself is discriminatory and is a violation of this policy.

Philip E. Austin, President

March 15, 2000

Reviewed: 6/00

## **APPENDIX C: UNIVERSITY OF CONNECTICUT OFFICE OF DIVERSITY & EQUITY DISCRIMINATION COMPLAINT PROCEDURES SUMMARY**

Any employee, student, or other member of the University community injured by the discriminatory behavior of an employee may file a complaint under the *Discrimination Complaint Procedures*. Similar complaints against students should be filed with the Office of the Dean of Students under the *Student Conduct Code*.

University policy prohibits discrimination on the basis of race, sex, age, national origin, ethnicity, physical or mental disabilities, learning disability, sexual orientation, marital status, religion, status as a disabled veteran or veteran of the Vietnam Era, and any other group protected by civil rights laws. Discrimination means unequal treatment or harassment based upon any of these group characteristics. Retaliation against a Complainant for filing a complaint, and against witnesses for providing testimony during an investigation, is also prohibited and can be filed as a separate charge under these procedures.

1. One may file complaints with the Office of Diversity and Equity (ODE) within 30 days after the discriminatory act by calling 486-2943 or writing to ODE at Room 221, Hall Building, 362 Fairfield Road, Box U-175, Storrs, CT 06269. Alternatively, one may file a complaint with the line administrator in the unit/division in which the incident occurred.
2. The ODE staff/line administrator interviews complainants to obtain complete accounts of their allegations, and advises them of their right to file complaints through the internal administrative systems and with civil rights agencies. They may also counsel complainants on self-resolution techniques or refer them to additional sources of support. Line administrators may enlist the ODE's advice or support in this phase.

### 3. Cases filed directly with the ODE

(a) If the accused employee is a member of a bargaining unit, the ODE will immediately involve the Labor Relations Unit of the Department of Human Resources (DHR/LR) and the line administrator responsible for resolving the problem. Throughout the complaint process, the ODE and the DHR/LR advise line administrators from the perspective of civil rights and contractual obligations, respectively.

(b) If the accused employee is not in a bargaining unit, the ODE may either have the line administrator handle the complaint or investigate it itself. In the latter case, the ODE's finding and recommendation are referred to the line administrator for action.

4. Cases filed directly with line administrators In all cases, line administrators receiving complaints must consult with the ODE who may advise him/her on the proper handling of the case. If the accused employee is covered by a collective bargaining agreement, 3 (a) applies. If not, 3 (b) applies.