

Title IX Sexual Harassment Grievance Process Training for Decision Makers

Monday November 16, 2020 at 2 pm
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Overview of SPU Policies Prohibiting Discrimination, Harassment, and Similar Conduct

1. [Nondiscrimination Policy](#) (Title IX Webpages)
2. [Notice of Nondiscrimination under Title IX](#) (Title IX Webpages)
3. [Student Standards of Conduct](#) (Student Handbook)
4. [Sexual Misconduct Policy](#) (Student Handbook)
5. Anti-Bias Policies ([Student Handbook](#) and [Employee Handbook](#))
6. [Employee and Volunteer Sexual Misconduct Policy](#) (Employee Handbook)
7. [Anti-Bullying Policy](#) (Employee Handbook)



Overview of SPU Grievance Procedures Regarding Discrimination, Harassment, and Similar Conduct

1. Title IX Sexual Harassment Grievance Process
2. Student Sexual Misconduct Policy
3. Student Nondiscrimination Complaint Procedures
4. Student Accountability Process
5. Discrimination and Harassment Grievance Procedure
6. Anti-Bullying Complaint Procedure

Link: <https://spu.edu/diversity/nondiscrimination-title-ix-oie/grievance-procedures>



How to Report Discrimination and Harassment

Nondiscrimination Policy:

- Link: <https://spu.edu/diversity/nondiscrimination-title-ix-oie/nondiscrimination-policy>
- Laura Hartley, Jeff Jordan, Sandy Mayo, Gary Womelsduff

Sex Discrimination, Sexual Harassment, & Sexual Misconduct:

- Link: <https://spu.edu/diversity/nondiscrimination-title-ix-oie/reporting-sex-discrimination>
- Sandy Mayo (Title IX Coordinator) or Sexual Misconduct Report Receiver

Online Forms:

- Crime and Sexual Misconduct Reporting Form:
https://spu.formstack.com/forms/online_report_form
- Online Bias Reporting Form:
https://oiex.formstack.com/forms/bias_incident_reporting_form

Confidential Options:

- Online Reporting Forms
- Professional Counselors and Pastoral Counselors



Reporting Expectations for Students, Employees, and Volunteers

- **Reporting Sex Discrimination and Sexual Misconduct:**
<https://spu.edu/diversity/nondiscrimination-title-ix-oie/reporting-sex-discrimination>
- **Reporting Expectations for Employees, Volunteers, and Students Leaders:**
<https://wiki.spu.edu/display/HR/Reporting+Expectations+for+Employees%2C+Volunteers%2C+and+Students+Leaders>



Response to Reports of Sexual Misconduct

Link: <https://spu.edu/diversity/nondiscrimination-title-ix-oie/responding-to-reports>

- The University's procedures for responding to notification of sexual misconduct are intended to eliminate the misconduct, prevent its recurrence, and address its effects.
- Upon receipt of a report of sexual misconduct, the University's initial response will consist of notifying the appropriate University officials, providing information and support to alleged victims of sexual misconduct, and taking steps to promote the safety of the campus.



Title IX Sexual Harassment Grievance Process (TSHGP): Purpose

- The University's procedures for institutional disciplinary action in cases of sexual misconduct are intended to include a prompt, fair, equitable, and impartial process from the initial investigation to the final result.
- The TSHGP is intended to satisfy the requirements imposed by Title IX and 34 CFR 106.45 with respect to formal complaints of sexual harassment, as defined in 34 CFR 106.



TSHGP: Definitions – Sexual Harassment & VAWA Offense

“Sexual Harassment” means conduct on the basis of sex that satisfies one or more of the following:

- An employee of SPU conditioning the provision of an aid, benefit, or service of SPU on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to SPU’s education program or activity; or
- A VAWA Offense.

“VAWA Offense” means “sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).



TSHGP: Definitions – Decision Maker

“Decision Maker” means:

- If the Respondent is a residential undergraduate student, the Director of Residence Life (or designee);
- If the Respondent is a non-residential undergraduate student, the Dean of Students for Community Life (or designee);
- If the Respondent is a graduate student, the Vice Provost for Academic Affairs (or designee);
- If the Respondent is an employee (other than a student employee), the employee’s Area Vice President (or designee); and
- If the Respondent does not fit into any of the preceding categories, an individual designated by the Title IX Coordinator.



TSHGP: Definitions – Appeal Reviewer

“Appeal Reviewer” means:

- In an appeal of a determination of responsibility:
- If the Respondent is a residential undergraduate student, the Dean of Students for Community Life (or designee);
- If the Respondent is a non-residential undergraduate student, the Vice Provost for Student Formation and Community Engagement (or designee);
- If the Respondent is a graduate student, the Provost (or designee);
- If the Respondent is an employee (other than a student employee), the President (or designee); and
- If the Respondent does not fit into any of the preceding categories, an individual designated by the Title IX Coordinator.



TSHGP: Definitions – Other Terms

Complainant

Formal Complaint

Respondent

Informal Process Facilitator

Area Vice President

Business Day



TSHGP: Scope

A Formal Complaint may only be filed under this TSHGP if it meets all of the following criteria:

- a) The conduct that is alleged would meet the definition of Sexual Harassment if true;
- b) The conduct is alleged to have occurred within the United States;
- c) The conduct is alleged to have occurred in an SPU education program or activity that the Complainant is participating in or attempting to participate in;
- d) The Respondent is an individual that is participating in an SPU education program or activity; and
- e) The individual making the Formal Complaint is the Complainant, the Title IX Coordinator, or the Deputy Title IX Coordinator for Students.



TSHGP: Scope (cont'd)

What is an SPU education program or activity?

- **Title IX (20 USC 1687):** *For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of - ... a college, university, or other postsecondary institution, or a public system of higher education...*
- **U.S. Department of Education webpage:** *Some key issue areas in which recipients have Title IX obligations are: recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment.*
(https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html)



TSHGP: Principles and Parameters

Employment

Presumption Before
Determination

Bias; Conflicts of Interest

Delegates and Designees

FERPA

Confidentiality

False Statements

Timing

Standard of Evidence

Amnesty

University Action

Ambiguity

Training

Advisors, Attorneys,
Parents, and Guardians

Privilege



TSHGP: Possible Pre-Complaint Actions

- Emergency Removal
- Administrative Leave
- No-Contact Directive



TSHGP: Formal Complaint Process (FCP)

1. Filing Formal Complaint
2. Notifying Respondent
3. Possible Dismissal of Formal Complaint
4. Investigation
5. Live Hearings and Cross-Examination
6. Determination
7. Appeal



TSHGP – FCP: Filing Formal Complaint

- Formal complaints should be filed with the Title IX Coordinator
- The Title IX Coordinator can file a complaint
- The complaint should include at least basic information about the allegations
- The Title IX Coordinator will evaluate whether the complaint falls within the scope of the TSHGP



TSHGP – FCP: Notifying Respondent

- The Title IX Coordinator will send the Complainant and Respondent a notice of formal complaint within five business days of receiving the complaint
- The notice of formal complaint will contain information required by regulation and SPU policy (see Section VII.2. of the TSHGP)
- The Respondent will have five business days to provide a written response



TSHGP – FCP: Dismissal of Formal Complaint

- **Mandatory:** Formal complaints that do not meet the criteria for the TSHGP will be dismissed (but could be evaluated under a different grievance procedure).
- **Permissive:** A formal complaint can be dismissed if:
 - a Complainant withdraws the complaint;
 - the Respondent is no longer a student or employee at SPU; or
 - specific circumstances prevent the University from gathering evidence sufficient to reach a determination.
- **Appeal:** Either party may appeal the dismissal of a Formal Complaint by sending a written appeal to the Title IX Coordinator.



TSHGP – FCP: Investigation

- The Title IX Coordinator will appoint one or more Investigators (e.g., an SPU employee or a third-party).
- Investigations involve gathering relevant evidence.
- The burden of proof and the burden of gathering evidence is on SPU, not the parties.
- SPU will provide an equal opportunity for the parties to:
 - Present witnesses and other relevant evidence;
 - Have others present (e.g., have an Advisor at meetings);
 - Inspect and review relevant evidence gathered in the investigation (even if SPU does not intend to rely on such evidence); and
 - Access evidence during any hearing, including for purposes of cross-examination.



TSHGP – FCP: Investigation (cont'd)

- The Investigator will create a report that summarizes relevant evidence.
 - Each party will receive a copy of the report at least 10 days prior to a hearing for their review and written response.
 - Prior to completion of the report, the Title IX Coordinator will give each party 10 days to review the evidence and submit a written response, which the Investigator will consider prior to completion of the report.



TSHGP – FCP: Live Hearings and Cross Examination

- After the investigative report is completed, the Title IX Coordinator will schedule a live hearing.
- Live hearings may be conducted in-person or virtually.
- The Decision Maker will facilitate the live hearing.
- The Decision Maker may question any party or witness and must allow each party's Advisor to question parties and witnesses, including questions that challenge credibility.
- Cross-examination must be conducted directly, orally, and in real time by the party's Advisor of choice and never by a party personally.
- Only relevant cross-examination and other questions may be asked of a party or witness.
- Before a question is answered, the Decision Maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- If a party does not have an Advisor present, SPU will provide an Advisor to the party free of charge to conduct cross-examination.



TSHGP – FCP: Live Hearings and Cross Examination (cont'd)

- If a party or witness does not submit to cross-examination at the live hearing, the Decision Maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- The Decision Maker cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.
- The University will create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.
- In general, no additional investigation will be performed after a live hearing. However, if a Decision Maker determines that additional investigation should be performed, each party will be provided with an opportunity to review the additional evidence.



TSHGP – FCP: Determination

- The Decision Maker will make a written determination regarding responsibility using a preponderance of the evidence standard following the final live hearing.
- The Decision Maker will make an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence, and will not base any credibility determination on a person's status as a Complainant, Respondent, or witness.
- The Decision Maker will attempt to issue the written determination within ten Business Days of the conclusion of the final live hearing.
- The Decision Maker will provide the written determination to the Complainant and Respondent simultaneously. The written determination must include certain prescribed information (see Section XI.3. of the TSHGP).
- If a Respondent is found to have committed Sexual Harassment, SPU will provide remedies to a Complainant and may impose disciplinary sanctions on the Respondent. Remedies must be designed to restore or preserve equal access to SPU's education program or activity.



TSHGP – FCP: Appeal

- Each Complainant and Respondent may appeal:
 - A determination regarding responsibility; and
 - A dismissal of a formal complaint or any allegations therein.
- An appeal may only be made on the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - The Title IX Coordinator, an Investigator, or the Decision Maker had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter; and
 - Solely with respect to an appeal of a dismissal of a Formal Complaint or any allegations therein, the rationale given for the dismissal of the Formal Complaint is not consistent with the standard for dismissal in this TSHGP.



TSHGP: Record-keeping

- SPU must maintain records for each Sexual Harassment investigation for at least seven years (e.g., audio or audio-visual recordings or transcripts, disciplinary sanctions, remedies, appeal, informal resolutions, training materials for process administrators).
- SPU must also maintain records of actions taken in response to a report of Sexual Harassment for at least seven years even if a Formal Complaint is not filed.
- SPU will make the training materials used to train the Title IX Coordinator, any Deputy Title IX Coordinator, Investigators, Decision Makers, Appeal Reviewers, and Informal Process Facilitators publicly available on its website.



TSHGP: Retaliation

- The University strictly prohibits any retaliation against any person who files a complaint or otherwise participates in an investigation or proceeding under this TSHGP.
- Retaliation can be any type of adverse or negative action taken toward a person who filed a complaint or otherwise participated in an investigation or proceeding.
- Any person who commits retaliation may be subject to disciplinary action, up to and including dismissal from the University (for students) or termination of employment (for employees).
- The Title IX Coordinator will coordinate an appropriate level of investigation into the alleged retaliation.
 - Alleged retaliation by a student will be addressed through the Student Accountability Process or in connection with an existing complaint proceeding.
 - Alleged retaliation by an employee will be addressed in connection with an existing complaint proceeding, through a separate proceeding under the DHGP, or directly by the accused employee's direct supervisor.



TSHGP: Informal Resolution

- At any time after a Formal Complaint is filed and prior to reaching a determination regarding responsibility, the University may offer to facilitate an informal resolution process that does not involve a full investigation and adjudication.
- The University will not require the two parties to participate in an informal resolution process.
- Also, the University will not offer or facilitate an informal resolution process to resolve allegations that an employee engaged in Sexual Harassment against a student.
- One option for an informal resolution process may be mediation.



Elaboration on Specific Topics: Overview

- **How to Conduct an Investigation and Grievance Process (Cheryl)**
 - In general
 - Protecting the safety of victims
 - Promoting accountability
- **How to Serve Impartially and Promote Impartial Investigations and Adjudications (Sandy)**
 - Avoiding prejudgment of the facts at issue
 - Conflicts of interest
 - Bias
 - Avoiding sex stereotypes
- **Technology for Live Hearings (Nick)**
- **Relevance of Questions and Evidence (Nick & Cheryl)**



How to Conduct an Investigation and Grievance Process: In General

Common Activities

- **Identification and location of sources of information**
- **Gathering of information**
 - Interviews
 - Physical evidence (e.g., weapon, book, food)
 - Documentary evidence (e.g., police report, performance review, floorplan)
 - Electronic evidence (e.g., video, card access logs, screen shots)
- **Collation and analysis of gathered information**
- **Evaluation of information in terms of material that is directly related and relevant**
- **Written summary of investigation**
 - May include credibility analysis
 - May include preliminary recommendations regarding responsibility



How to Conduct an Investigation and Grievance Process: Protecting the Safety of the Parties

- **Collaborative personal safety planning**
- **Safety measures:**
 - Are supportive measures
 - Are available to both parties (possibly witnesses too)
 - May include:
 - No-contact directive
 - Arrangements for in-person classes (e.g., seating in opposite sides of the room)
 - Emergency removal (if criteria met)
 - Office of Safety and Security assistance with obtaining a court issued protection order
 - Safety escorts
- **Confidentiality**
- **Presumption that respondent is not responsible**



How to Conduct an Investigation and Grievance Process: Promoting Accountability

- **Goals:** Accountability within the process and accountability of individuals
- **Accountability within process:**
 - Written procedures available to both parties
 - Training for administrators (required by Clery Act & Title IX)
 - TIX Coordinator provides oversight
 - Decision Maker asks questions, requests investigation, evaluates evidence
 - Document analysis (e.g., in reports, in decisions)
 - Appeal opportunity
 - Retain records
 - Bias / conflict of interest requirements
- **Accountability of individuals:**
 - Cross-examination during live hearings
 - Immediate steps to address retaliation
 - Remedies and disciplinary sanctions



How to Serve Impartially and Promote Impartial Investigations and Adjudications

Key Concepts

- Prejudgment of the facts at issue
 - Prohibition on sex stereotypes
 - Avoiding inferences – allegations involving sexual conduct, sexual history, or drugs and/or alcohol use
 - Avoiding inferences – party status
- Conflicts of interest
 - No *per se* conflicts of interest outlined in the regulations
 - Actual vs perceived
- Bias
 - Obligation under Title IX to treat each person as an individual, not as a member of a class
 - All protected classes



How to Serve Impartially and Promote Impartial Investigations and Adjudications

Promoting Impartiality

- Presumption of non-responsibility
- Equitable treatment of Respondents and Complainants
- Objective evaluation of all relevant evidence
- No single-investigator models
- Self-disclosure of any potential conflict of interest



Technology for Live Hearings

- Decision Makers can decide to hold live hearings in-person or virtually.
- If either party asks for a hearing to be virtual, SPU will allow the parties to be in separate rooms and use technology that allows participants to simultaneously see and hear the person answering questions.
- Title IX regulations require that Decision Makers receive training on any technology to be used at a live hearing.
- SPU would likely use Zoom or Teams to conduct live hearings virtually. In advance of any live hearing, a Decision Maker would receive training on how to use Zoom/Teams for the hearing (e.g., from CIS, from the Title IX Coordinator).



Relevance of Questions and Evidence: In General

- **Requirement:** Decision Makers must receive training on issues of relevance of questions and evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant.
- **Definition:**
 - Title IX Regulations: No definition provided for "relevance."
 - Federal Rule of Evidence 401: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."
 - Merriam Webster (one prong): "affording evidence tending to prove or disprove the matter at issue or under discussion."
- **Questions to consider:**
 - Is the evidence directly related to the allegation?
 - Does the evidence help prove or disprove the allegation?



Relevance of Questions and Evidence: Specific Considerations

- **Inculpatory & Exculpatory Evidence:** Decision Makers must make an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence.
 - Inculpatory: implying or imputing guilt; tending to incriminate.
 - Exculpatory: tending or serving to clear from alleged guilt or fault.
- **Sexual Predisposition & Prior Sexual Behavior:** Questions and evidence about a Complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
 - Such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
 - If the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

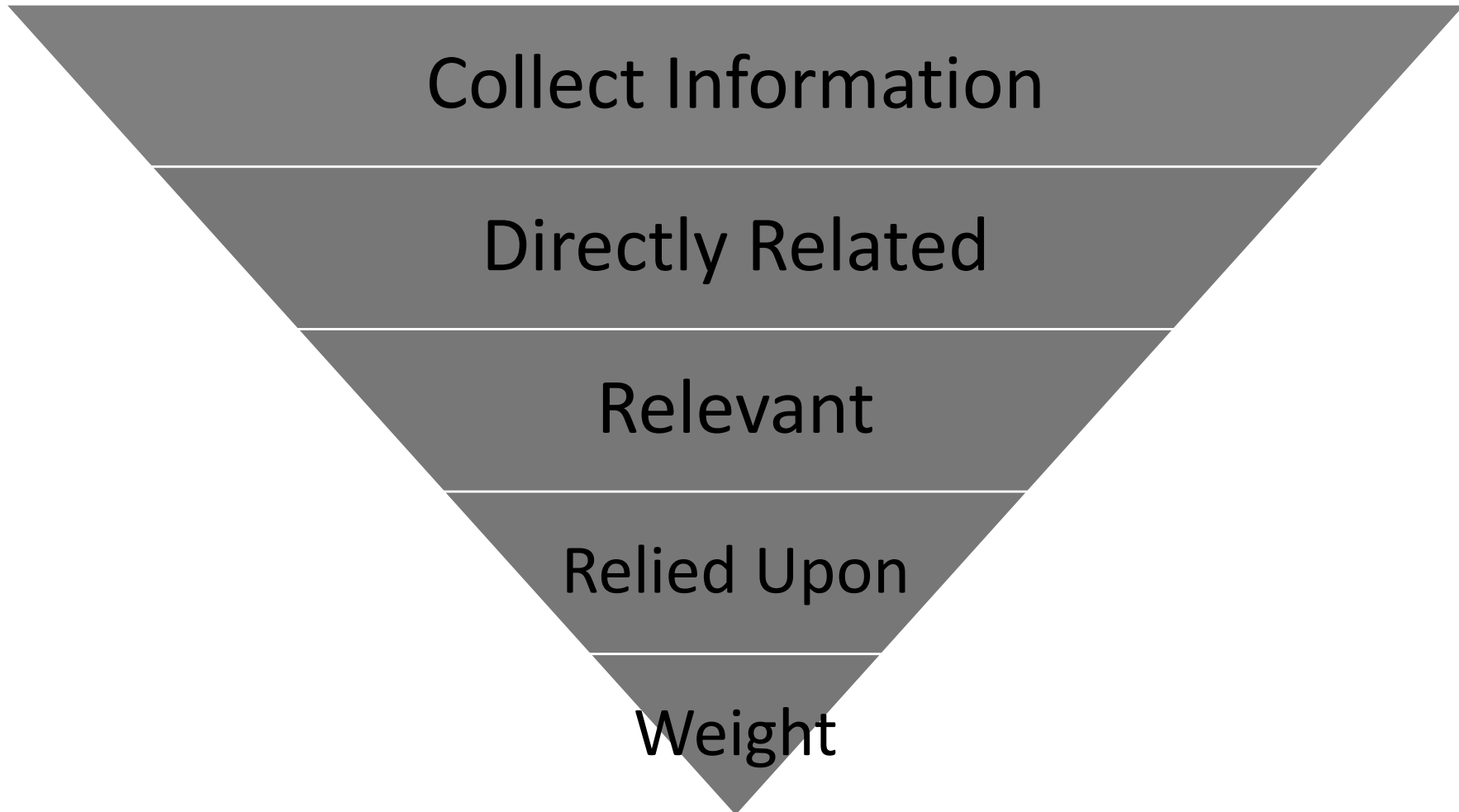


Relevance of Questions and Evidence: Specific Considerations (cont'd)

- **Repetitive Questions:** Questions that are duplicative or repetitive may be deemed not relevant and excluded.
- **Privilege:** SPU's grievance process may not require or permit questions or evidence that seek disclosure of information protected by legal privilege, unless the person holding the privilege has waived the privilege.



Relevance of Questions and Evidence: Getting to a Determination



Questions?



Definitions for Hypotheticals #1 & #2

“**Sexual Harassment**” means conduct on the basis of sex that satisfies one or more of the following:

- An employee of SPU conditioning the provision of an aid, benefit, or service of SPU on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to SPU’s education program or activity; or
- A VAWA Offense.

The term “**stalking**” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- (A) fear for his or her safety or the safety of others; or
- (B) suffer substantial emotional distress.



Facts for Hypothetical #1

Mr. Director is the supervisor of Mrs. Worker. Both are staff members. Both are married (not to each other). Mrs. Worker has worked for Mr. Director for the past year. Mrs. Worker has filed a sexual harassment complaint against Mr. Director alleging:

- Mr. Director makes frequent comments like “Nice haircut,” “Is that a new dress?” or “I like your shoes.”
- Mr. Director stops by Mrs. Worker’s desk almost daily to talk with her. Half the time the conversation is about work, but the other half is just casual conversation. The casual conversations often last several minutes.
- On several occasions, Mr. Director has patted Mrs. Worker on the back and told her “Good job.” He has also put his hand on her shoulder multiple times while talking with her.



Questions for Hypothetical #1 (Part A)

Which questions (if any) would you allow to be put to Mrs. Worker during a live hearing? If you believe a question isn't relevant, what explanation would you give?

1. Where did Mr. Director touch you?
2. Have you ever touched any other employees in the same place that Mr. Director touched you?
3. Have you ever made any other complaints of sex discrimination or sexual harassment by a co-worker?
4. Did you ever tell Mr. Director that any of his conduct was unwelcome?
5. What do you usually wear when you go to work?



Questions for Hypothetical #1 (Part B)

Which questions (if any) would you allow to be put to Mr. Director during a live hearing? If you believe a question isn't relevant, what explanation would you give?

1. Do you ever comment on the appearance of other employees in the office?
2. Have you ever been found responsible of sexual harassment in a job?
3. Do you find Mrs. Worker attractive?
4. Are you aware of any situations where Mrs. Worker has lied?
5. Have you told your attorney that you believe you may have engaged in sexual harassment against Mrs. Worker?



Facts for Hypothetical #2

Mr. Staff and Ms. Employee are both staff members in the same department. They report to the same person. They are both single. They have worked together for six months. Ms. Employee has filed a stalking complaint against Mr. Staff claiming:

- For the first few months, they had a good working relationship. After three months, Mr. Staff asked Ms. Employee on a date. She said no. After this he did not ask her out again, but he did frequently leave handwritten notes for her in her workspace.
- Mr. Staff frequently parked next to Ms. Employee on campus. At least two days a week, Mr. Staff would leave the office at the same time as Ms. Employee and walk with her to the parking lot.
- Recently, Mr. Staff showed up unannounced where Ms. Employee lives on her birthday with a gift. She had not told him where she lived. The gift was a book that Ms. Employee had wanted.
- Ms. Employee told an investigator that she has had significant mental health issues related to anxiety for years. She claims Mr. Staff's conduct has caused her PTSD (self-diagnosis).



Questions for Hypothetical #2 (Part A)

Which questions (if any) would you allow to be put to Mr. Staff during a live hearing? If you believe a question isn't relevant, what explanation would you give?

1. Did you ever threaten to physically hurt Ms. Employee, either verbally or in writing?
2. Did you ever consider physically hurting Ms. Employee?
3. Did Ms. Employee ever tell you any of your conduct towards her was unwelcome?
4. How did you find out where Ms. Employee lives?
5. Do you think a reasonable female co-worker would suffer substantial emotional distress if you acted towards the co-worker the way you have acted towards Ms. Employee?



Questions for Hypothetical #2 (Part B)

Which questions (if any) would you allow to be put to Ms. Employee during a live hearing? If you believe a question isn't relevant, what explanation would you give?

1. What was the book that Mr. Staff gave you for your birthday?
2. Did you ever fear for your safety when you were with Mr. Staff?
3. Do you have a history of mental health issues?
4. Have you ever been romantically involved with anyone in the office?
5. Why did you turn down Mr. Staff when he asked you out on a date?



Hypothetical #3

Facts: A Respondent has been accused of engaging in a sexual act with a Complainant without the Complainant's consent. During an interview with an Investigator, the Respondent said he heard the Complainant object to the sexual act but the Respondent performed the act anyway. When the Respondent was cross-examined during the live hearing by the Complainant's Advisor, the Respondent refused to answer whether he had heard the Complainant object to the sexual act, but he answered all of the other cross-examination questions.

Questions: In making your determination:

1. Can you rely on the Respondent's statement to the Investigator?
2. Can you make an inference about the Respondent's refusal to answer the question during cross-examination?
3. Can you rely on the other statements the Respondent made?



A photograph of a university campus during autumn. The scene features a large, leafy tree in the foreground on the left, a paved walkway, and several multi-story brick buildings in the background. The sky is overcast, and the overall lighting is soft. The word "Conclusion" is overlaid in white text in the center of the image.

Conclusion



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