

DISCRIMINATION, HARASSMENT, AND RETALIATION POLICY [INTERIM]

Policy Information

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Implementation Date	August 14, 2020
Next Review Date	August 14, 2023
Responsible Office	Equal Opportunity and Title IX
References	<u>Titles IV, VI, and VII of the Civil Rights Act of 1964</u> <u>34 C.F.R. pt. 100</u> <u>Title IX of the Education Amendments of 1972</u> <u>28 C.F.R. pt. 54</u> <u>34 .F.R. pt. 106</u> <u>Section 504 of the Rehabilitation Act; 34 C.F.R. pt. 104</u> <u>Age Discrimination Act of 1975</u> <u>34 .F.R. pt. 110</u> <u>Titles I and II of the Americans with Disabilities Act; 28 C.F.R. pt. 35</u> <u>Montana Human Rights Act and Governmental Code of Fair Practices, Title 49, Montana Code Annotated</u> <u>Board of Regents Policy 507</u>

Policy

The University of Montana, together with our Affiliates, commits to a learning and working environment that emphasizes the dignity and worth of every member of its community that is free from discrimination, harassment, and retaliation based upon race, color, religion, national origin, creed, service in the uniformed services (as defined in state and federal law), veteran status, sex, gender, age, political ideas, marital or family status, pregnancy, physical or mental disability, genetic information, gender identity, gender expression, or sexual orientation (taken together, generally, “protected-class harm”). An inclusive environment is necessary to a healthy and productive University community. The University will take appropriate action to prevent, resolve, and remediate protected-class harm.

I. Applicability

This Policy prohibits members of the University community including employees, students, affiliates, and visitors from engaging in Prohibited Conduct as described below at Section XI, while engaged in activities directly related to the nature of their University affiliation. This Policy incorporates the Discrimination Grievance Procedures, which set forth the University’s resolution processes for violations of this Policy.

II. Reporting to the Office of Equal Opportunity & Title IX

The University encourages prompt reporting of conduct that may violate this Policy. Reports of Prohibited Conduct should be made directly to the University's Office of Equal Opportunity and Title IX (EO/Title IX)¹. All Reports of Prohibited Conduct, as described below, or informational requests and inquiries about this Policy or the Procedures, should be filed with the EO/Title IX Office:

Office of Equal Opportunity & Title IX, Director and Coordinator

University Hall 006

University of Montana, Missoula, MT 59812

(406) 243-5710 | eoaa@umontana.edu | www.umt.edu/eo

Some forms of conduct contemplated by this Policy may also constitute crimes and the University strongly encourages individuals to make reports to law enforcement including the University of Montana Police Department (UMPD) or other appropriate law enforcement agency². The EO/Title IX Office can aid in reporting to law enforcement.

Particular conduct reported under this Policy may trigger a timely warning notification in accordance with the Clery Act. Specifically, the University must issue timely warnings for incidents reported that pose a serious or continuing threat of bodily harm or danger to members of the campus community. The University will undertake efforts to ensure that names and other personally identifiable information is not released, while providing sufficient information to members of the campus community to make informed decisions consistent with the circumstances.

A. Report of Prohibited Conduct

A Report of Prohibited Conduct may be filed with the EO/Title IX Office by any individual, including a third party, and is intended to alert the University of a potential violation of this Policy. Except for reports submitted within a University employee's Mandatory Reporter obligation, described below, a Report of Prohibited Conduct may include any information deemed relevant by the reporting person, including: names and contact information for all individuals involved; date(s); location(s); and a description of the protected-class harm.

Upon receipt of a Report of Prohibited Conduct, EO/TIX will promptly reach out to the identified Complainant to offer Supportive and Protective Measures, as described below at Section VI, consider the Complainant's wishes with respect to Supportive and Protective Measures, inform the Complainant of the availability of Supportive and Protective Measures with or without the filing of a Formal Complaint, and invite the Complainant to meet with EO/TIX staff to assess jurisdiction and discuss potential resolution options, including the process for filing a Formal Complaint. A Report of Prohibited Conduct does not trigger a Grievance Proceeding or Informal Resolution Process.

¹ A report of Prohibited Conduct by or against the EO/Title IX Coordinator or any member of the EO/TIX Office should be filed with the President of the University.

² Information about on-campus and off-campus resources, including contact information for relevant law enforcement agencies, is attached to this policy as Appendix A, and appears on EO/Title IX Website: www.umt.edu/eo.

B. Mandatory Reporting

All University employees must, within 24 hours of receiving the information, report information they have about Discrimination based on sex and Sexual Harassment, as defined by this Policy, involving students to the EO/Title IX Coordinator. The employee must provide the EO/Title IX Coordinator with all information they have directly related to the incident. This includes, but is not limited to the names of people involved, as well as facts, including the date(s), time(s), and location(s). Employees should not conduct their own investigations or engage in fact-finding, but as described above, should report information they have. Confidential Resources as defined in this Policy at Section V are exempt from this mandatory reporting requirement.

C. Formal Complaint

The University will not initiate a Grievance Proceeding or Informal Resolution Process, defined in the Procedures at Sections IV and V, respectively, in the absence of a Formal Complaint. A Formal Complaint means a document filed by a Complainant or signed by the EO/Title IX Coordinator alleging Prohibited Conduct by a named Respondent and requesting that the University investigate and adjudicate the allegation(s) of Prohibited Conduct; and meet the applicability and jurisdiction requirements set forth in this Policy at Sections II and IV, respectively. A Formal Complaint may be filed with the EO/Title IX Coordinator in person, by mail, by electronic mail, or at the contact information listed the Policy at Section III. The Formal Complaint must contain the Complainant's physical or digital signature, or otherwise indicate that the Complainant is the person filing the Formal Complaint.

The EO/Title IX Coordinator will not sign a Formal Complaint without a requesting and participating Complainant unless the EO/Title IX Coordinator deems it necessary to campus safety based on factors such as:

- Patterned Prohibited Conduct, as evidenced by more than one report of distinct but similar Prohibited Conduct against the same Respondent;
- Excessive violence, as evidenced by reported Prohibited Conduct involving a weapon, significant bodily injury, or ongoing and continued threats of physical harm; or
- Harm to minors, as evidenced by any report of Prohibited Conduct against a child.

III. Jurisdiction

A. Adjudicatory Jurisdiction

The objective of this Policy is to provide a learning and working environment that is free from the Prohibited Conduct described below consistent with the University's commitment to diversity, equity, and inclusion. While UM strongly opposes all forms of protected-class harm, the University's jurisdiction to investigate and adjudicate Formal Complaints is limited. Except as otherwise specified in the definitions below, adjudicatory jurisdiction under this policy extends to Prohibited Conduct that is alleged to have occurred within a University Program or Activity, or that has a material adverse effect on an individual's participation in or attempted participation in a University Program or Activity. A University Program or Activity includes locations, events, or circumstances over which the University exercised substantial control over both the Respondent and the context in which the Prohibited Conduct is alleged to have occurred, and also includes any buildings owned or controlled by a student organization that is officially recognized by the University.

Jurisdiction is determined by the EO/Title IX Coordinator.

Federal regulations limit the University's jurisdiction to resolve a Formal Complaint alleging Sexual Harassment to conduct occurring against a person in the United States.

B. Supportive and Protective Measures Jurisdiction

Individuals should not avoid reporting Prohibited Conduct to the University on jurisdictional grounds. While the University may not have jurisdiction to investigate or adjudicate a report of Discrimination, Harassment, or Retaliation that occurred separate from a University Program or Activity, EO/TIX has broad jurisdiction to coordinate and implement Supportive and Protective Measures, as described below at Section VI, to members of the University community adversely affected by protected-class harm.

Similarly, individuals should not wait to report ongoing conduct until it becomes sufficiently serious to constitute a Policy violation. The EO/TIX Coordinator can provide advice and, in some cases, may take non-punitive preventive measures, to address conflict in the interest of a maintaining a safe and equitable campus environment.

IV. Confidential and Non-Confidential Resources

There is a distinction between making a report to the University or law enforcement and seeking confidential assistance through Confidential Resources described below. Not every campus or community resource is confidential and this section explains to whom individuals who have experienced Prohibited Conduct can talk without their disclosure being revealed to any other person without their express permission or as required by law.

A. Confidential Resources

Confidential Resources are those campus and community professionals who can maintain legally-protected confidentiality within the University for the individual who shared the information. Confidentiality means that information shared by an individual with a Confidential Resource cannot be revealed to any other person without express permission of the individual, or as otherwise permitted or required by law. Confidential Resources are prohibited from disclosing confidential information unless (1) given permission by the person who disclosed the information; (2) there is an imminent threat of harm to self or others; (3) the conduct involves suspected abuse of a minor under the age of 18; or (4) as otherwise required or permitted by law or court order.

Confidential Resources available to individuals include the Student Advocacy Resource Center (SARC), Counseling Center, Curry Health Center Employees, other licensed medical health-care professionals acting in their health care capacity. Information about on-campus and off-campus resources is attached to this Policy as Appendix A, and appears on EO/Title IX Website: www.umt.edu/eo.

B. Non-Confidential Resources

The Office of Equal Opportunity & Title IX is not a Confidential Resource. Nevertheless, the EO/Title IX Coordinator will make every effort to respect and safeguard the privacy of the individuals involved in reporting or otherwise participating in any process described by this Policy or the accompanying Procedures. Privacy means that reports of Prohibited Conduct will only be shared with limited individuals who need to know for the purpose of assessment, implementation of Supportive and Protective measures, and resolution of a Formal Complaint, and to the extent required by law or court order.

V. Supportive and Protective Measures

The EO/Title IX Coordinator is responsible to coordinate Supportive and Protective measures in response to conduct contemplated by this Policy. Supportive and Protective measures are non-disciplinary, non-punitive individualized services and tools offered as appropriate, as reasonably available, and without fee or charge to a Complainant or Respondent before, during or after the filing of a Formal Complaint or where no Formal Complaint has been filed. Supportive and Protective measures are designed to restore or preserve equal access to the University's Programs and Activities without unreasonably burdening the other party, and includes measures designed to protect the safety of all parties or the University's campus environment, or prevent or deter potential Prohibited Conduct.

Supportive and Protective measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, safety planning, referrals to on and off-campus services, trainings, mutual restrictions on contact, and other similar measures. Additional information about mutual restrictions on contact is will become attached as Appendix B, and incorporated here by reference.

VI. Emergency Removal/Administrative Leave/Suspension

If the University determines that a student poses an immediate threat to the physical health or safety of any student or other individual, it may remove such student from the University in accordance with the [Student Code of Conduct](#). The University may place a non-student employee who is alleged to have violated this Policy on administrative leave or suspension in accordance with the accompanying Procedures and applicable collective bargaining agreements, during the pendency of the Grievance Proceeding described in the accompanying Procedures.

VII. Amnesty for Drug or Alcohol Possession or Consumption

The University strongly encourages students to report instances of potential Prohibited Conduct involving students. Therefore, students who report information about Prohibited Conduct involving students will not be disciplined by the University for any violation of the University's drug or alcohol possession or consumption policies in which they might have engaged in connection with the reported incident. Amnesty does not preclude or prevent action by police or other legal authorities pursuant to relevant state or federal criminal statutes.

VIII. Free Expression and Academic Freedom

The University of Montana has a long tradition of, and a deep commitment to, academic freedom. The welfare and strength of the University and of society at large depend upon the ability to engage in free expression in the search for meaning. To this end, the University of Montana recognizes and protects full freedom of inquiry, teaching, research, discussion, study, publication, and for artists, the creation and exhibition of works of art, without hindrance, restriction, equivocation, or reprisal. This right extends to other facets of campus life to include the right of a faculty member or student to speak on general educational questions or about the Administration and operation of his/her own institution and the Montana University System.

Constitutionally protected speech and traditional notions of academic freedom are valued in higher education. These ideals help to create the stimulating and challenging learning environment that should characterize higher education. In the spirit of a true university environment, individuals are encouraged to

invite, rather than inhibit, discourse on ideas. In addressing all reports under this Policy, the University will take all permissible actions to ensure the safety of students and employees while complying with free speech requirements for students and employees. While the University will vigilantly protect students' and employees' rights against Prohibited Conduct, this Policy does not apply to curriculum or in any way prohibit or abridge the use of particular textbooks or curricular materials.

IX. Prohibited Conduct

The following conduct is prohibited.

A. Discrimination

Discrimination is conduct based upon an individual's race, color, religion, national origin, creed, service in the uniformed services (as defined in state and federal law), veteran status, sex, gender, age, political ideas, marital or family status, pregnancy, physical or mental disability, genetic information, gender identity, gender expression, or sexual orientation ("protected classes") that:

1. Adversely affects a term or condition of an individual's employment, education, living environment or participation in a University Program or Activity; or
2. Is used as the basis for or a factor in decisions affecting that individual's employment, education, living environment or participation in a University Program or Activity; or
3. Constitutes Harassment, as defined below, by unreasonably interfering with an individual's employment, educational performance, on-campus living environment, or participation in a University Program or Activity.

Discrimination includes failing to provide reasonable accommodation to persons with disabilities. Under the Policy, a person with a disability means a person with a physical or mental impairment that substantially limits a major life activity; has a record of such impairment; or is regarded as having such an impairment. Determinations of whether individuals have a physical or mental impairment that substantially limits a major life activity (and therefore has a disability) are made on a case by case basis. In accordance with the Americans with Disabilities Act (ADA), as amended, Section 504 of the Rehabilitation Act of 1973, and applicable federal and state laws, the University is committed to providing access and reasonable accommodation in its services, programs, activities, education, and employment for individuals with disabilities.

An exception to the definition of Discrimination is a bona fide occupational qualification.

B. Harassment

The University prohibits two forms of Harassment as described below: (1) Discriminatory Harassment; and (2) Sexual Harassment.

1. Discriminatory Harassment

Discriminatory Harassment is unwanted conduct that is: (a) based upon an individual's race, color, religion, national origin, creed, service in the uniformed services (as defined in state and federal law), veteran status, sex, gender, age, political ideas, marital or family status, pregnancy, physical or mental disability, genetic information, gender identity, gender expression, or sexual orientation; and (b) that has the purpose or effect of unreasonably interfering with a reasonable person's participation in a University Program or Activity.

Discriminatory Harassment emphasizes the consequence of conduct on an individual's participation in a University Program or Activity.³ The following factors will be considered in assessing whether conduct objectively constitutes an unreasonable interference in a University Program or Activity:

- a. The identity of the parties, the nature of the parties' relationship, and the influence of that relationship on the complainant(s)' employment or education;
- b. The nature, scope, frequency, and duration of the protected class conduct;
- c. The degree to which the protected class conduct affected one or more students' education or individual's employment; and
- d. The nature of higher education.

2. Sexual Harassment

Acts of Sexual Harassment may be committed by any person upon any other person, regardless of the sex, gender, sexual orientation, and/or gender identity of those involved.

Sexual Harassment is unwanted conduct that: (1) occurs within a University Program or Activity located in the United States; (2) affects an individual participating or attempting to participate in a University Program or Activity at the time the Formal Complaint is filed; (3) is based on sex, gender identity, gender expression, or sexual orientation; and (4) satisfies the elements of Quid Pro Quo Conduct, Hostile Environment, Sexual Assault, Domestic Violence, Dating Violence, Stalking, or Sexual Exploitation, as defined below.

- a. Quid Pro Quo Conduct occurs when:
 - i. an employee of the University,
 - ii. conditions the provision of an aid, benefit, or service of the University,
 - iii. on an individual's participation in unwelcome sexual conduct.
- b. A Hostile Environment is created by:
 - i. unwelcome⁴ conduct,
 - ii. determined by a reasonable person,
 - iii. to be so severe, and
 - iv. pervasive, and,
 - v. objectively offensive,
 - vi. that it effectively denies a person equal access to a University Program or Activity.
- c. Sexual Assault is:

³ Although some protected class conduct may be egregious in nature, the lack of proximity of the conduct to the University may limit its effect on an individual's education or employment. Other conduct may be relatively less severe but, for example, occur between colleagues of the same office or students in a shared seminar and therefore result in a greater impact on an individual's education or employment.

⁴ Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is below the age of consent). Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances ("in the shoes of the Complainant"), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

- i. Non-consensual touching, or coercing or forcing another to touch a person's intimate body parts (defined as genital area, groin, inner thigh, or breast);
- ii. Penetration, no matter how slight, of a person's vagina or anus, by any body part or object, or oral penetration by a sex organ of another person without consent; or
- iii. Sexual intercourse between persons who are related to each other to the degree they cannot marry under state law.

Consent is informed, freely given, and mutual. If coercion, intimidation, threats, or physical force are used there is no consent. If a person is mentally or physically incapacitated, under the statutory age of consent, or impaired so that such person cannot understand the fact, nature or extent of the sexual situation, there is no consent; this includes impairment or incapacitation due to alcohol or drug consumption, or being asleep or unconscious. There is no consent when there is force, expressed or implied, or use of duress or deception upon the victim. Silence does not necessarily constitute consent. Past consent to sexual activities does not imply ongoing future consent. Whether an individual has taken advantage of a position of influence over an alleged victim may be a factor in determining consent.

Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the University to determine whether its Policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred.

Force: Force is the use of physical violence and/or physical imposition to gain sexual access. Force also includes threats, intimidation (implied threats), and coercion that is intended to overcome resistance or produce consent (e.g., "Have sex with me or I'll hit you," "Okay, don't hit me, I'll do what you want."). Sexual activity that is forced is, by definition, non-consensual, but non-consensual sexual activity is not necessarily forced. The absence of resistance alone is not consent. Consent is not demonstrated by the absence of resistance. While resistance is not required or necessary, it is a clear demonstration of non-consent.

Coercion: Coercion is unreasonable pressure for sexual activity. Coercive conduct differs from seductive conduct based on factors such as the type and/or extent of the pressure used to obtain consent. When someone makes clear that they do not want to engage in certain sexual activity, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive.

Incapacitation: Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent (e.g., to understand the "who, what, when, where, why, or how" of their sexual interaction). A person cannot consent if they are unable to understand what is happening or is disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs. As stated above, a Respondent violates this Policy if they engage in sexual activity with someone who is incapable of giving consent. Incapacitation is determined through consideration of all relevant indicators of an individual's state and is not synonymous with intoxication, impairment, blackout, and/or being drunk.

d. Dating Violence is:

- i. violence,
- ii. committed by a person,
- iii. who is in or has been in a social relationship of a romantic or intimate nature with the Complainant.
 - 1) The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—
 - 2) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 - 3) Dating violence does not include acts covered under the definition of domestic violence.

e. Domestic Violence is:

- i. violence,
- ii. committed by a current or former spouse or intimate partner of the Complainant,
- iii. by a person with whom the Complainant shares a child in common, or
- iv. by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
- v. by a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Montana, or
- vi. by any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Montana.

To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

f. Stalking is:

- i. engaging in a course of conduct,
- ii. directed at a specific person, that
 - 1) would cause a reasonable person to fear for the person's safety, or
 - 2) the safety of others; or
 - 3) Suffer substantial emotional distress.

For the purposes of this definition—

- (i) Course of conduct means two or more acts, including, but not limited to,
- (ii) acts in which the Respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- (iii) Reasonable person means a reasonable person under similar circumstances

- (iv) and with similar identities to the Complainant.
 - (v) Substantial emotional distress means significant mental suffering or
 - (vi) anguish that may but does not necessarily require medical or other professional treatment or counseling.
- g. Sexual Exploitation is any instance in which a person takes non-consensual or abusive sexual advantage of another for any person's benefit other than the person being exploited. Sexual Exploitation is conduct that falls within other categories of Sexual Harassment but is identified separately for clarity. Examples of behavior that could rise to the level of Sexual Exploitation include:
- i. Prostituting another person;
 - ii. Non-consensual visual (e.g., video, photograph) or audio-recording of sexual activity;
 - iii. Non-consensual distribution of photos, other images, or information of an individual's sexual activity, intimate body parts, or nakedness, with the intent to or having the effect of embarrassing an individual who is the subject of such images or information;
 - iv. Going beyond the bounds of consent (such as letting your friends hide in the closet to watch you having consensual sex);
 - v. Inducing incapacitation for sexual purposes;
 - vi. Engaging in non-consensual voyeurism;
 - vii. Knowingly transmitting an STI, such as HIV, to another without disclosing your STI status;
 - viii. Exposing one's genitals in non-consensual circumstances, or inducing another to expose their genitals; or
 - ix. Possessing, distributing, viewing or forcing others to view illegal pornography.

C. Retaliation

Retaliation means any adverse action, including efforts to intimidate, threaten, coerce or discriminate, and any adverse employment or educational actions, that would discourage a reasonable person from engaging in activity protected under this policy, against any individual for the purpose of interfering with any right or privilege secured by this Policy, or because the individual has made a report or complaint, responded to a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Policy and accompanying Discrimination Grievance Procedures.

X. Resolution, Sanctions, Appeal

The University's resolution processes are described in the accompanying Discrimination Grievance Procedures.

The possible sanctions and corrective actions that can occur as a result of violating this Policy are described in the accompanying Discrimination Grievance Procedures.

The University's procedure to appeal a finding of responsibility for violating this Policy is described in the accompanying Discrimination Grievance Procedures.

Appendices:

A: University Resource Guide; B: Mutual Restriction on Contact Guidelines