

Rule R1-012: DRAFT Discrimination Complaint Rule

I. Purpose and Scope

Purpose: The University of Utah (“University”) is committed to providing and fostering an environment that is safe and free from prohibited discrimination and harassment. University policy prohibits discrimination and prohibits retaliation against individuals for engaging in protected activities, such as filing a discrimination complaint or participating in a discrimination investigation process.

This Rule implements University Policy 1-012 and describes the manner in which individuals may pursue discrimination complaints, including complaints of Sexual Misconduct, at the University.

Scope: This Rule applies to all academic and administrative units of the University, and to all members of the University community, including all faculty, staff, students, and participants in University programs or activities.

All allegations of discrimination raised by or against students or employees of the University shall be resolved pursuant to this Rule and its accompanying Rules and Procedure. Allegations of discrimination that do not involve Sexual Misconduct shall be resolved pursuant to Rule 1-012A, *Discrimination Complaint Process Rule*. Allegations of Sexual Misconduct shall be resolved pursuant to Rule 1-012B, *Sexual Misconduct Complaint Process Rule*.

Allegations of discrimination raised by patients of University of Utah health care providers/facilities shall not be governed by this Rule, and shall be resolved under the procedure outlined at <http://healthcare.utah.edu/policies/discrimination.php>.

II. Definitions

For purposes of Policy 1-012 and its associated Rules and Procedure, the definitions of prohibited discrimination and other words and phrases are provided in this Rule.

- A. **Committee** is the hearing committee convened to hear complaints of discrimination.
- B. **Committee Report** is the written recommendation of the Committee. The Committee Report contains: (a) a determination of whether the evidence, evaluated under a Preponderance of the Evidence standard, supports a finding that a violation of University nondiscrimination policy occurred; and if so, (b) a determination of whether the sanctions are reasonable in light of the circumstances.
- C. **Complaint** means a signed statement that sets forth allegations of prohibited discrimination, the dates of the alleged conduct, and the name (if known) of the

individual(s) who has engaged in the conduct. Complaint forms may be obtained online at: <http://www.oeo.utah.edu> or by contacting the OEO/AA.

- D. **Complainant** is the individual who allegedly experienced discrimination in violation of University policy. See also Section VII, Receipt of Complaint.
- E. **Consent** means affirmative, unambiguous, and voluntary agreement. For a non-exhaustive list of situations in which consent has not been given, see Utah Code Ann. § 76-5-406.
- F. **Discrimination** means treating someone differently, i.e., disadvantaging the person, on the basis of being a member of a protected class described in University Policy 1-012 when:
 - 1. such conduct adversely affects a term or condition of an individual's employment, education, living environment, or participation in a University program or activity; or
 - 2. a person's membership in a protected class is used as the basis for or a factor in decisions affecting that individual's employment, education, living environment, health care, or other participation in a University program or activity.
- G. **Final Result** means (a) the University's final and binding determination of whether the evidence, evaluated under a Preponderance of the Evidence standard, supports a finding that a violation of University nondiscrimination policy occurred, and (b) the sanctions imposed.
- H. **Harassment** means unwelcome or offensive conduct which has the purpose or effect of interfering with a person's work or academic environment or creating an intimidating, hostile, offensive or otherwise adverse working or learning environment, when such conduct is based on or because of an individual's membership in a protected class described in University Policy 1-012. Harassment is a form of Discrimination.
- I. **Intimate Partner Violence** means actual or threatened physical violence, intimidation, or other forms of physical or sexual abuse that would cause a reasonable person to fear harm to self or others. For this policy, "intimate relationship" means marriage, domestic partnership, engagement, casual or serious romantic involvement, and dating, whether in a current or former relationship. Intimate Partner Violence can occur between persons of any sex, sexual orientation, gender, gender identity, or gender expression, and it can occur in any type of intimate relationship including monogamous, non-committed, and relationships involving more than two partners. Intimate Partner Violence can be a single act or a pattern of behavior. Intimate Partner Violence is sometimes referred to as, and includes behaviors that would be considered, dating violence, domestic violence, or relationship abuse. Examples of Intimate Partner Violence include, but are not limited to, situations in which the following behaviors are

directed toward a partner in a current or former intimate relationship: hitting, kicking, strangling, or other violence; property damage; and threat of violence to one's self, one's partner, or the family members, friends, pets, or personal property of the partner. Intimate Partner Violence is a form of Sexual Misconduct.

- J. **Nonconsensual Sexual Contact** means any physical contact with another person of a sexual nature without that person's Consent. The touching of a person's intimate parts (such as genitalia, groin, breast, buttocks, mouth, or clothing covering same); touching a person with one's own intimate parts; or forcing a person to touch another's intimate parts would be violations of this policy if they occur without Consent. Nonconsensual Sexual Contact is a form of Sexual Misconduct.
- K. **Nonconsensual Sexual Penetration** means the sexual penetration of any bodily opening with any object or body part without Consent. This could be committed by force, threat, intimidation, or through exploitation of another's mental or physical condition (such as lack of consciousness, incapacitation due to drugs or alcohol, age, or disability) of which the Respondent was actually aware or which a reasonable person in the Respondent's position should have been aware. Nonconsensual Sexual Penetration is a form of Sexual Misconduct.
- L. **OEO Draft** is the draft report of the OEO/AA's investigation. The OEO Draft will typically contain: (a) a determination of whether the evidence, evaluated under a Preponderance of the Evidence standard, supports a finding that a violation of University non-discrimination policy occurred; and if so, (b) any mitigating or aggravating factors.
- M. **OEO Report** is the final report of the OEO/AA issued at the conclusion of the investigation of a Complaint. The OEO Report contains: (a) a determination of whether the Preponderance of the Evidence standard supports a finding that a violation of University non-discrimination policy occurred; and if so, (b) any mitigating or aggravating factors.
- N. **OEO/AA** means the University of Utah Office of Equal Opportunity and Affirmative Action.
- O. **Outside Entity** means an organization or individual external to the University that is appointed to conduct an investigation.
- P. **Preponderance of the Evidence** is a legal standard meaning "more likely than not."
- Q. **Respondent** is the person(s) alleged to have engaged in the prohibited discrimination.
- R. **Responsible Employee** means any University employee:

1. Who has the authority to take action to redress Sexual Misconduct (e.g., supervisor for a subordinate; faculty member for a student);
 2. Who has been given the duty of reporting incidents of Sexual Misconduct or any other student misconduct to the University (e.g., administrator, resident advisor, program director); or
 3. Whom a student could reasonably believe has this authority or duty (e.g., administrator, public safety representative, faculty or staff member).
- S. **Sex Discrimination** means treating someone differently, i.e., disadvantaging the person, on the basis of sex, sexual orientation, gender, gender identity, or gender expression when:
1. such conduct adversely affects a term or condition of an individual's employment, education, living environment, or participation in a University program or activity; or
 2. a person's sex, sexual orientation, gender, gender identity or expression is used as the basis for or a factor in decisions affecting that individual's employment, education, living environment, health care, or participation in a University program or activity.
- T. **Sexual Exploitation** means taking sexual advantage of another person and includes, without limitation: indecent exposure; causing or attempting to cause the incapacitation of another person in order to gain a sexual advantage over him or her; causing the prostitution of another person; recording, photographing, or transmitting images of private sexual activity and/or the intimate parts of another person without consent; allowing third parties to observe private sexual acts without consent; engaging in voyeurism without consent; and knowingly or recklessly exposing another person to a significant risk of sexually transmitted infection, including HIV. ~~In this context, "consent" means affirmative, unambiguous, and voluntary agreement.~~ Sexual Exploitation is a form of Sexual Misconduct.
- U. **Sexual or Gender-Based Harassment** means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature or based on an individual's sex, sexual orientation, gender, gender identity, or gender expression when:
1. submission to such conduct is made either explicitly or implicitly a term or condition of the person's employment, education, living environment, health care or participation in a University program or activity;
 2. submission to or rejection of such conduct by an individual 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. such conduct has the purpose or effect of interfering with an individual's employment or education or creating an intimidating, hostile, or offensive environment for that individual's employment, education, living environment, or participation in a University program or activity.
- The free and open discussion of issues or theories relating to sexuality or gender

in an academic or professional setting, when appropriate to subject matter, will be presumed not to constitute Sexual or Gender-Based Harassment even if it offends or embarrasses an individual unless other factors are involved, such as targeting the discussion to an individual or carrying out the discussion in terms that are both patently unnecessary and gratuitously offensive.

Sexual or Gender-Based Harassment is a form of Sexual Misconduct.

- V. **Sexual Misconduct** is a broad term used to encompass a range of behaviors including Sexual or Gender-Based Harassment, Intimate Partner Violence, Sexual Exploitation, Stalking, Nonconsensual Sexual Contact, and Nonconsensual Sexual Penetration. Sexual Misconduct also includes the crimes of dating violence, domestic violence, sexual assault, and stalking as defined by state and federal law. Sexual Misconduct is a form of Sex Discrimination.
- W. **Sexual Violence** means any physical sexual act perpetrated against a person's will or where a person is incapable of giving consent (e.g., due to age or use of drugs or alcohol, or because an intellectual or other disability prevents the person from having the capacity to give consent).
- X. **Stalking** means engaging in a course of conduct directed at a specific person and based on that person's sex, sexual orientation, gender, gender identity, or gender expression, that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress. Stalking is a form of Sexual Misconduct.

III. Rule

- A. **Confidentiality.** The privacy of all parties involved in a complaint process shall be strictly respected insofar as it does not interfere with the University's legal obligation to investigate allegations of misconduct, to take appropriate action, or as otherwise provided by law.
- B. **Retaliation.** As provided in Policy 1-012, the University prohibits retaliation against individuals for engaging in protected activities, such as filing a discrimination complaint or participating in a discrimination complaint process. Allegations of retaliation are subject to the same process and sanctions described in this Rule and its associated Rules and Procedure.
- C. **Duty to Notify.** Any University representative who is contacted by an individual with a discrimination issue should advise that individual of the OEO/AA and the availability of the University complaint process. Once informed of a possible incident of prohibited discrimination, a supervisor, chair, dean, or other University representative should immediately inform the OEO/AA. A Responsible Employee (see definition above) must promptly report to the Title IX Coordinator allegations of Sexual Misconduct, subject to the confidentiality provisions of Rule 1-012B, Section III.C.

D. Filing a Complaint & Initial Review. A Complaint may be filed with the OEO/AA:

1. by any individual who believes they have been subjected to discrimination in violation of Policy 1-012, 5-106, 5-117, 6-400 Section II.E, or 6-316 Section 4; or
2. by an administrator acting on behalf of the University alleging a violation of University policy.

A Complaint is timely if it is filed within 120 calendar days of the last alleged discriminatory act. A Complaint that is not timely or that fails to state a claim of discrimination may be dismissed by the Director of the OEO/AA after an initial review. At the Director's discretion and for good cause, particularly in cases alleging Sexual Misconduct, a Complaint that is not timely may be accepted.

E. OEO/AA Investigation. If a Complaint is not dismissed as untimely or for failing to state a claim of discrimination, the OEO/AA will begin an investigation. Upon beginning an investigation, the OEO/AA shall notify the Respondent of the allegations in the Complaint, and will also notify the appropriate University administrator, which may include the supervisor, Chair, Dean, and/or cognizant Vice President with responsibility over the Respondent:

1. If the Respondent is a student, the Vice President for Student Affairs and the Office of Dean of Students will also be notified.
2. If the Respondent is a Vice President, another Vice President will be selected as the cognizant Vice President for purposes of this Rule.

If the OEO/AA Director determines that a conflict exists for OEO/AA staff to conduct an investigation, the OEO/AA, in consultation with the Office of General Counsel, may appoint an external organization ("Outside Entity") to conduct the investigation. All information and reports conducted by the Outside Entity will be subject to the same confidentiality and privacy requirements of the OEO/AA and the University. Any report issued by the Outside Entity will be maintained by the OEO/AA.

Reasonable time away from regular work duties during scheduled working hours shall be provided, with pay, to the parties, their representatives, or any witnesses called to testify, for time spent participating in the complaint resolution process.

The remainder of the complaint process will proceed pursuant to Rule 1-012A, if the complaint does not involve allegations of Sexual Misconduct, or pursuant to Rule 1-012B, if the complaint involves allegations of Sexual Misconduct.

F. Alternative Resolution.

1. Alternative Resolution may be appropriate in some cases. The University has the discretion to determine whether the nature of the reported conduct is appropriate for Alternative Resolution, to determine the type of Alternative Resolution that may be appropriate in a specific case, and, pursuant to Section III.D of this Rule, to refer a report for a formal Complaint any time. Alternative Resolution may not be available where the OEO/AA Director has determined that certain risk factors are present. Forms of Alternative Resolution that involve face-to-face meetings between the Complainant and the Respondent, such as mediation, will not be used in cases involving Sexual Violence.
2. Participation in Alternative Resolution is voluntary. The University will not compel a Complainant or Respondent to engage in Alternative Resolution, will not compel a Complainant to directly confront the Respondent, and will allow a Complainant or Respondent to withdraw from Alternative Resolution at any time. The University may decline the request for Alternative Resolution in any particular case and may terminate an ongoing Alternative Resolution process at any time. Pursuing Alternative Resolution does not preclude later use of the Complaint and investigation process if the Alternative Resolution fails to achieve a resolution acceptable to the parties and the University. If the Alternative Resolution is terminated for any reason, any statements or disclosures made by the parties during the course of the Alternative Resolution may be considered in a subsequent investigation.
3. With any form of Alternative Resolution, each party has the right to choose and consult with an advisor. The advisor may be any person, including an attorney, who is not otherwise a party or witness to the reported incident(s). The parties may be accompanied by their respective advisors at any meeting or proceeding held as part of Alternative Resolution. While the advisors may provide support and advice to the parties at any meeting and/or proceeding, they may not speak on behalf of the parties or otherwise participate in, or in any manner disrupt, such meetings and/or proceedings.
4. Alternative Resolution may include:
 - a. Resolution with the Assistance of a Third Party: A Complainant may seek assistance in informally resolving a report of discrimination from the OEO/AA Director, who can arrange to have a University representative facilitate a meeting or meetings between the parties. The availability of this form of Alternative Resolution, and any resolution reached through such form of Alternative Resolution, is subject to the agreement of the OEO/AA Director, the Complainant and the Respondent. This form of Alternative Resolution is not used where the allegation involves Sexual Violence.

- b. **Interventions and Remedies:** Alternative Resolution agreements may involve a host of interventions and remedies, such as actions designed to maximize the Complainant's access to educational, extracurricular, and/or University employment activities; increased monitoring, supervision, and/or security at locations or activities where the discrimination occurred or is likely to reoccur; targeted or broad-based educational programming or training for relevant individuals or groups; academic and/or University housing modifications for student Complainants; workplace modifications for employee Complainants; one or more of the restorative remedies or other sanctions described in this Rule; and/or any other remedial or protective measures that can be tailored to the involved individuals to achieve the goals of the University nondiscrimination policy.
- 5. Any form of Alternative Resolution and any combination of interventions and remedies may be utilized. If an agreement acceptable to the University, the Complainant, and the Respondent is reached through Alternative Resolution, the terms of the agreement are implemented and the matter is resolved and closed. If an agreement is not reached, and the OEO/AA Director determines that further action is necessary, or if a Respondent fails to comply with the terms of the Alternative Resolution, the matter may be referred for a Complaint and investigation under this Rule and its associated Rules and Procedure.
- 6. The OEO/AA will maintain records of all reports and conduct referred for Alternative Resolution, which typically will be completed within thirty (30) calendar days.

IV. Rules, Procedures, Guidelines, Forms, and other related resources.

A. Rules

Rule 1-012A

Rule 1-012B

B. Procedures

Procedure 1-012

C. Guidelines

None

D. Forms

None

E. Other related resource materials

None

V. References

20 U.S.C. § 1092(f)

20 U.S.C. § 1681 *et seq.*

29 U.S.C. § 794 *et seq.*

42 U.S.C. § 2000d *et seq.*

42 U.S.C. § 2000e *et seq.*

42 U.S.C. § 6101 *et seq.*

42 U.S.C. § 12112

42 U.S.C. § 12132

42 U.S.C. § 18116

34 C.F.R. § 668.46 Institutional Security Policies and Crime Statistics

Utah Code Ann. § 76-5-106.5 Stalking—Definitions—Injunction—Penalties

Utah Code Ann. § 76-5-402 to -405 Sexual Offenses

Utah Code Ann. § 76-5-406 Sexual offense against the victim without consent of victim—Circumstances

Utah Code Ann. § 76-5b Sexual Exploitation Act

Utah Code Ann. § 76-9-702.7 Voyeurism offenses—Penalties

Utah Code Ann. § 77-36-1 Definitions

Utah Code Ann. § 78B-7-402 Definitions

Board of Regents Policy No. R256: Student Disciplinary Processes

Board of Regents Policy No. R831: Minimum Requirements for Non-Faculty Staff Employment Grievances Policy

Board of Regents Policy No. R841: Minimum Requirements for Disciplinary Sanctions and Termination of Staff Personnel

Policy 1-004: Violence in the Workplace and Academic Environment

Policy 1-011: Campus Security

Rule 1-012: Discrimination Complaint Rule

Rule 1-012A: Discrimination Complaint Process Rule

Rule 1-012B: Sexual Misconduct Complaint Process Rule

Policy 5-106: Equal Opportunity and Nondiscrimination Employment

Policy 5-107: Consensual Relationships

Policy 5-117: Americans with Disabilities Act (ADA) Policy

Policy 5-203: Staff Employee Grievances

Policy 6-011: Senate Consolidated Hearing Committee

Policy 6-316: Code of Faculty Rights and Responsibilities

Policy 6-400: Code of Student Rights and Responsibilities

VI. Contacts:

The designated contact officials for this Policy are:

A. Policy Owner (primary contact person for questions and advice): Office of Equal Opportunity and Affirmative Action

B. Policy Officer: Vice President and General Counsel

These officials are designated by the University President or designee, with assistance of the Institutional Policy Committee, to have the following roles and authority, as provided in University Rule 1-001:

“A “Policy Officer” will be assigned by the President for each University Policy, and will typically be someone at the executive level of the University (i.e., the President and his/her Cabinet Officers). The assigned Policy Officer is authorized to allow exceptions to the Policy in appropriate cases.... ”

“The Policy Officer will identify an “Owner” for each Policy. The Policy Owner is an expert on the Policy topic who may respond to questions about, and provide interpretation of the Policy; and will typically be someone reporting to an executive level position (as defined above), but may be any other person to whom the President or a Vice President has delegated such authority for a specified area of University operations. The Owner has primary responsibility for maintaining the relevant portions of the Regulations Library... [and] bears the responsibility for determining which reference materials are helpful in understanding the meaning and requirements of particular Policies... .” University Rule 1-001-III-B & E

VII. History: *{Place for key information about, and documents comprising, the “legislative” history of the Policy, in both its latest revised version, and all previous revisions, by Revision number. The first--originally adopted version of each Policy is “Revision 0” and the first subsequently revised version is “Revision 1”, and so on.. }*

Renumbering: Not Applicable. *{If the Policy existed prior to September 2008, it was renumbered at that time as part of the mass reorganization of the entire regulations system, converting from the former “PPM” numbering to the new “University Regulations” numbering system. If the Policy did not exist prior to Sept. 2008, this is Not Applicable. }*

Revision History:

A. Current version-- University Rule 1-012, Revision 0. Approved by the Academic Senate: [Date of approval]. Approved by the Board of Trustees: [Date of approval], with the designated effective date of [Effective date].

Editorial revisions to current version: None

Background information on Revision 0. *{Identify and embed hyperlink to legislative history document which explains and shows the changes for this specific revision. Include materials which were included in the agenda for the Academic Senate processing of the proposal, including (i) Senate Cover Sheet form, (ii) explanatory memorandum to cabinet-level administrator describing proposal; (iii) marked up proposal showing changes made from previous version by strikeout and underlining fonts; (iv) any other useful legislative history information. For example see the legislative history file for Revision 2 of Policy 6-315 Faculty Parental Benefits...
http://www.regulations.utah.edu/academics/appendices_6/6-315R2_legislativehistory_2011-05-10.pdf }*

B. Earlier versions.

None.