

(Preventing and) Addressing EO Incidents



Roles & Responsibilities (Formal Complaint to EOP)

EOP:

- Provide official notification
- Consult with dept and HR, as needed*
- Investigate
- Recommend immediate remedial action, as needed*
- Prepare report
- Receive VP/Chief written response to report
- Notify parties of results
- Follow up to ensure completion and success of remedial actions, as appropriate

HR/ER/Dept:

- Receive official notification
- Consult with EOP, as needed*
- Facilitate investigation
- Implement immediate remedial actions, as needed*
- Implement accepted recommendations, as directed by VP/Chief
- Follow up to ensure completion and success of remedial actions, as appropriate

What is an “EO incident”?

= inappropriate conduct based on a protected characteristic/status or in retaliation for making or assisting with a complaint

Protected Characteristics/Statuses:

- age
- color
- disability
- marital status
- national or ethnic origin
- political affiliation
- race
- religion
- sex (including pregnancy)
- sexual orientation
- veteran status

Respondeat Superior

“Test cases” are rare. It is well-established that, with limited exceptions, an employer will be liable when:

- i. Supervisors/management personnel are the harassers. Generally, supervisor/management harassment will result in strict liability.**
- ii. Co-workers are the harassers, and the employer knew or should have known of the harassing conduct and failed to take prompt and effective corrective action. This same rule applies with third parties in the workplace (vendors, clients, etc.).**

Policies & Procedures



University Statement

- The University of Virginia is committed to equal employment opportunity and affirmative action. To fulfill this commitment, the University administers its programs, procedures and practices without regard to age, color, disability, marital status, national or ethnic origin, political affiliation, race, religion, sex (including pregnancy), sexual orientation or veteran status, and operates both affirmative action and equal opportunity programs, consistent with resolutions of the Board of Visitors and with federal and state requirements, including the Governor's Executive Order on Equal Opportunity.

University “EOP Policies”

- Preventing and Addressing Discrimination and Harassment (PADH)
- Preventing and Addressing Retaliation (PADR)

Policy Definitions

- **Discrimination:** Inequitable treatment by the University of a person based on one or more of that person's protected characteristics or statuses, excepting any treatment permitted or required by law.
- **Harassment:** Unwelcome conduct directed against a person based on one or more of that person's protected characteristics or statuses, which conduct is so severe or pervasive that it interferes with an individual's employment, academic performance or participation in University programs or activities, and creates a working, learning, program or activity environment that a reasonable person would find intimidating, hostile or offensive.

Policy Definitions (Cont'd)

- **Retaliation:** Reprisal, interference, restraint, penalty, discrimination, intimidation or harassment, determined in accordance with applicable legal standards.
- **Supervisor:** As used throughout this Policy, “supervisor” refers to any person who has authority to undertake or recommend tangible employment decisions affecting an employee or academic decisions affecting a student; or to direct an employee’s work activities or a student’s academic activities. Examples include faculty members to whom work-study students report and team lead workers who, from time to time, monitor other employees’ performance or direct their work.

Types of EO Complaints

- I. **Discrimination**
 - Disparate treatment – less favorable treatment than others similarly situated due to protected characteristic
 - Disparate impact – pattern or practice

- II. **Sexual and Other Harassment – a form of discrimination**
 - Hostile environment – typically, comments, e-mails, gestures, etc.
 - *Quid pro quo* (“this for that”) = demand for favors in exchange for work-related benefit

- III. **Retaliation/Reprisal**

- IV. **Failure to Provide Reasonable Accommodation**

EOP Complaint Procedures

- EOP Brochure: “Complaint Procedures”
- Procedures and complaint form online:
<http://www.virginia.edu/eop/complaint.html>
- Key provisions:
 - ❖ Violations of the “Preventing and Addressing Discrimination and Harassment” policy and the “Preventing and Addressing Retaliation” policy can be determined only by EOP, and typically, only in response to a formal complaint filed in accordance with these procedures.
 - ❖ 300-day filing period for formal complaints; may be waived for good cause and still may address concern.
 - ❖ Informal resolution procedures - may involve UHR and/or Ombudsman.

Addressing Incidents



Stages of Addressing

Depending on the circumstances, you will go through one or more of these:

- 1) Intake
- 2) Consultation
- 3) Coordination
- 4) Referral
- 5) Fact-Finding Inquiry
- 6) Remediation & Resolution
- 7) Follow-Up

Stage One: Intake

- = your initial interaction with someone about the incident; may occur by e-mail, phone or in-person; may or may not be with the aggrieved party.**
- Conduct in-person, if possible.**
- Focus on getting key facts (who, what, when, etc.), issue spotting and advising of policies and procedures.**
- This may be your only interaction with the aggrieved party and therefore also may need to serve as a fact-finding interview. If so, you will need to elicit more detailed information.**
- Consider whether informal resolution may be appropriate.**
- Remember: In most cases, the primary purpose is to gather and to provide enough information to determine next steps.**

Top Ten Tips for Intake & Fact-Finding Logistics

1. If the individual calls in advance for an appointment, ask some questions to be prepared for the intake, but suggest it is best done in-person. If the person does not want to meet, do not require it.
2. Schedule the intake at the earliest possible opportunity.
3. Meet in-person in a private (but not remote), comfortable, accessible location. Arrange for parking or other assistance as needed.
4. Do not introduce the individual around the office or otherwise announce his or her presence.
5. Take notes and allow the individual to take notes. Do not tape record or allow the individual to tape record. Have supplies on hand (for notetaking, tissues, water, etc.).
6. Do not take phone calls or allow other interruptions*. In some instances, you may want to have a nearby co-worker check in on you, perhaps in response to a code word. Example: “Bob, I’m expecting an important fax this morning from AUSTIN. Could you please let me know as soon as it arrives?”
7. Generally, it is best to meet one-on-one. However, if you are uncomfortable with the individual, you may want to have a neutral “notetaker” present. Take the seat nearest the door, if possible.
8. If the individual wants someone else present, find out who and why. If it is an attorney (unlikely at this stage), contact EOP and/or the Office of General Counsel.
9. Allow sufficient time (good rule of thumb: twice as long as you expect). Do not require the individual to use break time, come after hours or use time off.
10. The intake may be impromptu (i.e., individual just shows up). Reschedule other commitments, if possible. If not possible, advise individual at start of intake (e.g., “I have to leave in 20 min. for a meeting that can’t be rescheduled. I would like to see what we can discuss before then and if necessary, we can schedule additional time. Is that okay with you?”).

Consultation v. Coordination

As used in this training:

- Consultation - with EOP
- Coordination - other offices (i.e., UHR, MCHR, Student Affairs, FEAP, LNEC, University Police, etc.)

Stage Two: Consultation

Consult EOP when:

1. You are unsure whether a protected characteristic is even allegedly involved.
2. You are unsure how to proceed.
3. You would like a neutral perspective.
4. The complaining party does not wish to proceed, but the alleged incident(s) seems serious (e.g., severe and/or pervasive, physical contact, etc.).
5. The incident, or similar incidents between the parties, has been addressed previously.
6. The complaining party and/or the accused has an attorney.
7. There is the possibility of retaliation, i.e., a disciplinary action other materially adverse action (see #8 below) is pending against a party involved in a complaint.
8. You are uncertain what may constitute a “materially adverse action” (for purposes of retaliation).

***NOTE:** In some of the foregoing circumstances, the incidents may need to be referred to EOP.

Stage Three: Coordination

Coordinate with other offices when the (alleged) incident involves:

1. A student = Student Affairs Office
2. A faculty member = Office of the Provost
3. A disability = ADA Coordinator
4. A potential crime/threat of violence = University Police; Office of General Counsel
5. A disruptive or distressed employee = Faculty and Employee Assistance Programs; Employee Relations; Ombudsman
6. Sexual assault/domestic violence = University Police; Women's Center

Stage Four: Referral

Refer EO incidents to EOP when:

1. The alleged incident(s), if true, would constitute a violation of the PADH policy and/or PADR policy.
2. You have an actual or apparent conflict of interest or bias.

Example: You advised the supervisor to take the action which is the basis of the complaint.

3. An incident requires immediate attention, and for unavoidable reasons, you are unable to address it.

Example: You leave the next day for vacation.

Stage Five: Fact-Finding Inquiry

1. Plan/map it.

- ✓ Are the critical facts in dispute, or is this more a matter of interpretation?
- ✓ If facts are in dispute, is there any way to inquire into them on an anonymous basis (i.e., w/o identifying aggrieved party)? Who could corroborate or disprove facts? Do I need to interview everyone?
- ✓ Who do I notify?

2. Conduct it.

- ✓ Ask same questions in same way of similarly situated parties.
- ✓ Go from general to specific, as needed.
- ✓ Refer to additional communication tips on next slide for interviews.
- ✓ Consider keeping a contact log.

3. Document it.

- ✓ Take notes. (Refer to additional communication tips on next slide for note-taking.)
- ✓ For documents, note how obtained. Consider keeping a document log.
- ✓ Write a “confidential” report. Include factual findings, basis of findings and conclusion.

Top Ten Tips for Intake & Fact-Finding Communication

1. Address confidentiality upfront. [See related slide.](#)
2. Explain policies and procedures. Provide EOP's contact information, as appropriate.
3. Let the individual provide a free-flowing narrative, but be prepared to ask questions as necessary (i.e., if individual is hesitant to speak or is unfocused).
4. If you ask questions, avoid yes/no and "why" questions. Find out what, if anything, has been done to communicate that conduct was unwelcome and/or to address it already.
5. Take notes while you listen . Be specific w/ facts (dates, names, statements, actions, etc.). Quote exact statements and feelings.
6. Review notes and fill in gaps while individual is present.
7. If you cannot take notes while you listen, explain that you will listen first and then review in detail so that you can prepare accurate notes. Do not tape record the individual.
8. Do not offer any judgments, conclusions or subjective commentary in your notes or aloud. Do not tell the individual what you think will happen or promise a particular result. Keep an open mind and encourage the individual to keep an open mind.
9. Convey that you are concerned, but remain neutral. Do not offer any gesture or comment that would indicate you have reached a judgment or have taken a position.
10. Do not discuss the "law of the case" or a "policy violation". Rather, speak in terms of inappropriate behavior and do not make comments specific to the allegations. Example: "Generally, when allegations can be proven and they amount to inappropriate behavior, then . . .

Confidentiality

- **Make no promises.**
- **Instead offer: “To the extent possible, the confidentiality of this matter and your privacy will be respected. However, in order to inquire into and address the issues, it may be necessary to disclose your identity. But disclosure will be on a strictly need-to-know basis.”**
- **Also advise of prohibition against retaliation pursuant to PADR Policy.**
- **If individual does not wish to proceed, but the incident is severe and/or pervasive, consult EOP.**

[Back to: Top Ten Tips for Intake & Fact-Finding Communication](#)

Stage Six: Remediation & Resolution

- Training – online, classroom session, departmental
- Counseling - awareness-raising/informal vs. disciplinary/formal
- Other discipline – consult UHR or Provost’s Office, as appropriate
- Reassignment – ex. no contact with students; removal of supervisory responsibilities
- Mediation
- “Separation agreements”

Stage Seven: Follow-Up

- **Communicate findings and remedial actions to parties. Do not provide copies of your report to them. Do not disclose specific disciplinary actions.**
- **Ensure remedial actions are completed. Ex. – Was training satisfactorily completed by assigned deadline?**
- **Check in with the aggrieved employee and others, as appropriate. Have there been any other problems (retaliation, etc.)?**
- **Monitor situation.**

Good Faith

- Good faith is “holding a genuine belief in the truth of one’s allegations.”
- A complaint may be frivolous, but still made in good faith.
- Complaints must be made in good faith. Otherwise, the complainants can be subject to discipline and will not receive the protections of the PADR Policy.
- Proving a complaint was not made in good faith is rarely possible.
- Not being able to corroborate a complaint or an inquiry which does not prove the allegations does not necessarily establish a lack of good faith.
- Be careful and consult EOP before concluding a complaint was not made in good faith (and taking related disciplinary action).
- It can appear retaliatory to characterize a complaint as not in good faith. Also, it may have a chilling effect on future complaints.

Recordkeeping

- Notes, reports and other documents relied on in fact-finding inquiries (e.g., personnel documents, e-mails, etc.) may be subject to disclosure/discovery.
- They should be maintained (and as applicable, destroyed) appropriately.
- Pay documents in light of Lilly Ledbetter Fair Pay Act should also be maintained.
- They also are subject to state law and University policy pertaining to records management.
- Stay tuned - a special retention and destruction schedule for certain EOP records is under development by the University Records Officer.
- Questions? Contact the University Records Officer, Caroline J. Walters, 3-9162, or EOP.

Constructive Discharge

- Constructive discharge/dismissal occurs when an employee resigns because of an employer's conduct or treatment.
- The employee goes away, but not necessarily the underlying problem(s) or the potential for a claim/legal liability. Also, you may lose a good employee.
- When an employee cites EO concerns as the basis of a threatened resignation, do not simply refer the employee to EOP. Find out specifically what the concerns are. It may not be too late!
- If there are other issues (performance, absenteeism, etc.), consider whether they may be related to the employee's EO concerns.

Post-Complaint Performance Management & Retaliation

- A complaint does not have to be to EOP, nor formally written up, to entitle the complainant to the protections of the PADR Policy.
- The PADR Policy is not a shield against poor performance.
- If you wait until a complaint has been filed with EOP to check whether the supervisor has been diligent with performance management, it may be too late.
- Monitor closely personnel actions involving (potential) complainants.

Disability Issues



ADA Amendments Act of 2008

- **Signed into law by President George W. Bush on September 25, 2008**
- **Took effect on January 1, 2009**
- **Applies to the Rehabilitation Act**

Why Did Congress Amend the ADA?

- Congress intended the ADA definition of disability to be construed broadly, but courts were finding too many people outside the ADA's protections.
- The ADA's definition of "disability" was based on Section 504 of the Rehabilitation Act of 1973, which prior to the ADA, courts had construed broadly.
- The Supreme Court's decisions in the Sutton trilogy and in Toyota Motor Mfg, Ky v. Williams construed the term "disability" too narrowly.
- The EEOC's current regulation defining "substantially limits" as "significantly restricted" is inconsistent with Congressional intent by expressing too high a standard.

Major Goals of the ADAAA

- To restore the ADA's broad protections as intended by Congress.
- To reject the Supreme Court's view in the Sutton trilogy that "disability" should be determined by reference to the ameliorative effects of mitigating measures.
- To reject the Supreme Court's holding in Toyota that the ADA requires a "demanding standard" for establishing coverage and requires that an impairment "severely restrict" major life activities.
- To express Congress's expectation that EEOC will revise its regulation that defined "substantially limits" as "significantly restricted."

Definition of “Disability”

Basic 3-part definition remains the same:

- A physical or mental impairment that substantially limits a major life activity;
- A record of such an impairment; or
- Being regarded as having such an impairment.

Definition of “Disability” Changes

- **“Substantially limited” redefined.**
- **Provides illustrative list of major life activities that includes for the first time “major bodily functions.”**
- **Mitigating measures (other than ordinary eyeglasses or contact lenses) cannot be considered in determining “disability.”**
- **Impairment can be disability even if episodic or in remission.**
- **“Regarded as” redefined.**

Major Life Activities

- **Statutory examples include most of the major life activities that the EEOC has previously recognized.**
- **Also contains some activities that the EEOC has not specifically recognized, such as bending, reading, and communicating.**
- **Now also includes “major bodily functions,” e.g. functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.**
- **List of major life activities is illustrative, not exhaustive.**

Ameliorative Effects of Mitigating Measures

No longer taken into account in determining if “individual with a disability” - *for example:*

- medication, medical supplies, equipment, or appliances, low-vision devices, prosthetics (including limbs and devices), hearing aids and cochlear implants or other implantable hearing devices, mobility devices, oxygen therapy equipment and supplies;
- use of assistive technology;
- reasonable accommodations or auxiliary aids or services; or
- learned behavioral or adaptive neurological modifications.

“Regarded as” Disabled

Employer “regards” an individual as having a disability when it makes employment decision -- e.g., hiring, demotion, promotion, discipline, annual evaluation, compensation, termination -- based on an actual or perceived impairment that is not transitory and minor.

Common Examples of Reasonable Accommodation

- Making physical modifications to the workplace, acquiring equipment or assistive devices, or modifying existing equipment
- Making exceptions to policies
- Using different supervisory methods or modes of communicating
- Job restructuring (swapping or eliminating marginal functions)
- Part-time work or modified work schedules
- Sign language interpreters or readers
- Leave (unpaid leave where accrued leave, FMLA, etc. are exhausted or unavailable)
- Telework
- Reassignment to a vacant position

Actions Not Required as a Reasonable Accommodation

- Removing an essential function or hiring someone else to perform it
- Lowering performance or production standards
- Excusing misconduct
- Providing “personal use items,” such as eyeglasses, wheelchairs, or prosthetic limbs

Reasonable Accommodation – Practical Tips

- **Communicate, exchange information, search for solutions, and consult resources as needed.**
- **Employee must cooperate in providing legitimately requested information.**
- **If requestor knows only the problem, and not the solution, employer should search for possible solutions.**
- **If requestor specifies particular solution but it cannot be provided, employer should search for and consider alternatives.**
- **If more than one possible accommodation exists, employer has discretion to choose among equally effective alternatives.**
- **42 U.S.C. Section 1981a – no damages if employer makes “good faith” effort through interactive process.**

University Procedures & Form

**Procedures for Employees with Disabilities
to Request Workplace Accommodations
and**

**Voluntary Self-Identification for Persons
with Disabilities, available online:**

www.virginia.edu/eop/adacoordinator.html

Q & A

If you have additional questions regarding this training or other EOP-related matters, please contact us at 924-3200.

**Thank you for your participation
in today's training!**