

MSU Anti-Discrimination Policy Training

Spring 2026

ADP Training Agenda

- ▶ User's Manual Updates
- ▶ Underlying legal Requirements
- ▶ Structure and Purpose
- ▶ Process
- ▶ Standards
- ▶ Blend Cases

User's Manual Updates

- ▶ Add in footnote info and external complaints
- ▶ ADP transcripts in use now on all cases

Underlying legal requirements

The ADP is how we comply with MSU's obligation under:

Title VI of the CRA	Race, color or national origin - federal \$	Elliot-Larsen Civil Rights Act (MI)	Discrimination religion, race, color, national origin, age, sex, height, weight, marital status - MI employer and public entity
Title VII of the CRA	Race, color, religion, sex, national origin - employer	MI persons with Disabilities CRA	Disability - employment, housing, public accommodations, services, educational facilities
Title IX of the Education Amendments of 1972	Sex (et al.) - fed \$, including employment	Pregnancy Discrimination Act	Pregnancy, childbirth or related medical conditions
Age Discrimination Act of 1975	Age - fed \$	Title I of ADA	Disability - employer w/ 15+ employees
Age Discrimination in Employment act of 1967	40+ - employer	Title II of ADA	Disability - public entity including education
Civil Rights act of 1991	Provides \$ damages in employment discrimination - employer	Title III of ADA	Disability - place of public accommodation
Equal Pay act of 1963	Sex based wage discrimination - employer (EEOC)	Section 503 of Rehabilitation Act	Aff Action and discrimination people with disabilities - federal contractor / subcontractor
Exec. Orders 11246 & 13665	Engage in aff. action and not discriminate - race, sex, gender identity, national origin - Government contractor	Section 504 of Rehabilitation Act	People with disabilities - federal \$
Genetic Information nondiscrimination act of 2008	Discrimination based on genetic information - employer	Web Content Accessibility Guidelines	Requirement for making web content accessible
Michigan Constitution Art I, S. 206	Prohibits discrimination and preferential treatment - race, sex, color, ethnicity, national origin - public employer, public education, public contractor	Section 1557 of ACA	Discrimination on basis of race, color, sex, national origin, age or disability - health programs or activities

Overlap between ISR and external civil rights claims: EEOC, MDCR, OCR, litigation/prelitigation

Purpose

Michigan State University's scholarly community-building efforts occur within the context of general societal expectations, as embodied in the law. The University, consistent with its policies and governing law, promotes institutional diversity and pluralism within an over-arching strategy promoting equitable access to opportunity. The University's commitment to non-discrimination is the foundation for such efforts. **(ADP, Article I)**

Policy Coverage

- ▶ All University community members, including faculty, staff, students, registered student organizations, student governing bodies, the University's administrative units, and to the University's contractors in the execution of their University contracts or engagements
 - ▶ All educational, employment, cultural, and social activities occurring on the University campus;
 - ▶ University-sponsored programs occurring off-campus, including but not limited to cooperative extension, intercollegiate athletics, lifelong education, and any regularly scheduled classes;
 - ▶ University housing; and
 - ▶ Programs and activities sponsored by student governing bodies, including their constituent groups, and by registered student organizations.

Structure, Purpose, Players



Reporting

- Mandatory/encouraged reporters
- MSU Police & Public Safety



Initial Assessment

- Notification Group
- Alternative Resolution Partners
- Human Resources records
 - Unit administration



Investigation

- Notification group
 - Witnesses
- Alternative resolution partners
- Human Resources and other records



Findings, Appeal, Sanctions

- Equity Review Office
- Resolution Office (blend cases)
 - Notification Groups (employee cases)
- Office of Student Support and Accountability

Process:

► Community values embedded in ADP procedures

- Privacy:** Investigations are kept as private as practicable. Notice, updates and final reports are shared only with parties and a pre-determined notification group. Information is shared with witnesses and community partners as-needed to facilitate the investigation, explore informal resolution, or implement appropriate supportive measures. ISR does not share information about sanctions arising from an ADP investigation.
- Transparency:** All parties and witnesses are provided an explanation of ISR's processes and the applicable standard of proof prior to sharing any information with Investigators. All parties and witnesses are provided copies of an Investigator's summary of their statement and given the opportunity to make changes. All parties are provided with bi-weekly updates of case status throughout the investigation.
- Parity:** Claimants and respondents are provided the same information about the ISR process and given simultaneous notice of case milestones. In a formal investigation, parties are given the opportunity to ask questions of one another through the Investigator.
- Support:** All parties to an investigation are provided resources and given the opportunity to discuss interim and supportive measures with the Support and Intake Team.
- Autonomy:** Participation in an investigation under the ADP is voluntary. A party's decision not to participate or not to be interviewed will not be given an adverse inference in the investigation process. A party can choose to pursue informal resolution in lieu of an investigation, with the agreement of all parties to the process.
- Accountability:** ISR will provide information to the appropriate supervisory and human resources unit (employee respondents) and the Office of Student Support and Accountability (student respondents) with information discovered in the course of an investigation. Information contained in reports and closing letters can be used by these offices to craft sanctions and remedies that are proportional to the situation and consistent across the University community.



Process Overview



Reporting/Intake

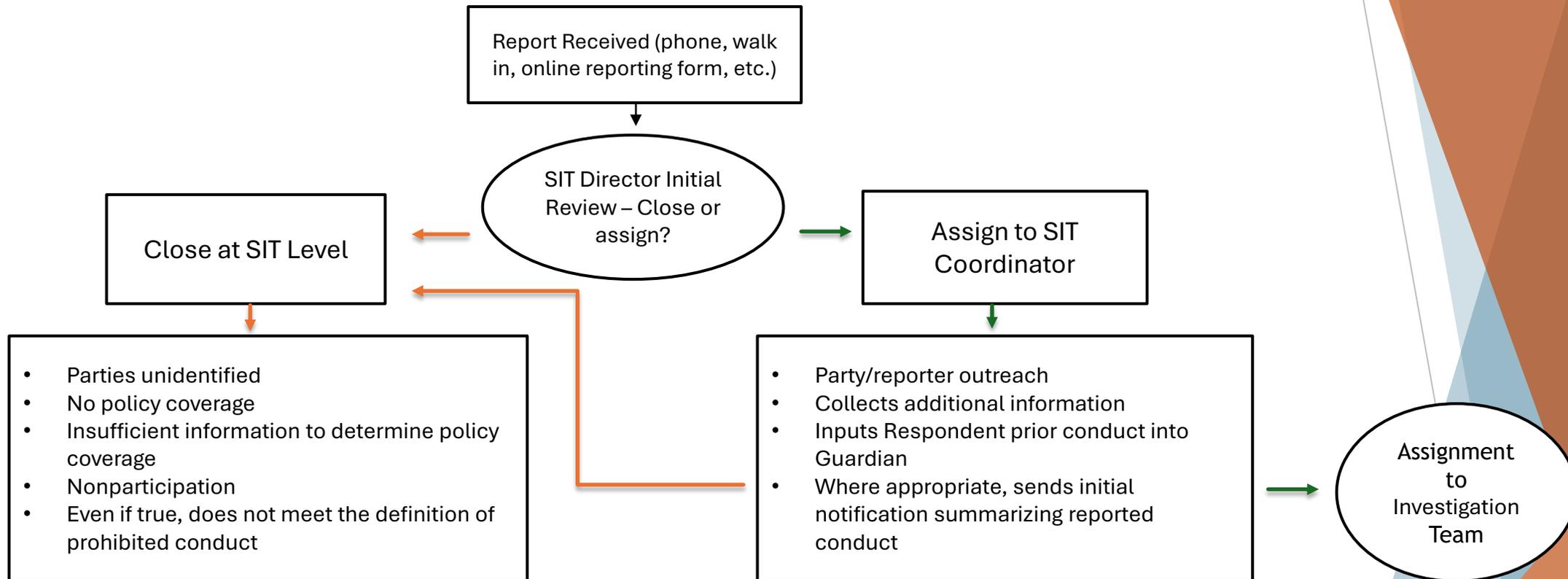
Initial Assessment

Investigation

Findings, Appeal, Sanctions

Who is responsible	SIT	SIT/Investigator (in consultation with Director)	Investigator (in consultation with Director)	Investigator, Resolution Officer, Appeal Officer, ELR/FASA/OSSA
Goal	Get enough information to classify report; acknowledge report; identify related reports	Determine whether allegations warrant assignment to investigation	Obtain information necessary to make determination;	Communicate findings, allow appeal, accountability
Requirements	Respond to reports within 5 days	Notification group within 5 days	Notice requirements, share information, regular updates	ERO will give 10-day response window and provide decision within 18 days after response window closes.

ADP Process: Reporting and Intake



Process: Assigned to Investigation Team

- Review of prior conduct, if any
- Initial Claimant meeting
- Gathering of relevant documentation/evidence
- Identification of witnesses
- NOI and Respondent Meeting
- Biweekly status updates to parties and notification group
- Closure notice or full investigation report



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Advisors and Support People

- ▶ Advisors are request-only on ADP matters
- ▶ If a Claimant requests an advisor, investigator should reach out to Respondent and offer the same opportunity – and vice versa
- ▶ Support persons: Under ADP procedures, the support person may not also be a witness or otherwise have any conflicting role during the investigation (ADP User's Manual, pg. 17)

Process: Investigation

Closure Notice

- ▶ Cases where a prima facie case has not been met will proceed to closure
- ▶ Concise closure notice is drafted summarizing the investigative steps and reason for closure
- ▶ Cases where an NOI has been sent, evidence collected, and witnesses interviewed may still proceed with a closing notice
- ▶ Closing notices are sent to parties and the notification group
- ▶ Cannot be appealed

Full Investigation Report

- ▶ Prima facie case has been established
- ▶ Preliminary Investigative Report (PIR) drafted, reviewed by Director, and sent to parties
- ▶ Feedback to PIR received and reviewed
- ▶ Final Investigation Report (FIR) drafted, reviewed by Director, and issued to parties
- ▶ FIR, not PIR, is sent to notification group
- ▶ ISR's determinations are subject to appeal

NOTE: Any case where an NOI is sent, regardless if there is a closing notice or PIR/FIR is a **formal** investigation



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Process: FIR

- Finding that Respondent either did or did not violate the ADP
- ISR may make factual determinations about what was more likely than not to have occurred- these factual findings may be relevant to the Unit for follow up under other policies
- Regardless of the outcome, the FIR is forwarded to Respondent employee's unit/HR for follow up under other policies as deemed appropriate by the unit
- See MSU HR Personnel File Policy: <https://u.policies.msu.edu/doctract/documentportal/08DB621230EC5D8A08F7D20AF8DC9F4D>
- Make sure to copy Jenelle Austin (ocr.jenelleaustin@msu.edu) and Equity Review Officer (ero@msu.edu), and Robert Kent to any FIR, regardless of the outcome



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Process: FIR Report Writing

- ▶ Investigators should use the appropriate template
- ▶ Analysis should be a clear synthesis of the information, not simply a recitation of the facts
- ▶ Analysis should occur element-by-element and investigators should avoid conflating elements of the analysis together
- ▶ Show your work. If you are arriving at a factual determination, you need to explicitly and clearly articulate the evidence you relied on to arrive at such a determination
- ▶ Written in a neutral, unbiased manner
- ▶ Investigators should never find themselves assuming or speculating on behalf of the parties

FERPA

- ▶ In ADP matters involving students, students will be presented with FERPA waivers
- ▶ If a student does not sign a FERPA waiver, their information will need to be deidentified from the closing notice or PIR/FIR
- ▶ Investigator will create a separate document entitled Party Key and issue the document separately (not as an attachment) to the report or closing notice
- ▶ NOTE: Blend cases will follow practices of RVSMTIX policy in terms of identification in student matters

Process: Appeal

- ▶ All parties have the right to appeal from a formal report (FIR)
 - Appeals are sent directly to the ERO, not the Investigator
 - Equity Review Officer- Aislinn Sapp – ero@msu.edu
 - Appeal info is included in the template to the parties along with the FIR
 - The appeal process is slightly different based on the Respondent's status and the result:
 - Respondent employee + Finding or No-Finding = appeal within 10 days of FIR to ERO
 - Student Respondent + No Finding = appeal within 10 days of FIR to ERO
 - Student Respondent + Finding = Matter referred to Dean of Students Office for decision on sanction. Within 10 days of the sanction decision, both parties can appeal the ISR decision and the sanction simultaneously to the ERO



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Process: Appeal

▶ Appeal standards:

- 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 investigator(s), or decision-maker(s) 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/or
- The written decision was arbitrary and capricious. A decision or finding is arbitrary and capricious when the application of the policy has no reasonable basis in fact.
- ADP Appeal Procedures can be found here: https://civilrights.msu.edu/_assets/documents/adp-appeal-procedures.pdf

New evidence will not be considered at appeal stage unless the party can show that the information is substantive and relevant to the investigation, was previously unavailable to the party submitting it, and the party acted with due diligence to obtain the evidence

Requests for extension of any deadlines should be forwarded to the ERO, who will consider such requests



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Process: Appeal Outcomes

- Uphold ISR's finding;
- Determine that procedural irregularity occurred and affected the outcome and remand the matter to ISR with instructions to remedy the procedural irregularity;
- Determine that the finding is arbitrary and capricious as written and remand to ISR to issue a revised finding;
- Overturn or modify the investigation finding based on a determination that the decision was arbitrary and capricious or resulted from procedural error
- In appeals of a student sanction, the Equity Review Officer may uphold the sanction or alter the sanction if it is determined that the sanction is clearly inappropriate or is not commensurate with the seriousness of the offense.

Process: Sanctions

Students

- ▶ Office of Student Support and Accountability (OSSA) determines sanctions for students
- ▶ OSSA will notify parties of the opportunity to submit a sanction recommendation
- ▶ OSSA will make a sanction decision based on a consideration of all circumstances in a particular case, and can include: warning, change of residence, probation, disenrollment, suspension, dismissal, etc.
- ▶ OSSA renders its sanction decision
- ▶ Once notified, the parties have 10 calendar days to appeal OSSA's sanction and the ISR finding to the ERO
- ▶ Sanctions are implemented 7 days after the appeal deadline terms with no filing of an appeal or 7 days from the ERO's decision



Reporting



Initial Assessment



Investigation



Findings, Appeal, Sanctions

Employees

- ▶ Sanctions for employees are determined by the unit in consultation with the applicable HR unit (FASA or ELR)
- ▶ OCR/ISR does not generally make recommendations about discipline for an employee
- ▶ If there is any follow up from an ISR FIR – FASA and ELR will forward that information to ISR to include in ISR's case file
- ▶ Any sanction from the unit after a finding from ISR will be documented in the Decision and Sanctions section in Emerald
- ▶ This is typically done after the case is submitted for closure

Prohibited Conduct/Treatment

- ▶ Discrimination
- ▶ Harassment
- ▶ Treatment of Protected Speech
- ▶ Retaliation
- ▶ Inappropriate Limitation

Protected Identities under the ADP

Age	Color	Gender	(Gender Identity/Expression)	Genetic Information
Disability Status	Ethnicity	Height	Marital Status	National Origin
Political Persuasion	Race	Religion	Sex (orientation and pregnancy)	Military/Veteran Status
		Weight		

Discrimination

Definition

Discrimination is conduct that is based on an individual's protected identity or identities that:

- ▶ Harms a term or condition of an individual's employment or an individual's access to education or participation in a University program or activity (see definition of Adverse Action);
- ▶ Is used as the basis for, or a factor in, decisions of an individual's employment, education or participation in a University program or activity, except a required or permitted by law; or
- ▶ Results in differential enforcement of a facially neutral policy or practice.

Standard

- ▶ (1) Claimant asserts a claim based on their protected identity;
- ▶ (2) Claimant suffered an adverse action; and
- ▶ (3) other similarly situated individuals outside of the Claimant's protected identity were treated more favorably.
- ▶ If ISR finds sufficient evidence of discrimination, it will evaluate whether there was a legitimate, nondiscriminatory reason for the adverse action. ISR will then determine if the LNDR was false, or a pretext, and discrimination was actually a motivating factor in the adverse action. Pretext may be established by showing the LNDR:
 - ▶ Had no basis in fact
 - ▶ Did not actually motivate the adverse action
 - ▶ Was insufficient to warrant the adverse action

Adverse Action (Post Muldrow)

- ▶ In the employment context, a demotion, termination, decrease in wages or salary, a loss of benefits, or other harm with respect to an identifiable term or condition of employment. In the education context, may include, but is not limited to, a grade not based on class or test performance; denial of access to a course, program, organization, or housing; denial of support, services, or other assistance given to other students; or denial of an award or scholarship that otherwise would have been received.
- ▶ Things we might now consider post-Muldrow include, forced transfers that reduce status, privileges, or cause a worse schedule, suspensions without pay, reductions in duties/opportunities that affect career prospects
- ▶ Things we might not consider as adverse actions (that the courts have rejected): written reprimands alone, mere threats of discipline, paid leave in some contexts, PIPs
- ▶ “Some harm” is not infinite or subjective. Courts still require a disadvantageous change in a term or condition of employment. Cannot assume that all managerial determinations are now adverse in the wake of Muldrow. We still need to build a factual narrative showing some real, negative change in the terms or conditions of employment.

Similarly Situated Individual(s)/Comparator(s) who are treated more favorably

Individuals must be similarly situated in material respects, not identical

- ▶ Comparator(s) generally subject to the same supervisor/decisionmaker and same employment/academic standards and policies
- ▶ Comparator(s) engaged in the same or comparable misconduct or performance deficiencies
- ▶ Comparator(s) held similar position, rank or set of responsibilities

NOTE: Identification of comparators alone is not sufficient to establish a prima facie case. Must be established they were also treated more favorably under similar circumstances.

LNDR and Pretext

- ▶ Evaluate whether there was a legitimate, nondiscriminatory reason (LNDR) for the adverse action
- ▶ Evaluate whether the legitimate nondiscriminatory reason was false, or a pretext, and discrimination was actually a motivating factor for the adverse action
 - Had no basis in fact;
 - Did not actually motivate the adverse action;
 - Was insufficient to warrant the adverse action.

Disparate Impact Discrimination

- ▶ A facially neutral policy or practice had a disproportionate adverse effect on individuals of a protected identity;
- ▶ Whether there was a substantial legitimate justification for the policy or practice; and, if so;
- ▶ Whether there was an alternative policy or practice that would achieve the legitimate objective but with less of a discriminatory effect.

Disability Discrimination

Includes

- ▶ Disparate treatment insofar as the requested accommodations or modifications were denied as not reasonable under the applicable policy but were provided to another similarly situated person who does not share Claimant's protected identity;
- ▶ A failure or refusal to implement a granted modification or accommodation, and;
- ▶ Harassment or retaliation related to a modification or accommodation.

Evaluate

- ▶ (1) Claimant has a disability;
- ▶ (2) Is otherwise qualified to participate in the educational program or perform the essential functions of the job, with or without accommodation; and
- ▶ (3) Suffered an adverse action, or was excluded from participation in, denied the benefits of, or subjected to disparate treatment or disparate impact under the program by reason of their disability.

Otherwise Qualified

- ▶ Claimant is otherwise qualified if they meet the essential requirements of the educational program or can perform the essential functions of the position, with or without reasonable accommodation.
- ▶ If the individual cannot perform the essential requirements with reasonable accommodations, then they are not otherwise qualified.
- ▶ Does not require
 - ▶ Individual does not have to be the best performer
 - ▶ Individual does not have to perform the job in the employer's preferred way
 - ▶ Individual does not have to eliminate all impact of the disability
 - ▶ Individual does not have to accept an ineffective accommodation

Adverse Action

- ▶ Differs slightly from other forms of discrimination
- ▶ There must be a nexus between the action/harm and the individual's disability
- ▶ Adverse action with no causal link example: employee is disciplined for missed deadlines, errors, or misconduct that are not related to the limitations of a disability, and records show similar discipline for those without disabilities

Failure to accommodate

To demonstrate a failure to accommodate claim, the evidence must demonstrate that

- (1) Claimant has a disability;
- (2) Claimant is otherwise qualified for the job or educational program; and
- (3) Respondent failed to implement the accommodations/modifications in the Accommodation Letter.

Note: Whether an accommodation or modification constitutes a “fundamental alteration” or is “essential to the program of instruction” is decided by the University’s fundamental alteration committee. An individual may choose to appeal that determination through RCPD or the Office of the ADA Coordinator. The ADA Coordinator’s decision is final, and thus, not subject to review in an ADP investigation.

Harassment

Definition

Unwelcome conduct that is based on the Claimant's an individual's protected identity or identities that unreasonably interferes with an individual's education or work environment such that it creates a hostile environment.

Standard

1. Claimant was subject to unwelcome conduct based on a protected identity or identities that,
 2. Is objectively and subjectively severe, persistent, or pervasive such that it,
 3. Creates an unreasonable interference with the individual's work or educational experience
- ▶ Conduct does not have to be directed at a specific person or persons to constitute harassment
 - ▶ Conduct must be objectively severe, persistent, or pervasive, and there must be a showing that Claimant subjectively perceived the conduct to be severe, persistent, or pervasive

Protected Speech/First Amendment

- ▶ As an institution of higher learning, the University values community members' right to freedom of speech, expression, religion, assembly, and the preservation of academic freedom. This Policy shall not be interpreted to violate a community members' First Amendment rights, or to chill speech or expression.
- ▶ ISR will not make a finding of responsibility on the basis of speech or expression that is protected by the First Amendment.
- ▶ The University also has an obligation under federal and state law to create an environment free from discrimination. As such, the University will respond, as outlined in this Policy, when the reported behavior impedes an individual's access to the University's programs or activities or creates a hostile environment.
- ▶ The University acknowledges that there will be instances where a community member will be impacted by an incident that is otherwise protected by the First Amendment. The University remains steadfast in its commitment to support a safe and inclusive environment for all community members and will, as appropriate, provide individual support to preserve and restore community members' access to the University's programs and activities.

Prohibited Conduct/Treatment

Protected Speech/First Amendment

▶ What can be protected speech:

- ▶ Protests
- ▶ Class discussions
- ▶ Academic papers
- ▶ Student newspapers
- ▶ Residence halls
- ▶ Performances
- ▶ Bulletin boards
- ▶ Commencement
- ▶ Faculty Meetings
- ▶ Committee Meetings
- ▶ Staff Meetings
- ▶ Alumni Communications

Making Findings of Fact

- ▶ Determination of whether the reported conduct occurred by a preponderance of the evidence
- ▶ Consider party/witness statements, documentation, video/screenshots, contemporaneous evidence etc.
- ▶ Considering witness statements – what are the relationships between the parties/witnesses (i.e., independent witnesses may bear greater weight than close, personal friendships), is the information specific, was the information firsthand or was it rumor/gossip/innuendo? Did the parties tell other people about the reported conduct when it happened? (Who did they tell, what did they say?)
- ▶ Credibility and Reliability of statements
 - ▶ Credibility: Consistency, plausibility, corroboration, demeanor, bias or motive, honesty and integrity
 - ▶ Reliability: direct knowledge, contemporaneous, alignment with other evidence

Unwelcome and Based on a Protected Identity

- ▶ After the investigator determines if the conduct occurred, they must then determine whether it was unwelcome and based on a protected identity/identities. Only include information determined to have occurred by preponderance
- ▶ Some conduct, even if it occurred and was unwelcome, is not inherently based on a protected identity such as general bullying/intimidation, favoritism/nepotism, micromanaging, social exclusion, unprofessional language or tone, spreading rumors unrelated to a protected identity
- ▶ Context is important and can either support, or not, that the conduct was on the basis of a protected identity.

Severe, Persistent, or Pervasive

- ▶ Of the conduct the investigator determined 1) has occurred and 2) was unwelcome and based on a protected identity, the investigator will determine if the conduct is severe, persistent, or pervasive.
- ▶ The investigator will consider all conduct in totality.

Severity

- ▶ ADP User's Manual states that severe conduct means, "of a great degree, significantly more than minimal." So, how do we interpret that? We use case law to guide our determinations (6th Circuit)
- ▶ Must be *both* objectively and subjectively severe
- ▶ Things ISR might often find severe: single use of the N-word (or similarly derogatory phrases), extreme epithets, threats of violence/physical intimidation
- ▶ Things ISR might often find not severe: petty slights/minor annoyances, single/non-severe remarks, protected speech, rude/unprofessional/abrasive behavior that is not targeted at a specific protected identity
- ▶ Context again matters: A reasonable person in a similar context might not find something objectively severe, even if Claimant was subjectively offended by it.

Persistence and Pervasiveness

- ▶ Each incident may not be severe alone, but multiple incidents over time can be persistent and pervasive
- ▶ User's Manual does not make it clear that persistent and pervasive behavior require some indication of frequency and duration. However, guiding case law makes this distinction clear.
- ▶ Investigators will need to establish a timeline over which the conduct occurred using all available evidence.
- ▶ Things to consider based on the evidence collected include, more than one person is subjected to similar or identical conduct, conduct is visible or broadly known, “open secret” that it is ongoing behavior, culture or environment level conduct, not isolated acts.
- ▶ Example that might not be considered pervasive: Professor shows something offensive (non-severe) during a seminar where hundreds of students were present one time. Are there facts that could change this? Yes.

Totality of the Circumstances

- ▶ Investigators need to consider the totality of the circumstances when considering conduct that has occurred and is based on a protected identity.
- ▶ It means looking at the **whole picture**, not just one detail. Instead of focusing on a single comment or action, you consider **everything together**.
- ▶ Example: we have determined 3 race comments occurred, along with 2 weight comments, and one gender comment over a period of two months. We would consider all together. We would not say, “the race comments are not severe, persistent or pervasive over two months” or otherwise analyze them separately by the identified protected identity.
- ▶ **NOTE: Investigators should not include conduct that we have deemed did not occur and/or was not unwelcome and based on a protected identity.**

Unreasonable Interference

The conduct need not be so egregious that it causes economic or psychological injury. However, it must also be substantially disruptive/more than minimal.

Examples from 6th Circuit:

- ▶ Employee avoids parts of the workplace or essential duties due to fear or humiliation
- ▶ Causes distraction, anxiety, fear such that an individual is less than able to perform job duties
- ▶ Employee forced to spend work time managing/avoiding harasser
- ▶ Causes employee to take medical leave or miss work

What is NOT considered?

- ▶ Personality conflicts or rudeness
- ▶ Occasional or sporadic offensive remarks
- ▶ Subjective stress without impact on work duties
- ▶ Work criticism or supervision that is uncomfortable but not discriminatory

Which Standard Do I Use?

- ▶ Investigator is responsible for evaluating the information under the correct and appropriate standards. The parties are not the experts – we are
- ▶ Look at what type of harm is alleged and how it affects a person's access or opportunities
- ▶ Harassment = harm to a person's environment
- ▶ Discrimination = harm to a person's opportunities or terms or conditions of employment
- ▶ Evaluation under the incorrect standard is an appealable issue and can be the result of procedural irregularity

ADP Retaliation and Retaliatory Harassment

- ▶ Whether a preponderance of the evidence establishes that:
 - (1) Claimant engaged in protected activity;
 - (2) Respondent had knowledge of the protected activity;
 - (3) Claimant suffered a material adverse action or was subject to severe, persistent or pervasive harassment, and;
 - (4) “But for” Claimant’s protected activity, the material adverse action or severe, persistent, or pervasive harassment would not have occurred.

“But for” does not require that retaliation be the sole cause of the action.

An adverse action is an action that might have dissuaded a reasonable person from engaging in a protected activity.

Protected Activity

A protected activity includes:

- ▶ A report of discrimination or harassment;
- ▶ Participation (or reasonable expectation of participation) in any manner in an investigation, proceeding, hearing, or interim or supportive measure under the ADP or RVSMTIX Policy;
- ▶ opposition to discrimination or harassment;
- ▶ request for accommodation related to disability, religion, pregnancy, childbirth or pregnancy related condition, and/or;
- ▶ student request for a modification related to pregnancy, childbirth, pregnancy related condition or parenting status.
- ▶ Non-protected activity examples: safety issues, ethics violations, nepotism (not tied to protected identity), financial mismanagement, policy violations unrelated to discrimination/harassment

Respondent Had Knowledge of the Protected Activity

- ▶ Establishing the date at which the Respondent was first aware of the protected activity, whether by imputed or actual knowledge, is essential
- ▶ General vs. specific knowledge: Respondent knowing Claimant engaged in some activity vs. knowing the activity was protected or related to possible discrimination and harassment
- ▶ Actual and imputed knowledge
 - ▶ Actual: Respondent received the complaint, was copied on emails or ISR notifications, participated in response meetings, was verbally informed of the complaint/ admission they were aware
 - ▶ Imputed: Respondent consulted closely with HR or staff who were aware, relied on information that necessarily referenced the protected activity

Adverse Action

- ▶ Any action that might well dissuade an individual from engaging in protected activity
- ▶ Action does not have to be extreme, permanent, or officially documented to be adverse. Can occur even when the original report is not substantiated.
- ▶ Not every management decision or unpleasant interaction is retaliation
- ▶ Not typically adverse:
 - ▶ Routine feedback given consistently and documented
 - ▶ Performance management based on legitimate, pre-existing concerns
 - ▶ Actions that were planned prior to protected activity
 - ▶ Neutral policy enforcement applied equally

Severe, Persistent, or Pervasive Harassment

- ▶ Same evaluation has the harassment standard above in terms of severity, persistence and pervasiveness, except that it would reasonably dissuade someone from engaging in protected activity
- ▶ Examples:
 - ▶ a supervisor makes repeated, sarcastic remarks or hostile comments toward an employee for “reporting to HR”
 - ▶ After reporting, a supervisor publicly criticizes employee in meetings

Causal Connection

Retaliation, under ADP and RVSMTIX, cannot exist where a causal connection is not established. Meaning, the adverse action(s) would not have happened but-for the individual's protected activity

- ▶ The protected activity does not have to be the only reason, but it must be a determinative reason for the action
- ▶ An employer or institution can have multiple reasons for a decision but if the protected activity tipped the scale, the causal connection may be satisfied
- ▶ Supported by timing, shifting explanations, departure from normal policy/procedure, etc. No single factor is required or dispositive alone (i.e., timing alone generally cannot establish a causal connection)
- ▶ If Respondent did not have knowledge of the protected activity at the time of the action, there is no causal connection. A Respondent cannot retaliate for activity they did not know about.

Other Covered Categories

- ▶ Inappropriate Limitation – Inappropriate limitation of employment or access to facilities and programs on the basis of protected identities.
 - ▶ Not directly related to a legitimate University purpose.
 - ▶ Includes:
 - ▶ Providing for the safety of University community members or the public;
 - ▶ Furthering the business of the University,
 - ▶ Complying with a legal mandate or another University policy, or;
 - ▶ Furthering an educational objective or a core value or the mission of the University.
- ▶ Unequal Pay Based on Sex - Requires that employees be paid equal pay for equal work
 - ▶ Must show: (1) Employees of the opposite sex were paid different wages; (2) for equal work on jobs requiring equal skill, effort, and responsibility that are; (2) performed under similar working conditions.
 - ▶ If shown, must then be a showing that the pay differential was justified by (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; or (4) a disparity based on any factor other than gender.

Blend Cases

- ▶ Involves reported conduct under both the ADP/RVSMTIX that is inherently connected
- ▶ Blend cases adhere to the RVSMTIX process and policy, including the definitions and dismissal standards
- ▶ Important note: closing standard under ADP-only cases (failure to establish prima facie case) do not always align with RVSMTIX dismissal standards.
- ▶ If a case starts as ADP-only and move to blend, investigators should request advisors for the parties on the date the case-type changes. Conversely, if RVSMTIX components are dismissed, and the parties have advisors, the advisors will continue through the completion of the ADP process.
- ▶ NOTE: Gender discrimination, with no alleged gender harassment, should be evaluated under the ADP.

Blend: Gender Harassment

- ▶ Reported cases involving gender harassment will proceed under the RVSMTIX process
- ▶ Decisionmakers: Do not evaluate gender-based harassment under RVSMTIX and ADP – only the RVSMTIX
- ▶ Under RVSMTIX process, consider whether the gender-based harassment alone must be dismissed. Dismiss if so. The conduct can then be considered, in totality, with other reported harassment based on protected identities under the ADP and ADP process. See footnote **XXX** of User's Manual.

Blend Dismissals

Title IX Formal Complaint Dismissal

- ▶ The formal complaint must be dismissed under Title IX if the conduct alleged does not meet all of the coverage requirements in Section XII.E.2 and/or the allegations would not, even if proven, meet the definition of Title IX Sexual Harassment.
- ▶ The formal complaint may be dismissed if (i) the claimant requests that the complaint be withdrawn, or for Title IX Coordinator signed complaints, the Title IX Coordinator withdraws the complaint, or (ii) specific circumstances prevent gathering evidence sufficient to reach a determination.
- ▶ Appeal: Parties can submit an appeal to the Equity Review Officer within five (5) business days.

University RVSM Formal Complaint Dismissal

- ▶ The formal complaint must be dismissed if the conduct alleged does not meet all of the coverage requirements in Section XII.E.1 and/or the allegations would not, even if proven, meet a definition of prohibited conduct.
- ▶ The formal complaint may be dismissed if (i) the claimant requests that the complaint be withdrawn, or for Title IX Coordinator signed complaints, the Title IX Coordinator withdraws the complaint; (ii) neither claimant nor respondent are affiliated with the University at the time of the filing of the formal complaint; or (iii) specific circumstances prevent gathering evidence sufficient to reach a determination.
- ▶ Appeal: Parties can submit an appeal to the Equity Review Officer within five (5) business days.

NOTE: If you are dismissing ADP-only conduct in a blend case, the RVSMTIX dismissal standards apply. Additionally, the right to appeal also applies, even when it would not apply in an ADP-only case.

Blend Dismissals Cont.

- ▶ Investigators should avoid dismissals at the DIR stage – Dismissals should be completed when we know the conduct is dismissible
- ▶ Gender harassment should not be noticed under both the RVSMTIX and ADP – only RVSMTIX
- ▶ Appeal rights are still applicable if ADP-only conduct is being dismissed from a blend case

Similarities and Differences with RVSMTIX

Same

- Reporting Process
- Access to Supportive & Interim Measures
- Retaliation Protections
- Regulated by federal laws
- Aims to protect campus community from harm

Different

- Mandatory reporting across MSU / strongly encouraged
- FERPA
- Adaptable Resolution
- Availability of advisors
- Hearing / no hearing process
- Students: Governing rules do not allow for sharing of findings/sanctions
- Employees: What is kept in the personnel file
- Sanctioning process for students

Questions?

