



Item: AC: A-3

Tuesday, June 4, 2019

SUBJECT: REQUEST TO AMEND REGULATION 5.010, ANTI-DISCRIMINATION AND ANTI-HARASSMENT

PROPOSED BOARD ACTION

Approve amendments to FAU Regulation 5.010, Anti-Discrimination and Anti-Harassment.

BACKGROUND INFORMATION

The Office for Equity, Inclusion and Compliance under the Division of Administrative Affairs seeks to amend FAU Regulation 5.010, Anti-Discrimination/Anti-Harassment. The Anti-Discrimination/Anti-Harassment Regulation is a critical component of the University's efforts to ensure our campus is inclusive and free from prohibited discrimination. This regulation outlines the process by which the University defines protected groups, and the process for addressing behavior that is inconsistent with the high standards we expect from our campus community. These revisions are intended to further clarify Regulation 5.010. The proposed changes are summarized as follows:

1. Moderate reorganization of the definitions and examples in Section II to ensure clarity and consistency in the application of FAU's anti-discrimination policies.
2. Update the leadership of the EIC office from the Director to the Executive Director and revise the time-period for investigations consistent with new DOE Regulations.
3. Inform supervisory employees that failure to report any alleged violation of Regulation 5.010 may result in disciplinary action, up to and including separation or termination.

IMPLEMENTATION PLAN/DATE

If approved by the Board, the regulation will be amended and effective June 4, 2019.

FISCAL IMPLICATIONS

N/A

Supporting Documentation: Text of proposed amended Regulation 5.010.
Presented by: David Kian, Vice President & General Counsel
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Florida Atlantic University

Regulation 5.010

Anti-Discrimination and Anti-Harassment **Regulation**

I. **POLICYPURPOSE**

- A. Florida Atlantic University (“FAU” or University) shall comply with applicable federal, state and local discrimination/harassment laws to provide an educational, employment, and business environment free of all forms of discrimination or harassment. Unlawful discrimination or harassment based upon an individual’s race, color, religion, sex, national origin, age, disability, veteran status, marital status, sexual orientation, gender identity or expression, or other protected status is prohibited. Federal laws covered by this Regulation include Title II of the Civil Rights Act of 1964 (“Title II”), Title VI of the Civil Rights Act of 1964 (“Title VI”), Title VII of the Civil Rights Act of 1964 (“Title VII”), and Title IX of the Education Amendments Act of 1972 (“Title IX”). This Regulation also covers the Florida Civil Rights Act and any other applicable local, state or federal laws.
- B. This Regulation 5.010 (“Regulation”) ~~This policy~~ applies to all FAU students, applicants for employment, faculty, volunteers and staff (hereinafter collectively referred to as “University Community Members”), as well as third parties providing services to FAU. This Regulation ~~5.010 (“Regulation”)~~ establishes procedures for a University Community Member to file a complaint of alleged discrimination, harassment or retaliation.
- C. Discriminatory conduct in the form of sexual misconduct/sexual harassment is also prohibited, and procedures for processing and investigating claims of sexual misconduct/sexual harassment by a University ~~employee~~ Community Member will be processed in accordance with ~~current~~ FAU Regulation 4.007 (Student Code of Conduct) and/or FAU Policy 1.15 (Prohibited Sexual Conduct) ~~the University policy on prohibited sexual conduct (Policy 1.15). The Executive Director of the Office of Equity, Inclusion, and Compliance and/or their designee is the Title IX Coordinator for the University.~~
- D. The Office of Equity, Inclusion and Compliance (“EIC”) shall administer this Regulation. Inquiries regarding the procedures contained in this Regulation should be forwarded to EIC.
- E. It shall be a violation of this Regulation for any University Community Member to discriminate against or harass any other University Community Member on the basis of a protected status as defined by law or University regulations and policies. ~~Retaliation, or otherwise taking adverse employment or educational action, against a University Community Member because he/she in good faith reported discrimination or harassment, or who assisted or participated in any investigation, regarding a complaint, is prohibited.~~
- F. Activities covered under this Regulation include, but are not limited to, all educational, athletic, cultural and social activities occurring on campus or sponsored by FAU, housing supplied by the University, and employment practices between the University and its employees.

- G. Those found to have violated any term, condition or provision of this Regulation will be subject to disciplinary action, up to and including suspension, expulsion, termination, or separation.
- H. Any supervisory employee who receives a report, observes or learns of an alleged violation of this Regulation has an absolute and unqualified duty to immediately report the conduct to ~~the EIC Executive Director~~EIC. Failure to do so can report an alleged violation as required by this Regulation may result in disciplinary action up to and including separation or termination from employment.
- I. All Every University employees hasve a duty to cooperate fully and unconditionally in a University investigation. This duty includes, among other things, speaking truthfully with ~~EIC the EIC investigator~~Executive Director or his/her/their designee and voluntarily providing all documentation and information that~~which~~ relates to the claim being investigated.

II. DEFINITIONS/EXAMPLES

A. ~~For the purpose of this Regulation,~~ “Unlawful discrimination” is defined as a difference in treatment ~~on the basis of~~based on a person’s status in a protected class, ~~i.e. an individual’s.~~ Harassment based on one’s membership in a protected class is a form of unlawful discrimination. Laws covered by this regulation include Title II, Title VI of the Civil Rights Act of 1964 (Title VI), Title VII of the Civil Rights Act of 1964 (“Title VII”), and Title IX of the Education Amendments Act of 1972 (“Title IX”). Harassment is a form of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”) these Acts, the Florida Civil Rights Act and other applicable local, state or federal laws. “Prohibited discrimination” includes unlawful discrimination and ~~that which is~~discrimination based on other protected classes defined by University regulations or policy. A violation of this Regulation may occur regardless of any finding of “unlawful” conduct, as the standards for finding a violation of this ~~policy~~Regulation are independent.

A.B. ~~For purposes of this Regulation,~~ “Executive Director” shall refer to the Executive Director of the Office of Equity, Inclusion, and Compliance ~~and/or their designee.~~

C. Discrimination on the basis of sex in education programs and activities receiving federal financial funding as set forth in Title IX of the Education Amendments of 1972, as amended (“Title IX”), is ~~included in this Regulation’s definition of prohibited discrimination~~also prohibited. Discrimination on the basis of sex includes sexual violence, sexual battery, sexual harassment, domestic battery, dating violence, stalking and bullying (as defined below). Title IX prohibits sex discrimination in both the educational and employment settings. Sex discrimination is governed by the current University policy on prohibited sexual conduct (Policy 1.15).

B.

CD. —For purposes of this Regulation, examples of ~~prohibited~~ conduct that fall into the definition of prohibited discrimination include, but are not limited to:

1. Disparity of treatment

Disparate treatment occurs when an individual suffers less favorable treatment than others because of the protected status.

2. Disparate Impact

Disparate impact occurs when an employment policy, although neutral on its face, adversely impacts persons in a protected status. Disparate treatment on the basis of a class not protected by federal, state or local law shall not constitute discrimination or harassment if such disparate treatment is required by federal or state law.

3. Retaliation

Retaliation is adverse action taken against a person for engaging in protected activity. Examples of adverse action include: firing, denial of a promotion, lowering a grade, unjustified negative performance evaluations and reports, increased supervision or scrutiny, sudden enforcement of previously unenforced policies, exclusion from activities or privileges open to others, making critical comments about the protected activity to others, or any other action that would deter a reasonable person in the same circumstances from filing a complaint or engaging in protected activity.

DE. For the purposes of this Regulation, examples of ~~prohibited~~ conduct that fall into the definition of harassment include, but are not limited to:

~~1. “Hostile Environment Harassment” is unwelcome ~~verbal~~ and/or physical conduct based on a person’s protected class ~~protected characteristic~~ that: (A) has the purpose or effect of: (A) creating an objectively intimidating, hostile or offensive work or educational environment; (B) ~~has the purpose or effect of~~ unreasonably interfering with an individual’s work or learning performance; or (C) otherwise unreasonably adversely affects an individual’s employment or educational opportunities.~~

~~2. Examples could include making comments (“humorous” or “non-humorous”) based on a protected characteristic, objectionable epithets/slurs, threatened or actual physical harm or abuse, the display of hostile symbols/objects, and other intimidating or insulting conduct directed against the individual because of their membership in a protected class.~~

~~“Quid Pro Quo~~

~~3. “Quid pro quo” ~~h~~Harassment is established when submission or rejection of conduct is used, explicitly or implicitly, as the basis for decisions affecting an individual’s education, employment, or participation in a University program or activity.~~

~~a.—~~

EF. ~~-Sexual harassment, which includes acts of sexual violence and ~~may include~~ gender-based harassment, is also form of unlawful discrimination prohibited ~~by Title VII, Title IX and other~~~~

~~applicable laws. Sexual harassment can take the form of “hostile environment harassment”;~~

~~-or “quid pro quo” harassment”, as described above. ~~Gender based harassment~~~~

~~may be a form of sexual harassment prohibited under Title IX or other state or local laws.~~

~~Gender-based harassment includes acts of verbal, nonverbal or physical aggression,~~

intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature.

Hostile Environment

~~Hostile environment harassment exists when harassment has the purpose or effect of unreasonably interfering with a person's work or educational performance or participation in a university program or activity, or is sufficiently severe or pervasive to create an intimidating, hostile, or offensive work or educational environment.~~

Quid Pro Quo

~~Quid pro quo harassment is established when submission or rejection of conduct is used, explicitly or implicitly, as the basis for decisions affecting an individual's education, employment, or participation in a University program or activity.~~

~~**FG.**—Gender based harassment may be a form of sexual harassment prohibited under Title IX or other state or local laws. Gender based harassment includes acts of verbal, nonverbal or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature.~~

~~**GH.**—The definition of sexual harassment excludes the use of sexual material in a classroom setting for academic or educational purposes.~~

III. REPORTING VIOLATIONS

A. EIC is responsible for administering the complaint and investigation process set forth in this Regulation.

~~1. All complaints, formal or informal, must be reported to EIC.~~

2. In cases where the individual person making an allegation that they have been subjected to conduct that violates this regulation, (“Complainant”) chooses not to file a formal complaint, EIC will take any action it deems necessary to attempt to address remedy the situation or prevent further concerns. ~~Such action may include, including but not limited to~~ informing the alleged offender (“Respondent”) or their supervisor of the potential violation concerns, and suggesting behavioral modification that the alleged offender individual monitor and modify (if necessary) his/her the reported behavior.

~~1. All complaints, formal or informal, must be reported to EIC.~~

2. The EIC contact information is provided below:

Office of Equity, Inclusion and Compliance
Florida Atlantic University
Administration Building
777 Glades Road, Room 265
Boca Raton, Florida 33431-0991
<http://www.fau.edu/eic/>

~~B.~~ In all cases in which a violation of Title IX is alleged against a University Community Member, the University shall provide notice to the Complainant of his/her rights as soon as possible after it receives notification of the alleged violation. For complaints involving allegations of student misconduct by a student, the Regulation 4.007 Student Code of Conduct, Regulation 4.007, and Policy 1.15 Prohibited Sexual Conduct will govern.

~~1.~~ The EIC Executive Director is the Title IX Coordinator for the University.

~~2.~~ Individuals with questions or concerns about Title IX may contact the University's Title IX Coordinator and may file a complaint directly with that office consistent with the procedures outlined herein.

~~C.~~ Any University employee or applicant who believes he/she has been harassed, discriminated or retaliated against in violation of this Regulation should report the facts and circumstances thereof to the ~~EIC Executive~~ Director, or in the alternative, may report to the appropriate Vice President or Provost, College Dean, or the Director of Human Resources, who in turn must notify the ~~EIC Executive~~ Director.

~~C.~~ Any student who believes he/she has been harassed or discriminated against in violation of this Regulation should report the facts and circumstances thereof to the ~~EIC Executive~~ Director, or in the alternative, may report to a University Vice President or Provost, the Dean of Students, the Dean of his/her College, or to his/her Department Head, who in turn must notify the ~~EIC Executive~~ Director.

~~D.~~ Reports or allegations of an alleged violation of this Regulation will be processed upon the filing of a written complaint with EIC. The ~~Executive~~ Director ~~of EIC~~ may process an alleged violation without a written complaint if deemed necessary by the ~~Executive~~ Director and if enough information is available, in the discretion of the Executive Director, to conduct a responsible investigation ~~based on their judgment~~.

~~E.C.~~ A complaint must be filed with EIC within one-hundred eighty (180) calendar days of the alleged act(s) of discrimination/harassment. EIC may process an alleged violation outside of this time limitation in the discretion of the ~~if deemed necessary by the~~ Executive Director. The filing of a

complaint under this Regulation is independent and does not preclude the Complainant from also filing a complaint with federal, state or local enforcement agencies. The filing of a complaint with EIC does not constitute a filing with, or have any effect on the filing time limitations of those external agencies. All Complainants are urged to contact these external agencies directly to learn the filing deadlines and procedures for each agency. Contact information for these agencies is available from the EIC office.

~~F.D.~~ All complaints ~~should~~ contain the name of the Complainant reporting party and state the nature of the act(s) complained of, including such details as the name of the alleged offender and the date(s) or approximate date(s) on which the offending act(s) occurred, the name(s) of any witnesses, and the desired resolution(s). Any portion of a complaint file that is exempt from public disclosure under the Florida Public Records law shall

remain confidential to the extent permitted by law.

IV. INVESTIGATION OF COMPLAINTS

- A. EIC shall investigate all complaints that contain enough information to qualify for substantiate investigation and allege prohibited discrimination or harassment. ~~This~~ investigation ~~will~~ may include, but shall not be limited to, interviewing the Complainant and Respondent and any relevant witnesses ~~alleged offender (also referred to as Respondent) and the complainant~~ Complainant. Each party shall have an equal equitable opportunity to present relevant ~~the names and contact details of~~ –witnesses and other relevant evidence. ~~The investigation may include the interviews of other persons who may have information relevant to the allegations, preparation of witness statements for all persons interviewed, and review of any relevant documents.~~ Upon completion of the investigation, a final report shall be prepared which includes a summary of the complaint, a description of the investigation, whether a violation of University Regulation was found, based on a preponderance of the evidence, and recommendations for disposition.
- B. EIC may attempt conciliation or informal settlement before or ~~during the course of~~ during an investigation of a complaint. If conciliation or informal settlement is not achieved, ~~then~~ EIC shall continue to investigate the complaint, and shall issue a final report.
- C. EIC shall attempt to conclude its investigation ~~on non-Title IX matters~~ and issue its final report within seventy-five (75) calendar days of the filing of the complaint. However, the investigation process may be stayed for good cause as determined by the Executive Director.
- D. The final report by EIC shall be submitted to the appropriate Vice President, Provost or designee if an employee is involved, and/or to the Dean of Students or designee if a student is involved. The Respondent and Complainant will each be notified in writing of the outcome of the complaint and any appeal. Corrective or disciplinary action up to and including dismissal or expulsion will be considered and implemented, if warranted, by the Vice President, Provost or Dean of Students in consultation with the ~~EIC~~ Executive Director. Corrective or disciplinary action may also be considered and implemented if EIC determined the complaint was unfounded and made maliciously or recklessly. All disciplinary action shall be subject to applicable University Regulations [~~(including but not limited to University Regulation 5.009 (Grievance Procedure) and University Regulation 4.007 (Student Code of Conduct))~~], policies, and applicable collective bargaining agreements.
- E. Any Complainant or Respondent may submit a response or statement to be attached to the EIC's final report and which will be maintained in the EIC file; any response or statement must be submitted to the ~~EIC~~ Executive Director within ten (10) calendar days of the date the final report is published.

~~E.~~

VI. RECONSIDERATION

- A. Any Complainant or Respondent may request reconsideration of a finding in the ~~EIC~~ Report ~~final investigation report~~ by filing a written request with the ~~EIC~~ Executive Director.

1. The ~~EIC~~ Executive Director must receive the written request within ten (10) calendar days of the date the final investigation report is published.
2. The request must include a basis for the reconsideration.
3. ~~The EIC Executive Director will consider any request for reconsideration, but~~ Reconsideration will only be granted in cases where new evidence is provided or relevant evidence was not previously considered or reviewed.
4. The ~~EIC~~ Executive Director shall notify the requesting party, in writing, of the appeal decision within twenty (20) calendar days.

Specific Authority: Article IX of the Florida Constitution; Florida Board of Governors Regulation 1.001; Formerly 6C5-5.012, Amended 11-11-87, 7-5-99, 11-9-05, 6-28-06, 11-16-11, 07-01-15, 6-4-19.