



WARTBURG AAUP

"Committed to Academic Excellence"

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FACULTY REVIEW COMMITTEE PROPOSES NEW SEXUAL HARASSMENT POLICY

In a special meeting on February 16, the Wartburg College faculty will consider two amendments to the faculty handbook—a revision to Section 2.4.3.2, which defines sexual harassment, and a new appendix which sets forth the procedures to be followed in handling sexual harassment complaints.

Although the American Association of University Professors and a number of Wartburg faculty have recommended changes (see "AAUP Identifies Problems," page 5, and "Faculty Raise Concerns," below), the proposed policy will come to the faculty with few substantive modifications, in the hope that it can be amended on the floor.

The purpose of this issue of the *AAUP Newsletter* is to help facilitate Thursday's discussion by providing the faculty with background information, illustrative cases, and AAUP analyses.

FACULTY RAISE CONCERNS ABOUT PROPOSAL AT SEXUAL HARASSMENT FORUMS

Faculty participants in the two forums sponsored by the Faculty Review Committee voiced a number of concerns relative to the proposed sexual harassment policy:

- That the policy is "victim unfriendly" in a number of ways. It requires the victim to file a written complaint as a first step in seeking any kind of redress, even mediation. The complaint is submitted to the vice president under whose jurisdiction the accused is employed. It was pointed out that a young woman, for example, might not feel especially comfortable divulging her experience to a male administrative official.
- That the policy represents an "all or nothing" approach, insofar as it leaves the victim with only two options: (1) do nothing but seek personal counseling on his/her own or (2) file a complaint with the alleged harasser's boss, since even mediation requires the filing of a written complaint with the jurisdictional vice president, with a copy to the accused. Several faculty said that an informal and more "victim friendly" mediation stage would probably help resolve many of these cases at a lower level.
- That the policy does not include a sexual harassment officer or officers to assist complainants in mediation or in navigating the shoals of a formal investigation. Faculty pointed out that these tasks should be handled by someone who possesses the appropriate skills; enjoys the trust of students, staff, and faculty; and is not part of the "personnel loop."
- That it was inappropriate that the vice president for academic affairs should also be the mediation officer. According to the draft, if a student files a complaint against a faculty member and wishes to pursue mediation, the academic vice president handles the mediation and keeps a record of the outcome in a "confidential file." Several faculty expressed concern that the person chiefly responsible for decisions about their renewal, tenure, and promotion should also be handling mediation in sexual harassment charges against them.

- That the team that investigates complaints against faculty does not include students.
- That a record of the investigation is placed into the faculty member's permanent personnel file even if the charges are found to be groundless.
- That the draft does not name the specific sanctions that apply to faculty found guilty of sexual harassment.
- That the "hostile environment" element of the definition of sexual harassment is vague, subjective, and threatening to the principle of academic freedom. (It should be noted that this definition has been invoked in most of the sexual harassment charges against faculty. See the article below and the two stories on page 4. See also "AAUP Identifies Problems in Proposed Sexual Harassment Policy," page 5, and "'Hostile Environment' Clause Incompatible with Academic Freedom," page 6.)
- That the draft proposal does not afford an accused faculty member due process, even though severe sanctions could be imposed. (It should be noted that the 2/9/95 draft has added a stipulation that requires due process for the sanction of dismissal.) The accused is not allowed the opportunity to confront and question his/her accuser or any adverse witnesses. He or she is not allowed the right to an academic advisor or legal counsel. There is no indication regarding burden of proof—whether the accused is guilty until proven innocent or whether it is incumbent upon the administration to establish the truth of the charges.
- That the body making the determination of the guilt or innocence of a faculty member is appointed by the president and the dean, not elected by the faculty.
- That one of the members of this body determining the guilt or innocence of an accused faculty member is not a faculty member. Several participants insisted that decisions so potentially damaging to a faculty member's career and reputation should be the product of hearings conducted by a body of professional peers.
- That a faculty committee should be put in a position of writing a policy for staff and students without their knowledge or consent. (The latest draft [2/9/95] applies only to faculty.)
- That a flawed policy could place the college in more legal and financial jeopardy than could no policy at all. The growing number of lawsuits filed by professors who claim their universities mishandled complaints of sexual harassment against them was mentioned, as well as the recent ruling in favor of Professor J. Donald Silva at the University of New Hampshire (see below).

LEGAL IMPLICATIONS OF THE NEW HAMPSHIRE SEXUAL HARASSMENT CASE

University of New Hampshire (UNH) professor J. Donald Silva told a class of writing students in 1993 that "focus [in writing] is like sex. You seek a target. You zero in on your subject. You move from side to side. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one." During another session, he offered this example of a simile: "Belly dancing is like Jello on a plate with a vibrator under the plate."

When nine female students complained to university officials about these remarks, the administration investigated and found Silva guilty of creating "a hostile classroom environment." After a series of hearings, appeals, and disciplinary actions, Silva was suspended from his teaching duties.

Claiming that his classroom remarks were within his constitutional right to freedom of expression and that his rights to due process had been violated, Silva sued in federal court. In September, district court judge Shane Devine issued a preliminary injunction ordering the University of New Hampshire to reinstate Silva, pending the results of the upcoming trial.

Although Devine did not rule on the substance of the case, he did state that when it proceeds to trial, Silva was "likely to succeed on the merits of his First Amendment claims." Devine's conclusion

stemmed in part from his opinion that the students in the class were adults and were “presumed to have the sophistication of adults.” He also said that he thought that Silva’s comments “advanced his educational objective of conveying certain principles related to the subject matter of the course” and that they were “made in a professionally appropriate manner.”

Silva’s claims received additional support from the American Association of University Professors, which sent a committee to UNH to investigate the administration’s handling of Silva’s case. The results of that investigation are published in the November-December 1994 issue of *Academe*. The committee found that the “sanctions imposed on Professor J. Donald Silva by the administration of the University of New Hampshire were attended by numerous serious departures from standards of academic due process.”

AAUP president James E. Perley told the *Newsletter* that the Silva case demonstrates that “there are major consequences to institutions with flawed policies if someone is found guilty of harassment and then sues.

“Think of the costs of defending an indefensible decision, made on the basis of procedures and processes that are so easily fought. Surely no administration would want that. Just ask New Hampshire’s lawyer what kind of fees the university had to lay out to defend itself, while ultimately losing the court case and incurring severe criticism from the [AAUP] investigating team.”

(information from the September 28 *Chronicle of Higher Education* and the November-December *Academe*.)

WHAT IS SEXUAL HARASSMENT, AND WHY DO WE NEED A POLICY ?

Legally, the most authoritative definition of sexual harassment is that found in the guidelines adopted by the Equal Employment Opportunity Commission in 1980:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment. (29 C.F.R. 1604.11[a])

Although these guidelines do not have the full force of law, they derive considerable authority from the Supreme Court’s endorsement of them in *Meritor Savings Bank, FSB vs. Vinson* (1986).

The EEOC Guidelines define the two types of sexual harassment recognized by the legal system—*quid pro quo* and “hostile work environment.”

In *Quid pro quo* (“something for something”) harassment, the harasser is a person with the power to affect employment decisions relative to the victim and thus in most cases is an employer or supervisor. Usually, tangible employment benefits are offered in exchange for sexual favors.

A “hostile work environment” can exist when an employee is subjected to unwelcome sexual jokes, gestures, innuendo, insults, intimidation, or physical contact. The harasser offers the victim nothing in return for enduring this behavior. (For an AAUP critique of the application of this concept of sexual harassment to the academic workplace, see “‘Hostile Environment’ Clause Incompatible with Academic Freedom,” page 6.)

Harassment in the workplace on the basis of sex is prohibited by Title VII of the Civil Rights Act of 1964, which makes it unlawful to discriminate in employment on the basis of “race, color, religion, sex, or national origin.” Congress extended these rights to students in 1972 when it passed Title IX of the Education Amendments Act, which prohibits sex discrimination in educational programs receiving federal funds.

Under Title IX, an educational institution must develop sexual harassment grievance procedures and designate an employee to coordinate its responsibilities, including the investigation of complaints.

There are strong incentives for colleges like Wartburg to articulate and enforce sexual harassment policies. First, if a college or university fails to develop and enforce such policies, it can lose its federal aid, although this rarely happens. Second, and more importantly, the Supreme Court in 1992 removed the cap on the amount of monetary damages that can be awarded sexual harassment victims under Title IX. Therefore, colleges and universities without properly enforced policies are legally and financially vulnerable.

SEMINARY PROFESSOR ACCUSED OF SEXUAL HARASSMENT FOR QUOTING THE TALMUD

For the last 34 years, New Testament professor Graydon Snyder has been citing a theoretical case from the Talmud to illustrate a passage in the Sermon on the Mount. But it is only in the last few years that the theologically conservative Snyder has been teaching at the ultra-liberal Chicago Theological Seminary. At CTS the 63-year-old Snyder apparently stepped on a few politically correct toes, making enemies who, he suggests, coached the two students who charged him with violating the policy that prohibits "verbal conduct of a sexual nature that has the effect of creating an intimidating, hostile, or offensive academic environment" (see "'Hostile Environment' Clause Incompatible with Academic Freedom," page 6).

As a result, in March of 1993 the seminary issued Snyder "a formal reprimand for sexual harassment, with specified expectations for changed behavior," and placed him on probation. He was also encouraged to undergo therapy and to attend sexual harassment workshops (he declined), and he was forbidden to be alone with students. During the fall term a seminary official taped all his lectures.

The Talmudic story that got him into trouble is about a man fixing a roof on a hot day, so hot that he takes off his clothes. Meanwhile, down below, a woman has done the same thing. A sudden wind blows the man off the roof so that he falls on the woman and unintentionally has sexual intercourse with her. The commentary on the story points out that neither the man nor the woman has sinned, since their act of intercourse was not intended.

According to Snyder, the story illustrates the rabbinic notion that sin occurs only when the intention to sin is present, regardless of the act. Snyder says that Jesus makes the same point, in reverse, in Matthew 5:27-28: "You have heard that it was said, 'You shall not commit adultery.' But I say to you that everyone who looks at a woman with lust has already committed adultery with her in his heart." In other words, sin occurs without the act when only the intention is present.

Last February, Snyder filed a lawsuit against CTS claiming denial of due process and defamation of character.

(from *Bible Review* [August 1994])

MORE FREQUENTLY, PROFESSORS ACCUSED OF SEX HARASSMENT ARE FIGHTING BACK

Theodore H. Hirschfield, an assistant professor of English at Southeast Missouri State University, is suing that institution for \$2.5 million because he says the university violated his rights to academic freedom when it processed two sexual harassment complaints against him.

According to the March 16, 1994, *Chronicle of Higher Education*, Hirschfield was alleged to have told his creative writing class that "all a woman has to do is lay on her back, spread her legs, and the government rewards her" for every child she bears. Although Hirschfield says that a student actually made the comment, he is more intent on defending his right to have said it than in denying that he did so. He contends that even if he had made the remark, he would have been operating well within the limits of his First Amendment rights.

Courtney Leatherman, the author of the article, points out that Hirschfield is not alone. "As the number of sexual harassment complaints rises on college campuses, so does the number of those fighting the charges."

Among the institutions now being sued by professors accused of sexual harassment are Butte and San Bernardino Valley Colleges and the Universities of New Hampshire (see page 2), Puget Sound, and Texas. Two complaints against MIT have been filed with a state civil-rights agency. And last January the University of Houston settled a multi-million-dollar suit out of court.

According to Leatherman, professors are fighting back because they are "unwilling to succumb to policies that breach their rights to free speech and due process."

Officials of scholarly organizations like the American Association of University Professors are also concerned about violations of academic freedom and due process, says Leatherman. They "worry that the definitions that colleges use for the offense are overly broad and that their procedures violate the rights of the accused."

Leatherman says that it is the concept of "hostile environment" that is especially troublesome. While "instances of unwelcome touching or offers of sex-for-grades are clearly inappropriate, determining what creates a 'hostile environment' is subjective."

The hostile environment language was adapted from EEOC Guidelines intended to define harassment in the workplace. But critics point out that "the concept of a 'hostile' environment doesn't work well in an academic setting, where ideas—even offensive ones—are supposed to be freely exchanged." (See "'Hostile Environment' Clause Incompatible with Academic Freedom," page 6.)

Leatherman talked to AAUP associate general secretary Jordan E. Kurland, who said that the association is handling about three calls a week from professors who have been charged with sexual harassment. "There's little doubt in my mind that much of this has gotten out of control," said Kurland.

Kurland also said that, at some institutions, officials investigating complaints act as "judge, jury, and coach."

"We're against sex harassment," Kurland said. "We're also against theft and assault and battery. Over the past two years, sexual harassment has been singled out as a very special sort of offense that requires a different kind of due process. We've always been opposed to that."

AAUP IDENTIFIES PROBLEMS IN PROPOSED SEXUAL HARASSMENT POLICY

After reviewing a draft of the proposed sexual harassment policy, AAUP associate secretary B. Robert Kreiser identified two "areas of concern": (1) a subjective definition of sexual harassment and (2) a lack of academic due process.

In comments forwarded to FRC committee chair Bill Shipman, Kreiser pointed out, first of all, that the document (and the current handbook) states that sexual harassment is "... verbal and physical conduct ... of a sexual nature ... [that] has the purpose or effect of ... creating an intimidating, hostile, or offensive ... academic ... environment." In Kreiser's view this definition is too subjective.

To illustrate his concern, he said that AAUP has handled many complaints like the following:

A student claims that a professor's statements in the classroom about gender make her feel extremely uncomfortable, even intimidated, and that the resulting hostile educational environment has made it virtually impossible for her to complete the course.

According to the definition of sexual harassment contained in the draft text, Kreiser said, the student's mere assertions about the subjective effect (i.e., her feelings) of the faculty member's expression of ideas

are adequate to establish the validity of her claim. As a result, the faculty member is found guilty of sexual harassment.

Kreiser gave another example, from a situation he was currently reviewing at a church-related college. An English professor was accused by students of creating a hostile learning environment as a result of his raising questions concerning sexual imagery in works of 20th-century fiction, most notably Margaret Atwood's *The Handmaid's Tale*. After an investigation by the dean, the professor was informed that, although his conduct was sufficiently reprehensible to justify dismissal for cause, the administration would merely demote him in rank from full to assistant professor, with a corresponding reduction in pay.

Thus, said Kreiser, the definition contained in the proposed revision constitutes a fatal flaw in the policy. Even if a student has indeed been sexually harassed, his or her self-perception does not constitute evidence of that harassment.

Beyond the dangers to individual faculty, Kreiser was concerned about the baneful effects that adopting such a definition might have on academic freedom at Wartburg. According to him, this definition appears to "open the door to the suppression of speech on grounds that it expresses harmful ideas, a course of action that would be incompatible with the fundamental premises of academic freedom." (See "Hostile Environment" Clause Incompatible with Academic Freedom," below.)

Kreiser's second concern related to the procedures set forth in the proposed Appendix E. According to Kreiser, these procedures "depart significantly" from AAUP standards of academic due process.

Kreiser said that AAUP standards require that the following principles and procedures be observed whenever the conduct in question is sufficiently grave to warrant a severe sanction:

1. that the charges be heard by an elected faculty committee in a hearing of record
2. that the faculty member is allowed the right to an academic advisor or legal counsel of his or her choice
3. that the faculty member have the right to call witnesses to testify on his or her behalf
4. that he or she be permitted to confront and cross-examine all witnesses
5. that the burden of proof rests with the administration and that the committee's recommendation should be based on clear and convincing evidence

An expert on faculty governance and academic freedom, Kreiser edited the 1990 edition of the *AAUP Policy Documents and Reports* (the "Redbook"). Two years ago, when the Wartburg faculty was revising the Handbook, Kreiser reviewed and analyzed a draft of that document, making a number of suggestions, most of which were eventually incorporated into the final version by the Handbook Committee.

"HOSTILE ENVIRONMENT" CLAUSE INCOMPATIBLE WITH ACADEMIC FREEDOM

Thoughtlessly applying the "hostile learning environment" concept of sexual harassment in an academic setting, "without regard to the special needs of teaching and scholarship," produces a "chilling effect" on academic freedom, according to a Committee A report published in the September-October 1994 issue of *Academe*. The committee recommends eliminating "hostile environment" language from academic sexual harassment policies.

A summary of the main sections of the report follows:

The EEOC Guidelines. The committee points out that the EEOC Guidelines on sexual harassment were "developed principally to deal with workplace relationships." (See "What Is Sexual Harassment, and Why Do We Need a Policy?" page 3.) The hostile workplace environment theory responds to the legitimate concern that "a pattern of supervisory or co-worker speech and conduct directed at employees on the basis of their sex may drive them from employment and so discriminate against them in violation of equal employment opportunity law."

Commonly, colleges and universities have adapted the EEOC Guidelines merely by substituting "learning" for "working" in clause 3 ("such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive *working* environment" [italics added]).

Sexual Harassment Policies and Academic Freedom. Committee A recognizes that "sexual harassment is an important campus concern" and that "in the regulation of non-academic supervisory and co-worker speech, universities do not differ from other employers." Thus, the EEOC Guidelines should fully "apply to the university in its *non-academic* functions" (italics added).

The committee also recognizes that insofar as *quid pro quo* harassment involves speech, that particular kind of speech deserves "no protection anywhere in the university."

However, the committee does object to the application of the "hostile environment" clause to the academic setting.

"Our concern," writes the committee, "is with the direct, wholesale translation of rules adopted to govern workplace speech to the very different situation of speech in the classroom, studio, and laboratory, and to interchanges between colleagues and to discussions with students in non-classroom settings—that is, to speech that would otherwise be protected by principles of academic freedom."

Yes, the university can be thought of as a workplace, but "it is a workplace of a special kind, one in which the work carried out, by students and faculty alike, is discovery and assessment of ideas. That is the very purpose of the enterprise." Therefore, the freedom to express ideas in the academic context "requires particularly strong protection."

It follows, then, that "those institutions . . . that have emulated the EEOC Guidelines" by proscribing verbal conduct that creates a "hostile *learning* environment" have paid "insufficient respect to that requirement."

The academic working environment "at its best" consists in "the robust exchange of ideas." As a result, ideas that many people might find "distasteful or distressing" will find expression in the classroom.

For this reason, "ideas whose expression may be felt to be intimidating, hostile, or offensive cannot be prohibited on the sheer ground that they are felt to be so. The learning environment must be open to all ideas, however distasteful or distressing they may be felt to be, for there cannot be responsible assessment of ideas—or acquisition by students of the ability to make responsible assessments of ideas for themselves—in an environment in which some ideas are suppressed at the outset because they may or do offend."

Adequate Notice of What is Proscribed. The committee contends further that if a particular type of expression is to be prohibited, a "clear, ascertainable, and administrable standard" must exist. In other words, because "the rule would regulate what faculty . . . may say to students . . . or colleague[s]," even "in spontaneous exchanges or impromptu remarks as part of academic discourse," faculty should "not be required to guess at where the zone of forbidden expression lies."

Unfortunately, a rule proscribing speech that creates "'an intimidating, hostile, or offensive learning environment' fails in this regard" because it cannot provide a clear definition of precisely what must be avoided. "Any reference, observation, or proposition germane to the topic," whether it be uttered "to stimulate thought, to advance a line of analysis, or simply to provoke discussion," could conceivably be found deeply offensive by a particular student, even while it strikes "a responsive chord" with others.

"Speech uttered by faculty members in the course of carrying out their professional obligations cannot be so regulated."

The members of Committee A who authored the report are Ralph Brown (Law), Yale University, *Chair*; Matthew Finkin (Law), University of Illinois; Betsy Levin (Law), Georgetown University; Carol Simpson Stern (Performance Studies), Northwestern University; Judith J. Thompson (Philosophy), Massachusetts Institute of Technology; and Linda Fisher (Law), Dickinson School of Law, *Consultant*.

ZEMKE RESPONDS TO DEAN OF FACULTY EVALUATION

On January 16, President Vogel wrote a memo to some members of the campus community inviting them to participate in the evaluation of James Pence, dean of the faculty and vice president for academic affairs. Faculty members invited to participate include members of the Faculty Council and the Appointment, Rank and Tenure Committee; academic department chairs; chairs of the Educational Policies Committee, Faculty Review Committee, and Faculty Development Committee; and titled, tenure-track, and tenured faculty selected at random. Selected students and administrative staff, including the President's Council, were also invited to participate. The deadline for responses was February 6.

The last two times the dean was evaluated (in 1991 and 1993), all faculty members were invited to respond. Otherwise, the evaluation procedure is similar to the earlier ones: the president will prepare a summary of the responses and share the essential aspects of it with the dean and ART. The dean will not be permitted to see the individual evaluation responses.

In a letter to Vogel, AAUP president Warren Zemke offered two criticisms of the evaluation, based on AAUP principles: (1) the dean should be able to see the individual evaluations; a select summary of faculty responses is not at all the same as direct feedback through individual responses; (2) a summary of the evaluation should be shared with the whole faculty (such as was done in 1991, but not in 1993). Zemke wrote, "I strongly and candidly encourage you do so. . . . It would make the current evaluation credible and really meaningful."

FORUM SHEDS LIGHT ON NEW ADMISSIONS/FINANCIAL AID POLICIES

John Olson, director of admissions, and Dan Kielman, assistant director of financial aid, addressed faculty at the AAUP-sponsored forum on admissions and financial aid on February 2. Their remarks gave faculty a clearer picture of the college strategy for reaching the enrollment goal articulated by President Robert Vogel at the January 26 faculty meeting—1,500 students by 1998.

In response to concerns expressed about Vogel's concession that the college would have to accept a lower average ACT composite score in order to reach the 1,500-student goal, Olson presented encouraging statistics (as of 1/30/95): the average ACT composite score of the 778 students already accepted for next year is 24.6, and 94% of these students are in the top half of their high-school classes.

These numbers compare favorably with those of the past three years. In 1992, the average ACT was 24.6, and the percentage in the top half was 91%. In 1993, the ACT average was 24.2, with 89% in the top half. And in 1994, the ACT was 24.2, and 92% were in the top half of their graduating class.

However, only 78, or 10%, of these 778 students have made deposits. Olson emphasized the importance of faculty contact with these students at this critical time of the admissions year.

Participants also learned that 1994 Fall Term enrollment of international students was 59, contrasted with more than 100 international students for the same term in 1991 and 1992. 1995 Winter Term enrollment is down to 42.

In response to questions about new merit aid for international students—\$1,000 awards to incoming students and \$2,000-\$3,000 scholarships to continuing students—both Olson and Kielman emphasized that the goal is to attract and retain these students.

"Wartburg AAUP is grateful to John and Dan for their willingness to explain to faculty how we're going to make our admissions goals," said chapter president Warren Zemke.