

# Fresno Pacific University

## President's Council Policy Review Session with Legal Counsel

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*Presented by  
Ashley Emerzian, Esq., Legal Counsel  
Pam Schock, Title IX Coordinator  
Jordan Sharp, Exec. Dir. Human  
Resources*

*February 23, 2021 8:30 AM – 10:00  
AM via Remote Video Conference*







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***1. The Three Buckets Model***

***2. Reporting Obligations***

***3. Case Studies & Hypos***

***4. Q/A***



# Discrimination, Harassment, Sexual Misconduct & T9 Policy

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*1. Effective August 2020*

*2. Comprehensive Single Policy  
Covering All Forms of  
Discrimination/Harassment*

*3. Covers Students & Employees*





# Discrimination, Harassment, Sexual Misconduct & T9 Policy

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In keeping with its long-standing tradition and policies, and with applicable state and federal law, Fresno Pacific University (“FPU” or “University”) does not discriminate in the operation of or access to the University’s programs on the basis of the following protected classes: race; color, national origin (including possessing a driver’s license issued under Vehicle Code § 12801.9), or ancestry; age; physical or mental disability, perceived disability or perceived potential disability; sex, gender, pregnancy or perceived pregnancy, childbirth, breastfeeding or medical conditions related to pregnancy, childbirth or breastfeeding; medical condition; citizenship; military and veteran status; genetic characteristics; political affiliation; or any other classifications protected by applicable federal, state, or local laws and ordinances (“Protected Class” or “Protected Classes”).





## Discrimination, Harassment, Sexual Misconduct & T9 Policy

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Fresno Pacific University is governed by the Pacific District Conference of Mennonite Brethren Churches. The University is deeply and intentionally rooted in the Anabaptist Christian tradition. ...As a Christian university, FPU administers this policy in alignment with the University's Statement of Faith, the FPU Idea and applicable exemptions for religious institutions afforded by state and federal law. Nothing in this policy is intended to limit or otherwise conflict with the University's exercise of rights as a religious institution and/or under applicable religious exemptions.





# Discrimination, Harassment, Sexual Misconduct & T9 Policy

**This Non-Discrimination Policy (“Policy”) prohibits the following conduct (“Prohibited Conduct”):**

- 1. Harassment or discrimination, including, but not limited to, Sex-Based Misconduct against students, employees, and applicants for admission or employment based on membership in a Protected Class;**
- 2. Harassment or discrimination based on the perception that a person is a member of a Protected Class or is associated with a person who has, or is perceived to have, membership in a Protected Class;**
- 3. Any and all Retaliation against any person for submitting a report of violation of this Policy or for cooperating in the administration of this Policy, including participation in an investigation or adjudication process;**
- 4. Knowingly submitting a complaint under this Policy based on false allegations or to knowingly provide false information in connection with an investigation or adjudication of a complaint processed under this Policy;**
- 5. Any Responsible Employee who fails to report allegations of Prohibited Conduct, including, but not limited to, Sex-Based Misconduct or Title IX Sexual Harassment;**
- 6. Any person in a position of power or influence that intentionally deters or hinders another person from reporting allegations of conduct which, if true, would violate of this Policy;**
- 7. Any other violation of this Policy.**

# The Three Buckets

*Bucket 0: Informal Resolution (limited cases, requires RA approval)*

*Bucket 1: Non-T9 Allegations of Harassment, Discrimination, Sexual Misconduct, Retaliation & Other T9*

*Bucket 2: T9 Sexual Harassment (New Regulations)*

## ***Responsible Administrators***

### ***Title IX Coordinator***

- All gender-based or sex-based complaints, including cross-overs.

### ***Highest Level Admin for HR***

- All other complaints involving employees, including student-employees.

### ***Highest Level Admin for Campus Life***

- All other complaints involving only students.



# Bucket 0: Nuts & Bolts

1. T9, HR, Campus Life Sign Off on Offer – Meets Compliance Criteria

2. If Formal T9, Written Complaint Filed

3. Respondent Must be a Student (Not Student Employee)

4. All Parties Agree – No Investigation or Adjudication

5. All Parties Get Written Notice of Informal Resolution Procedures & Voluntarily Sign Participation Agreement

## Informal Resolution

✓ *Facilitated Restorative Justice*

OR

✓ *Facilitated Mediation*





# Bucket 1: Nuts & Bolts

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*1. Support & Notice for All Parties*

*2. Investigation (If Required – 90 days)*

*3. Report Goes to Responsible Admin*

*4. Decision & Corrective Measures*

*5. Appeal (Paper Review If Requested)*

## Hearing Requirements

- ✓ *Students Only*
- ✓ *Upon Request After Decision*
- ✓ *Suspension/Expulsion Only*
- ✓ *Uses Student Judicial Board*



# Bucket 2: Nuts & Bolts

## Formal T9 Sexual Harassment

*1. Support & Notice for All Parties*

*2. Investigation (90 days) – Includes Required Disclosure of Evidence*

*3. Report Completed, Opportunity to Respond & Hearing Notices Issued*

*4. Live Hearing with Cross Examination – Hearing Officer Issues Decision*

*5. Appeal (Paper Review)*

### Hearing Requirements

- ✓ *Students & Employees*
- ✓ *Mandatory – Requires Witnesses to Appear Including Complainant*
- ✓ *Any Level of Corrective Action*
- ✓ *Legalistic Process – Numerous Protocols Required*





**“Notice”  
&  
“Actual  
Knowledge”**

Report

Complaint

Formal Complaint (TIX Only-  
Actual Knowledge)

Anticipated Changes To:

# 2020 Title IX Regulations

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**Top Priority for Biden**



**T9 - Biden's Signature Issue as VP**



**Multiple Avenues for Change**

New Statute  
(unlikely)

Ongoing  
Litigation (wait  
& see)

Repeal  
(compliance  
issues)

Repeal and  
Replace (most  
likely)



# Reporting Obligations: Policy Requirements

- *All employees are responsible for reporting complaints, concerns or allegations raised of policy violation.*
- *Few Exceptions: Campus Nurse, Campus Pastor or Mental Health Counselors.*
- *Duty is to report – not to investigate, resolve, confront, or to be sure.*
- *Failure to report is a policy violation.*
- *<https://fresno.tfaforms.net/39>*



FRESNO PACIFIC  
UNIVERSITY

## FRESNO PACIFIC UNIVERSITY UNLAWFUL DISCRIMINATION, HARASSMENT AND SEXUAL MISCONDUCT REPORT FORM

### FRESNO PACIFIC UNIVERSITY

#### Background Information

While anonymous reports are accepted, you are strongly encouraged to provide your name and contact information in order to allow us to most effectively provide appropriate supportive measures and resources, address the concerning behavior, and maintain safety on campus (Responsible Employees, who have knowledge of discrimination, harassment, sexual misconduct and Title IX misconduct are required to fill out the Name & Contact information), you are STRONGLY encouraged to provide your name and contact information in order to allow us to most effectively provide appropriate supportive measures and resources, address the concerning behavior, and maintain safety on campus.

Do you wish to provide your name?

☐ Yes ☐ No

Your position/title:

Your phone number

# What is a Complaint?

- ☐ I am concerned because... I don't want to file a complaint I just want you to know.
- ☐ XYZ happened, what do you think I should do?
- ☐ \_\_\_\_\_ gives me a weird vibe, makes me so uncomfortable, I know I'm not the only one.



# How to Receive a Complaint

## Do's

- ✓ Listen first.
- ✓ Ask gentle for more information.
  - Can you say more about that?
- ✓ Reassure:
  - Did the right thing.
  - University prohibits harassment.
  - University has a policy.
  - Retaliation is not permitted.
- ✓ Take immediate action to report the conversation.

## Do Not's

- × Assume the best.
- × Assume the worst.
- × Blame or draw conclusions.
- × Promise confidentiality or that their complaint can be “informal.”
- × Dismiss concerns.
- × Wait to take action.
- × Tell other colleagues before reporting.



# Investigation Requirements

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- ☐ *Preponderance of the Evidence*
- ☐ *Neutral, Unbiased, Trained Investigator*

# Case Studies & Hypotheticals

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# Karasek v. Regents of Univ. of Cal. (N.D. Cal. 2020)

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1. *Deliberate Indifference – overuse of informal process, failure to educate on sex-based misconduct*
2. *Heightened Risk – mishandling of complaints put students at risk*
3. *Causal Link – “But, for...”*
4. *Severity – unwanted physical touching*

*HELD: MSJ Denied in part.*

*UC Berkeley maintained a de facto policy of deliberate indifference that created a heightened risk of harassment.*



# Cavalier v. Catholic Univ. of Am. (D. D.C. 2021)

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- *Cavalier alleged rape by Doe and Doe denies*
- *Upon completing investigation, University decides it will not conduct a hearing*
- *Cavalier appeals, hearing is held and finds Doe not in violation*
- *Cavalier files suit alleging unlawful discrimination under Title IX*

## *HELD:*

*A reasonable jury could find that the University's investigation was clearly unreasonable for failing to meaningfully consider Cavalier's incapacitation.*







# Hypo Questions

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*1. Is this the University's educational program or activity?*

*2. Which bucket are we in?*

*3. Who is the responsible administrator?*

*4. Who is responsible to make a report?*



# Virtual Game Night

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Mark is a freshman. Due to the pandemic, the entire semester is scheduled to be online. Mark joins a student organization that helps new students get acclimated to the college campus and meet new friends. The organization hosts a virtual game night on the first Friday of every month and the theme is “Casino Night.”

Shortly after logging into the meeting, Mark realizes the group is playing strip poker. Uncomfortable with the situation, Mark immediately logs off. The next day, Mark receives an e-mail from the organization, stating that he is not a good fit for the group.

Later that day, Mark mentions what happened to his faculty mentor. The faculty mentor tells the Dean what happened via email.



# The Faculty Lounge

Professor Lee and Professor Simmons eat lunch together in the faculty lounge most days. They are long-time friends. They went to college at the University together years ago. Professor Lane also usually lunches around the same time and overhears their conversations. Sometimes they talk about other female employees in ways that make Professor Lane uncomfortable.

Alex, a program manager also lunches at the same time and hears the conversations taking place. Professor Lane comments to Alex “I just don’t think I can take their dirty comments much longer” and hurries out of the room with a sad look on her face.





# The Pregnant Professor

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Professor Smith is 5 months pregnant. She told her students at the beginning of the semester that she plans to be available through final exams and has a back-up plan should she unexpectedly need to be out sooner than that to have her baby. Michael, a student, raised concerns during the first week of class via the classroom chat about Professor Smith not being able to do her job while pregnant. During online class sessions he routinely makes derogatory comments about Professor Smith. On several occasions Michael states that she should be at home with her children while her husband works. Professor Smith gets fed up and reports it to the Dean of Campus Life for help managing the student.

Ricardo, another student in the class, also works in the campus cafeteria. Ricardo's supervisor is Chi Lao. Chi asks Ricardo one day how the semester is going. Ricardo responds that he may have to drop one of his classes. Chi offers to change Ricardo's work schedule if that would help. Ricardo responds by telling Chi, "It's just that I'm so uncomfortable in that class because Dr. Smith is being bullied by a classmate because she's pregnant."





# Study Abroad

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A group of students are studying abroad in the same program in France. Taylor reports to their faculty chaperone that she isn't feeling part of the group because all the other students are white. Taylor tells the chaperone that Miles, another student, made jokes on the first day about how she stands out and doesn't look "French" because she is tall and curvy with dark skin. Miles joked that hanging out with Taylor wouldn't get any of them a date while on the trip. Since then, Taylor hasn't wanted to go on any of the trips to museums. The chaperone encouraged Taylor to try again with the other participants, and to be sure not to miss the Louvre.



# Movie Assignment

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The T9 Coordinator receives a report from a student about a History professor who required their students to watch a film that depicts nudity and marital infidelity and included a diverse cast. The Complainant states that the film offended her as a Christian and as a woman of color.

The T9 Coordinator follows up with the Dean and is informed that the film did not meet any learning objectives and there were plenty of other films that could have been selected via university resources. The Dean wishes to handle the matter directly and never reported it to HR or Title IX.





# Nursing Student Internship

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Jenni is a nursing student and is assigned to a local Urgent Care facility as part of the internship requirements to complete her program. The Office Manager at the Urgent Care, Brian, routinely keeps Jenni after her shifts in his office asking her about her dating life. Brian tells Jenni she should dump her boyfriend and date an older man. Brian touches Jenni on the arm from time to time. Brian also makes comments about Jenni being Asian.

The program manager for nursing internships is doing routine check-ins with students to evaluate internship sites. During the routine check-in, the program manager speaks to Jenni. Jenni discloses the above situation.





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