

# Duke University

DURHAM  
NORTH CAROLINA  
27708-0928

ACADEMIC COUNCIL  
UNION WEST  
BOX 90928

phone (919) 684-6447 304  
e-mail [acouncil@acpub.duke.edu](mailto:acouncil@acpub.duke.edu)  
fax (919) 681-8606

## Minutes of the Regular Meeting of the Academic Council

Thursday, December 2, 2004, 3:30 - 5:10 PM

### *Announcements*

Nancy Allen (Medicine, Chair of the Council): Due to the short period between the November and December Council meetings, the November and December minutes will be distributed with your January agenda materials. The second announcement is that an Academic Council Chair Nominating Committee has been formed. According to our bylaws, the Executive Committee appoints a 5-person committee from the University Faculty to nominate 2 persons for chair of the Academic Council. This committee will report on the nominees during the January Council meeting and the election will be held by secret ballot at the February meeting. (That is so the newly elected chair can't come back to the people who voted for him or her and give them a hard time!) The new chair will take office on July 1, 2005. Our former Council chair, Peter Burian, has graciously agreed to chair this committee. Other members are: Blanche Capel (Cell Biology), Fritz Mayer (Public Policy and current ECAC vice-chair), Craig Henriquez (Biomedical Engineering) and Randy Kramer (Nicholas School). We look forward to receiving their report in January. The third announcement is: Happy Birthday Tallman! Sorry, we're a day late. And I won't ask how old you were...

*The Council then went in to Executive Session to vote on Honorary Degrees.*

Nancy Allen then continued:

### *Question for the Provost*

As is customary, the Academic Council receives questions anonymously for the President, Provost or other key administrators. The questions are mailed to the Council in advance of the meeting and the appropriate administrator comes to answer the question at our next meeting.

Provost Lange: Thank you Nancy. As always it is a pleasure to answer these questions. Let me read the question:

In a recent report to the Academic Council on the topics to be discussed this year by the University Priorities Committee, one item listed was how Schools that are running operating deficits are to be held accountable financially. The question is: How many Schools are there at present that are running deficits, and has the University policy changed that requires each School to make up any such operating deficits from reserve funds at the end of each fiscal year?

Let me answer the question as follows. First, we have generally not permitted budgeting a deficit — that is the use of reserves for budgeting deficits. That doesn't mean haven't permitted

the use of reserves if there *is* a deficit. We have not commonly permitted the budgeting of a deficit, but with the economic pinch of the last couple of years we have permitted such budgeting in a few cases. I would expect over the next couple of years that we will eliminate budget use of reserves.

Second point: Schools who have deficits, or who budget deficits, have to support those deficits through their own funds, and they are doing so. Hence, the policy has not changed. If you run a deficit you pay for it yourself. If you budget a deficit, you know if you have it you will have to pay it from reserves. And we would not let you budget a deficit unless we knew that you had the funds with which to pay for it.

Third: In this spirit there are two types of reserves at the school level. There are discretionary reserves, which are funds that the Dean can spend on discretionary purposes. Operating surpluses and deficits flow to and from the deans' discretionary reserve fund. Second, in the fiscal year 2001, target-reserve levels were established for schools in specific operating units. By which I mean that we tell each unit that you must maintain a certain target level of reserves — which we refer to as either rainy-day or designated reserves. These rainy-day reserves were established to back-stop operating risks each program faced. The level of risk was determined by the structure of the budget and a review of performance over the last decade. These funds are included in the assets of the units. I have these target levels of reserves, if you want to know what they are. So I think that answers the question thoroughly. The basic answer as you know is “yes,” we occasionally allow schools to budget reserves, especially in this period of fiscal stringency, and now schools cannot be bailed out by others. In fact we require them to draw on their reserves in order to pay for deficits that they may encounter.

There being no questions, Nancy Allen continued:

### *Graduate Program in Medical Physics*

The next item of business is continued discussion and vote on the Graduate Program in Medical Physics. We have up front a resolution that's different from the one in your packets, because we made a few corrections since we sent out the mailing. We have Professor Dobbins and some other faculty members here who represent the proposal; if you have any questions for Professor Dobbins at this time, or for any of the administrators, please let me know. He and his team did a great job putting the proposal together and at this time I will entertain a motion to accept the resolution which we revised since the mailing. (It's the one that has 12/2/04R at the bottom.)

## ACADEMIC COUNCIL RESOLUTION SUPPORTING PROPOSAL FOR CREATION OF A NEW GRADUATE PROGRAM IN MEDICAL PHYSICS

**Whereas**, the Medical Physics Graduate Program Steering Committee has submitted a proposal to the Graduate School for a Graduate Program in Medical Physics, offering Masters of Science and Ph.D. degrees, and

**Whereas**, this proposal has been reviewed and received support from the Executive Committee of the Graduate Faculty, the Academic Programs Committee, and

**Whereas**, the proposal, which would create the first Ph.D.-granting program at Duke initiated by a clinical department, has been endorsed by chairs of the constituent departments that form the basis

of the Medical Physics Program and the deans of the three schools involved (Graduate School, Medicine, Engineering), and

**Whereas**, the Provost endorsed the proposal with the addition:

*That the Medical School Dean's Office instruct the Appointments, Promotions, and Tenure Committees of the clinical departments in the Medical School to include teaching in the Medical Physics graduate program as a priority activity, alongside research and clinical service, in evaluations and,*

*That the chairs of the clinical departments in the Medical School work with their faculty involved in the Medical Physics graduate program to ensure that their teaching activities are appropriately balanced with their clinical and research responsibilities.*

and,

**Whereas**, the Academic Council Executive Committee, finding the review process to be sound and the proposal to be extremely well documented, recommends approval,

**Therefore**, be it resolved, that the Academic Council enthusiastically endorses the establishment of a Graduate Program in Medical Physics, and encourages the Dean of the Graduate School to follow carefully the progress of this interdisciplinary endeavor. The Academic Council commends the Medical Physics Graduate Program Steering Committee for developing this interdisciplinary field which will contribute substantially to the advancement of knowledge and the practice of medicine at Duke University.

12-2-04R

The motion was moved, seconded and carried without dissent.

### *Harassment Policy*

Nancy Allen: The next order of business is to continue the discussion on the proposed revised Harassment Policy. And at this time I will call on Vice Provost Judith Ruderman...

Judith Ruderman(Vice Provost, Academic & Administrative Services): The responses of the Harassment Policy Review Committee to some of the issues brought up at the time of the last Council meeting on November 18 have been included in the revised document sent to you a few days after and dated November 23. But, on the basis of comments and discussion since that time, the committee has made several additional changes I would like to present to you now, before we open up the floor for discussion of these and other aspects of the proposed policy.

The first change responds to a concern expressed by a couple of you that an educational institution's special responsibility toward students is not evident anywhere in this policy. In response to that concern, we have inserted some language right at the start of the document to make this point explicitly. We added to "students" the category of "patients," since both constituencies may be said to be particularly vulnerable. One because of relative youth, in the case of undergraduates especially, and the other because of illness or incapacitation.

So, we begin as we began before: harassment on any basis, and so forth and so on, is not acceptable at Duke University. Harassment is inconsistent with the University's commitments to excellence and so forth. Abuse of the relationship between teacher and student or provider and patient is a particular concern because of the educational and health care missions of the university. We don't have to discuss each of these changes as I present them, but we certainly can if

you wish. So, madam chair, what is your pleasure? There are seven suggestions that Council has not as yet seen.

Nancy Allen: Why don't you run through them and then we can come back.

Judith Ruderman: OK. I'll do that. The second change responds to the suggestion that it is important to know what happens to a case being handled at Duke if external proceedings are initiated before or during that internal process. So we elaborated on Footnote 1, which has already added language after our last meeting about a complainant's right to institute external proceedings. But we felt, on the basis of further input from you, that a little more was necessary, so we'd like to see what you think about this. We had already added: some forms of harassment may violate federal and state laws and a complainant or respondent may choose to invoke external processes to resolve his or her concerns instead, of or in addition to, pursuing the procedures set forth herein. And then we added "any internal process proceeds without regard to an external process unless university counsel instructs otherwise." That is a very general statement, but we felt it would suffice.

The committee was asked to provide more examples in Footnote 1 of the university rules or policies that deal with "disturbing behaviors other than harassment." We expanded this list by one. I will say parenthetically, it appears that for faculty members there is no real guidance to be provided by the Faculty Handbook in such cases and so that document is not included in the list.

We also added language to encourage people to consult with others not only about disturbing behaviors that are not harassment, but also about behaviors that they don't quite know how to classify. So this reads: "Some behaviors that are disturbing to members of the Duke University and Duke University Health System communities may not constitute harassment per se." In certain cases other university rules, policies or manuals (and then here's the list, to which is added, the Undergraduate Bulletin of Information and Regulations) may nonetheless prohibit such behavior. Persons who believe they have been subjected to inappropriate behaviors not covered by this harassment policy, or who are unclear about whether those behaviors constitute harassment, are encouraged to seek assistance from...— and some sources of assistance are listed.

On to the definition section, for which I will offer you two possible alternatives. In each of them we add the phrase that the definitions are derived from case law (Law professor Trina Jones, a member of our committee, has informed us; Trina is here now.)

Case law started with a definition of harassment as sexual coercion and then developed a broader definition as well. Both of these definitions are operative and thus we employ both in the Duke policy. Although the first definition is broad and some of you may think nebulous, in fact the wording is more detailed and explicit than that in other university policies we looked at. But we have now removed the phrase, "sexual coercion" from the second definition, since that phrase seemed to raise some distracting issues for one or more of you. So here is the first alternative I'm presenting as perhaps an improvement over the definition we now have. Very much like the one you got originally, all it does really is say that these definitions of harassment may take two forms as defined by case law. The only other change is that it removes the words "sexual coercion" in the definition of the second form of harassment. If, however, you would prefer one definition rather than two, the committee offers you this alternative, which merges the two definitions and uses sexual coercion as an example of harassment rather than a second form of harassment. So, this one now says, as defined by case law, harassment is verbal or physical conduct... and then we go through the definition. And then we say in the next sentence: This definition includes, but is not limited to situations in which a person uses a position of authority and so forth. So, two definitions of harassment or one? Those are now two alternatives for you.

George McLendon (Dean of the Faculty of Arts and Sciences): Just out of curiosity. Is the first bullet implicitly contained within the second? Because decisions affecting the individual could certainly include terms and conditions.

After some general discussion:

McLendon: If we borrow the government's language, that's fine.

Ruderman: The statement on the subject of malicious claims in the current policy — and by the current policy I mean the 2002 document in force today — is, to the committee's mind, overly convoluted. Moreover, our committee heard at the last Council meeting an objection to removing malicious claims from the Harassment Policy. Our committee still believes that malicious claims of harassment should be handled by explicit policies against fraud or by workplace standards of behavior, rather than by a policy against harassment per se. Footnote 4 in the document sent to you before Thanksgiving attempts to defend this point. We also note that an assertion of a fraudulent claim does not constitute retaliation under the harassment policy — which is an element retained from the current policy. Otherwise there could be a vicious circularity in all of this. Finally, when we looked at other schools' policies, we saw that some (MIT's for example) do call a malicious complaint of harassment itself harassment. Others don't call it harassment. Pennsylvania is an example. And still others don't mention it at all within their harassment policy. Yale is an example. So we do have alternatives. Different schools do this differently. And I would say that if this is a real sticking point — and I've said this to Rich who brought this up last time — if this is a real sticking point with the Council, then certainly the committee will take it under advisement and investigate it with the other constituencies that are subject to this policy, and if all are in accord with any major objection that you have to our considering it fraud rather than harassment, we certainly will take that under advisement. I don't want us to get hung up permanently on this issue. The only reason I bring it up again is because we did make one change in wording. And we used the words "fraudulent assertions." I can't remember what we changed it from, (someone said "a claim") — well we made it assertions instead of a claim. I bring it back to you simply because it is different from what you saw.

The question of who supervises the supervisor has been raised. That is, who ensures that the sanctions decided on after a finding of responsibility will actually be imposed? The committee has now answered this question by inserting language about the obligation of the Office of Institutional Equity to follow through on the matter. Here is the wording. [slide] After this long description of implementation of corrective actions, we say that OIE shall verify that the sanction has in fact been imposed — or we can change that to "any sanctions have in fact been imposed."

And then the last point: I note that a suggestion was made to add a phrase about removing the harasser either temporarily or permanently from all instructional responsibilities. The suggestion was made to add that to the list of possible recommended sanctions for harassment. Since suspension and dismissal are already on the list on p. 9 of your copy, the committee saw no need to add any further language to address that point.

Those are the changes since the last changes. The committee would like to hear your reactions to those particular changes...

### *Questions*

Teresa Berger (Divinity): Thanks, Judith, for your work on this. I have a question that relates to the first change you suggested in the very first paragraph under "introductions." I like the completeness of listing particular types of vulnerability in the university, but it strikes me that listing just two has the danger of occluding other types of vulnerability. As convener of the Faculty Women's Network, one of the things that comes to my attention sometimes is a power differential — for example between a young woman faculty member and an older male colleague or a dean or whatever. The emphasis on the differential power between instructor-student and patient-doctor should not be taken to minimize the power differential between a staff person and a dean, for example.

Ruderman: Yes, Teresa that's a very good point and I believe I made that point to the person who brought up the issue. But the person was sufficiently convincing that as an educa-

tional and health care institution, as well as of course a workplace in general, we should make that point. And so we did respond to it. That's not meant to say that there aren't any other forms of harassment or there aren't any other power differentials. But rather that there is a specific relationship between doctor and patient and teacher and student that are particularly vulnerable to abuse. Now as I said these are reactions to suggestions that the committee has received. The Council can vote one way or another on them. OK

Teresa Berger: Could I suggest an extension of the sentence?

Ruderman: One may suggest whatever one wishes to suggest. I thought that was a prologue to suggesting one.

Burger: English is not my first language so I may need some time to think about how to torture that sentence. (laughing)

Srinivas Aravamudan (English): On the same topic it seemed to me that the list of possible bases of harassment is quite long and you don't want to make it an endless list. I do think some kind of recognition of class or social status as a basis on which harassment often occurs might be something that would include the sort of thing that Teresa is bringing up. Because something like institutional status with respect to custodial staff or secretarial staff would then be included within the list that says at the beginning age, color disability.... It just strikes me that something like social status or class as often a basis on which something like this could occur.

Ruderman: Who wants to respond to that point?

Provost Lange: It is difficult to write a list which is comprehensive. There are words on this page which in fact are excerpted from a comprehensive list as examples. There is the word included in the paragraph to which Srinivas just referred, and there is the word of particular concern, which does not mean of only concern in the sentence which Teresa brought up. The concern I have is that this process can go on unendingly... I must say I am defending my vice provost, who is spending an exorbitant number of hours attempting to perfect this policy, and the committee members, who don't even have jobs that require them to do this — working on an amending process which could go on forever. So I would ask the Council to be prudent in its suggestions, and to recognize that any policy that is written will have to have some flexibility for risks which are not anticipated, and that other aspects of the policy must depend on the goodwill of those administering the policy.

Aravamudan: Could I have a quick comeback? I appreciate what Peter said and I do want to make this point though because if you look at the list there are 3 categories there that are slightly different, but sound similar, ways to looking at a question, by color, ethnic or national origin and race. Which are all of course not exactly the same thing, but they seem to in a way go around certain issues of social categorizations. I do think that class as a major social differential is lacking and it does mark economic understandings of what we are in a way that these categories aren't really getting at. So, I mean we could replace one categories on the list with one of these others...

Ruderman: We hear you and the committee appreciates this input and since we're not voting today I think we should get everything out that you want to have stated.

Nancy Allen: Thank you Judith for saying that. I did send an e-mail to Council members 2 days ago saying that we would continue discussion here. Judith and her committee will take into account the comments made at the last meeting, today, and in between. And we will hope to vote in January based on all of those comments and additional ones up until December 20, so that Judith and her committee will have time to incorporate those. So we won't be dealing with amendments and all of that today. We will hope to have a distillation of all of these comments so that we'll have another document at our next meeting.

Sunny Ladd (Public Policy): My suggestion for dealing with these would be to add a phrase to before the sentence in red so among the many areas of concern abuse of the relationship is of particular concern...

Peter Burian (Classical Studies): If we're simply collecting suggestions: I took Peter's point, but both the questions address the same issue, which is a crucial one, and is also of particular concern to this institution ... So, I would suggest simply adding institutional status to this list, and then maybe read it a little differently, the final sentence to say something like: In addition to abuses arising from the power differences operative in any institution relationship...That is to say simply to recognize the importance of this other element which ...

Ruderman: And if the scribes did not get that, he will send it by e-mail.

Garnett Kelsoe (Immunology): I'm curious about the intent of disturbing behaviors. As I read this, it is basically this is not harassment, but some problems that maybe handled by other university rules and regulations and bylaws. And if there are rules, regulations and bylaws that handle "disturbing behaviors," and if by definition disturbing behaviors are not harassment, what is the point of having disturbing behaviors in a harassment policy?

Ruderman: Well first of all it is a footnote. And the reason it is a footnote is because (you might not be surprised to know) that sometimes people can't figure out whether something is technically harassment or not, they just know that the behavior disturbs them...For instance (I'll just throw something out here) something that might be called hazing or anything. It's disturbing. But people make claims that it's harassment. That's why it is here as a footnote. Such behavior may be prohibited by other rules or regulations; that's all we mean to say. Don't worry if we tell you that it isn't harassment...it may be another type of prohibited behavior. That's the reason for the footnote.

Garnett Kelsoe: My concern is simply to generalize a series of behaviors that are so vague and so broad as to promote a feeling that, for example, might inhibit free academic discourse and exchange of ideas. And it just seems to me that by defining something that actually has no basis as harassment... Scientific fraud is not harassment. I find it disturbing, but I'm sure you would not mention it in this harassment policy. That's all — it just seems very open ended.

Ruderman: The first response I would make is just to repeat that people do sometimes feel that behavior is harassment when, upon discussing it, they see that it is not. And this gives them an avenue to explore it, to have it investigated through processes other than the harassment policy. Somebody — your supervisor, for example — could reprimand you for doing a bad job and you might immediately think that is harassment. And it might not be. That's all it says.

On the second point, I note that the second paragraph in the text above reiterates the institution's commitment to academic freedom. Again, with any of these we're taking all these things down and if a majority of you feel strongly about these issues I know you'll let us know. So thank you for bringing them up. What else?

Craufurd Goodwin (Economics): If you were to change the "disturbing" to "prohibited" wouldn't that solve your problem?

Ruderman: Well some of it isn't prohibited and some of it is. Some of it is just plain old disturbing and that's why we say "may not constitute harassment"...

Ben Reese (Office of Institutional Equity): That's inserted in the footnote because really the great majority of situations that come through our office don't fall within the definition of harassment, but are situations that people find upsetting or disturbing. And rather than say "it's not harassment so go figure it out," we state in the policy that even it doesn't fall within the definition of harassment, it still a concern and so we will make recommendations that someone go to the appropriate place. But if it's disturbing, it's disturbing. And so it is a recognition that things that don't fall within the policy are still a concern.

Ruderman: And may be prohibited by other policies in certain cases.

Reese: Maybe.

John Staddon (Psychological and Brain Sciences/ECAC): I had a question concerning the new language about putting OIE in charge of monitoring disciplinary action. I haven't thought very deeply about it, but it seems as if this proposal combines the functions of the judiciary and

the police department in one department: is this a wise thing to do? In the normal legal system, the courts make a judgment and then law enforcement takes care of enforcing it. Is it a good idea to put enforcement and judgment in the same office?

Ruderman: I'll give my insert and then we'll have Ben give the OIE position. My answer is that OIE is not really the judiciary. Let's say there is a hearing panel. This is set up by the Harassment Grievance Board. The hearing panel is constructed by the Harassment Grievance Board. They are what you might say is the judiciary. That would be my response. The person who brought up this issue wants to make sure that appropriate actions *are* taken. Our first response was that well, any supervisor should be supervised by her supervisor. So that's the case for the department chair, for example. It's the dean's responsibility to make sure the sanction has been imposed. But that was not satisfactory to the person or persons who brought that forward and so we inserted this language that OIE who is responsible for the Harassment Policy and its good implementation would in fact follow through with a phone call: Has what was proposed actually been done? Will that do?

Reese: OK

Will Wilson (Biology): I appreciate all the effort you guys put into it and how frustrating it is to go on and on. I have two concerns. One is just a scenario. Let's say there are 2 gay students kissing in Duke Gardens or something. Does this allow someone else to file this as a disturbing action? A second case is that somehow the policy prohibits a protest of some administrator's actions on the part of students who have a sit-in in the Allen Building say, which could also be considered disturbing. So I just want to make sure.

Ruderman: In response to your first point, I think of the yiddish language and the same word depending on the inflection means different things. I'm sure that's true in many contexts. So the same act, I would say off the top of my head, could be considered harassment or could not be considered harassment. So on the face of it I would say of course to a gay couple kissing in the Gardens is not harassment. Somebody else could say I could think of an instance where it would be. So we have to make the best judgment that we can. I don't think this definition or this policy opens the floodgates for everything to be called harassment. Nor do I think it unduly closes off charges of harassment. Now that was my response to your first point. The second point I'm not sure I fully understood about the student sit-in.

Will Wilson: It's more the scope of disturbing behavior.

Ruderman: Yes, If you're talking about undergraduates doing this, that or the other, there are five gazillion rules for undergraduates and then when we don't have a rule specifically prohibiting (for example) throwing a TV off the dorm roof, which our undergraduates have done in their infinite creativity, we have more general rules that will apply. So for undergraduate behavior, and for behavior of graduate and professional students, there are their own codes of conduct and so forth...

Will Wilson: In the first case I gave, I know that's not harassment, but the question was whether it's disturbing behavior for an observer.

Ruderman: I don't have to deal with that because I'm not creating a disturbing-behavior policy. Do you know what I mean? I don't know the answer to that.

Wilson: I just want to make sure we're not creating a policy against kissing in the gardens.

Ruderman: I certainly hope not.

Provost Lange: As Provost, I can assure you we are creating a policy against demonstrations against administrators....

Ruderman: Only in the Allen Building. Let them go elsewhere.

Roxanne Springer (Physics): I want to go further so at some point when we're done with these seven...

Ruderman: Roxanne, go further.



Springer: I'd just like some clarification on the label put on this document which says "confidential not for distribution or circulation." Would you clarify who is actually allowed to see it?

Ruderman: This is a very good question. You know that on my computer there are probably 50 versions of this. And you know it took us over a year... This label started on day one, when the thing was in process, and it has simply remained there. As far as I'm concerned it can have as wide as circulation as this Council or the chair of this Council thinks appropriate... We have not withheld it from any responsible person, Roxanne.

Springer: Could we remove the "confidential" and just say "draft"?

Ruderman: Well that's fine with me. As I responded to Ronen when he made that point to me in an earlier e-mail today, if the Council and the Council chair wish to put this up on a website or do anything else with it that is your pleasure. The committee just acts on the instructions of the Provost and in this case the Council.

Springer: So will the Council vote on this before the end of the meeting so that we know what to do?

Ruderman: I'll leave that up to Nancy to respond to.

Nancy Allen: I don't know that the Council can mail it out to the entire community. We don't have an operational website that can put it up. Judith has been very generous in circulating this. As Council members you can share it with your faculty for input to you or back to Judith. Judith is the collector of information in this process.

Springer: So the position of the Council is that anyone can see it?

Ruderman: Yes, again another thing I said to Ronen earlier today was that yes this is a very important policy and the faculty council has voted on many an important policy in its history and if that's a process that's comfortable with the Council they should do it and if it's not then you won't. That is to say put it out there. It's not any more important than so many other policies.

Springer: I'll agree with that and submit that we should always have open circulation...

Ruderman: That's a good point.

Harold Baranger (Physics): I wanted to bring up a concern about the confidentiality paragraph: p.3 of the November 23 document. If I'm reading this right, it says that in both the informal and formal processes, the confidentiality of both the proceedings and the circumstances giving rise to the dispute shall be confidential. And the limit that is until resolution has been achieved. My concern is that while in the formal process there is a very clear limit on how much time this should take, in the informal process there is not. And in fact it seemed to me in the informal process it is quite likely that resolution will not be achieved because resolution is defined by an agreement which signed by both parties. And it would seem to me that in many cases, and it was my experience in a number of such cases, that the parties never do come to an agreement. So in that case we would have an informal complaint which is never resolved ...

Ruderman: Any allegation should be resolved. And I thought there was a timetable appended to one of the earlier versions. You don't have it Harold, but I believe even informal resolutions have a time limit.

A voice: 45 days.

Ruderman: So there is a time limit in which resolutions must be achieved. So allegations that the complainant feels are not achieved — they are hanging out there — can go to the complaint which can be handled in a formal way.

Baranger: That's very good.

Kathleen Smith (Biology): I'd like to comment on the two definitions of harassment. I think that it's very important to keep them separate. The first one is an issue that is harassment generally. It is not simply sexual harassment.

Ruderman: It could be though.

Smith: It could be; it would be the broadest definition. And the second is very specific about sexual harassment and it's also very specific in terms of the requirements we have in terms of the government definition and employment laws. So they do have fairly different entities and I think it's important to retain separation.

Ruderman: The committee would like to hear other responses on this point. You see the first alternative offered to you. It merely adds "as defined by case law" and takes out the term sexual coercion. And the second one just to remind you makes what we used to call sexual coercion a subcategory of the more general definition.

Ronen Plessner (Physics): Regarding the definition, in the places where I looked at the standard employment law actually the definition of sexual harassment was pretty much our second definition... In other words, unwelcome sexual advances constitute harassment if either submission is a condition of employment or it influences the education, employment or promotion or it is of such a nature that it adversely affects the environment for someone. And I thought it was important, in the case of sexual coercion, to note that even if a faculty member is making unwanted sexual advances to students and explicitly telling them that grades will not be affected — this could still constitute harassment. Regardless of the issue of proving an implicit association between submission....

Ruderman: I'm going to let the lawyers on the committee respond to this. This one is beyond me Ronen.

Trina Jones (Law): I haven't read the exact definitions of harassment to which you are referring, but if you think about the development of harassment claims, more specifically sexual harassment claims, as a legal matter, when these claims were first brought the typical situation involving sexual harassment was one where an employer or supervisor would make a job benefit contingent upon some type of sexual interaction. Thus, a man might say to a woman unless you sleep with me you're not going to get a promotion. Historically, that type of harassment has been called quid pro quo. An employment benefit that is contingent upon performance of a sexual "favor" or compliance with a sexual demand.

Over time, the courts began to recognize that harassment make take other forms. There are other situations when a woman's work environment can be adversely affected without an overture being made. Thus, you may have a situation where the environment is polluted with pornography and continuous negative references to and about women, but no sexual demand per se is made. That's called "hostile-environment sexual harassment." Thus, what we now have in the law are two working definitions or categories of sexual harassment. And, that's why we have the two definitions in our policy. We are simply tracking the categories or forms as they developed in the law and as they are generally understood. If you look at the first definition or form of harassment in our policy, you will see that it basically describes hostile-environment harassment. But, it could also be read to embody quid pro quo harassment. The first definition really includes the second. However, the committee thought it important to recognize that in legal terms, and in general parlance, a distinction has traditionally been drawn between the two different forms of harassment and therefore we kept that separation in the policy. To be sure, this is defensible because quid pro quo is a special or unique form of harassment that is still pervasive in our society. But again you could theoretically limit the definition to the first form and argue that all sexual harassment can potentially fall within the hostile environment category. In fact, one could argue that this is the direction in which the courts are going. Indeed, the Supreme Court has struggled in recent years with whether the distinction between the two different types of sexual harassment makes sense. This issue has yet to be resolved legally and therefore the committee thought it was sensible to proceed with two discrete categories, which are still widely recognized. Does that respond to your concerns?

Ronen Plesser: I think I would be happier with maybe leaving the first definition. The problem is when you break it up into two cases of the second of sexual advances that do not involve quid pro quo can still obviously be harassment under the hostile...

Ruderman: We assume that's the case. The question now we brought to you is if you can live with one of these two ways of phrasing the whole definition, which do you prefer? The first one, not this one. Maybe we could take a little vote on that just so the committee has guidance. Any more comments on this point?

Sally Kornbluth (Pharmacology and Cancer Biology): I would just say that the reason I think this first one is preferable is because many people think of sexual harassment is all it applies to, whereas I think it's good for people to know that there is harassment of other kinds that is explicitly set apart, and they realize up front that that sort of behavior is also covered under harassment policy, even if it's not sexual in nature.

Ruderman: Well I see some heads nodding, but ...

Nancy Allen: We can take a straw vote on this. So is there a motion to accept this definition of so the committee can move forward with the addition of as defined by case law? Move, second, any discussion or questions? All those in favor please say aye — opposed. You've got that one Judith.

Larry Zelenak (Law): My attention was drawn to the confidentiality point at the bottom of p. 3. It seems to be saying that if you are a complainant, and you follow the procedure, then you're not supposed to tell anybody about the facts of the harassment... And I don't understand.

Ruderman: It says until resolution is achieved. After resolution has been achieved it doesn't say that you can't say this to anybody.

Zelenak: Well that's right, but why you can't tell your friends or your parents or whom-ever....

Ruderman: Well, again, I would like to hear comments from those who have real experience with the handling of such cases. What is the reason for these statements about confidentiality before resolution has been achieved. Isn't that what you are asking about?

Zelenak: Confidentiality with respect to the facts of the allegation.

Ruderman: I know also in the undergraduate judicial process confidentiality is set as an expectation, but I'll let you respond — anybody over here on the committee.

Cynthia Clinton (Office of Institutional Equity): There are two reasons for the confidentiality provision in the harassment policy. One, case law and federal agencies have consistently said, and we also believe, that many parties and many people who feel harassed are actually more likely to come forward if they feel that the proceedings or the process would be held confidential or handled in a discreet manner.

The second reason for having a confidentiality clause is that by doing so you tend to minimize the run-amok rumor mill at the office. You tend to guard the privacy of the people who are involved. But I want to say that it is not a bar or prohibition against speaking about your experience or your concern or complaint in the policy. And if people come to our office we make it very clear that we are not prohibiting you from talking to people that you would like to talk with, your family, your lawyer, your chair, your dean, your supervisor. I can't think of any circumstances where we would say you couldn't talk with anyone...

Ruderman: I think this is one of the changes between this proposed policy and the one in effect right now. That we have loosened up — setting confidentiality as an expectation, but not saying we'll prosecute you for breaches of confidentiality.

Provost Lange: Let me just add from my own experience. While it is the case that we certainly wouldn't want a person who felt that they had been harassed not to be able to speak to a range of people, there is the opposite problem as well. If the allegation of harassment is brought and it is not upheld, and many, many people have been talked to. It is almost impossible to re-

wind that unraveling ball of twine. And so obviously you want confidentiality while the case is being heard...

I think the effort to manage within reasonable bounds the discussion of an allegation of harassment during the time it is under review is appropriate if done in a reasonable way. I think Cynthia has made clear it *is* done in a reasonable way. But once the rumor mill takes over, I'll tell you it is impossible. The person who may have been accused falsely then finds himself in the position where there are many people — people he or she does not even know — who believe that the individual committed an improper act but do not know that he has in fact been exonerated. So there are two sides to this information problem that need to be considered. A person who sees such cases recognizes both sides.

Roxanne Springer: I'd like to follow up on this and ask that the point of view Cynthia Clinton just described is made very clear in the policy. Because right now it says "all participants, etc., etc., shall respect the confidentiality ..." That implies to me that if someone does not respect confidentiality he or she is in violation of this policy.

Judith Ruderman and Roxanne Springer then engaged in a dialogue about confidentiality, the conclusion of which was that a revision that achieved more balance between the perspectives of the University and the complainant was desirable.

Rich Schmalbeck (Law): Appendix W [the harassment policy] does include an explicit statement that false claims are a violation of the policy. And I think that was a good idea at the time and would like to hear a little more about why the committee thinks it is not a good idea. And I guess again, as I say, this does seem to me that one that would benefit from a straw vote among the members. I should say, I don't feel that strongly about it. Because I was actually chair, I think, of the first committee that Duke had about, we sort of discovered that this existed about 1987. We were shocked! Shocked! that actually sexual harassment existed so we had a committee. I participated in several investigations and never, never thought that any of them even raised the possibility of false accusations. I don't think it happens very often at all. But I do think it's tremendously damaging when it does happen. And I do think there is some benefit and some symmetry in having in policy statements to the effect that false accusations are also prohibited actions.

Ruderman: So again I would reiterate, Appendix W is nothing more and nothing less than the current in-effect-now Harassment Policy. So, that's why you find that there. It is also the University-wide harassment policy.

Why do we want to replace it? I can only say again that the committee thought this was an issue of fraud. It is interesting that when I called up Steven Bryan (on the undergraduate level, the associate dean for judicial affairs) and asked him, How would you handle a case of a malicious claim of harassment? He said, "we'd handle it by our fraud policy." So we looked and what the undergraduate bulletin does is just take wholesale the university policy so of course that's not what it says. Intuitively he thought that's how he would handle it because there is a policy against fraud. But then we might consider as fraud the use of false ID's to buy liquor. But that's how he would handle it, but then he found out it says it would be prohibited under the harassment policy or adjudicated under the harassment policy. So he was surprised and that bore up our committee's fear that it should be handled as fraud. Again, I want to reiterate, if the Council thinks that's a bad idea and it should go back in the harassment policy we'll look at it again.

John Staddon: It's very odd to call it fraud because fraud is often an action like presenting a false ID, which is not directed at any individual. But a false allegation is always directed at, and harms, a particular individual.

Ruderman: Well I think the policy to which I've just referred is very broad in its definition of committing fraud — very broad. I should not have used that example, because I misled you. I think it's probably the most common example of fraud on the undergraduate level, but it

is certainly not the only one. It's a blanket policy for fraud. And these are fraudulent claims, but so be it.

Chris Counter (Pharmacology): Did that original language concerning this matter inhibit any people from coming forward? Were there cases where people saw this language and were frightened by it?

Ruderman: Well, you may remember that last time I came before you I said we just examined everything. That's not what the Provost really wanted, but we couldn't help ourselves and we came to that. We said look, what is this doing here as harassment, we think it's fraud. Others could argue differently. That's why I mentioned the 3 different example of schools that treat this differently. Now, as to actual cases, I have to ask my colleagues on the committee in OIE or like Trina and Steve who have sat on grievance boards ... Do you have a response to that?

Cynthia Clinton: I'm not aware of any complaint based on the fraudulent bringing of a claim of harassment...

Schmalbeck: It has a chilling affect..

Clinton: I think there are several things that could happen. One, I think it could have a chilling affect...I think that the core issue is intent, whether there's a fraudulent complaint or a complaint of fraud. Intent is very difficult to establish; I would hesitate to try to assess the mental intent of anyone. I think you mentioned the possibility of an unbalanced individual. I think it would be almost impossible for someone either at OIE or a manager or supervisor to try to make a determination as to whether someone was unbalanced and therefore not capable of intending a fraud or whether the person actually intended to bring a malicious fraud complaint.

Schmalbeck: I think you misrepresented what I was saying in that e-mail. I don't think you need to make any determination of whether somebody is balanced or unbalanced. I'm actually thinking about the sort of case where somebody just makes it up. Somebody says so and so made a pass at me — and it never happened. I agree that it is very difficult to prove that. That's kind of the quintessential "he said she said" kind of thing. But I guess I think that there is a message sent in the policy, if it says that sort of thing is prohibited.

Clinton: There are situations where we can corroborate whether intent has occurred or not occurred.

Schmalbeck: Sometimes, sometimes not.

Ruderman: I think it's important to note — Rich, Cynthia, everybody — that Footnote 4 says that this is prohibited behavior. It's just not to be adjudicated under the harassment policy.

Clinton: Fraudulent allegations shouldn't be permitted. I just question whether or not that's the place to have the policy, as opposed to something similar to retaliation or some kind of harassment where you can more easily judge the offense by some objective behavior as opposed to someone's mental or psychological intent.

Zelenak: Go back to the definition of harassment on the top of page 2 and see if it doesn't fit a fraudulent complaint. This form of harassment is verbal conduct which because of its severity interferes significantly with work or living conditions. I think it's just under the general definition. If you want to point out in the footnote that it is the definition that's fine.

Ruderman: So in other words you are saying that a malicious complaint *is* a form of harassment? If the Council feels that way they should so state and we should amend the policy appropriately.

Schmalbeck: The current form on Footnote 4 seems to contradict that implication, so that it actually makes the situation worse.

Ross McKinney (Pediatrics): In large measure I think it may be an operational problem. Consider the nature of what you have. The first thing you have to is to evaluate the original complaint. So, the harassment process must have a finding that the original complaint was not valid. At that point it opens the door for the potential of the respondent to declare that the origi-

nal complaint was in fact malicious. So the question would then become potentially a circular one because the first person would say, no it wasn't. They just didn't find proof. And the other person as you said it's a "he said she said." So the standard that we thought was better was that when it came back around it was better to move to a policy that was based on the issue of fraud and the attempt to assess a situation where someone was trying to deceive. That was a better standard to use than the sexual harassment standard. It is in fact probably harassment and we sort of have to acknowledge that, but operationally it worked better if wasn't in a policy because then it became an endless circle.

Staddon: If I understand what he's saying, a complainant making a confidential claim to the committee could not constitute harassment because nobody else would know about it, right? So it has to be in violation of the confidentiality requirement, does it not, in order for it to constitute this kind of harassment?

McKinney: No because it would be disturbing to the person to have that sort of a claim made that would be very disruptive because of the process.

Ruderman: It will get out.

Schmalbeck: I just don't see the circularity of it. It is just more like a counter-claim and those are pretty common in any kind of dispute resolution or litigation, and I don't see this as being particularly different. Why circular? Each of them is accusing the other that's two straight lines.

Ruderman: Let's have some other views on this.

Julie Britton (Fuqua/ECAC): This is really much more on this particular point. Looking at the way it's stated now does not include (it seems to me) fraudulent claims brought by students, for example. So, it may fit as more workplace-related — because these are violations of workplace behavior that would be handled by your supervisor...

Ruderman: I don't understand. Why doesn't this apply to students?

Britton: Well it says violations of expected workplace behavior. So...something between students.

Ruderman: You're right, that's a mistake. So let's assume that it didn't say workplace behavior, but it says something else that includes...you're perfectly right. That could be easily corrected...needs to be because it does apply to students. We'll get rid of that

Garnett Kelsoe: If I understood the discourse here: the argument was made that in fact the filing of a malicious claim, a fraudulent claim, actually fits the definition of harassment, but the committee chooses not to define it as harassment as a special case. And since we're academics it seems to me if we're going to define something it should be inclusive. I see no good excuse to make a sort of subcategory of harassment that is not harassment.

Ruderman: OK, fair enough.

Teresa Berger: It seems to me that sometimes life is more complicated than scholarly categories allow for...I've heard enough on this. I'm ready to take a straw vote. I'm quite clear. It's a complicated issue. Other universities haven't resolved it. So, let's just choose.

Ruderman: You choose the way that you favor, but remember, I cannot promise that the committee will incorporate it. We need to look at the other constituencies the policy applies to.

Nancy Allen: OK would someone like to make a motion to maintain what is in this form of the policy, with the changes that have been discussed here, which is not to define fraudulent claims as under this policy? Do I have a motion to that effect? Second? All those in favor.

Springer: I know this is a straw vote, and I assume it's only members of the Academic Council who are voting.

Nancy Allen: That is correct. That is it is members of the Academic Council who are voting on this straw vote...Any discussion?

John Aldrich (Political Science): What is the alternative?

Ruderman: The alternative is to maintain it within the harassment policy. Where it is in the current, that is 2002, policy.

Nancy Allen: And was also in one of your earlier 29,000 drafts.

Ruderman: Was it? I don't think so.

Sunny Ladd: If it's maintained in the harassment policy, could it also be viewed as fraud? So does that rule out...

Ruderman: I think it has to be adjudicated one way or the other. It's just an issue of how it is handled. It's bad behavior, period.

Nancy Allen: Any other questions or discussion? All those in favor of maintaining this please raise your hands. Of keeping this form which is putting it out of the harassment policy please raise your hands. All those opposed. Well Judith you have hand vote not straw vote.

Ruderman: It wasn't unanimous by any means. The committee will continue to investigate that point, taking it into account all your good comments and we appreciate them. I really mean it when I say we appreciate them.

Margie McElroy (Economics): I would like to offer one quick friendly amendment to the amendment on disturbing behavior. I was disturbed by disturbing behavior paragraph...Here's what I suggest. Individuals who consider filing a complaint under this policy may be unsure whether their complaint is about harassment per se or something else. Such individuals are urged to seek help sorting this out with their supervisors, their academic deans, etc.

Ruderman: Again, I want to hear. You can send that to me by e-mail Margie. Are other people disturbed by that footnote on disturbing behaviors.

Nancy Allen: Is there a motion to change the disturbing behaviors paragraph? After some further general discussion of the "disturbing behavior" issue...

Ranjana Khanna (English): I'm a bit concerned about the disturbing paragraph too and I think that the problem is that "inappropriate" and "disturbing" get used together. There may be a way of actually reshaping the footnote to say there are some rules against inappropriate behaviors, without actually bringing in the idea of disturbing at all. Because disturbance doesn't really necessarily have much to do with it seems to me. Also, one other thing: I know we're sort of finished with the fraudulent thing, but could I sort of also throw this out the suggestion that some cases could be dealt with as fraud and some as harassment depending on the case. Surely there would be some instances where they are plainly harassment and others where they are plainly fraud?

Ruderman: Any other remarks about disturbing behaviors?

Ben Reese: I don't want to belabor this, but there are people who come in and feel disturbed, upset and use those words, but it is not inappropriate behavior. They use the words disturbed and upset. And if we're saying the words you use to define your feelings are not the words we recognize, then let's be clear about that. Because people do say they were disturbed.

Ruderman: Another point is that this policy applies to everybody and I think it's fair to say that this may not be so much a faculty issue, but things that have actually arisen many, many times in the workplace.

Ranjana Khanna: Could these cases then be referred the appropriate department for inappropriate behavior? (Laughing)

Nancy Allen: I'm getting the sense, Judith, that it would be difficult to take a straw vote on this without a bit more work from the committee. Anyone who has specific language suggestions, please send them to Judith between now and December 20. We're getting very close to 5:00. I am happy to have us continue a bit longer. Judith may not be. I would like to know if there are any other specific points on the document today that you would like to bring up for discussion.

Springer: I have many points, but I e-mailed them to Judith.

Ruderman: Roxanne, I would have responded to you, if I'd had the time, but we will deal with some of those tomorrow morning in the Faculty Women's Network. So, really we encourage you to forward to us any suggested language and any other issues that you have and the committee will meet again and probably again and again.

Nancy Allen: I see that that is a motion to adjourn. Thank you for your comments and the discussion today.

Respectfully submitted



John Staddon  
Faculty Secretary

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