



University Senate CHARGE

Date:	September 28, 2011
To:	Vincent Novara Chair, Equity, Diversity, and Inclusion (EDI) Committee
From:	Eric Kasischke Chair, University Senate 
Subject:	Proposal to Retain "Clear and Convincing Evidence" as the Evidentiary Standard in Sexual Harassment Cases
Senate Document #:	11-12-09
Deadline:	March 30, 2012

The Senate Executive Committee (SEC) requests that the Equity, Diversity, and Inclusion (EDI) Committee review the attached "Proposal to Retain 'Clear and Convincing Evidence' as the Evidentiary Standard in Sexual Harassment Cases" and make recommendations on whether the University of Maryland Policy and Procedures on Sexual Harassment (VI-1.20(A)) should be revised.

The University's sexual harassment policy defines which acts constitute sexual harassment and outlines procedures for filing a complaint. However, the procedures by which these cases are evaluated might be more clearly defined. The SEC requests that the EDI Committee review the proposal and advise whether the current policy should be revised to include information about the evidentiary standard and review process.

Specifically, we ask that you:

1. Consult with the proposer to discuss his specific concerns about the current process.
2. Review similar sexual harassment policies at our peer institutions.
3. Consult with the University's Office of Legal Affairs.
4. Consult with the Senate's Student Conduct Committee on the impact that any changes to the existing policy may have on the Code of Student Conduct.
5. If appropriate, recommend how evidentiary procedures could be implemented in the current policy.

We ask that you submit your report and recommendations to the Senate Office no later than March 30, 2012. If you have questions or need assistance, please contact Reka Montfort in the Senate Office, extension 5-5804.



**University Senate
PROPOSAL FORM**

Name:	John A. Tossell
Date:	Sept. 6, 2011
Title of Proposal:	Proposal to Retain "Clear and convincing evidence" as the evidentiary standard in sexual harassment cases
Phone Number:	301 346 2750
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Campus Address:	Chemistry, Bldg. 091, 1102A
Unit/Department/College:	Chemistry and Biochemistry, CMNS
Constituency (faculty, staff, undergraduate, graduate):	Faculty (emeritus)
Description of issue/concern/policy in question:	In April 2011 the Office of Civil Rights (OCR) of the Dept. of Education wrote a "Dear Colleague" letter to universities charging them to change the evidentiary standard for guilt in sexual harassment cases from "clear and convincing evidence" to the much weaker "preponderance of the evidence". The AAUP has strongly opposed this change in two letters to OCR, stating that this change would violate due process and weaken academic freedom for faculty and students. In effect it would substitute the weak standard used in civil cases where mostly money changes hands for the stronger standards using in criminal trials. Since penalties for sexual harassment convictions can include loss of tenure and termination of employment the higher evidentiary standard should be used.
Description of action/changes you would like to see implemented and why:	So far as I can tell, the evidentiary standard used in sexual harassment cases is never precisely stated in University documents. It is noted in the University of Maryland Policy and Procedures on Sexual Harassment (VI-1.20(A)) part B. Procedures that "The Campus is committed to protecting the rights of the alleged offender as well as the offended". It is also stated in the Human Relations Code Article III Paragraph L that "The burden of proof rests with the complainant". This seems to me to suggest a burden of proof of the "clear and convincing evidence" variety. I would like to see it stated explicitly that in sexual harassment cases the "clear and convincing" evidence standard should be used.

<p>Suggestions for how your proposal could be put into practice:</p>	<p>Such changes could simply be announced and placed in the Policy and Procedures documents available online. No new personnel would need to be established.</p>
<p>Additional Information:</p>	<p>Reasonable people may well disagree with my desire to retain the old, stronger evidentiary standard. The probable result of retaining the stronger standard is that some people who are really guilty will be found not guilty. The probable result of using a weaker standard is that some people who are actually innocent will be found guilty. As I understand American justice, people are presumed innocent until proven guilty, not the reverse. I believe that the University should adhere to standard American justice standards. Surely there is a better way to deal with sexual harassment than simply making it easier to convict after the infraction is committed. Attached is the second AAUP letter to OCR.</p>

Please send your completed form and any supporting documents to senate-admin@umd.edu or University of Maryland Senate Office, 1100 Marie Mount Hall, College Park, MD 20742-7541. Thank you!

AAUP

American Association of University Professors

Academic Freedom for a Free Society

June 27, 2011

VIA U.S. MAIL AND FACSIMILE (202.453.6012)

Ms. Russlynn Ali
Assistant Secretary for Civil Rights
Office for Civil Rights
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Avenue SW
Washington, District of Columbia 20202-1100

Dear Assistant Secretary Ali:

Since its founding in 1915, the American Association of University Professors has served the common good by promoting sound academic standards in higher education. In cooperation with other higher-education organizations, the AAUP developed the policies and procedures on academic freedom, tenure, and governance that have become normative in American colleges and universities.

My purpose in writing is to convey our Association's concern with respect to the following passage in your office's "Dear Colleague" letter of April 4, 2011:

Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

Our Association's interest in this mandate of the preponderance of the evidence standard of proof stems from our longstanding commitment to basic principles of academic freedom and tenure, as enunciated in the foundational 1940 *Statement of Principles on Academic Freedom and Tenure* (enclosed), developed jointly by the AAUP and the Association of American Colleges (now the

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Association of American Colleges and Universities) and endorsed by more than 200 scholarly and educational organizations.

AAUP-supported standards for dismissal of faculty members derived from the 1940 *Statement* are set forth in Regulation 5 of our widely adopted *Recommended Institutional Regulations on Academic Freedom and Tenure* (enclosed), first issued in 1957. Regulation 5c(8) provides that, in dismissal cases, “[t]he burden proof that adequate cause exists rests with the institution and will be satisfied only by *clear and convincing evidence* in the record considered as a whole” (emphasis added).

Since charges of sexual harassment against faculty members often lead to disciplinary sanctions, including dismissal, a preponderance of the evidence standard could result in a faculty member’s being dismissed for cause based on a lower standard of proof than what we consider necessary to protect academic freedom and tenure. We believe that the widespread adoption of the preponderance of the evidence standard for dismissal in cases involving charges of sexual harassment would tend to erode the due-process protections for academic freedom.

In a May 5 letter, our colleagues at the Foundation for Individual Rights in Education wrote to urge, among other things, that the Office of Civil Rights of the U.S. Department of Education rescind its mandate of the preponderance-of-the-evidence standard. Our request regarding cases of potential dismissal is the same.

Sincerely,



Gregory F. Scholtz

Associate Secretary and Director

Department of Academic Freedom, Tenure, and Governance

Enclosures (via U.S. mail)

cc: Mr. William Creeley, Director of Legal and Public Advocacy, Foundation for Individual Rights in Education