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Civil Rights Policy: II. Prohibited Conduct, Affirmative Consent and Incapacitation



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This section provides the definitions of Prohibited Conduct, Affirmative Consent, and Intoxication for the purposes of this Policy.

Discrimination on the Basis of a Protected Status

Except as permitted by law, such as in the case of housing which permits sex-separated residential arrangements, CMC prohibits discrimination on the basis of a Protected Status.

There are two forms of discrimination prohibited by this Policy:

Disparate Treatment Discrimination

Disparate impact discrimination occurs in CMC's education programs or activities or employment, when:

- Complainant was subjected to an Adverse Action and was harmed;
- Complainant's Protected Status was Respondent's substantial motivating reason (*which does not need to be based on discriminatory animus*) for the Adverse Action; and
- Respondent's conduct was a substantial factor in causing the harm.

For the purposes of this definition Adverse Action means:

An action or a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of employment or causes student or participant in an education program or activity to be excluded from participation in, be denied the benefits of CMC's education programs or activities, including any academic, extracurricular, research, occupational training, or other education program or activity operated by CMC. However, minor or trivial actions or

conduct that is not reasonably likely to do more than anger or upset an individual cannot constitute an Adverse Action.

Disparate Impact Discrimination

Disparate impact discrimination occurs in CMC's education programs or activities or employment, when CMC:

- Has a policy or practice that does not reference a Protected Status that has a disproportionate adverse effect on a specific Protected Status or result in an Adverse Action;
- A Complainant identifies as having the specific Protected Status and was harmed by the CMC's policy or practice;
- CMC's policy or practice was a substantial factor in causing the harm; and
- For cases involving employment discrimination, the policy or practice is not job-related nor consistent with business necessity.

Discriminatory animus is not required to establish disparate impact discrimination.

For the purposes of this definition, unless permitted by Title IX, adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex and will be considered prohibited discrimination.

In the employment setting, discrimination on the basis of Protected Status includes, but is not limited to, hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and making decision regarding other terms or conditions of employment on the basis of a Protected Status. Minor or trivial actions or conduct, although frustrating or offensive, do not constitute prohibited Discrimination.

Examples of Discrimination:

- A student is excluded from joining a club on campus based on their ethnicity.
- A supervisor refuses to promote a qualified employee of a certain ethnicity without a valid business purpose.
- A professor refuses to allow a colleague on a committee due to a belief that the colleague's recent marriage or divorce will impact the colleague's availability for committee duties.

Sex-Based Harassment in Education Programs and Activities and Employment

Sex-Based Harassment is a form of sex discrimination. Sex-Based Harassment includes the following:

Quid Pro Quo Harassment

- Someone from or in the work or educational setting, including an employee, agent, or other person authorized by CMC to provide an aid, benefit, or service under a CMC education program or activity,
- Who explicitly or implicitly conditions the provision of such aid, benefit, or service of CMC in an education program or activity on an individual's participation in unwelcome sexual conduct,
- Which includes but is not limited to, unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, including under any of the following conditions:
 - Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress;
 - Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual; or,
 - Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

Quid Pro Quo Harassment can include situations in which an employee, agent, or individual who purports to have authority from CMC to provide and condition an aid, benefit, or service under CMC's education program or activity on a person's participation in unwelcome sexual conduct, even if that person is unable to provide that aid, benefit, or service.

Sex-Based Hostile Environment Harassment

Sex-Based Hostile Environment Harassment is defined as:

- Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that, from the perspective of a reasonable person in the Complainant's position, it effectively limits or denies a person's ability to participate in or benefit from any CMC education program or activity; or
- Unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting where, from the perspective of a reasonable person in the Complainant's position, the conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.

Sexual Assault under Title IX

Sexual Assault is any sexual act directed against an individual, without the consent of that individual, including instances where the individual is incapable of giving consent. Affirmative Consent is required. This type of conduct is not eligible for mediation as a form of Agreement-Based Resolution under this Policy.

For these definitions, a Sexual Act is defined as conduct between persons consisting of:

- Contact between the penis and the vulva, or between penises and vulvas;
- Contact between the penis and the anus;
- Contact between the mouth and the penis;
- Contact between the mouth and the vulva;
- Contact between the mouth and anus;
- Contact between anuses; or,
- Contact involving any of the above with the buttocks or breasts.

For the purposes of the definition of fondling, private body parts include all of the body parts specified above, including genitals, groin area, breasts and buttocks.

Sexual Assault includes:

- **Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. Affirmative Consent is required. Attempted Rape falls under this prohibition.
- **Fondling:** The touching of the private body parts of another for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity. Affirmative Consent is required.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent. In California the statutory age of consent is 18.

Sexual Violence Under the California Education Code

CMC also prohibits Sexual Violence as defined by the California Education Code. This type of conduct is not eligible for mediation as a form of Agreement-Based Resolution under this Policy.

Sexual Violence means physical sexual acts perpetrated against a person without the person's Affirmative Consent. Physical sexual acts include both of the following:

- **Rape:** Penetration, no matter how slight, of the vagina or anus with any part or object, or oral copulation of a sex organ by another person, without the Affirmative Consent of the victim. (This type of conduct is not eligible for mediation as a form of agreement-based resolution in California).

- **Sexual Battery:** The intentional touching of another person's intimate parts without their Affirmative Consent, intentionally causing a person to touch the intimate parts of another without Affirmative Consent, or using a person's own intimate part to intentionally touch another person's body without Affirmative Consent. (This type of conduct is not eligible for mediation as a form of agreement-based resolution in California).

Sexual Exploitation Under the California Education Code

CMC also prohibits Sexual Exploitation as defined by the California Education Code. Sexual Exploitation includes a person taking sexual advantage of another person for the benefit of anyone other than that person without that person's Affirmative Consent, including, but not limited to, any of the following acts:

- The prostituting of another person.
- The trafficking of another person, defined as the inducement of a person to perform a commercial sex act, or labor or services, through force, fraud, or coercion.
- The recording of images, including video or photograph, or audio of another person's sexual activity or intimate parts, without that person's consent.
- The distribution of images, including video or photograph, or audio of another person's sexual activity or intimate parts, if the individual distributing the images or audio knows or should have known that the person depicted in the images or audio did not consent to the disclosure.
- The viewing of another person's sexual activity or intimate parts, in a place where that other person would have a reasonable expectation of privacy, without that person's consent, for the purpose of arousing or gratifying sexual desire.
- Surreptitiously observing another individual's nudity or sexual activity or allowing another to observe consensual sexual activity without the knowledge and consent of all parties involved;
- Non-consensual possession, sharing, or streaming of images, photography, video, or audio recording of sexual activity or nudity, or distribution of such without the knowledge and consent of all parties involved;
- Exposing one's genitals or inducing another to expose their own genitals in non-consensual circumstances;
- Knowingly exposing another individual to a sexually transmitted disease, virus, or infection without the other party's knowledge; or
- Inducing incapacitation for the purpose of making another person vulnerable to non-consensual sexual activity.

For the purposes of this definition, intimate body parts include genitals, groin area, breasts, buttocks, anus, vulva, and mouth.

Dating Violence

Dating Violence (including the use of Force or the threat of the use of Force) is violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and
- Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.

Emotional and psychological abuse do not constitute violence for the purposes of this definition.

Domestic Violence

Domestic violence (including the use of Force or the threat of the use of Force) is violence committed by a person who:

- Is a current or former spouse or intimate partner of the Complainant under the family or domestic violence laws of the State of California or a person similarly situated to a spouse of the victim;
- Is cohabitating, or has cohabitated, with the Complainant as a spouse or intimate partner;
- Shares a child in common with the Complainant; or
- Commits acts against a youth or adult Complainant who is protected from those acts under the family or domestic violence laws of the State of California.

Emotional and psychological abuse do not constitute violence for the purposes of this definition.

Stalking

Stalking means engaging in a course of conduct directed at a specific person based on a Protected Status that would cause a reasonable person under similar circumstances and with similar identities to the targeted person to (i) fear for the person's safety or the safety of others; or (ii) suffer substantial emotional distress.

A "course of conduct" means two or more acts; acts are broadly defined to include conduct that is direct, indirect, or through third parties, by any action, method, device, or means, which involves following, monitoring, observing, surveilling, threatening, or otherwise communicating to or about, or interfering with the property of, the targeted person.

"Substantial emotional distress" means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Stalking may include, but is not limited to:

- Non-consensual communication, including face-to-face communication, telephone calls, voice messages, e-mails, texts, letters, notes, gifts, or any other communications that are undesired and place another person in fear;
- Using Global Positioning Systems (GPS) to monitor an individual;
- Pursuing, following, waiting, or showing up uninvited at or near a residence, workplace, classroom, or other places frequented by the individual;
- Surveillance or other types of observation, including staring or “peeping”;
- Trespassing;
- Vandalism;
- Verbal or physical threats;
- Gathering information about an individual from friends, family, or co-workers;
- Threats to harm self or others;
- Lying to others about the victim; or
- Cyber-stalking, including but not limited to, the use of online, electronic, or digital technologies, including:
 - Unauthorized posting of pictures, messages, or information about the Complainant on websites, Internet sites, social networking sites, or bulletin boards or in chat rooms;
 - Sending unwanted/unsolicited email, texts, or talk requests; or
 - Posting private or public messages on Internet sites, social networking sites, or bulletin boards.

Affirmative Consent and Incapacitation

Affirmative Consent

Affirmative Consent means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that they have the Affirmative Consent of the other or others to engage in the sexual activity. Affirmative Consent must be ongoing throughout a sexual activity and can be revoked or withdrawn at any time.

- Lack of protest or resistance does not mean consent.
- Silence does not mean consent.
- The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.

It shall not be a valid excuse that the Respondent believed that the Complainant Affirmatively Consented to the sexual activity if the Respondent knew or reasonably should have known that the Complainant was unable to consent to the sexual activity under any of the following circumstances:

- The Complainant was asleep or unconscious.
- The Complainant incapacitated, as defined below, due to the influence of drugs, alcohol, or medication, so that the Complainant could not understand the fact, nature, or extent of the sexual activity.
- The Complainant was unable to communicate due to a mental or physical condition.

In addition, it shall not be a valid excuse to alleged lack of Affirmative Consent that the Respondent believed that the Complainant consented to the sexual activity under either of the following circumstances:

- The Respondent's belief in Affirmative Consent arose from the intoxication or recklessness of the Respondent. A Respondent's own intoxication or incapacitation from drugs or alcohol does not diminish that person's responsibility to obtain Affirmative Consent before engaging in sexual activity.
- The Respondent did not take reasonable steps, in the circumstances known to the Respondent at the time, to ascertain whether the Complainant Affirmatively Consented.

Affirmative Consent cannot be given if any of the following are present: Incapacitation, force, or coercion.

Consent may not be given by an individual who has not reached the legal age of consent under applicable law, which is the age of 18 in California.

Incapacitation

Affirmative Consent cannot be given by someone who is incapacitated. Incapacitation occurs when someone cannot make rational decisions because they lack the capacity to give knowing and informed Affirmative Consent (e.g., to understand the "who, what, when, where, why, and how" of their sexual activity). Incapacitation is determined through consideration of all relevant indicators of a person's state and is not synonymous with intoxication, impairment, or being under the influence of drugs, including prescription drugs, or alcohol. A person may be incapacitated due to a temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of drugs or alcohol, or while they are sleeping.

Consumption of alcohol or other drugs alone is insufficient to establish incapacitation. Whether an intoxicated person (as a result of using alcohol or other drugs) is incapacitated depends on the extent to which the alcohol or other drugs impact the person's decision-making ability, awareness of consequences, and ability to make rational decisions.

In general, sexual contact while under the influence of alcohol or other drugs poses a risk to all parties. Alcohol and drugs impair a person's decision-making capacity, awareness of consequences, and ability to make informed judgments. It is especially important, therefore, that anyone engaging in sexual activity be aware of the other person's level of capacity to consent. If there is any doubt as to the level or extent of the other individual's intoxication or impairment, the prudent course of action is to forgo or cease any sexual contact or activity.

The impact of alcohol and drugs varies from person to person, and evaluating incapacitation requires an assessment of how the consumption of alcohol or drugs impacts an individual's:

- Decision-making ability;
- Awareness of consequences;
- Ability to make rational decisions; and/or,
- Capacity to appreciate the nature and the quality of the act.

California Harassment in Employment

Any unwelcome behavior towards an employee (which for this definition includes Staff Faculty, and student-employees in their capacity as an employee, applicants for employment, unpaid interns, contractors or volunteers), that is reasonably regarded as offensive, that is based on the Complainant's Protected Status and that:

- Sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, or,
- Affects the victim's ability to perform the job as usual, or,
- Otherwise interferes with and undermines the victim's personal sense of well-being.

For California Harassment in Employment, a single incident of harassing conduct based on a Protected Status may create a hostile work environment if the harassing conduct has unreasonably interfered with the victim's work performance or created an intimidating, hostile, or offensive work environment. Whether or not the person meant to give offense or believed their comments or conduct were welcome is not significant. Rather, the Policy is violated when other individuals, whether recipients or mere observers of the conduct, are actually offended by comments or conduct based on Protected Status and the conduct is considered offensive by a reasonable person.

Examples of conduct that may constitute California Harassment in Employment (based on Sex) may include, but are not limited to:

- Unwanted physical touching;
- Telling sexually explicit jokes or stories;
- Making comments or gestures reasonably regarded as lewd or offensive;
- Displaying sexually suggestive objects, cartoons, or pictures;
- Sending sexually explicit messages by letter, notes, electronic mail, social media posting, or telephone;
- Making unwelcome comments reasonably regarded as offensive about a person's body, physical appearance, or clothing;
- Frequent use of unwelcome terms of endearment; or
- Repeatedly asking an individual for a date or meetings outside of working hours after they have indicated an unwillingness to go.

Harassment in the College's Education Programs and Activities Based on Protected Statuses Other than Sex

Harassment in education programs and activities means any unwelcome behavior (physical, verbal, graphic, or written) based on a Protected Status (other than Sex-Based Harassment which is separately defined above), that, based on the totality of the circumstances, is subjectively and objectively offensive and that, from the perspective of a reasonable person in the Complainant's position, it is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from CMC's education programs or activities.

A person can commit harassment without intending to create these outcomes.

In evaluating the severity, persistence, or pervasiveness of the conduct, the College considers whether the target(s) of the conduct, as well as an objectively reasonable person considering the conduct from the perspective of the target(s), would find the conduct to be severe, persistent, or pervasive. Relevant factors for consideration may include, but are not limited to, the context, nature, scope, frequency, duration, and location of the harassment based on Protected Status, as well as the identity, number, age, and relationships of the persons involved. Generally, the less pervasive the harassing conduct, the more severe it must be to establish a hostile environment. In some instances, a single act may be sufficiently severe as to be prohibited by this Policy.

Academic Freedom. Without diluting any of the protections set out above, the College recognizes the uniqueness of the educational environment and the importance of encouraging and protecting academic freedom. For this reason, expression which occurs in the context of academics, education, and/or research are broadly protected by the principles of academic freedom.

Examples of possible Harassment based on a Protected Status other than Sex:

- A professor's derogatory comments, slurs, or jokes during class about a particular race which makes it too difficult for a student of that racial background to attend or participate in class.
- A coach continually denigrating a particular student athlete due to the student's inability to practice at certain times because of the student's religious beliefs.

Retaliation

CMC prohibits retaliation against any person opposing Prohibited Conduct or participating in any Prohibited Conduct Resolution Procedures, including an investigation, whether internal or external to CMC. Retaliation includes threats, intimidation, harassment, coercion, discrimination, violence, or any other conduct against any person by CMC, a student, or an employee or other person au-

thorized by CMC to provide aid, benefit, or service under any CMC education program or activity, for the purpose of interfering with any right or privilege secured by this Policy, or because the person has reported information, made a Complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Policy, including the Agreement-Based Resolution Procedures, Investigation and Hearing Resolution Procedures, and in any other action taken by CMC to promptly and effectively end any Prohibited Conduct in its education programs or activities, prevent its recurrence, and remedy its effects. Retaliation does not include perceived or petty slights or trivial annoyances.

This Policy also applies to peer retaliation, which is defined as retaliation by a CMC student against another CMC student.

CMC may require an employee or other person authorized by CMC to provide aid, benefit, or service under CMC's education program or activities to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this Policy.

Hate Crimes

A hate crime is a specific form of discrimination linked to criminal act involving one or more of the following crimes:

- Murder, manslaughter, sexual offense (forcible or non-forcible), theft, simple assault, intimidation, stalking, or vandalism, or any other crime involving bodily injury.
- Where such criminal act was motivated by bias against any person or group of persons, or the property of any person or group of persons because of the actual or perceived Protected Status of the person or group.

Prohibited Relationships

Engaging in a sexual or other intimate relationships in which one party maintains a direct supervisory or evaluative role over the other party does not necessarily constitute a form of Prohibited Conduct under this Policy. However, such relationships do present special concerns related to the potential for such misconduct and are therefore prohibited as described below.

In general, this prohibition includes all sexual or other intimate relationships between students and their employers, supervisors, professors, coaches, Advisors or other College employees.

Similarly, College employees (faculty and staff) who supervise or otherwise hold positions of authority over others are prohibited from having a sexual or other intimate relationship with an individual under their direct supervision.

The College does not wish to interfere with private choices regarding personal relationships when such relationships do not interfere with the goals and policies of the College. However, faculty, ad-

ministrators, and others who educate, supervise, evaluate, employ, counsel, coach or otherwise guide students or directly supervise subordinates should understand the fundamentally asymmetrical nature of the relationship they have with students or subordinates.

Intimate or sexual relationships where there is differential in power or authority produce risks for every member of our community and undermine the professionalism of faculty and supervisors. In either context, the unequal position of the parties presents an inherent element of risk and may raise sexual harassment concerns if one person in the relationship has the actual or apparent authority to supervise, evaluate, counsel, coach, or otherwise make decisions or recommendations as to the other person in connection with their employment or education at the college.

In addition, sexual relations between persons occupying asymmetrical positions of power, even when both consent, raise suspicions that the person in authority has violated standards of professional conduct and potentially subject the person in authority to charges of sexual harassment based on changes in the perspective of the individuals as to the consensual nature of the relationship. Similarly, these relationships may impact third parties based on perceived or actual favoritism or special treatment based on the relationship.

Therefore, persons with direct supervisory or evaluative responsibilities who contemplate beginning or are involved in such relationships are required to promptly:

- Disclose the circumstances to their own supervisor.
- Where feasible and practicable, coordinate with the supervisor to develop, implement, and maintain any appropriate reassignment or other protocols to have the effect of discontinuing or eliminating any direct role as a supervisor of the subordinate employee.
- When not feasible or practicable, avoiding or discontinuing the relationship.

Failure to fully or timely comply with these requirements is a violation of this Policy by the person in authority, who may be subject to disciplinary action, up to and including termination for cause.

Finally, any member of the CMC community who was subjected to discrimination or harassment based on a person of authority's failure to abide by the terms of this Policy may file a Complaint under this Policy.



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