

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: October 5, 2005

**MEMORANDUM**

TO: Mayor David J. Cieslewicz

FROM: Roger Allen, Assistant City Attorney

RE: Executive Summary of Revised APM 3-5

**Staff Team Review of Current APM's**

A staff team of representatives from Affirmative Action, Equal Opportunities Commission, Human Resources and the City Attorney's Office met over the last two and one-half years to review and revise the City's anti-harassment and anti-discrimination employment policies. This process was initiated because of shortcomings experienced in responding to complaints filed under the current policies and because of evolvement of the law in this field. The staff team reviewed policies of major employers, both public and private, in the development of the current proposal.

**Similarities between the Old & The New Policy**

The policy continues to place primary enforcement and training responsibilities upon Department/Division Heads. Affirmative Action retains a key role in this area as well. In fact, under the proposal Affirmative Action shall coordinate each investigation. Under the current policies, Affirmative Action has the option of co-investigating a complaint. Both policies recognize that management and supervisory personnel are held to a higher standard of conduct and must lead by personal example. The proposed policy also recognizes a recent change in Wisconsin law wherein employers are strictly liable for any acts of harassment/discrimination committed by management employees.

The proposal retains the requirements of a final investigative report and, where necessary, corrective action plans. The proposed policy also retains many aspects of the confidentiality requirements of the current policy.

**Changes Made to Eliminate Problems With The Current Policy**

*Combining Three Into One*

The City's current policies have been stated in three separate Administrative Procedure Memorandums. (APM 3-5 anti-harassment policy; APM 3-5A anti-discrimination policy, and; APM3-5B investigative procedures). This structure is unnecessary and confusing. It is more effective to state these three inter-related policies as a single unified APM.

*Expanded Protected Classes*

The protected classes under the current anti-discrimination policy (APM 3-5A)) are broader and more inclusive than the protected classes identified under the anti-harassment policy

(APM 3-5). While this difference is legally defensible, it must be recognized that the law establishes a "floor" or base of protections that an employer is obligated to its employees. However, the staff team heard reports that this dichotomy of protected classes is confusing for both management and non-supervisory employees. Further, court cases where unabated harassment coupled with management knowledge of such harassment, was held to be a form of discrimination itself, thus further blurring the lines. Given the goal of a simplified, understandable and effective policy to promote equal opportunities in our workforce, it is fitting to prohibit harassment of any kind that would be unlawful if it were employed as the basis for discrimination. Therefore, in the proposed policy the protected classes for harassment and discrimination are the same. The staff team also expanded the protected classes to include protections against harassing or discriminating against a person based upon that person's HIV status.

#### *Providing Due Process to the Alleged Violator*

Employees have complained that the current policy lacks fairness or due process for those accused of violating the policy. Allegations of violations are responded to with a confidential investigation. The accused is not provided a copy of any charges or allegations. In fact, it is possible that a person may never learn the identity of their accuser. The proposed policy provides alleged violators with notice of an impending investigation and, in cases where it is safe to do so, a copy of the complaint.

#### *Providing a Process For Complaints Against Elected Officials*

The proposed policy also eliminates ambiguities that have existed regarding the application of this policy to elected officials. The City has few, if any, remedies it can pursue if an elected official is the alleged offender. The City's authority is limited to investigating and publicly reporting the allegations made against an elected official. It is up to the public and its power of the ballot box to determine the appropriate remedy for any such violations. The proposed policy explicitly recognizes these limitations.

#### *Providing Follow-Up Contacts*

The current policy does not require any follow up contacts with the parties involved in an investigation. The proposed policy requires that both the complainant and the alleged violator be informed of the outcome of the investigation.

#### *False Complaints vs. Unsubstantiated Complaints*

Recent case law has affirmed the authority of employers to discipline employees who file false and malicious allegations of harassment/discrimination. Although such discipline could be imposed under the current policy, the proposed policy recognizes that it is better to affirmatively state that possibility. The new policy, like the old, prohibits disciplining any employee who files a good faith complaint, even if an investigation fails to substantiate the allegations of that complaint(s).