



LOCAL 5810

2030 Addison Street, Suite 640B
Berkeley, CA 94704

p: 510-845-5726 f: 510-845-5863
uaw5810@uaw5810.org
www.uaw5810.org

January 13, 2016

Ms. Sheryl Vacca
Senior Vice President
University of California Office of the President
1111 Franklin Street
Oakland, California 94607-5200

Prof. Dan Hare
Chair, University of California Academic Senate
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200

Re: Comments to Joint Committee Regarding UC Sexual Harassment Policy

Dear Ms. Vacca and Professor Hare:

We write to you on behalf of the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 5810, the exclusive bargaining representative of over 6,000 postdoctoral scholars working throughout the University of California campuses. We wish to provide comments regarding the inadequacies of UC's current process of addressing allegations of sexual violence and sexual harassment by faculty members. Our hope is that through this process of consideration and review by the Joint Committee, the University will adopt clear policies and procedures to be applied across all UC campuses, which address this critical concern for our members.

We support UCOP's efforts to overhaul UC's sexual harassment policy. That said, we are concerned that the manner in which the Joint Committee has acted thus far is not consistent with the charge directed by President Napolitano. Indeed, there has been a lack of clarity as to the objective of the Committee and the purpose of the instant hearings.

Effective January 1, 2016 the University issued its revised Sexual Harassment and Sexual Violence Policy. Since this policy is now final, it is unclear whether this Joint Committee has the authority to recommend changes to that policy. We hope that to be the case.

We understand that President Napolitano has tasked the Joint Committee with issuing recommendations to her on how best to handle cases of sexual violence, assault and harassment involving UC faculty, by February 29, 2016. We recognize that discipline of Faculty takes place under Academic Senate Rules, but that process is often divorced from the complaint process. The University cannot effectively address the issue of sexual harassment on campus if it does not consider faculty discipline in the context of the Sexual Harassment and Sexual Assault policy.

As for the meetings on January 13th and 14th, it is unclear how these meetings propose to elicit real input from concerned Postdoctoral Scholars. The Administration hand-selected the representative Postdoctoral Scholars testifying before the Joint Committee, while rejecting others who specifically requested to testify. And despite the Union's direct requests to be involved in the Joint Committee's review process and offer our input based on experiences representing Postdoctoral Scholars through the sexual harassment complaint processes, which we have done as part of our role as the Union, we were excluded. The Union perspective will still be represented at the meetings, but only because our members reached out to us.

The University did not send the Union the accurate time or location of the hearings, or information about the topics to be covered there. Moreover, because of the lack of publicity regarding these hearing, the Joint Committee will not benefit from the input of students, academic student employees, and post docs who have been impacted by the failures in the policies. If the Joint Committee truly desired a comprehensive understanding of what does not work with regard to the current policies, it should have been trying to gather information from as many affected individuals as possible, rather than limiting access to only a select few.

Despite these drawbacks, we are prepared to partner with the Joint Committee to create a meaningful shift in both process and culture at the University. The areas that we believe the Joint Committee must include in its recommendations to President Napolitano involving handling cases of sexual violence, assault and harassment, are set forth below. We recognize that this is not an easy task, as there is tremendous confusion surrounding the sexual harassment complaint process, particularly when the alleged perpetrator is a faculty member. We hope that our comments herein can shed light on the inadequacies of processes that currently exist and help to pave a path forward.

UAW 5810 Representing Postdoctoral Scholars:

UAW Local 5810 is the collective bargaining representative for Postdoctoral Scholars throughout the UC system. Postdoctoral Scholars are academic workers who have already completed their Doctoral degrees, and have decided to conduct research in academia. They are, by UC's own account, considered highly valued members of the research endeavor of the University. Some aspire to be professors themselves, others professional researchers in universities or researchers in public or private enterprise. All Postdoctoral Scholars work under a Professor (also referred to as the Principal Investigator, or PI), who has significant control over the Postdoctoral Scholar's employment with the University as well as future career opportunities.

The characteristics of a Postdoctoral Scholar's employment are unique and differ from all other employment classifications. A postdoctoral scholar is a relatively short-term employee. The postdoc's assignment can only last five to six years, at most, and is currently contingent upon the renewal of the postdoc's contract each year. The success of a postdoc's employment is measured by the number of papers published, the authorship rank, the renewal of contracts, and other factors that fall entirely within the discretion of the PI. A Postdoctoral Scholar cannot, at her own option, just pick up and change labs or approach a different professor for a recommendation when confronted with sexual harassment by her PI.

In many ways, a PI has tremendous influence over the career of a Postdoctoral Scholar. A Postdoctoral Scholar will need a recommendation from the PI when he or she leaves the lab, and a PI's refusal to provide a positive one could interfere with the Postdoctoral Scholar's ability to find future employment. Postdoctoral Scholars, therefore, work in one of the most vulnerable positions on campus. Many Postdoctoral Scholars are also here on nonimmigrant visas, so the University can attract the best and the brightest from around the world to support its research mission. The nonimmigrant status makes our members even more vulnerable when coming forward to raise concerns about faculty member misconduct.

For these reasons, a clear complaint process, including protection from all forms of retaliation for the Postdoctoral Scholar throughout the sexual harassment and sexual assault investigation process and thereafter, is essential. It is from this perspective that we provide the following comments.

Recommendations to the Joint Committee:

1. Process

A clear complaint process responsive to the needs of the complainant as well as the overall goal of changing the climate throughout UC is critical. The current process deters Postdoctoral Scholars from making complaints, rather than encouraging them to do so. To ensure that Postdoctoral Scholars and others in the campus communities feel supported enough to bring complaints to the University's attention, the University should incorporate the following changes to the Title IX complaint process, as well as the complaint and disciplinary process before the Academic Senate.

a. **Reporting and Detection**

We recommend several substantive changes to the University's policies and procedures to increase the likelihood that a victim will report sexual misconduct by a faculty member. The way to do this is to address the reporting mechanism. The Title IX office is not accessible enough under the current policy. The policy itself is confusing, and victims are often unwilling to make the Title IX office their first point of contact about an allegation against a faculty member. According to a recent survey conducted by the Association of American Universities, only 1 in 4 students report sexual assault to their school or law enforcement. The failure to report offenses is often due to lack of knowledge or distrust of the reporting mechanisms. Victims need an option to report sexual misconduct by a faculty member short of going to the Title IX office. We recommend instituting the following policy changes to facilitate this.

i. **Peer Advisors** – The University should designate a group of *Peer Advisors* whose role would be to offer consultations to victims. They can provide information about the reporting process, or just offer support with the promise of confidentiality. Reporting to a *Peer Advisor*, on its own, would not constitute a Title IX complaint. That said, if a victim reports an offense that is serious enough in nature, the peer advisor must report the offense to administration so that the University can take immediate steps to investigate and remove the perpetrator if appropriate. Under no circumstances, however, would the peer advisor reveal the identity of the victim who reported the allegation. The current sexual harassment policy references the designation of such personnel under Section V(B)(2). **We simply recommend that the designated persons be peers, and emphasize the importance of training the peer advisors and anonymity of the complainant.**

ii. **Mandatory Reporting for Department Chairs** – Under the Academic Senate’s Privilege and Tenure process, Bylaw 336, knowledge by an administrator or employee in a supervisory role constitutes knowledge by the Chancellor. *See* Bylaw 336(B)(4). We are aware of numerous examples where colleagues of faculty members, including department chairs, revealed having prior knowledge of sexual misconduct by fellow faculty members, yet never reported the offenses. This is unacceptable. Under the current policy, the University would not be able to take disciplinary action against that faculty member if his Department Chair had known about the misconduct for more than three years. We address the need for an exception to the existing 3-year statute of limitations for offenses involving violations of the sexual harassment policy in a section below.

We recommend here that the policy mandate that Department Chairs and other supervisory employees report serious violations of the sexual harassment policy to a designated member of the University administration, who is in a position to take immediate action. For less serious offenses, the Department Chair must act as any supervisor on notice of such an allegation, and take steps to properly address it, including directing the accused faculty member to cease engaging in such conduct, and reminding the faculty member that retaliation is strictly prohibited. The policy should clearly enumerate the steps available for a Department Chair who becomes aware of a complaint.

b. Timelines

The Title IX office exists to ensure that no individual is discriminated against or excluded from participation in, or denied benefits of any education program, based on sex. The UC Title IX complaint process provides an avenue for individuals to report claims of unlawful discrimination or harassment based on sex, and seek possible remedies, including that the unlawful activity cease. The guarantee of a fair process and outcome, including necessary remedies, is contingent upon the existence of measurable timelines at each step of the complaint process. Such timelines are currently absent from the policy.

The Academic Senate process is only triggered if University administration moves to take disciplinary action against a faculty member for an alleged violation. The process can occur parallel to, before, or after a Title IX complaint process. Neither process is contingent upon the success or even existence of the other, but information obtained from one process can be relevant to the other.

i. Title IX Complaint Process

According to Section V of the UC Sexual Violence and Sexual Harassment Policy (hereinafter "Sexual Harassment policy"), the Title IX complaint process begins at the Title IX office of each campus. The policy requires numerous steps of a Title IX officer who receives a complaint, including an Initial Assessment of a complaint, a possible Formal Investigation, and if that takes place, the issuance of an Investigation Report. What is missing at each step is a timeline, or deadline.

The first point of contact with the Title IX office is a phone call, email or visit inquiring into the complaint process. The Sexual Harassment policy currently does not address such inquiries, or provide any guaranteed response time. As a result, there are situations where complainants have left messages and emailed the Title IX officer about a possible complaint, but did not ever receive a reply. Timely replies are critical, especially in an emergency situation. If a complainant does not receive a reply to an inquiry about filing a complaint, he or she is not going to do so. **The policy should require that the Title IX officers respond to all phone calls and emails within 48 hours.**

With regard to the actual steps an officer is supposed to take upon receipt of a complaint, the sexual harassment policy does not contain a timeline for an officer to complete an initial assessment. The initial assessment is simply an officer's determination that a complaint, on its face, alleges a violation of the policy. In some cases, initial assessments have taken *over one year*. This is before any investigation has even commenced. This type of delay is unacceptable. Most complainants only have a life cycle on campus of a few years, and the nature of the concern of sexual harassment and sexual assault is immediate. With this type of delay, the UC is sending a message to the campus community that it is not interested in receiving or investigating complaints of sexual violence and sexual harassment. **We recommend that the policy be amended to mandate that an initial assessment be completed within one week of receiving a complaint.**

Similarly, there is no timeframe or deadline for an investigation, or the issuance of an investigation report. The policy states that the investigation would "typically be completed within 60 working days," but that is not a requirement, and there is a provision that allows the officer to extend the 60 days for "good cause" as long as there is notice to the Complainant and Respondent of the reason for the extension. Any extension should require the approval of a supervisory official who oversees the work of the Title IX officer, and be granted only when a proof of necessity is presented.

Moreover, under the current policy, the 60-day deadline is a farce, since after the investigation is “completed,” there is no deadline with regard to when the Title IX officer must prepare the written investigation report. The close of an investigation bears no significance until the issuance of an investigation report with conclusions. **We recommend that the policy be amended to clearly state that an investigation will be completed, and an investigation report with conclusions issued, within 60 calendar days.**

To satisfy the recommended deadlines, Title IX offices must be adequately funded so that there are sufficient staff members to respond to inquiries and investigate complaints.

ii. **Academic Senate Disciplinary Process**

The Academic Senate Bylaw 336 provides strict timelines to protect the due process of the faculty member in the event administration brings a disciplinary action against the member. We do not recommend any changes to such protections. There should, however, be an exception to Bylaw 336(B)(4) for the statute of limitations to take disciplinary action against a faculty member for alleged violations of the sexual harassment policy. Bylaw 336(B)(4) provides:

No disciplinary action may commence if more than three years have passed between the time when the Chancellor...[including any employee in a supervisory role] knew or should have known about the alleged violation of the Code of Conduct, and the delivery of the notice of proposed disciplinary action.

To change the University culture around sexual violence and sexual assault, the University must take a strong stance against any related allegations, even if a department chair or other supervisor failed to report a complaint to the proper authorities to initiate disciplinary action. The current policy would prohibit the administration from bringing allegations against a faculty member simply because a supervisory colleague knew but ignored allegations. A faculty member should not be excused of unlawful behavior involving sex-related misconduct, based on a colleague’s protection, or simply because too much time has elapsed. **We recommend an exception to the statute of limitations provided in Bylaw 336(B)(4) for disciplinary actions based on allegations of sexual violence or sexual harassment.**

c. Transparency of Process

The UC must be clear about the avenues available for students and academic workers to seek remedial action in the event of sexual violence or sexual harassment by a faculty member.

i. Title IX Process

A complaint with the Title IX office does not necessarily result in the cessation of unlawful conduct, and cannot, on its own, result in disciplinary action against the faculty member. Rather, the end result is an investigation report, which may contain remedies. The University must be clear about how that report will result in remedial action. The policy simply states:

If the Report finds a violation of Prohibited Conduct, the University shall take prompt and effective steps reasonably calculated to stop the violation, prevent its recurrence, and as appropriate, remedy its effects in order to eliminate a hostile work environment.

Section V(A)(6)(a) of the Sexual Violence and Sexual Harassment Policy. The policy does not explain who from “the University” will take prompt steps to stop the violation, or how that will happen. It also does not define “prompt.”

To be effective, the policy must hold administrators accountable by identifying which administrator will make the decision whether to take steps, and what types of steps to take, to eliminate the hostile work environment and stop the violations. If each campus must designate an administrator for this purpose, the policy should so state, and indicate how an individual complainant can locate that information. The administrator must also be held to a timeframe within which to initiate disciplinary action against the faculty member, if recommended in the Investigation Report, or to take action on any other remedies.

ii. Academic Senate Disciplinary Process

As part of the administrator’s steps to seek remediation, the Sexual Harassment policy should include explicit language referencing disciplinary action before the Academic Senate as a possible remedy. If a faculty member is involved and an investigation concludes that the faculty has violated the policy, the administrator’s actions should involve pursuing disciplinary actions, up to and including termination,

before the Academic Senate. The policy should clearly state this, as it may involve the continued participation and cooperation of the complainant and other witnesses.

Some campuses have procedures that allow a student or academic researcher to submit a complaint against a faculty member directly with the administration, without having to go through the Title IX office. This option should be referenced in the Sexual Harassment policy as well, so that complainants understand the full range of remedial processes available to them.

d. Representation

The Sexual Harassment policy clearly states that a complainant “may have a representative present when personally interviewed and at any related meeting” throughout the Title IX complaint process. *See* Section V(4)(b). The policy should be clear that an employee can be represented by her Union, and that remedies under the Union contract may also be available.

The right to representation does not exist, however, for a complainant involved in a disciplinary hearing against a faculty member pursuant to the Academic Senate procedures. The Bylaws governing such procedures provide a right to counsel for the faculty member accused of wrongdoing, but does not extend the right to a complainant who is involved in the hearing as a witness. This is improper and must be changed.

Under the Privilege and Tenure Hearing and Posthearing Procedures contained in Bylaws 336(D), an accused faculty member has the right to counsel, and the right to cross-examine any witnesses. Such witnesses include the complainant, who in most cases is the victim of the faculty member’s misconduct. The University’s current practice prohibits the victim from being represented by his or her own counsel. This has a severe chilling effect against the victim, as the victim is essentially questioned and doubted through a trial-like process, without having an advocate or representative objecting to mistreatment of the victim by the faculty member’s counsel, or other improper lines of inquiry designed to intimidate and humiliate the victim.

There is a legal consequence for the victim as well. The hearing is recorded, and may be transcribed by a court reporter. *See* Bylaws 336(D)(11). At the conclusion of the hearing, in addition to the transcript, the Hearing Committee produces a report to the Chancellor with its findings of fact, conclusions, and recommended course of action. If the victim became involved in litigation related to the allegations against the faculty member, the victim’s testimony at the Academic Senate disciplinary hearing, where he

or she was subject to cross examination without counsel, could be damaging to the victim's legal rights.

It is difficult enough for a complainant to repeat what is often a humiliating and upsetting experience before the accused faculty member. To require a complainant to go through that process without individual representation is cruel, and sends the message that the University does not really want to hear what the complainant has to say at the disciplinary hearing. **We recommend that Bylaw 336 be amended to provide complainants in sexual harassment and sexual assault matters with a right to counsel during any disciplinary hearing against a faculty member.**

e. Appeal Rights

The Sexual Harassment policy ties the outcome of any complaint to the decision of the investigating Title IX officer. It does not provide for any reconsideration or appeal rights to the complainant. The policy should provide opportunities for a complainant to seek review of a decision at any step of the Title IX complaint process. For example, a complainant should be able to request reconsideration of a determination by a Title IX officer during his or her initial assessment, that a complaint does not state a violation of the policy. The reviewer should be the supervisor of the Title IX officer. This same level of review and reconsideration should be available for the conclusion of an investigation.

2. Available Remedies

a. Interim Measures needed after Initial Reporting

The current version of the Sexual Harassment policy does not provide any interim measures to protect a complainant pending an investigation of alleged violations of the policy by a faculty member. The University should make interim measures available, ranging from responses to more minor offenses to methods of addressing more serious ones. The following are examples of interim measures that should be made available to a Title IX officer or a Department Chair who becomes aware of prohibited activities.

i. Minor Offenses – In the event of a minor offense which may not rise to the level of “sufficiently severe or pervasive [sexual misconduct] as to create a hostile environment that denies or adversely limits a person's participation in or benefit from the education, employment or other programs and services of the University,” (see Section II(B)(2)(a) of the Sexual Harassment policy), the Title IX officer, Department Chair or other supervisory employee, should have an informal meeting with the

accused faculty member to notify the member of the alleged offenses. Such a meeting should involve notifying the faculty member that the allegations have come to their attention, but that no formal complaint has issued and no investigation is taking place. The faculty member must then understand that any misconduct must cease immediately. Training should be offered to that Faculty member. This informal meeting should protect the anonymity of the complainant. It offers the faculty member an opportunity to cease from engaging in the prohibited behavior without becoming involved in an investigation or being subject to disciplinary action. The Title IX officer or Department Chair must also emphasize the prohibition against any retaliation of any sort.

ii. Serious Offenses – The most critical interim measure the University must put in place for victims who allege serious offenses is separating the victim from the faculty member’s environment and control. This could involve removing the faculty member from campus, or allowing the victim to continue her research under a different faculty member and location. Interim measures should include paid leave for the complainant, if requested, and an extension of her employment appointment to ensure the victim is not harmed while a permanent remedy is being developed. If there is evidence of serious misconduct early on, the administration should initiate disciplinary action against the faculty member immediately.

b. Disciplinary Action against the Faculty Member

i. Changes to Faculty Code of Conduct

Apart from the Title IX process, which provides remedies to the complainant, the University administration must bring charges against a faculty member through the Academic Senate Privilege and Tenure Process under Bylaw 336 to take disciplinary action against the faculty, up to and including termination. The Faculty Code of Conduct addresses prohibited misconduct by a faculty member that could result in disciplinary action. **The Code of Conduct should be amended to explicitly state that violations of the Sexual Harassment policy constitute grounds for disciplinary action against the faculty member, up to and including termination.** It currently contains broad language prohibiting discrimination on the basis of sex, and other grounds, but does not clearly prohibit violations of the sexual harassment and sexual assault policy

ii. **Burden of Proof During Privilege and Tenure
Disciplinary Hearing**

The University's Sexual Harassment policy and Privilege and Tenure hearing procedures involve varying burdens of proof that conflict with each other. The Title IX investigation process results in a policy violation finding if there is a *preponderance of the evidence* that the alleged violation occurred. This means that the evidence shows that it is *more likely than not* that the alleged violation occurred, and is the proper burden of proof.

The disciplinary process under Bylaw 336(D)(8), however, provides that the Chancellor "has the burden of proving the allegations by clear and convincing evidence" to take disciplinary action against a faculty member. This is the highest level of proof required of any legal proceeding. **We recommend that the University add language to Bylaw 336 to clarify that the hearing committee must take judicial notice of a Title IX office's conclusion that a violation occurred. Further, a finding that a violation of Title IX occurred should constitute the clear and convincing evidence that a violation of the faculty code of conduct occurred, as required by the disciplinary hearing process.** With this approach the University does not wind up in a situation where it has proven by necessary legal standards that a faculty member has violated an employee's or student's Title IX or VII rights, yet does not face discipline. This approach may also enhance the chance the victim may not need to testify before the Academic Senate Disciplinary Committee if the record from the Title IX office is sufficient.

The foregoing recommendation is further necessary because the grievance process for faculty members under Bylaw 335 provides that the grievant faculty member need only "bear the burden of proving the validity of the grievance by a preponderance of the evidence" to prevail in the grievance. *See* Bylaw 335(D)(7). In other words, the University must demonstrate by the highest burden of proof that the professor has violated the sexual harassment policy to discipline the professor, yet even if there is a finding of a violation, the professor need only establish the lowest burden of proof to challenge the disciplinary action. While we are proponents of due process, and measures to protect faculty's right to academic freedom, the current procedure is stacked in favor of the faculty member against any real result for victims of sexual harassment, and as written, does not serve to deter sexual harassment on UC campuses.

3. **Training**

The current training available to faculty members, Title IX staff, and academic employees, which we have accessed both through UC websites and directly through faculty members, is inadequate. The University should develop training materials targeted toward each campus group – faculty, students, etc. – and include realistic scenarios to illustrate conduct prohibited by the Sexual Harassment policy and Faculty Code of Conduct. For example, the current training provides examples of female faculty members harassing young male students and employees, or women students entrapping faculty members. The training rarely portrays male faculty members as the perpetrators, even though that is what occurs in the majority of cases. It seems the training is geared toward teaching faculty how to avoid claims, rather than how to comply with the law.

Faculty and Department Chairs should be required to take the training annually. The training should also include tips for detecting improper conduct by colleagues, and ways to report such conduct. It should address the reporting, investigation, adjudication and disciplinary procedures for such violations.

In addition to this annual training, however, faculty members must also participate in sexual harassment training in accordance with Ca. Government Code, § 12950.1. Section 12950.1 requires the UC to “provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees in California...” Section 12950.1(a). The classroom training must occur at least once every two years. The sexual harassment training used by UC made available to us, is not compliant with state law. The training does not include the required “practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment.” Section 12950.1(a). The law further requires training that instructs supervisors “in the prevention of harassment, discrimination, and retaliation...” Section 12950.1(a).

Faculty members who run a lab are considered supervisory employees, as they supervise postdocs and other academic employees. They are thus required to participate in the two-hour classroom training on a biannual basis.

4. Retaliation

The University must develop policies with concrete protections to prevent faculty members from retaliating against academic employees for submitting a complaint or being a witness in a proceeding involving the faculty member. Faculty members often protect each other and may retaliate against students and academic researchers in the form of negative employment references, letters of recommendation, exclusion from authorship or other reference in a research paper, or other ways. Measures to prevent retaliation are necessary not only to deter faculty members from retaliating, but to encourage Postdoctoral Scholars and all victims to come forward. The designated Administrator responding to Title IX investigation reports must have authority over faculty members to enforce anti-retaliation measures and actions to remedy retaliation. Such remedies may include an agreed-upon letter of recommendation or support, the removal of a negative evaluation, or authorship on a research paper based on accepted standards of authorship based on division of labor rather than the faculty member's own personal preferences.

The sexual harassment policy and faculty code of conduct should clearly prohibit faculty members from retaliating against complainants or witnesses involved in a complaint, regardless of whether the complaint is ultimately meritorious. Disciplinary action against the faculty member should be available based on retaliation alone, even if the underlying offense was without merit or did not constitute serious violations of the sexual harassment policy.

Please do not hesitate to contact us with regard to these comments. We believe that adoption of the foregoing recommendations is necessary to begin changing the current climate across the UC that allows sexual violence and harassment to continue without consequence. We are happy to provide further examples, and as stated before, would greatly appreciate the opportunity to be involved in the Joint Committee's review process further. Finally, we reserve the right to provide additional comments at a later date should the need arise.

Sincerely,



Anke Schennink