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Recommended Revisions to the September 18, 2018 UC Sexual Violence and Sexual Harassment Policy Draft

As the union of over 6,500 Postdoctoral at the University of California, we wish to provide comments on the draft changes to the UC Presidential Policy on Sexual Harassment and Sexual Violence policy we were provided on September 16, 2018. Recent reports by the National Academies of Science, Engineering and Medicine (“Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine”, 2018) and the California State Auditor (Report 2017-125) found systemic changes are necessary to prevent and effectively respond to the epidemic of sexual harassment and sexual violence. This issue is of critical concern of our members and below we outline changes to the draft policy to these ends. Please do not hesitate to contact us with regard to these comments.

INTRODUCTION

It is imperative that all options for reporting be set forth at the outset of the Policy. The Policy starts by stating, “For assistance with incidents of sexual violence, sexual harassment, relationship violence, and stalking, please contact your ***Title IX Officer***” (Emphasis added), but this is only one of many reporting options. In addition to Title IX Officer, the Policy should include the following as contacts: ***a Responsible Employee; Confidential Resource; the DFEH, EEOC, OCR; and/or the police department, as applicable***. Making that change would also reflect the UC Berkeley Resolution Agreement, OCR Case No. 09-14-2232, which specifically indicates that the University should include a statement that persons “may direct inquiries to the OCR.” (Resolution Agreement at p. 1)

RETALIATION

II. DEFINITIONS

The policy draft also need to be improved to clarify the protections against retaliation.

Under Section B, Prohibited Conduct, the University lists:

1. Sexual Violence,
2. Sexual Harassment
3. Other Prohibited Behavior

Under Section 3 “Other Prohibited Behavior,” which contains subsections (a) through (e), “Retaliation,” is obscured in subsection (e).

Although the most recent Policy now appropriately includes an explicit reference to Retaliation in the Policy Summary, Retaliation is still consumed into the amorphous category of “Other Prohibited Behavior” in the Definition section. Consistent with the change to the Policy Summary to specifically identify Retaliation as a separately identified violation, Retaliation should be given its own Section under Prohibited Conduct, i.e.:

1. Sexual Violence,
2. Sexual Harassment
3. ***Retaliation***
4. Other Prohibited Behavior

Making that change would also reflect the UC Berkeley Resolution Agreement, OCR Case No. 09-14-2232, which specifically references the need to ensure training on, “the University’s prohibition against sexual harassment, sexual violence, and **retaliation**....” and “how and to whom any incidents of sexual harassment, sexual violence, and **retaliation** should be reported....” (Resolution Agreement at p. 4, emphasis added)

With regard to the definition of Retaliation (currently on p. 6), the Policy should explicitly state that the Complainant only needs to have a **good faith belief** that the person engaged in a Prohibited Conduct—the Complainant does not have to be correct.

A Complainant’s conduct may constitute protected activity for purposes of the anti-retaliation provision of the FEHA not only when the Complainant opposes conduct that ultimately is determined to be unlawfully discriminatory under the FEHA, but also when the Complainant opposes conduct that the Complainant reasonably and in good faith believes to be discriminatory, whether or not the challenged conduct is ultimately found to violate the FEHA.

So, even if the Respondent is found to have not engaged in Prohibited Conduct, the Complainant should still be protected against retaliation if the Complainant nevertheless reported the incident in good faith.

Also, the definition of Retaliation should also expressly provide protection for **Responsible Employees** since they may also be vulnerable to retaliation by their superiors or others for performing their duties as a Responsible Employee.

CONSENT AND INCAPACITATION

II. DEFINITIONS

In this section, we request a number of changes regarding the definition of “incapacitation.”

Under A. Consent, subsection (3) should be revised to remove the two references to incapacitation, which are extraneous given the descriptions in 3(a) through 3(c).

In particular, the phrase, “was incapacitated, in that the Complainant was” should be removed, as well as the newly added, “Note: Incapacitation is a state beyond drunkenness or intoxication. A person is not necessarily incapacitated merely as a result of drinking, using drugs, or taking medication.”

Under B. Prohibited Conduct, 1. Sexual Violence, b. Sexual Assault – Contact, the second to last bullet regarding aggravated circumstances currently states, “Deliberately taking advantage of the Complainant’s incapacitation (including incapacitation that results from voluntary use of drugs or alcohol).” This sentence must be revised to cover more than just incapacitation, especially if the note regarding incapacitation remains stating that “[i]ncapacitation is a state beyond drunkenness or intoxication.”

The sentence should be changed to, “Deliberately taking advantage of the Complainant’s intoxication or inability to provide consent.”

SEXUAL HARASSMENT

The Policy’s definition of “Sexual Harassment” is outdated and must be revised. The current definition states that sexual harassment must be “conduct of a sexual nature.” In 2014, however, the definition of sexual harassment in FEHA was expressly amended to state, “**Sexually harassing conduct need not be motivated by sexual desire.**” (Gov. Code, § 12940(j)(4)(C) (emphasis added)) Thus, sexual discrimination and harassment claims may apply under the FEHA even when the defendant has no actual sexual desire for the plaintiff. “[T]here is no requirement that the **motive** behind the sexual harassment must be sexual in nature.” (*Singleton v. United States Gypsum* (2006) 140 Cal.App.4th 1547, 1564, *rehearing and review denied* (emphasis in original)) Rather, it can be asserted when someone uses the power or status of his or her sex or gender as a “weapon to create a hostile work environment.” (*Id.*) Therefore, the University’s narrow definition requiring the conduct be “sexual in nature” does not comport with the FEHA and corresponding case law.

Moreover, the current definition of sexual harassment does not address other sex-based harassment covered under the FEHA. In addition to the language regarding no need for motivation by sexual desire, the definition should be changed to reflect Government Code section 12940(j)(4)(C), which states, “[H]arassment’ because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.” Following that statement, the current language can then be changed to, “Sexual Harassment **includes** unwelcome sexual advances....”

Under Quid Pro Quo, rather than “a person’s submission to such conduct is implicitly or explicitly **made the basis for** employment decisions....” (emphasis added), it should be “made a condition of.” The employment decisions, etc., do not need to be wholly based on the person’s submission—the submission needs to be just a part of the various requirements considered. The language “made a condition of” aligns more closely with the definition under 2 CCR 11034(f)(1).

COMPLAINANT AND RESPONDENT

The revised definition of a Complainant is, “A person alleged, **in a report to the Title IX Officer**, to have experienced Prohibited Conduct.” (Emphasis added) The phrase, “in a report to the Title IX Officer,” is too restrictive. The definition should be further revised to include: as reported to a Responsible Employee, Confidential Resource, or an outside agency, or as otherwise reported to the Title IX office. Persons alleged as reported to those other persons/entities should also have the protections afforded to Complainants such as protections against retaliation.

The definition of Respondent should also be changed accordingly to include as reported to a Responsible Employee, Confidential Resource, or an outside agency, or as otherwise reported to the Title IX office.

III. POLICY TEXT

A. GENERAL

In the first paragraph on page 8, discipline should not be issued to the Respondent only “when necessary.” That language should be removed and replaced by “which can include issuing appropriate discipline to the Respondent.”

Also, to align more closely with Government Code section 12940(j)(4)(C), the Policy should include after “discrimination based on sex, gender, gender identity, gender expression, sex- or gender-stereotyping, or sexual orientation,” harassment based on “pregnancy, childbirth, or related medical conditions.”

E. PROTECTION OF COMPLAINANTS, RESPONDENTS, AND WITNESSES

Under Privacy on page 10, the revision now states that the “University will **make reasonable efforts to** protect individuals’ privacy to the extent permitted....” (Emphasis added) That “make reasonable efforts to” language should be removed to affirm that the University “will protect” individuals’ privacy to the extent permitted, or the language should otherwise be strengthened to that effect.

IV. COMPLIANCE/RESPONSIBILITIES

Under Section B. Revisions to the Policy, the University should also regularly review the Policy to ensure that it is updated in a manner that is consistent with **the law**—not just with other University policies.

For example, the law has changed since 2014 to clarify that sexual harassment does not need to be conduct sexual in nature. Thus, the University’s Policy should have been updated to reflect that change in the law.

V. PROCEDURES

RESPONSE TIME FOR INQUIRIES, PHONE CALLS, AND EMAILS

The Procedures section currently does not contain a policy regarding the Title IX Office's response time to phone calls and emails. The Policy should require that the Title IX officers respond to all inquiries, phone calls, and emails ***within 48 hours***.

3. INITIAL ASSESSMENT OF A REPORT

Although the Policy states that the Title IX Officer shall make an immediate assessment concerning health and safety, the language regarding the initial assessment otherwise is far too weak and vague stating, "***As soon as practicable*** after receiving a report...."

(Emphasis added) Again, the Policy should require that the Title IX officers respond to all inquiries, phone calls, and emails ***within 48 hours***.

The Policy also states that "Complainants will also be informed of the range of possible outcomes...." without indicating an express deadline for that communication to occur. The Policy should be amended to mandate that an initial assessment be completed ***within one week*** of receiving a complaint, and the Complainant should also be given notification of the outcomes and other required notification within that one week timeframe.

4. CLOSURE FOLLOWING INITIAL ASSESSMENT

The Policy currently states that a Title IX Officer may determine that the matter does not constitute Prohibited Conduct covered by the Policy and summarily close the case without any mention of ***review or appeal***. The Complainant should be given an opportunity to challenge the decision to close the case immediately after initial assessment.

TIMELINES AND EXTENSIONS FOR "GOOD CAUSE"

The draft fails to improve the inadequate timelines for Title IX officer to receive and investigate allegations of SVSH violations, which is especially important for Postdoctoral Scholars on limited-term appointments. Moreover, the Policy revisions do not address the concerns regarding investigation timelines stated by the Audit. The Audit's Summary of Recommendations state:

To ensure timely completion of investigations, the Office of the President should modify university policy to take effect July 2019 to:

- make clear what good cause for a time extension would be,
- set a standard extension period, and
- require that a campus request and receive a time extension before the initial 60 business-day period expires.

(bullet points added)

Rather than comply with the Audit's recommendations, the revised Policy simply **extends** the 60 business-day period to 60-**90 business days**.


For both the Alternative Resolution Process and the Formal Investigation, the Policy needs to follow the Audit's recommendations and include express procedures for granting extensions. There are no **clear factors** to define good cause, except that the complexity of the case will be taken into account. Every case can be deemed complex in its own way, and the vagueness of the Policy has and will continue to lead to an abuse of the "good cause" extensions.

Also, the new Policy failed to implement the recommendation that a campus request and receive a time extension **before** the initial 60 business-day period expires. The Policy should be revised to expressly state that extensions need to be requested and received before the 60-day deadline, and not just issued on the last day.

The Policy revision increasing the review period to 90 business days should be deleted and **changed back to 60 business days or, preferably, reduced to a shorter time period such as 60 calendar days**. Significantly, the Formal Investigation only takes place after an Alternative Resolution (such as mediation, referral to discipline, training, etc.) is inappropriate or unsuccessful. So, 60 days from the initial Formal Investigation may possibly be **months** after the receipt of the complaint.

The Policy should also include a "cap" or a maximum number of extensions possible, such as, in no event will extensions granted exceed a total of 60 business days.

Sincerely,

A handwritten signature in blue ink, appearing to be 'AS', is written over a light yellow rectangular background.

Anke Schennink, PhD
President, UAW 5810