

IN-PERSON TRAINING

CONDUCTING EFFECTIVE EQUITY, DISCRIMINATION AND HARASSMENT INVESTIGATIONS

8:00 A.M. TO 12:00 P.M., TUESDAY, DECEMBER 5, 2023

SARAH MULLEN & BRAD WACHLER – LEWIS RICE LLC

I. The Legal Landscape

a. Federal Law

i. Title VI of the Civil Rights Act of 1964

- Title VI prohibits discrimination based on race, color or national origin in any federally funded education program or activity.
- An institution may not, directly or through contractual or other arrangements, on the ground of race, color or national origin:
 - Deny an individual (or provide in a different manner) any disposition, service, financial aid or benefit provided under the program;
 - Segregate or provide separate treatment;
 - Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others;
 - Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program;
 - Deny an individual an opportunity to participate in the program; or,
 - Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

ii. Title IX of the Education Amendments of 1972

- Title IX prohibits discrimination based on sex in any federally funded education program or activity.
- Conduct on the basis of sex that satisfies one or more of the following:
 - An employee of the institution conditioning the provision of an aid, benefit or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the institution's education program or activity; or
 - Defined under the law as sexual assault, dating violence, domestic violence or stalking.
- Supportive/Interim Measures
 - Consider “non-disciplinary” and “non-punitive” services that are designed to restore or preserve equal access to the institution’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the institution's educational environment or deter sexual harassment
 - Such measures may include:
 - Counseling;
 - Extensions of deadlines or other course-related adjustments;
 - Modifications of work or class schedules;
 - Campus safety services;
 - Mutual restrictions on contact between the parties; and/or,
 - Changes in work or housing locations.

- iii. Title VII of the Civil Rights Act of 1964
 - Title VII protects employees and job applicants from employment discrimination based on race, color, religion, sex and national origin.
 - Discussion on the two types of discrimination under Title VII
 - Disparate Treatment
 - Disparate Impact
 - Title VII prohibits discrimination based on sex, which includes sexual orientation and gender identity.
- iv. Age Discrimination in Employment Act (ADEA)
 - The Age Discrimination in Employment Act of 1967 protects certain applicants and employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment.
- v. Americans with Disabilities Act (ADA)
 - Title I – Prohibits discrimination against a qualified individual based on his disability with regard to hiring, advancement, compensation, training, discharge or other terms, conditions and privileges of employment.
 - Title II – “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”
- vi. Section 504 of the Rehabilitation Act of 1973
 - “No otherwise qualified individual with a disability in the United States... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...”
 - “Program” or “activity” is defined in part as a college, university, or other postsecondary institution, or a public system of higher education.

- b. State Law & Other Anti-Discrimination Laws
 - i. Missouri Human Rights Act (MHRA)
 - Discrimination prohibited in employment, housing, and public accommodations
 - Types of discrimination covered under the MHRA:
 - Race Discrimination
 - Religious Discrimination
 - National Origin/Ancestry Discrimination
 - Sex Discrimination
 - Age Discrimination (*only in employment*)
 - Disability Discrimination
 - Familial Status Discrimination (*only in housing*)
 - ii. Equal Pay Act of 1963
 - Prohibits discrimination on account of sex in the payment of wages by employers.
 - Part of the Fair Labor Standards Act (FLSA), as amended.
 - iii. Family and Medical Leave Act (FMLA)
 - Entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons and prohibits interference with those rights and retaliation based on the exercise of such rights.
 - iv. Genetic Information Nondiscrimination Act (GINA)
 - Restricts employer ability to request genetic information; prohibits employer use of genetic information in personnel decisions.
 - v. Pregnant Workers Fairness Act (PWFA)

- Requires employers to provide reasonable accommodations to pregnant workers.
- Effective June 27, 2023.
- vi. Uniformed Services Employment and Reemployment Rights Act (USERRA)
 - Provides leave, reinstatement and benefits to military employees; prohibits discrimination based on membership in uniformed services.
- vii. Missouri Whistleblower's Protection, R.S. Mo. §105.055
 - Prohibits disciplinary action against an employee who reports a violation of law, rule, or regulation or other gross misconduct.
- c. Harassment & Retaliation
 - i. Overview and definition of harassment
 - Harassment is a form of discrimination under federal and state anti-discrimination laws.
 - Failing to provide an environment free of unlawful harassment is a form of discrimination under both federal and state law.
 - Harassment violates the law if it is based upon race, color, sex, religion, national origin, ancestry, age, disability or other protected status.
 - ii. Discussion on the different types of harassment:
 - Quid Pro Quo
 - Subjected to unwelcome sexual advances or requests for sexual favors;
 - Submission to such advances/requests is an express or implied condition for receiving benefits, or refusal to submit to such advances/requests results in tangible detriment; and,
 - Supervisor-subordinate relationship exists.
 - Hostile Environment

- Subject to unwelcome harassment based on sex or other protected category;
 - Harassment affected a term, condition or privilege of employment or participation;
 - Harassment was sufficiently severe or pervasive;
 - Institution knew or should have known of the harassment and failed to respond with prompt corrective action; and,
 - The recipient of unwelcome harassment acted reasonably under the circumstances.
- iii. Under both federal and state anti-discrimination laws, retaliation is prohibited against individuals who:
- Oppose unlawful discrimination;
 - Complain of or report discrimination; or,
 - Otherwise engage in protected activity.
- d. Remedies Available Under Federal & State Laws
- i. Provided an overview on the available remedies for plaintiffs under federal and state anti-discrimination laws

II. UCM's Governing Policies

- a. Reviewed the following UCM governing policies:
- i. Non-Discrimination and Equal Opportunity Statement
 - ii. Discrimination and Harassment Procedures for Reporting and Investigating Complaints (*Board of Governors Policy 1.2.150*)
 - Discussed the formal procedures for documenting, responding to and investigating a complaint
 - iii. Policy Prohibiting Sexual Misconduct, Sexual Harassment, and Sex Discrimination (*Board of Governors Policy 1.2.155*)

III. Best Practices in the Investigatory Process

- a. Importance of a Thorough Investigation
- b. The Role of the Investigator
- c. Confidentiality
- d. Step-by-Step Review of the Investigatory Process:
 - i. Meet with the Reporting Student/Employee
 - ii. Considerations for the Initial Interview with the Reporting Party
 - iii. Create an Investigation Plan
 - iv. Consider Supportive Measures & Interim Actions
 - v. Collect Documents
 - vi. Gather and review relevant policies, procedures, and documentation
 - vii. Identify Witnesses
 - viii. Interview Witnesses
 - ix. Conduct Any Necessary Follow-up
- e. Drafting the Report
 - i. Gathering and Weighing the Facts
 - ii. Content of the Report
 - iii. Finalizing the Report
 - iv. Communication of Findings
 - v. Confidentiality
 - vi. Recordkeeping

IV. Practical Application and Review: Case Studies

V. Group Exercises: Hypothetical Fact Patterns, Devise Investigation Plan