



Association of
Title IX Administrators

Title IX Overview

UNIVERSITY OF SOUTH CAROLINA
JANUARY 19, 2023

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TRAINING AGENDA

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- 2 Introduction to Laws & Statutes
- 3 Civil Rights Act of 1964
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Understanding Elements of Hostile Environment

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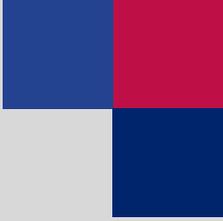
Pregnancy & Title IX

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Intersectionality



CONSENT CONSTRUCT

Force

Incapacity

Consent

OVERVIEW OF THE THREE QUESTIONS

1. Was force used by the Respondent to obtain sexual or intimate access?
2. Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity.

3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

FORCE

- 1. Was force used by the Respondent to obtain sexual or intimate access?**
 - Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force
 - Consider the impact of power dynamics

FORCE (CONT.)

Types of force to consider:

- **Physical violence:** hitting, restraint, pushing, kicking, etc.
 - This may also involve alleged violations of other policies (e.g., harms to persons, violation of law)
- **Threats:** anything that gets someone to do something they wouldn't ordinarily have done absent the threat
 - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat

FORCE (CONT.)

Types of force to consider:

- **Intimidation:** an implied threat that menaces and/or causes reasonable fear.
 - This requires the same threat analysis as above
- **Coercion:** the application of an unreasonable amount of pressure for sexual access
 - Consider isolation, frequency, intensity, and duration

INCAPACITY

Was the Complainant incapacitated?

- Incapacity ≠ impaired, drunk, intoxicated, or under the influence.
- What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non-prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious

INCAPACITY (CONT.)

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
 - unable to understand who, what, when, where, why, or how
- Incapacitation is a determination that will be made after the incident **in light of all the facts available**
- Assessing incapacitation is very fact-dependent
- Blackouts are frequent issues
 - Blackout ≠ incapacitation (automatically)
 - Blackout = working memory functional; short-term memory not retained, not stored long-term; long-term memory from before blackout can be accessed
 - Partial blackout must be assessed as well

BEHAVIORAL CUES

Evidence of incapacity context clues:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Passing out
- Throwing up
- Appearing Disoriented
- Unconsciousness

BEHAVIORAL CUES (CONT.)

Evidence of incapacity context clues:

- Although memory is absent in a blackout, verbal and motor skills are still functioning
- Outrageous or unusual behavior (requires prior knowledge)

PRIOR KNOWLEDGE CONSTRUCT

- These answers should be in the investigation report if the primary consideration is the out of norm behaviors of the Complainant as a determination of incapacity:
 - Did the Respondent know the Complainant previously?
 - If so, was Complainant acting very differently from previous similar situations?
 - Evaluate what the Respondent observed the Complainant consuming (via the timeline)
 - Determine if Respondent provided any of the alcohol for the Complainant
 - Other relevant behavioral cues

INCAPACITY ANALYSIS

- If the Complainant **was not** incapacitated, move on to the Consent Analysis.
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know it, **AND**
 - The Respondent would not have reasonably known it = policy not violated. Move to Consent Analysis.
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it** = policy violation
Sanction accordingly
 - The Respondent **should have known it** = policy violation
Sanction accordingly
 - The Respondent's own intoxication cannot be used as a defense

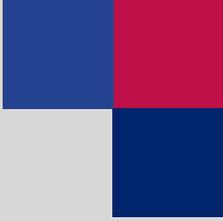
CONSENT

- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Creates mutually understandable permission regarding the conditions of sexual activity
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally

CONSENT ANALYSIS

What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

- Is there any sexual or intimate pattern or history between the parties?
- What verbal and/or non-verbal cues were present during any acts that the parties agree were consensual?
- This is where getting detail and specifics of intimate behaviors is critical



CREATING TIMELINES

Timeline Construct

CREATE A TIMELINE

First evaluate if the Complainant was incapacitated

- This inquiry may be triggered by statements such as:
 - “The next thing I remember was . . .”
 - “I woke up and . . .”
 - “I don’t remember anything after . . .”
- This is your cue to start a timeline of the events during the incident to collect the evidence to assist the Decision-maker(s) in making their analysis as to whether the Complainant was incapacitated

TIMELINE CONSTRUCT

- Begin the timeline at the time the incident began, starting at the time the Complainant began using alcohol/drugs
- Ask (but perhaps in a different way):
 - What were you drinking (e.g., wine, beer, or hard liquor)?
 - Quantity? (e.g., shot glass, large Solo cup, 12 oz. can)
 - How many drinks did you have?
 - Were you using any drugs?
 - When did you eat? What did you eat?
 - Are you taking any medications?
 - Functional tolerance questions

TIMELINE CONSTRUCT (CONT.)

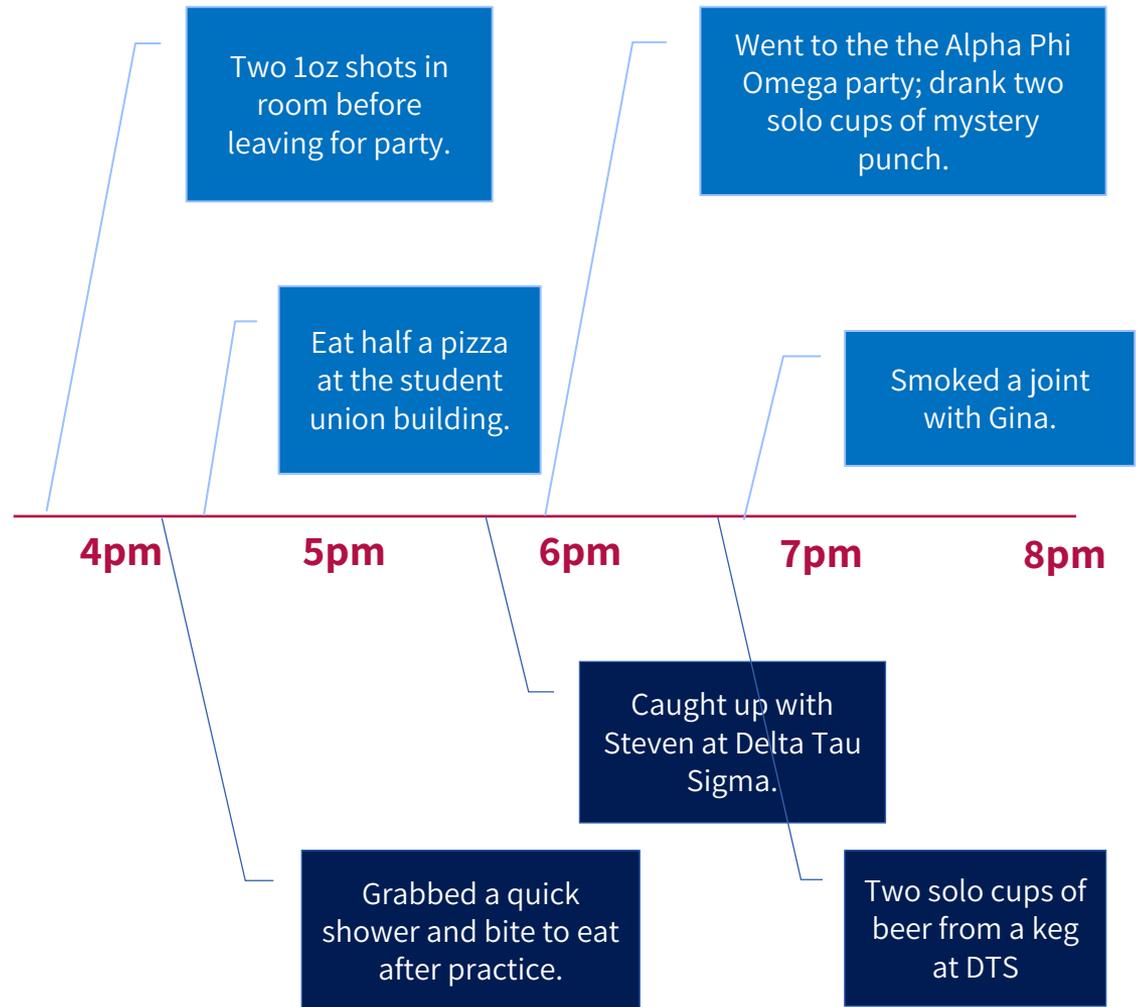
- If Complainant did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. You will need to ask:
 - Where were you when you were drinking?
 - Did you leave your drink at any time then resume consuming?
 - Did anyone provide drinks for you?

TIMELINE CONSTRUCT (CONT.)

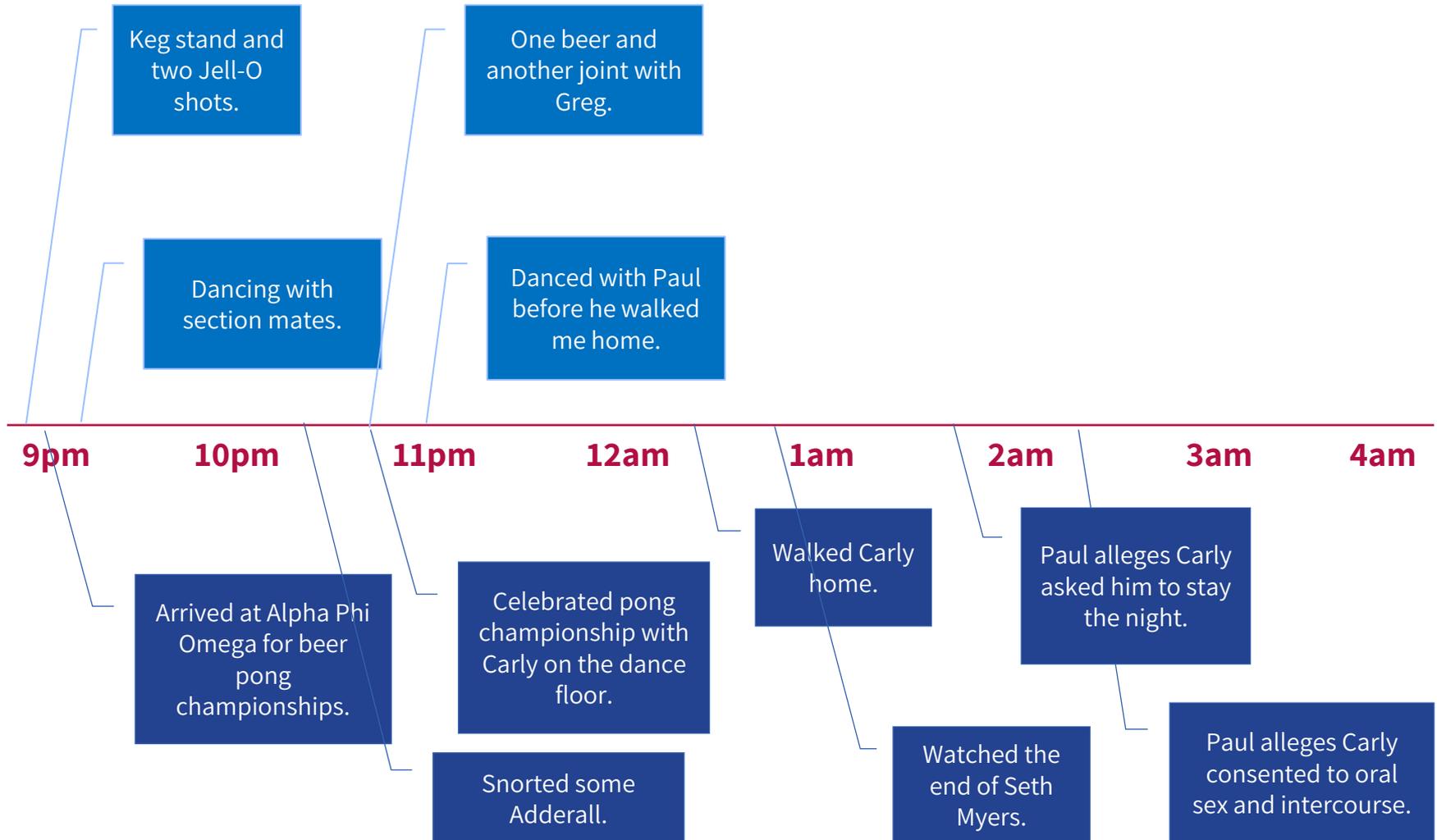
- The Decision-maker will need to make an assessment if, based on the standard of evidence, the Complainant was incapacitated
- If the answer is “No,” proceed to the Consent analysis
- If the answer is “Yes,” move to part two of the Incapacity analysis
- Conduct the same timeline for the Respondent, superimposed on the Complainant’s timeline

CREATING A TIMELINE EXAMPLE

- Use documentary evidence (e.g., texts) to establish where, why, when, how, and who
- Match up as many times and locations as possible
- What did the other party observe?



CREATING A TIMELINE EXAMPLE (CONT.)



CASE STUDY: OMAR & DEVYA



KYLE & BOB

- Kyle O'Neil, the Complainant, a first-year student
- Bob Thompson, the Respondent, a second-year student

KYLE O'NEIL'S STATEMENT

It was Friday night and man it had been a long week. I was invited to an off-campus party and was ready to blow off steam. My adjustment to college has been a challenging one. Frankly, I'm struggling with feelings that I had not recognized before and it's scaring me. I just wanted to forget all the stress of school and my personal life and have a good time.

I was dancing and doing some drinking and a guy came up to me and started dancing. I'd seen him on campus and thought he was really good looking. No one seemed to be paring off, so it didn't feel awkward.

Over the next couple hours, I had a blast. Bob got me some more beers and then they started passing out Jell-O shots. I'd never had them before, and they were great. I think I had a bunch.

KYLE O'NEIL'S STATEMENT

I started feeling really nauseous and hit the can cause I knew I was going to be sick. I got sick and decided it was time to head home. I only made it as far as the outside door and got sick again, right there in the bushes. I didn't realize anyone was around, but Bob came up to me and asked if I needed help. I was so glad for someone to help me get back to my dorm.

I remember us coming in my room and I remember hugging Bob (I don't know why--I think I was just so glad to be back). Then I got sick again. Bob was still there when I came back from the bathroom and he encouraged me to lay down. I must have. The rest of the night is a blur. I remember someone rubbing my back, it must have been Bob.

KYLE O'NEIL'S STATEMENT

When I woke up, I was naked and had a terrible hangover and then I saw a note from Bob. I didn't realize he left me one. I also saw a used condom in the trash. I was so confused and didn't know what had happened. I called him to find out just what went on last night and he asked me out! I'm so upset! What did I do? What did he do? I don't know if I want to find out, but I know it's bad. He did this to me, and I want him held responsible. This whole thing is messing with my mind.

BOB THOMPSON'S STATEMENT

On the night of Friday, September 13th, I went to an off-campus party. There was a band, and a lot of alcohol. I got to the party at about 11:00 pm and slammed about three beers in the first hour I was there. It was very crowded, and people were dancing. A lot of people already seemed to be drunk. I hung out around the dance floor with my friend Jami Warren for a while, until I noticed Kyle O'Neil dancing. He was really hot, and I had noticed him on campus a few times. I didn't know if he was into guys, but I was willing to find out. I went up to him and we started talking.

BOB THOMPSON'S STATEMENT

He seemed a little tipsy and in a pretty loose mood. We talked for a while, and he asked me to get us some more drinks. I think I got him about two or three beers over the next hour.

I didn't have anything more to drink because the three beers I slammed were doing the trick just fine. Around 1:00 am, somebody started passing out Jell-O shots spiked with grain alcohol. I didn't want to mix beer and liquor, but Kyle had a few shots.

We danced a lot, and he had a few more Jell-O shots. He went off to the bathroom, and after that I couldn't find him, and that really bummed me out. I waited around to see if he would show up again, but he didn't. I took off and started to walk back to my residence hall.

BOB THOMPSON'S STATEMENT

As I left the party, I heard someone vomiting. I looked over and saw Kyle in the bushes, throwing up. I went over to help him, and he seemed to be in pretty bad shape. I offered to take him home, and he told me where his dorm was and leaned on my arm. When we got to his dorm, I helped him inside, and was about to leave, but he asked me to come up to his room, just to make sure he got there. I took him upstairs, opened the door for him, and let him in. He asked me to get him a glass of water, and I did. I started to take off again, but he asked me not to go. When I turned around, he hugged me. We hugged for a while, but he wasn't feeling well, and went into the bathroom. When he came out, he said he felt better, but tired.

BOB THOMPSON'S STATEMENT

We crashed on the couch and then started kissing. I started to massage his back, and he fell asleep. He woke up about 20 minutes later, and he started to kiss me, and fondle me. He took off my shirt, and I took off his, eventually we were both naked. I started to give him oral sex, and he said he needed some rest. I asked him if this was OK and if he was OK, and he said he was, he just needed to rest some more. I asked him if he had a condom, and he said he had one in his dresser. I went to get it, and when I got back to the couch, he was asleep again. He woke up after about 20-30 minutes, and I suggested that he just go to sleep. But he said he felt much better and started to give me oral sex.

BOB THOMPSON'S STATEMENT

After a while, he put the condom on and we had sex. It was great. Afterward I gave him my number and left. The next day, he called me to ask me why my name and number was on the pad by his sofa. I told him about meeting him at the party, and about our evening together. He seemed to get upset, and said he remembered meeting me at the party, and me helping him back to his dorm but almost nothing else. I asked if he wanted to go out sometime, and he said, "I'm not gay," and hung up on me. Two days later, I was notified by the Dean that Kyle filed a complaint against me, and here I am.

EXERCISE

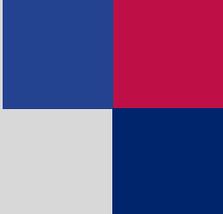
- Note points of disagreement or inconsistency between Kyle and Bob's statements.
- Did you create a timeline of events?
- Discuss credibility elements present for Kyle & Bob
- Identify what additional evidence you need to make a decision before going to next slide.

EXERCISE PART II

- Is it more likely than not that Kyle was incapacitated?
 - What forms the basis for your decision?
- If you determine yes, is it more likely than not that Bob knew?
 - What forms the basis for this determination?

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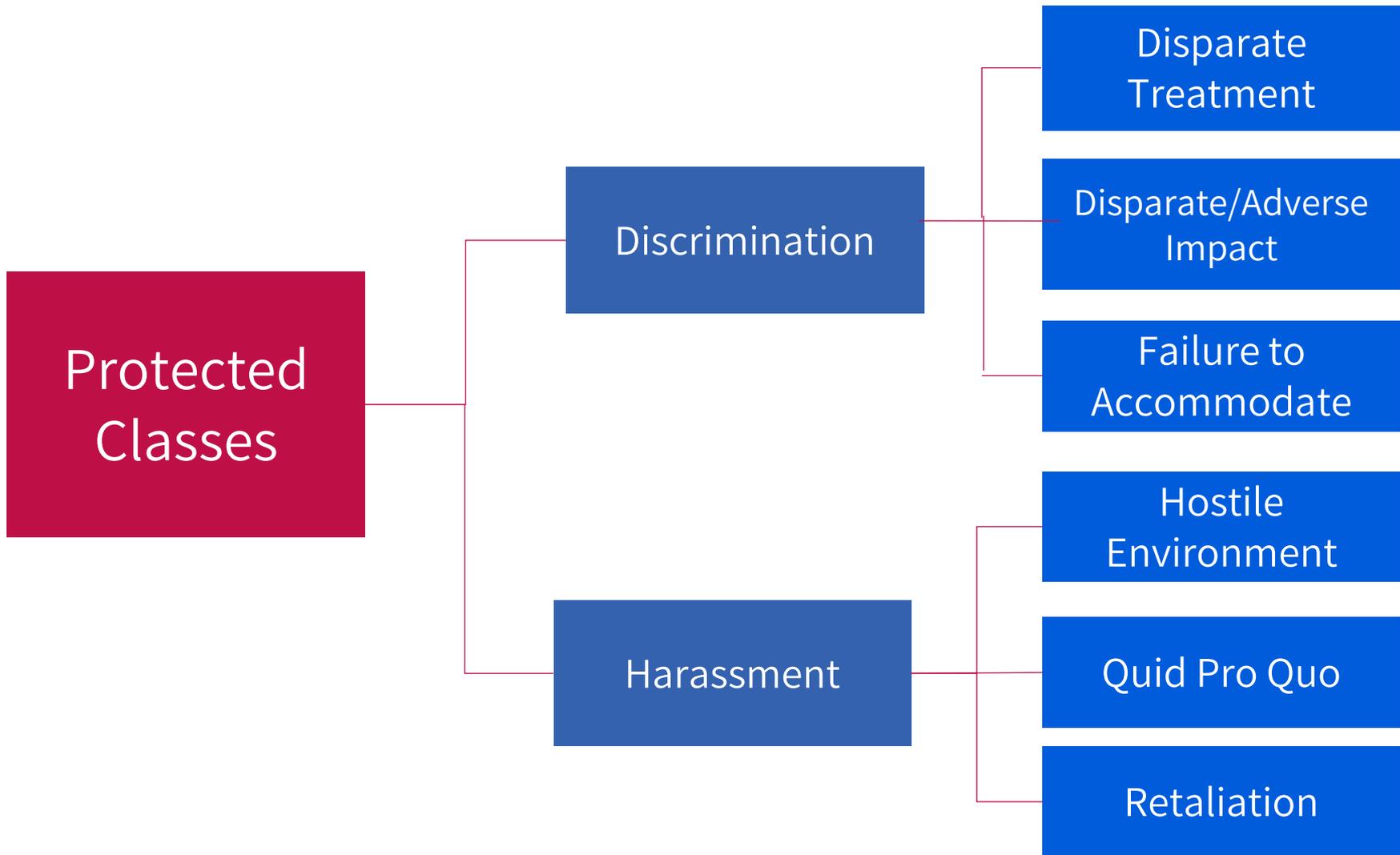
INTRODUCTION TO LAWS AND STATUTES

- Civil Rights Overview
- Title VI of the Civil Rights Act
- Title VII of the Civil Rights Act
- Title IX of the Education Amendments
- Section 504 of the Rehabilitation Act

CIVIL RIGHTS ACT OF 1964

- Title VI
 - 42 U.S.C. § 2000d et seq
 - 28 C.F.R. § 42.101 et seq
- Title VII
 - 42 U.S.C. § 2000e et seq
 - 29 CFR Parts 1604 - 1608

WHAT IS COVERED?



TITLE VI OF THE CIVIL RIGHTS ACT

- 42 U.S.C. § 2000e-2(a)

“No person in the United States shall, on the ground of **race, color, or national origin**, be **excluded from participation in, be denied the benefits of, or be subjected to discrimination** under any **program or activity receiving Federal financial assistance.**”

TITLE VI OF THE CIVIL RIGHTS ACT

■ Prohibited Conduct

- Discrimination/harassment on the basis of race, color, and national origin in programs and activities receiving federal financial assistance
- Discrimination
 - Disparate impact
 - Disparate treatment
 - Failure to accommodate (Limited protected classes)
- Harassment
 - Hostile Environment
 - Quid pro quo
- Retaliation

TITLE VI OF THE CIVIL RIGHTS ACT (CONT.)

Jurisdiction

- Employers with 15 or more employees for each working day in 20 or more calendar weeks in the current or preceding calendar year (payroll method)
- Employment agencies and labor organizations
- Program and activity defined as
 - A college, university, or other postsecondary institution
 - Public system of higher education

WHAT MUST OCCUR FOR VI TO APPLY?

- Must occur in the United States
- Institution must be a recipient of federal funding, either directly or indirectly, including contractual relationship
 - Not required to be an educational entity like IX
- Must provide a service

TITLE VII OF THE CIVIL RIGHTS ACT

- 42 U.S.C. § 2000e-2(a)

“It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to **discriminate against any individual with respect to their compensation, terms, conditions, or privileges of employment, because of** such individual’s **race, color, religion, sex, or national origin**; or (2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect their status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

TITLE VII OF THE CIVIL RIGHTS ACT

“It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

- 42 U.S.C. § 2000e-2(a)

TITLE VII - EMPLOYMENT PRACTICES

- Hiring and firing
- Compensation, assignment or classification of employees
- Transfer promotion, layoff, recall
- Job advertisement and recruitment
- Testing
- Use of university facilities
- Training and apprenticeship programs
- Retirement plans, leave and benefits
- Harassment – Hostile Environment

VII ALSO ADDRESSES:

- Refusal or failure to reasonably accommodate an individual's sincerely held religious observances or practices, unless doing so would impose an undue hardship on the operation of the employer's business
- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain race, color, national origin, sex or religion
- Denial of employment opportunities to an individual because of marriage to, or association with, an individual of a particular race, color, national origin, sex or religion.

TITLE VII OF THE CIVIL RIGHTS ACT

- **Prohibited Conduct**

- Discrimination/harassment based on race, color, religion, sex, and national origin
- Retaliation

- **Jurisdiction**

- Employers with 15 or more employees for each working day in 20 or more calendar weeks in the current or preceding calendar year (payroll method)
- Employment agencies and labor organizations

EMPLOYER LIABILITY

Conduct by a Supervisor

- Employer always liable when conduct results in a tangible employment action
- If no tangible employment action, employer must show it:
 - 1) exercised reasonable care to prevent and promptly correct harassment and
 - 2) employee unreasonably failed to take advantage of employer's preventative/corrective opportunities or otherwise avoid harm

EMPLOYER LIABILITY (con't)

Conduct by a Co-Worker

- Employer liable when it knew or should have known of harassment and failed to take prompt corrective action

Conduct by a third-party/non-employee

- Employer is liable when it knew or should have known of harassment, could control the harasser's conduct or otherwise protect the employee, and failed to take prompt and appropriate corrective action

TITLE VII OF THE CIVIL RIGHTS ACT

▪ **Exceptions/Exemptions/Defenses**

- Employers may make a nondiscriminatory decision based upon:
 - Bona Fide Seniority or Merit System
 - Professionally Validated Test
 - Quality/Quantity of Production
 - Different Work Locations
- **Bona Fide Occupational Qualification (BFOQ)**
 - Distinction is reasonably necessary for normal operation (e.g., authenticity, genuineness, privacy)
 - Can be used for religion, sex, or national origin
 - No BFOQ for race or color
- **Ministerial Exception**
 - Religious entities may hire based upon religion for positions whose primary duties are religious in nature

RETALIATION

- Both VI and VII prohibit retaliation
- Retaliation is established by:
 - Complainant was engaged in a protected activity
 - The institution knew of the complainant's protected activity
 - The institution took adverse action against the Complainant
 - There was a causal connection between the protected activity and the adverse action
- Once these elements are established, the institution must be able to show it had a legitimate, non-discriminatory reason for the action taken
- This will be subject to a pretext analysis

TANGIBLE EMPLOYMENT ACTION

- Significant change in employment status
 - hiring
 - firing
 - promotion
 - demotion
 - undesirable reassignment (less status, create hardship)
 - decision causing significant change in benefits, compensation, work assignment

FOLLOW-UP TO BOSTOCK

Jimenez v. Laborer's Welfare Fund, 2020 WL 5979653 (N.D. Ill. Oct. 8, 2020)

An Illinois district court applied the *Bostock* analysis when a worker alleged her union discriminated against her based on sex when it refused to enroll her wife in health insurance coverage that it previously granted to opposite-sex couples.

The court ruled for the employee, noting that "there can no longer be any dispute that the conduct alleged constitutes sex discrimination Had Jimenez been a man seeking spousal coverage for a wife, coverage would not have been denied. She did not receive this coverage because she was a woman seeking coverage for her wife."

SIGNIFICANT HISTORICAL CASES

—

MERITOR v. VINSON

477 US 57 (1986)

Facts

- Mechelle Vinson worked for MSB for four years, starting as a teller-trainee and earning several promotions.
- She was fired for abusing her sick leave.
- She alleged she was subjected to sexual harassment, fondling, and non-consensual sex by her supervisor.
- District Court dismissed, finding no tangible employment action.
- Appeals Court reversed, recognizing the “hostile environment” theory.
- MSB appealed to U.S. Supreme Court, challenging hostile environment theory and noting existing policy and reporting options.

MERITOR v. VINSON

477 US 57 (1986)

- Hostile environment sexual harassment is discrimination.
- No need to demonstrate a negative economic effect.
- Accepted EEOC guidelines related to sexual harassment
- Existing policy, reporting procedure does not automatically preclude liability
- Strict liability for supervisor harassment not automatic
- Did not outline threshold for liability based on types of employees

MERITOR v. VINSON

477 US 57 (1986)

Significance to employers

- Hostile environment is a form of sexual harassment that must be prohibited and promptly addressed.
- Sexual harassment does not have to produce an adverse action to trigger employer liability.
- Strict liability for supervisors – if it results in adverse action, the employer is automatically liable.
- ***Train, promptly address, and discipline appropriately.***

BURLINGTON v. ELLERTH

524 US 742 (1998)

Facts

- Kimberly Ellerth quit her job and later claimed it was due to ongoing offensive conduct by her supervisor which included threats to deny her tangible job benefits if she refused his advances.
- She did refuse his advances but he did not carry out his threat. She did not suffer any negative job consequences.
- She did not complain prior to her resignation.

BURLINGTON v. ELLERTH

524 US 742 (1998)

- The U.S. Supreme Ct. determined that an employer is vicariously liable for actionable discrimination caused by a supervisor, but is also subject to an affirmative defense by reviewing the reasonableness of the employer's conduct.
- The employer must show they exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- The employee asserting harassment must have unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

FARAGHER v. BOCA RATON

524 US 775 (1998)

Facts

- Beth Ann Faragher was a lifeguard for the city of Boca Raton. She alleged that she was subjected to lewd remarks and offensive touching from two immediate supervisors, constituting a discriminatory hostile environment. She did not report this conduct to management
- The Court found that the city could not assert an affirmative defense that they were not liable because Ms. Faragher did not report it because they had not disseminated its policy among employees or exercised reasonable care to prevent harassment.

FARAGHER & ELLERTH

524 US 775 (1998)

524 US 742 (1998)

The “Ellerth-Faragher Defense” is considered an employer affirmative defense. Employers are not automatically liable for offensive, harassing or threatening conduct by supervisors if the employer can show:

1. That the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior
2. That the complaining employee unreasonably failed to use the preventive or corrective opportunities available to him or her. The Court further stated that an employee’s failure to use an employer’s complaint procedure will suffice to support this prong.

Significance to employers

This affirmative defense cannot be used to prevent liability when the employer knew or should have known about the harassment and failed to stop it, or the supervisor's harassment culminated in a related tangible job action such as discharge, demotion or undesirable reassignment.

Significance to employers

- Liability defense begins with a robust policy
 - Create and disseminate policy
- Provide methods to report misconduct
- Include an avenue for complaining to someone other than to one's supervisor
- Act quickly to prevent and correct
- Employer must take prompt, reasonable action upon a report of misconduct
- No formal complaint required. The standard throughout is “knew or should have known”

Significance to employers

- Establish a policy on relationships between supervisors and supervisees
- Conduct ongoing training
- Test your complaint channels

UNDERSTANDING ELEMENTS OF “HOSTILE ENVIRONMENT”

HOSTILE ENVIRONMENT

- **Hostile Environment:** Unwelcome conduct determined by a reasonable person to be so severe and pervasive (under Title IX), and objectively offensive, OR severe or pervasive (under Title VII) that it effectively denies a person equal access to the Institution's education program or activity
 - Education program or activity means employment, too!

HOSTILE ENVIRONMENT: “UNWELCOME”

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

HOSTILE ENVIRONMENT: “REASONABLE PERSON”

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

HOSTILE ENVIRONMENT: “SEVERE”

- Physical conduct is more likely to be severe without need for repetition
 - Sexual assault and many dating/domestic violence incidents are almost always sufficiently severe
 - Other conduct that does not meet the 34 C.F.R. § 106.30 definitions for sexual assault or dating/domestic violence may also rise to the level of “severe”
- Consider the circumstances (e.g., ability for Complainant to escape the harassment)
- Assess whether accompanied by threats or violence
- Assess whether there was a degree of embarrassment or humiliation

HOSTILE ENVIRONMENT: “PERVASIVE”

- Widespread
- Openly practiced; occurring in public spaces
- Well-known among students or employees – reputation of a department, person, etc.
- Frequency, intensity, and duration of the conduct
- Unreasonable interference with school or job
- Incidents occurring in concert or with regularity are more likely to be considered pervasive
- Consider the specific circumstances and facts

HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”

- Reasonable person standard in context
 - “I know it when I see it...”
 - Age and relationships of Complainant and Respondent
 - Number of persons involved
 - Frequency
 - Severity
- Physically threatening
 - Humiliating
 - Intimidating
 - Ridiculing
 - Abusive

HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”
- In evaluating the totality of the circumstances, consider:
 - Frequency, nature, and severity of the conduct
 - Whether the conduct was physically threatening
 - Whether the conduct was humiliating
 - Identity of and relationship between the Respondent and the Complainant
 - Age and sex of the Respondent and the Complainant
 - Size of the school, location of the incidents, and context in which they occurred

HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

- Totality of the circumstances to consider:
 - Effect on the Complainant’s mental or emotional state
 - Whether the conduct was directed at more than one person
 - Whether the conduct unreasonably interfered with the Complainant’s educational or work performance
 - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
 - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection
 - “Constellation of surrounding circumstances.”

CASE STUDY: PROFESSOR JONES



CASE STUDY – PROF. JONES

- Frank, a trans male student, comes to you to complain that Professor Jones, his (tenured) English professor, has made comments in class that make Frank “feel unsafe.”
- Specifically, he alleges that Prof. Jones made the following comments:
 - After the transgender letter was repealed by the Trump administration, Prof. Jones brought it up in class and said, “Finally, some common sense from Washington – you are either a man or a woman. Period.”

CASE STUDY – PROF. JONES

- When a student wore a gay pride shirt to class, Prof. Jones said, “I get not being ashamed of who you are having sex with, but is ‘proud’ really the word you should use?”
- He assigned all the students in class to write their persuasive essays on “trying to convince me that people should be able to use whatever bathroom they want to.”

CASE STUDY – PROF. JONES

- There are about 26 students in the class, and Frank brought with him Georgina, Haley, Isaiah, Jeremy and Ken. He tells you that all the students will back him up and that he has heard that Jones is not liked in the department as well.
- He also says he knows a student who is trans female. He says she is not comfortable even going to the English department offices because she also feels “unsafe.”

CASE STUDY – PROF. JONES

- Do these statements and actions constitute a policy violation? Why or why not?
- If you start to look into the allegation(s), can Frank remain anonymous?
- What supportive measures might be taken?
- Frank requests that you assist him in withdrawing from Jones' class, as do the other 5 students.

CASE STUDY – PROF. JONES

- Further, Frank shares with you that a month ago, while walking across campus with Ken, he heard another student use the word “faggot.” He can not identify the other student, but thinks he is in student government.
- He also heard from Georgina that, at a recent social function, a group of students made fun of the LBGTQ group on campus. As a result of this, he says that he feels even more “unsafe.”

CASE STUDY: DEB



CASE STUDY: DEB

Deb is a faculty member working with a small team of seven student research assistants who meet each morning to check-in with each other and the status of their grant projects in the university lab. May is a student team-member who has recently announced that she is pregnant.

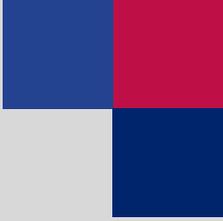
One morning, May texted Deb that she was going to miss the morning meeting. Deb announced to the group that they should get started because May wouldn't be joining the meeting that day. A third student researcher, Paulie, responded with a snort, and said, "I bet she has morning sickness. Too bad, her breasts are getting to be GINORMOUS and I was looking forward to having a peek this morning." Several team members laughed hard at this joke, while a couple of others chuckled uncomfortably.

CASE STUDY: DEB

Deb was livid, and immediately began to wonder how she could work with a team of people who objectify women like this. After the meeting she stormed into the Title IX office to complain about Paulie's conduct. She explained how uncomfortable she felt by the incident, how she no longer could work with Paulie, stating that he should be terminated from the grant-funded position and that the other students who laughed should be put on probation.

CASE STUDY: DEB

- Discuss the steps you will take to address this
- What will you recommend to Deb?
- Will you suggest involving the class?



PREGNANCY AND TITLE IX

PREGNANCY DISCRIMINATION

- Pregnancy or related conditions:
 - 1) Pregnancy, childbirth, termination of pregnancy, or lactation
 - 2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
 - 3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions
- Nondiscrimination
 - Cannot adopt policies, practices, or procedures
 - To treat a student **OR** employee differently based on current, potential, or past pregnancy related conditions

§ 106.2
§ 106.21

PREGNANCY DISCRIMINATION (CONT.)

- Admissions/Enrollment
 - No pre-admission or enrollment inquiries regarding marital status
 - Including asking “Miss or Mrs.”
 - Self-identification of sex is permissible if required from all applicants
- What’s Unclear?
 - Rights of non-birthing parents
 - Scope of parental protections

§ 106.40
§ 106.57 87

WHO IS COVERED UNDER TITLE IX PREGNANT AND PARENTING STUDENT REGULATIONS?

- Students who become pregnant, terminate a pregnancy, or give birth during an academic school year
- Title IX regulations apply to pregnant students for as long as deemed medically necessary by the student's health care provider
 - These protections are not indefinite

RESPONSE TO PREGNANCY

- Providing Information
 - When an employee acquires knowledge of a student's pregnancy or related conditions by the student...the employee must inform that person of Title IX support
- TIXC required response:
 - Prohibit sex discrimination
 - Reasonable modifications (document it!)
 - Allow voluntary access to separate and comparable program, if desired
 - Voluntary leave of absence
 - Availability of lactation space
 - Grievance procedures for sex discrimination complaints

§ 106.40; NPRM pg. 669-72

REASONABLE MODIFICATIONS

- Reasonable modifications may include:
 - Breaks to attend health needs
 - Breaks for breastfeeding or expressing breast milk
 - Absences for medical appointments
 - Access to online or homebound education
 - Changes in sequence or schedule of courses
 - Extensions or rescheduling examinations
 - Counseling
 - Elevator access

§ 106.40; NPRM pg. 669-72

PREGNANCY-RELATED LEAVE

- Pregnancy or related conditions serve as a justification for a reasonable, voluntary leave of absence
 - Can be unpaid
 - Applies to employees and students
 - Even if there is no policy **or** the person does not qualify under the policy
- Upon return, the person should be reinstated to their prior or a comparable status
 - For employees, there should be no decrease in compensation
 - For students, this includes academic and extracurricular status

§ 106.40; NPRM pg. 670
§ 106.57; NPRM pg. 699

LACTATION TIME & SPACE

- Employees and students must be provided reasonable break times for breastfeeding or expressing breast milk
- Lactation Space
 - Not a bathroom
 - Clean, shielded from intrusion
 - Can be used by a student or employee, as needed



Decision Point:
**How many lactation spaces
are needed to reasonably
accommodate both student
and employee populations?**

§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 699

PREGNANCY & TITLE IX: REGULATORY LANGUAGE

Physician Certification

- “A Institution **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation in the normal education program or activity **so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.**” (34 C.F.R. § 106.40)
 - “Thus, for example, a student who has been hospitalized for childbirth must not be required to submit a medical certificate to return to school if a certificate is not required of students who have been hospitalized for other conditions.”

PREGNANCY & TITLE IX: REGULATORY LANGUAGE

Pregnancy as a Temporary Disability

- “An Institution shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom **in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan, or policy which such Institution administers, operates, offers, or participates in with respect to students admitted to the Institution's educational program or activity.”
(34 C.F.R. § 106.40)

PREGNANCY & TITLE IX: OCR GUIDANCE

Doctor's Note to Participate

- **“Schools cannot require a pregnant student to produce a doctor’s note in order to stay in school or participate in activities**, including interscholastic sports, unless the same requirement to obtain a doctor’s note applies to all students being treated by a doctor.” (34 C.F.R. § 106.40)
- “That is, schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; **schools should not presume that a pregnant student is unable to attend school or participate in school activities.**”

PREGNANCY & TITLE IX: REGULATORY LANGUAGE

Leave Policies

- “In the case of a Institution which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a Institution shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as **a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which they held when the leave began.**” (34 C.F.R. § 106.40)

PREGNANCY & TITLE IX: OCR GUIDANCE

Leave Policies (Cont.)

- “When the student returns to school, they must be reinstated to the status they held when the leave began, which should include giving them the opportunity to make up any work missed.”
- “A school may offer the student alternatives to making up missed work, such as:
 - Retaking a semester
 - Taking part in an online course credit recovery program
 - Allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave
- The student should be allowed to choose how to make up the work.”

PREGNANCY & TITLE IX: EXCUSED ABSENCES AND MEDICAL LEAVES

- Teachers and faculty must understand that they are required to excuse absences/medical leaves as determined by the Title IX Coordinator
 - May not refuse to allow work to be submitted after deadline if missed due to pregnancy or childbirth
- If grading is based in part on class participation or attendance, student must be given an opportunity to make those points up if missed due to pregnancy or childbirth

PREGNANCY & TITLE IX: HARASSMENT PROTECTIONS

- The College must protect pregnant students from harassment based on sex
 - This includes harassment because of pregnancy or pregnancy-related conditions
- Conduct that is sufficiently severe, pervasive, and objectively offensive is prohibited and must be addressed under the Institution's sexual harassment adjudication process. Conduct can include:
 - Sexual comments or jokes about student's pregnancy
 - Sexually-charged named calling
 - Spreading rumors about sexual activity
 - Sexual propositions or gestures

PREGNANCY & TITLE IX: POLICY AND PROCEDURE REQUIREMENTS

- Develop and annually distribute a policy prohibiting sex discrimination that includes prohibited discrimination against pregnant and parenting students
- Adopt and publish grievance procedures for students to file a complaint of sex discrimination that includes discrimination related to pregnancy or parental status
- Students and employees should be aware that the Title IX Coordinator also holds the responsibility of overseeing complaints of discrimination against pregnant and parenting students

RESIDENCE HALLS

- Not required to change occupancy policies for any residence hall on your campus for pregnant students (may prohibit bringing child to live in residence hall)
- Upon birth of child, Institution can move the student to housing more appropriate for parenting students, if applicable
 - Not required to pay additional cost for housing of parenting student if institution does not offer family housing
- Pregnant students are required to have equal access to housing and cannot be discriminated against, regarding housing, during their pregnancy
 - Example: A student with a roommate becomes pregnant. Pregnant student develops morning sickness, which causes her to vomit often. The roommate wants the school to move the pregnant student to another room because of the vomit.

LABS, CHEMICALS, EXPOSURE TO DISEASE, ETC.

- Reasonable restrictions for health and safety (as determined by a physician) are permitted
- No one at the institution/school is permitted to make this decision on behalf of pregnant student
- Cannot force a pregnant student to restrict themselves from the class, lab, or exposure. Can recommend, but not force.
- Cannot impose penalties for a pregnant student who decides to restrict themselves
- Cannot require a doctor's note from pregnant student, if it is not required for other students

COHORT PROGRAMS & LICENSURE REQUIREMENTS

- Institution is obligated to accommodate pregnant students
- Can recommend, but cannot force a student to change academic courses or programs
- Students should still be held accountable for coursework completion and standards regardless of pregnancy
- Provide options to pregnant students and allow them to make the decision of which path they take

ONLINE LEARNING & HOMEBOUND INSTRUCTION

- If this is a service offered to other students with temporary medical conditions, it should be offered to pregnant and parenting students
- More common following the pandemic
- All other accommodations should still apply, if applicable
- Cannot force student into this option but can recommend
- May be appropriate to offer to other parent if this falls under Institution's leave policy

CHILDCARE

- Childcare is not considered “medically necessary” under Title IX
- Students can still be held to regular standards set forth for all students (i.e., attendance)
- If teachers/faculty provide latitude for parenting students as it relates to childcare, they must provide latitude for all other students as well
- Important for teachers/faculty to set the tone early
- Be consistent

CASE STUDY:



CASE STUDY:

- Sasha is a sophomore theatre major and just found out she is pregnant. Sasha is having a very rough first trimester and is having to miss a lot of rehearsal time for a play in which she was recently cast as the lead role.
- Professor Alexa, Sasha's Acting II instructor and the director of the production Sasha is in, has a very strict attendance policy when it comes to missing rehearsals.
- Professor Alexa's policy is, if a student misses more than two rehearsals, they are removed from their role. Sasha has now missed her third rehearsal and is removed from the lead role and the play altogether.

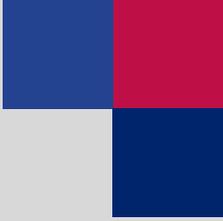
CASE STUDY:

- Sasha is mad that she has been removed from the cast of the show and reports to you that she is being discriminated against based upon her sex and pregnancy status.
- Professor Alexa states that Sasha's removal has nothing to do with her sex or pregnancy status and has everything to do with the attendance policy which is applied equally to all students in productions.
- Furthermore, according to the national theatre accrediting body, each production must include a minimum of twenty rehearsal hours for each actor prior to the first full dress rehearsal in order for the play to be considered of educational quality, and for it to count towards the student's degree requirements.

CASE STUDY DISCUSSION:

- Rehearsals take place one day per week for six hours each session. Missing one rehearsal is the equivalent of missing three weeks of course material.
- Sasha's three absences have significantly impacted the others involved in the productions, including other students not having the ability to rehearse scenes with her, which has in turn decreased their total number of rehearsal hours.
- Sasha tells you that she has been rehearsing during the weekends with her scene partners and knows her lines despite missing the three class periods.

What do you do as Title IX Coordinator?



INTRODUCTION TO BIAS

INTRODUCTORY CONCEPTS



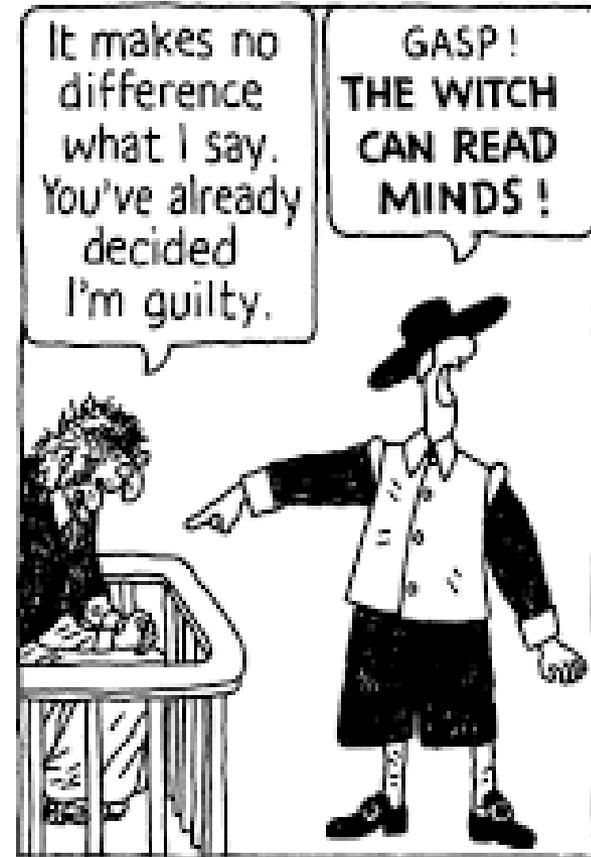
What is bias?



Sources/
causes of bias



Common
types of bias



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WHAT IS BIAS?

- A preference or tendency to like or dislike
- A cognitive process
- Can be a systematic error in our thinking process
- Mental shortcuts
- A thought process developed over time through repeated personal experience
- Implicit or explicit
- Can be intentional, but generally unintentional

WHAT IS BIAS (CONT.)?

- Formed from stereotypes, societal norms, cultural experiences, expectations of the people around you
- Can affect our perceptions of Complainants *and* Respondents
- Can affect our perceptions of others within the process or associated with the process
 - Example: parents/guardians
 - Example: witnesses, advisors

BIAS ORIGINATION

Past Experiences

Family

Societal &
Institutional
Norms

Stereotypes

Politics, Religion

Self Identity,
Affinity Groups

COMMON BASIS FOR POTENTIAL BIAS

- Ability
- Age
- Citizenship status
- Ethnicity
- Gender
- Gender Identity/Expression
- Health status
- Marital status
- Mental health status
- National origin
- Parental status
- Physical attributes
- Race
- Religion
- Sexual orientation
- Socioeconomic status (can include finances, education, housing, etc.)

TWO TYPES OF BIAS

Explicit

- Conscious bias
- Clear feelings and attitudes
- Behaviors are conducted with intent
- In its extreme, it is characterized by overt negative behaviors that can be expressed through physical and verbal harassment or through exclusion

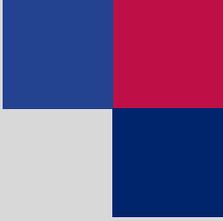
Implicit

- Unconscious bias
- Operates outside of the person's awareness
- Can be in direct contradiction to a person's espoused beliefs and values
- Can be pervasive

COMMON FORMS OF IMPLICIT BIAS

- Confirmation Bias
- Attribution Bias
- Beauty Bias
- Conformity
- Affinity Bias
- Halo Effect
- Horn Effect
- Contrast Effect
- Gender Bias
- Racial Bias





INTERSECTIONALITY

WHAT IS INTERSECTIONALITY?

- An analytical framework for understanding how aspects of a person's identities combine to create various types of discrimination and privilege
- Recognizes that identity markers (e.g., woman and Latina) do not exist independently of each other **and** that each informs the others
- Often creates a complex convergence of oppression



INTERSECTIONALITY IN PRACTICE

- Recognize differences
 - Steer away from labeling individuals
 - Ask rather than assume
 - Acknowledge that individuals have unique experiences
- Avoid oversimplified language
 - Move away from language that seeks to define people by a singular identity
- Analyze the space you occupy
 - Recognize when differences are not represented
 - Seek other points of view
- Value and include other points of view
- Be present

Crenshaw, K. (2017, March 29). *What is intersectionality, and what does it have to do with me.*
<https://www.ywboston.org/2017/03/what-is-intersectionality-and-what-does-it-have-to-do-with-me/>

CASE STUDY: INTERSECTIONALITY



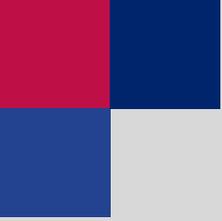
CASE STUDY

- The Title IX Coordinator has charged the institution's Sexual Misconduct Task Force (a group of five individuals across campus) with creating a one-hour consent event on the quad that includes food
- As the group is discussing the logistics of the event, the lone member of color on the task force reminds the group that it is important that the event is inclusive and takes into consideration the multitude of cultures that represent the institution's student body, which has a high percentage of black students
- Another member says, "Well consent is consent regardless of your culture, but we can serve fried chicken, watermelon, and red Kool-Aid," then laughs as do several other members of the group

CASE STUDY DISCUSSION

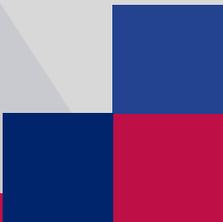
This gets reported:

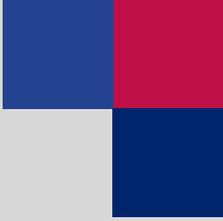
1. How do you address this?
2. Who do you speak with and what do you say to them?
3. Do you report this to the commentor's supervisor?



Association of
Title IX Administrators

Questions?





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