Respect
UCommunity

Hard Wired for Discriminating Taste

Civil Rights Act of 1964, Title VII
42 USC § 2000e-2

Unlawful employment practice for an employer:
(1) to hire, fire, otherwise to discriminate against any individual with respect to
Title VII (cont.)

compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify employees or applicants in any way which would deprive or tend to deprive

Title VII (cont.)

any individual of employment opportunities or otherwise adversely affect status as an employee, because of such individual's race, color, religion, sex, or national origin

Equal Pay Act of 1963 (EPA)
29 USC § 206(d)²
(1) Equal Wages between sexes if:
  i. Equal work
  ii. Equal skill, effort and responsibility
  iii. Performed similar
EPA (cont.)

(2) Exceptions
i. a seniority system;
ii. a merit system;
iii. a system which measures earnings by quantity or quality of production; or
iv. a differential based on any other factor other than sex
v. employer who is paying a wage rate differential in violation of this subsection shall not reduce the wage rate of any employee to comply

Education Amendments of 1972, Title IX
20 U.S.C. §§ 1681-1688

No person shall be excluded from participation, denied benefits of, or be subjected to discrimination on the basis of sex, under any educational program; activity; receiving federal funds

Pregnancy Discrimination
Act of 1978 (PDA)
42 USC § 2000e(k)

(1) Amended definition of 'because of sex' or 'on the basis of sex' to include, because of or on the basis of pregnancy, childbirth, or related medical conditions;
PDA (cont.)
(2) Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including benefits, as other persons not so affected but similar in their ability or inability to work;
(3) Nothing in section 703(h) of this title shall be interpreted to permit otherwise.

Pregnancy and Maternity Leave
• May not have a rule which prohibits an employee from returning to work
• Must hold a job for a pregnancy related absence the same length of time jobs are held open for employees on sick or disability leave.

EEOC Charges and Lawsuits

<table>
<thead>
<tr>
<th>FY</th>
<th># of Charge</th>
<th>Monetary Benefits</th>
<th>All Suits Filed</th>
<th>Resolution Monetary Benefits</th>
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<tr>
<td>2011</td>
<td>99,947</td>
<td>5364.7</td>
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<td>362</td>
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<td>2228.9</td>
<td>403</td>
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* in Millions | WEB PAGE: www.eeo.gov/statsafo.html
### EEOC Charges and Lawsuits

<table>
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<tr>
<th>Charges</th>
<th>FY 2013</th>
<th>% of Cases</th>
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<td>Total charges</td>
<td>99,947</td>
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<tr>
<td>Race</td>
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<tr>
<td>Retaliation</td>
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<tr>
<td>Sex</td>
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<td>Religion</td>
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<td>GINA</td>
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</table>

### 42 USC § 1983

Prohibits the State from depriving any person of any rights, privileges, or immunities secured by the Constitution and laws

### Discriminatory Practices under these Anti-Discrimination Laws

- Harassment based on one of the protected classes
- Hiring and Firing
- Compensation
- Assignment or classification
- Transfers, promotions, layoffs, recalls
- Job advertisements
- Recruitment
- Testing
Discriminatory Practices (cont.)

- Use of Company Facilities
- Training and apprenticeships
- Fringe Benefits
- Retirement and Disability plans
- Decisions based on stereotypes or assumptions about the abilities, traits or performance of individuals of a certain sex
- Anything that affects the terms and conditions of employment

Retaliation is prohibited

1. Filing a charge
2. Participating in an investigation
3. Opposing discriminatory practices

Retaliation

Actionable retaliation occurs if the behavior would dissuade a reasonable worker from making or supporting a charge of discrimination.
Retaliation

Actionable retaliation occurs against a third party if the third party falls within the zone of interest sought to be protected by the statutory provision whose violation forms the legal basis for the complaint.

Retaliation Under Title IX

Retaliating against a person because that person has complained of sex discrimination is a form of gender discrimination actionable under Title IX.

Generally there are two types of Discrimination Cases

1. Disparate Treatment
   a. Employee intentionally treated differently because of their protected class
   b. Harassment
   c. Quid Pro Quo
   d. Hostile work environment
Discrimination Cases (cont.)

2. Disparate Impact
   a. Neutral policies that
do disproportionately exclude
  minorities and that are NOT
  job related

Disparate Treatment\(^9\)
Employee shows:
- Employee is in a protected class
- Employee is qualified for the position
  or benefit at issue
- Employee suffered an adverse
  employment action or treated less
  favorably than others similarly
  situated
- Raises an inference of discrimination

Employer Shows:
Legitimate non-discriminatory reason for its
actions
Employee Shows:

Pretext
1. Employers reason is pre-textual inconsistencies and contradictions
2. Can’t just disagree with employer’s decision
3. Pretext permits, but does not compel, finding of intentional discrimination

Mixed Motives

Employee shows:
- Impermissible factor was a “motivating factor”
- Can show by either direct evidence or circumstantial evidence

Employer shows:
- Employment decision would have been made even if impermissible factor played no role in decision

Disparate Impact

Employee shows:

a. Employer uses a particular policy or practice

b. Policy or practice causes a disparate impact on one of the protected classes
Disparate Impact (cont.)
Employer defends by showing:

a. Policy or practice is job related
b. Consistent with business necessity

Employee can overcome defense by showing alternative employment practice which employer refuses to adopt

 Discrimination Prohibitions

Federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not extremely serious

Title VII/Discrimination Statutes

Do not set forth a general civility code for the American workplace\textsuperscript{12}

Judicial standards for sexual harassment must filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing\textsuperscript{13}
Hostile Work Environment
• Behavior which creates an intimidating, hostile, or offensive working environment or unreasonably interferes with the individuals work performance, or
• Results in a tangible employment action such as hiring, firing, promotion, constructive discharge or demotion

Harassment/Discrimination can be Same Sex\textsuperscript{12}
Sex discrimination can be male on female, female on male, male on male, or female on female
Key: was the discriminatory behavior “because of sex”

Language Matters
Professor referred to student as Monica Lewinsky in classroom;
“How was your weekend with Bill?”
“Shut up, Monica. I’ll give you a cigar later.”
Enough to support a Title IX and 1983 actions
Case was allowed to proceed,
Court of Appeals ruled that Professor may be individually liable under 1983\textsuperscript{14}
Because of lack of knowledge, SUNY defendants were dismissed under Title IX
TITLE IX

Gender may not be used in decision regarding admission to school

Gender Plus case, children, military

Applying to veterinary school
6 times application rejected
Denied without an interview 4 times
Interviewed twice

TITLE IX (cont.)

2002: Rejected, no interview, told to strengthen her application by completing a Masters in biology

2003: Rejected, no interview, told to discuss husband's active duty status in military to explain relocations

TITLE IX (cont.)

2004: Interview, Masters completed, has a baby, included information on her husband's military status, interviewed, "a lot on her plate" "what would you do if husband suddenly deployed," raised child care issues, noted on form family situation, mother of young children, husband on active duty
Student representative told her "probably would not waste a spot on a woman who has a baby and a husband on active duty"
TITLE IX (cont.)

2005: Rejected, no interview, "what have you done to improve your application;" research recently published in major scientific journal, teach basic science courses at college level, advisor again suggested that she note "stay at home mother," and explain her marital and parental status in application

TITLE IX (cont.)

2006: Interview, "she would be at school with two young children;" "concerns about how she'll do in school esp. w/family etc." "tough row to hoe" "time to fish or cut bait" discussed military career of husband, issues with family support, improved application by taking Calculus - "A", volunteered at a small animal vet; taught basic science labs at Temple University

TITLE IX (cont.)

Key: Key male applicants not told to improve application by showing interest in field of veterinary medicine; all had similar GRE scores and grades

Court said enough to go to jury on Title IX gender discrimination
Reverse Discrimination

Philadelphia School District sued by four white male purchasing managers terminated by female supervisor, Kimberly Sangster

"Too many white male managers" in Procurement Department

Fired 4 white males, but hired new managers less qualified, first 7 hires African Americans

At first meeting kept track of attendees race

Employer Liability

Vicarious liability for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee

Defense Only When No Tangible Employment Action

Employer may raise an affirmative defense

1. Employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, (policy and investigation)
Defense

2. Employee unreasonable failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise (failed to report or utilize the employer’s policy/procedure)

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CAT’S PAW LIABILITY

Low-level supervisor intends to discriminate

Low-level supervisor disciplines USERRA Protected employee

Upper level employee reviews employee’s File and based in part on documentation Put in the file by low level supervisor decides to terminate employee

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CAT’S PAW LIABILITY

At termination employee says discipline and violation was fabricated, low level supervisor out to get me because of military leave

No investigation was performed, didn’t review decision to terminate
CAT’S PAW LIABILITY

- Intent to discriminate
- Adverse employment act intended
- Act of discrimination was the proximate cause of employment action

Relief Available

1. Back Pay
2. Front Pay
3. Compensatory Damages
4. Punitive/Liquidated Damages
5. Reinstatement
6. Injunctive Relief

Limitations on Damages

If unlawful intentional sex discrimination (Not disparate impact)
Provided that the complaining party cannot recover under § 1981
Complaining party may recover compensatory and punitive damages
Caveat: No punitive damages against government, government agencies and political subdivisions
Limitations on Damages (cont.)

14 to 100 employees, $50,000
101 to 200 employees, $100,000
201 to 500 employees, $200,000
501 or more employees, $300,000

Counting employees – in each of 20 or more
calendar weeks in the current or preceding
calendar year

UCO Equal Employment Opportunity20

Inclusive educational and employment
environment that provides equal opportunity and
access to qualified persons . . . without
discrimination or harassment because of . . .
gender, marital status, . . . sexual orientation,
gender identity, . . .

Sexual Harassment Policy21

Commitment to ensuring an environment for
employees and students which is fair, humane and
respectful;

Behaviors which inappropriately assert sexuality as
relevant to employee or student performance are
damaging

Sexual harassment by faculty is a violation of board
policy and will not be tolerated
Sexual Harassment Policy\textsuperscript{21}  
(cont.)

Applies to students, faculty and staff;

Any member of the university committee

Sexual Harassment Policy\textsuperscript{21}  
(cont.)

Employment and academic decisions must be made purely on ability and qualifications related to job and academic performance

Academic community should support principle that sexual exploitation of professional relationships will not be condoned

Sexual Harassment Policy\textsuperscript{21}  
(cont.)

Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:
Sexual Harassment Policy (cont.)

1. Submission is either explicit or implicit term or condition of employment or academic standing

2. Submission or rejection of conduct is used as basis for employment decision or academic standing

3. Conduct has purpose or effect of unreasonable interfering with work environment, creates an intimidating, hostile or offensive work environment or academic environment

Examples of Prohibited Conduct

- Unwelcome flirtation, advances, propositions for sexual activity
- Continued or repeated verbal abuse of sexual nature, sexually explicit jokes
- Sexually degrading language
- Coerced sexual intercourse
- Actions indicating benefits will be gained or lost based on response to sexual advances

Examples of Prohibited Conduct (cont.)

- Continuing to express sexual interest after being informed that the interest is unwelcome
- Reprisals, or threats of reprisals following a negative response
- Offering educational or employment favors in exchange for sex
Ethical Principals

- Responsibility to students
- Respect for students
- Adhere to proper role as intellectual guides and counselors
- Faculty make every reasonable effort to foster honest academic conduct and to assure that their evaluations reflect true merit
- Faculty does not exploit students for private advantage

Ethical Principals – Unacceptable Conduct

- Avoid situations where faculty members may be affected by relationships or associations, i.e. sexual relationships
- Unacceptable conduct includes evaluation of student work by criteria not directly reflective of course performance
- Discrimination for or against a student for reasons of gender
- Use of position or powers of faculty in a manner that would violate the sexual harassment policy

UCO Complaint Procedure in Cases of Unlawful Discrimination or Harassment

Restates the EEO policy “fair and equal employment and educational practices” without discrimination because of:
- Gender
- Marital status
- Sexual orientation
- Gender identity
- Any other protected characteristic
Complaint may be made by:

- Employee (faculty or staff)
- Student
- Applicant (employment or admission)
- Visitor
- Non-affiliated individual

UCO will investigate

- Fair and impartial investigation
- No retaliation for making a complaint or cooperating in an investigation

Reporting of Harassment/Discrimination:

Coordinators of Investigation

Brad Morelli, Affirmative Action Officer,
Director of Equal Opportunity/Title IX/ Title VII/ 504 Complaint Coordinator
Elizabeth H. Kerr, Deputy Affirmative Action Officer,
Deputy Director of Equal Opportunity/Title IX/ Title VII 504 Complaint Deputy Coordinator
114 Lillard Admin. Building, 100 N. University Dr.
Phone: (405) 974-3377 Fax: (405) 974-3807
After hours: University Police (405) 974-2345
bmorelli@uco.edu ekerr@uco.edu
Initiating a complaint

Applies to complaints of sex discrimination

Applies to the following individuals:

Employees, students, applicants for employment/admission, visitor or other non-affiliated individual, to offices identified above

Initiating a complaint (cont.)

Initiate complaint by in person, meeting, or writing

Complaint includes dates, places, individuals’ names, efforts to informally address situation, results, any pertinent information

Additional Faculty or Staff Reporting Options

Office of Student Conduct

Human Resources Department

Dean of college where harassment or discrimination allegedly occurred
Offsite Locations:
Report complaints to any of the above, or to on-site director

After hours complaints/Holidays:
UCO Police Services (405) 974-2345

RUSO* Tip Line:
EthicsPoint
Anonymous submissions
www.ruso.ethicspoint.com

*Regional University System of Oklahoma

EthicsPoint (cont.)
Employee, student, applicant, visitor, or other affiliated individual
Report by calling (866) 898-8438
EthicsPoint Contact Center Specialist will facilitate call
EthicsPoint forwards information to UCO, who conducts investigation
Investigation/Resolution of Complaints

Coordinator/Deputy Coordinator designate person to do investigation

If student is complainant – will be investigated and resolved by Office of Student Conduct

Investigation/Resolution of Complaints (cont.)

Notice and opportunity to respond to those alleged to have committed discrimination or harassment;
Meet with parties, interview witnesses, request written statements

Investigation/Resolution of Complaints (cont.)

Attempt to complete investigation within 60 days of receipt of complaint, if not complete provide a status of investigation within 60 days of receipt of complaint

Confidential record will be maintained – Coordinator/Deputy Coordinator
Complaints against Faculty Members

Should be referred to Dean, Coordinator or Deputy Coordinator, investigation rules apply

If involves grades, will be referred to UCO policy on this issue

Complaints against Faculty Members (cont.)

Investigator will provide findings and conclusions in writing to University Provost, Coordinator and Deputy Coordinator

Provost charged with decision regarding appropriate action

Complaints against Staff Members

Human Resources Department, Coordinator or Deputy Coordinator, investigation rules apply

Investigator provides findings and conclusions in writing to Executive Vice President, Coordinator and Deputy Coordinator

Executive Vice President determines appropriate action
Confidentiality
Reasonable effort to protect privacy and confidentiality, consistent with need to investigate complaint; no complete confidentiality Inform that complete confidentiality cannot be promised Refer to EAP, and Student Counseling, not reporting a complaint though if only go to EAP or Student Counseling

Required Procedures
This procedure is the Title IX grievance procedure

Retaliation is Prohibited\textsuperscript{24}
Individuals who:
- Report Discrimination or Unethical behavior
- Participate in an investigation of such reports
- Sustained a workers compensation injury
- Request FMLA
Retaliation (cont.)

Obligation to Report Retaliation Promptly

Failure to report can be basis for disciplinary action

Workplace Relationships\textsuperscript{25}

Romantic or Sexual Relationship between employees, supervisor/manager can create difficulties

If the relationship occurs such that it violates the anti-nepotism policy\textsuperscript{25}
  a. create supervisor/subordinate relationship
  b. both working in same reporting structure
  c. actual conflict or appearance of a conflict

Workplace Relationships (cont.)

- Duty to disclose relationship
- If a manager or supervisor involved, mandatory that they report it
- Upon disclosure, UCO will take all appropriate steps to bring into compliance
Questions & Answers
bjmaule@phillipsmurrah.com
(405) 552-2453

THE END