Manager Training
Worcester Polytechnic Institute

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Supervisors as Responsible Employees under Title IX
Responsible Employees

OCR deems a school to have direct notice of student on student sexual violence when a responsible employee knows or reasonably should know of possible sexual violence.

A responsible employee is any employee who:

• has the authority to take action to redress sexual violence;
• has been given the duty of reporting incidents of sexual violence or any other misconduct by students; or
• a student could reasonably believe has this authority or duty.
• WPI considers all employees to be responsible employees.
Responsible Employee

Reporting Obligations:

A responsible employee must report to the Title IX coordinator all relevant details about the alleged sexual violence that the student or another person has shared including:

- Name of the alleged perpetrator (if known)
- Name of the student who experienced the alleged sexual violence
- Other students involved in the alleged sexual violence
- Date, time, and location of alleged sexual violence
- All other relevant facts regarding the alleged sexual violence
Before a student reveals information that he or she may wish to keep confidential, a responsible employee should make every effort to ensure that the student understands the following:

1. the employee’s obligation to report the names of the alleged perpetrator and student involved in the alleged SV, and all relevant facts regarding the alleged incident to the Title IX coordinator or other appropriate school officials;
2. the student’s option to request that the school maintain his or her confidentiality, which the school will consider; and
3. the student’s ability to share the information confidentially with staff within the Student Development and Counseling Center and the Student Health and Wellness Office.
Confidentiality Complexity

- Schools should inform and obtain consent from the complainant...before beginning an investigation (DCL)
- OCR strongly supports a student’s interest in confidentiality in cases involving sexual violence (Q&A)
- There are situations in which a school must override a student’s request for confidentiality in order to meet its Title IX obligations (Q&A)
- Disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence (Q&A)
- “Doing nothing is always the wrong response” (Q&A)
Confidentiality Complexity

If a student requests his/her name not be revealed to the alleged perpetrator or that the school not investigate or seek action against the alleged perpetrator, the school should:

1. Inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator.

2. Explain to the student that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

If the student still insists, the school must:

3. Determine if it can honor the request while still providing a safe and nondiscriminatory environment for all students, including the student who reported the sexual violence.
Confidentiality Complexity

Factors WPI will consider in weighing a student’s request:

• Prior SV complaints against alleged perpetrator
• Alleged perpetrator has a history of arrests or records from a prior school indicating a history of violence
• Alleged perpetrator threatened further SV or other violence against the student or others
• The SV was committed by multiple perpetrators
• Student’s report reveals a pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group.
• The SV was perpetrated with a weapon
• Other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence).
• The respective ages of the parties
An assistant coach has a cup of coffee with a male athlete and informs the coach about a conversation the male athlete had with a small group of four or five friends (male and female) the previous evening. A female athlete in the group reported that she was date drugged and thinks she was sexually assaulted by a well-known male athlete who is a senior and about to graduate. She did not specify where or when the alleged assault took place and asked her friends not to tell anyone. The assistant coach corroborates that he has heard similar rumors about the alleged perpetrator in the past but “nothing too specific.” What should the coach do?

a) Nothing because it is third-hand, inconclusive information and the female student asked her friends to keep the information confidential.

b) Ask the male athlete to provide you with all of the details he received so that you can report the incident to the Title IX Coordinator.

c) Confront the alleged perpetrator so you can determine whether there is anything to the story.

d) Ask the assistant coach for the identity of the alleged victim/survivor and arrange to reach out to her.
Title IX Incident Report/Checklist

(See Handout)
You Get the Green Light

• Listen, Support and Understand that she may be in distress and will be dealing with a wide array of strong, and sometimes overwhelming, feelings.

• Resist the impulse to reassure or minimize. Saying things such as “It could have been worse” may easily be interpreted as suggesting that you are minimizing or trivializing their experience. Telling the student “It will be okay” might come across as having a lack of understanding, and is a promise you cannot make. What can you say? “I’m sorry this happened to you,” or “How may I help?”
You Get the Green Light (cont.)

• Don’t blame the individual for her decisions; whether she ran out, remained, had a drink or two, stayed out late – do not communicate your opinion about what the student was doing at the time. Asking questions about “why” may come across as if you are blaming the victim. (“Why were you sitting on the bed?” “Why didn’t you just run out?” “Why have you waited so long to tell anyone?”)

• Don’t promise an outcome. Saying things like “We’ll get him expelled, I promise” might set the student up for an expectation that is not met.
Consent Complexities

- Words or activities which indicate a willingness to participate in specific sexual activity
- Alcohol (Drugs)
  Intoxicated ≠ Incapacitated
- Inability to make informed, rational judgments and decisions
- When drugs or alcohol are involved, incapacitation should be measured by evaluating how the substances affect:
  - Decision-making capacity
  - Awareness
  - Ability to make informed judgments
Consent Complexities (cont.)

• Amorous relationships – even if consensual – between a WPI faculty or staff member and any person for whom he or she has a professional, supervisory or advisory responsibility (for example, professor/student, supervisor/supervisee, coach/athlete, advisor/student) are inappropriate and should be avoided. Implicit in the area of professionalism is the recognition by those in positions of authority that in their relationships with those whom they supervise there is always an element of power and consent to a romantic relationship may not be valid where either person has direct or indirect power or control over any aspect of the other person’s academic or employment environment (emphasis added).
A female student working in the Facilities Department office on work-study becomes friendly with one of her supervisors. She confides in the supervisor that, approximately one week earlier, she had sexual intercourse with a male resident whom she had met at a party that evening through a mutual friend. She admits that both she and he were drinking alcohol before and during the incident. She reported that she did not want to have sex with him at the time but was too afraid to say “no” because he might become angry or tell his friends about the incident.

Is this:

a) Sexual Assault
b) Sexual Violence
c) Consensual Sex
d) Can’t Tell
Common Title IX Scenario

• Part 1:

Mike and Elle, both freshmen, are part of a group of friends out for an evening of drinking. After, Mike walks Elle back to her dorm. Before leaving, he invites Elle to come visit him at his dorm room if she is interested. Thirty minutes later, she knocks on his door. The two have sex. The next day Elle texts Mike and invites him to dinner. Elle expresses her desire to continue their relationship. Mike is cool to the idea. Five days later, Elle, a work study student in the Registrar’s Office, tells the story to her Supervisor. Elle acknowledges that both she and Mike had been drinking, but she is now upset and embarrassed, and wonders whether to make an issue of it. What, if anything, does the Supervisor do now?
Common Title IX Scenario (cont.)

• Part 2:

Mike also works in the Registrar’s Office and notices that Elle is refusing to talk or interact with him. Mike confides in the same Supervisor and reports that Elle used to like him and one night took advantage of him when he was too drunk to protest. Mike wonders out loud whether he should report this to anyone. The Supervisor did not report his earlier conversation with Elle because he believed there was consensual sex. What does the Supervisor do now?
Harassment Awareness and Prevention
WHY SHOULD YOU CARE?

- Workplace policies prohibit unlawful discrimination and harassment, violations can result in termination.
- You are the eyes and ears of the University and the first line of defense.
- Workplace morale affects everyone.
- You can be sued individually.
Individual Liability of Managers/Supervisors

- It is unlawful for any person, whether an employee or an employer, to aid or abet any acts forbidden under the Massachusetts discrimination statutes. G.L. c 151B, Section 4(5).

- Active harassment/discrimination by a supervisor is obviously actionable.

- However, non-action by a supervisory employee can be a basis for Chapter 151B liability.

“A deaf ear from management may contribute to and encourage the hostility of the workplace, creating an impression that employees may engage in sexual harassment or discrimination with impunity.” (Chapin v. University of Massachusetts at Lowell.)
WHAT IS DISCRIMINATION?

Federal and State law protect individuals from conduct in the workplace based on membership in a **protected class** that negatively impacts the terms or conditions of employment or unreasonably interferes with work performance.

*Title VII and state equivalents*
PROTECTED CLASSIFICATION EXAMPLES

- Race
- Color
- Gender
- Age (40 and over)
- Religion/Creed
- National Origin
- Military Service
- Sexual Orientation
- Sexual Identity
- Disability (actual or perceived)
Complaints Filed With the MCAD - By Protected Category

COMPLAINTS: FILED BY PROTECTED CATEGORY IN 2014

<table>
<thead>
<tr>
<th>Complaints Filed by Protected Category</th>
<th>Count</th>
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<tr>
<td>Disability</td>
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<td>Retaliation</td>
<td>911</td>
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<tr>
<td>Creed</td>
<td>98</td>
</tr>
<tr>
<td>Children</td>
<td>57</td>
</tr>
</tbody>
</table>

*Arrest Record, Familial, Gender Identity, Genetic Information, Lead Paint, Marital Status, Military Status, Public Assistance.
SEXUAL HARRASSMENT
INVESTIGATION AND RESPONSE

- Contact HR
- Investigate promptly
- Interview Complainant
- Collect Evidence (e.g. documents)
- Focus on Behavior and Language – get details
INVESTIGATION AND RESPONSE

- Interview Alleged Harasser
- Emphasize non-retaliation
- Interview Witnesses
- Document Investigation
- Reach a Conclusion
- Take Appropriate Corrective Action
- Inform Complainant
PREVENTION

• **OBSERVE** how conduct is being received by others. Should you be stepping in?

• **OBSERVE** what is going on in your workplace and report troublesome conduct

• **COMMUNICATE** to others when they are engaging in objectionable conduct

• **COMMUNICATE** any concerns or complaints of sexual or other harassment to your *boss and* Human Resources
PREVENTION

• Set the example
• Enforce appropriate standards of behavior
• Express immediate disapproval of inappropriate conduct
• Talk with employees privately about expectations for professional behavior
• Remind employees of harassment and discrimination policies
RESPONDING

- Respond regardless of whether you receive an explicit complaint
- Respond regardless of the source of the information
- Respond to information that sounds at all like there could be sexual or other harassment
- Document your steps
RESPONDING – What NOT to Say

- It’s just a joke. Lighten up!
- I know he/she didn’t mean anything like that.
- It’s your fault for dressing so provocatively.
- You need to learn to handle these things.
- Just ignore it.
- He puts his arms around everyone.
- Can’t you accept a compliment?
RESPONDING – What NOT to Say

- That’s how we do things around here.
- We’ve never had a complaint, so we don’t have a problem.
- This kind of behavior is all part of growing up.
- We are not in an office environment, you have to expect gruff behavior.
- If we had to discipline everyone who did that we’d never get anything else done.
Protecting Yourself and Preventing Unlawful Conduct

The following checklist can be used to examine behavior:

- Does this behavior contribute to achieving our goals?
- Could this behavior hurt my colleagues or employees?
- Could this behavior be sending out signals that invite harassing behavior on the part of others?
- Would you say it in front of your spouse, parent, or child?
- Would you say it if you were going to be quoted on the front page of the newspaper?
- Would you say/act the same way to a member of your same gender?
- Why does it need to be said at all?
RETAIIATION
The law and WPI policy also protects individuals who engage in *protected activity* from *retaliation* – a form of discrimination.
Retaliation Refresher

Plaintiff must show:

1. Protected activity;
2. The University knew of the protected activity;
3. An adverse employment action;
4. A causal connection existed between the protected conduct and the adverse action.
Protected Activity

Protected Activity includes:

• Filing or threatening to file a claim, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing concerning an employment discrimination;
• Complaining to anyone about discrimination against oneself or others;
• Requesting reasonable accommodation of a disability or religion; and
• Opposing or reporting an illegal or fraudulent practice, unsafe work conditions, whistle blower activity.
Adverse Employment Action

Examples

• Any form of discipline or reprimand
• Negative evaluations
• Avoiding, ignoring or giving the employee the cold shoulder
• Treating them in an angry or hostile manner
•Calling them stupid
Causal Connection

“Timing is Everything”

Direct Evidence of the Causal Connection is NOT required.

Circumstantial Evidence is Enough.

“Temporal Proximity” Between the Employee’s Protected Activity and the Adverse Employment Action is Evidence of a Causal Connection.
Retaliation

**IMPORTANT**

Employees are protected from retaliation even if their complaint, i.e., protected activity, is found to be baseless.

Retaliation Claim Succeeds Despite Ruling Of No Bias

By Meghan S. Laska

A black employee who was fired after complaining that he did not get promoted because of his race could sue his employer for retaliation even though there was no finding of bias, an MCAD commissioner has ruled.

The employee argued that his termination was in retaliation for complaining that the failure to promote him was based on discrimination.
Hypothetical #1

Sarah, an employee working in the Library Archives, reports to you that she is concerned about the air quality in the building where she works. Unbeknownst to you, she has also filed a complaint with OSHA the day before.

- Has Sarah engaged in protected conduct?

Sarah’s performance had been declining over the months prior to her report, and you spoke to her about needing to improve her performance, though you never got around to issuing her a PIP, which you finally finished yesterday and had planned to give to her today.

- Do you give Sarah the PIP? Why or why not?
Americans with Disabilities Act ("ADA")
Employers must provide accommodations to qualified employees with disabilities unless it would cause an undue hardship.

An employee who cannot perform the essential functions of a job with or without an accommodation is not a qualified employee.

An employer is not required to eliminate an essential job function as an accommodation.
Essential functions of a job are defined as:

- The duties the employee is required to actually perform.
- The duties that are fundamental and not marginal.

Some indications that a function is essential are:

- The position exists to perform that function;
- There are a limited number of other employees available to perform the function, or among whom the function can be distributed;
- The function is highly specialized;
- The function is identified in the written job description.
The duty to provide a reasonable accommodation requires an employer to participate in an interactive dialogue with a disabled employee who requests an accommodation. Even if an employee has not requested a reasonable accommodation, an employer’s duty to offer an accommodation and engage in the interactive process is triggered if the employer knows or should have known that the employee is disabled and requires accommodation. Failure to engage in the interactive process may be a violation even though it would have been an exercise in futility.
COMMON SUPERVISOR ISSUES
  • DISCIPLINE
  • DOCUMENTATION
Personnel Records Law

Under Massachusetts law, an employer must “notify an employee within 10 days of the employer placing in the employee’s personnel record any information to the extent that the information is, has been used, or may be used, to negatively affect the employee’s qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action.”
Personnel Records Law

*Remember . . .*

- A “personnel record” under the statute is not just an employee’s personnel file kept by the employer’s Human Resources Department.

- It may include any record kept by an employer - even supervisor notes - if the record is used, or may be used, by an employer regarding terms and conditions of an employee’s employment.
Enforcement/Penalties

• The Attorney General enforces the statute and can seek fines of between $500 and $2,500 for each violation.

• But plaintiffs will seek to prevent an employer from using such records in subsequent court, agency, or arbitration proceedings if there is a violation.
Six Steps to Success in the Handling of Discipline

1. Knowledge of Rules
2. Reasonable Rules
3. Fair Investigation Before Discipline
4. Consistency
5. Reasonableness of Discipline
6. Progressive Discipline
1. Knowledge of Rules

Ensure that all policies are communicated and understood by employees. Did the employer give the employee adequate forewarning or should the employee in any case have known of the possible or probable disciplinary consequences of the employee’s conduct?
2. Reasonable Rules

Was the supervisor’s directive, whether an oral or written rule or order or assignment, reasonably related to the orderly, efficient and safe operation of the employer’s business?
Before administering discipline to an employee, ensure that (a) there has been a full and fair investigation and (b) there was substantial evidence or proof that the employee did, in fact, commit the alleged offense?
4. Consistency

Has the employer applied its rules, orders and penalties evenhandedly and without discrimination to all employees? Enforce rules uniformly and consistently.
5. **Reasonableness of Discipline**

Was the degree of discipline administered by the employer in a particular case reasonably related to the seriousness of the employee’s proven offense under all of the circumstances of the case?
6. Progressive Discipline

*Progressive Discipline*
The principles of Progressive Discipline apply at WPI. Afford employees a reasonable opportunity to correct any deficiency cited before taking adverse action.

*Positive Discipline*
Incorporate a constructive or positive approach to the traditional system of ever-increasing penalties.
Positive Discipline Steps

**Identify** the specific problem in terms of desired and actual behavior.

**Analyze** the problem in terms of the good business reasons why it must be solved and the consequences the employee will face if it isn’t.

**Discuss** the problem and gain the employee’s commitment to change.

**Document** the specific problem, the history of the situation, and the key points that arose during the discussion.

**Follow-Up** to make sure the problem has been corrected.
Key Points of Documentation

1. Describe the **PROBLEM**.

2. Describe the **HISTORY**.

3. Describe the **DISCUSSION**.
1. **Describe the Problem**

When *describing the problem*:

- Use facts and specifics, not generalities or judgments.
- Compare and contrast to desired performance.
2. Describe the History

When **describing the history of the problem:**

- State how long the problem has existed.
- Refer to earlier informal discussions and any disciplinary steps that preceded the current discussion with the employee.
- Indicate that the employee has failed to live up to the agreement made earlier to correct the situation.
3. Describe the Discussion

When describing the disciplinary conversation:

- Indicate the date, time and location of the conversation.
- Record specific comments and statements made by the employee.
- Reflect the employee’s agreement to change.
- In those rare instances where you are unable to gain the employee’s agreement to change, indicate what compliance standard you mandated.
- Indicate how performance will be evaluated after the conversation.