



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

400 MARYLAND AVENUE, SW
WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, DC

December 7, 2018

XXXXX

Dr. Gregory T. DeCinque
President
Tidewater Community College
121 College Place
Norfolk, Virginia 23510

RE: OCR Complaint No. 11-18-2196
Resolution Letter

Dear Dr. DeCinque:

This letter is to advise you of the outcome of the complaint that the Office for Civil Rights (OCR) of the U.S. Department of Education (the Department) received XXXXX, against Tidewater Community College (the College). This letter confirms that the College has voluntarily signed a Resolution Agreement (Agreement) to resolve this complaint.

The Complainant alleged that the College discriminated against her on the basis of race, age, and disability, and retaliated against her for raising concerns with regard to the discrimination. Specifically, the Complainant alleged that XXXXX, an instructor:

- 1) Made racially discriminatory statements in front of the whole class during every class session;
- 2) Made age-related discriminatory statements in front of the whole class on multiple occasions;
- 3) Denied the Complainant accommodations that had been approved and were on her accommodations sheet; and
- 4) Retaliated against the Complainant by giving her a failing grade in the course.¹

OCR enforces the following federal laws that prohibit discrimination in programs and/or activities that receive Federal financial assistance from the Department:

- Title VI of the Civil Rights Act of 1964 (Title VI) and its implementing regulation at 34 C.F.R. Part 100, which prohibit discrimination on the basis of race, color, or national origin;
- the Age Discrimination Act of 1975 (the Age Act) and its implementing regulation at 34 C.F.R. Part 110, which prohibit discrimination on the basis of age; and

¹ XXXXX

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

- Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulation at 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability.

OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II) and its implementing regulation at 28 C.F.R. Part 35, which prohibit discrimination against qualified individuals with disabilities by public entities, including public education systems and institutions, regardless of whether they receive Federal financial assistance from the Department. The laws enforced by OCR prohibit retaliation against any individual who asserts rights or privileges under these laws or who files a complaint, testifies, assists, or participates in a proceeding under these laws. Because the College receives Federal financial assistance from the Department and is a public entity, OCR has jurisdiction over it pursuant to Section 504, Title II, Title VI, and the Age Act.

On XXXXX, OCR sent notification letters to the parties informing them that the complaint was being opened and referred to the Federal Mediation and Conciliation Service (FMCS) for attempted mediation between the parties as required by the regulation implementing the Age Act. Because the allegations of race and disability discrimination and retaliation were related to the age discrimination allegation, OCR forwarded the entire complaint to FMCS. The complaint was returned to OCR from FMCS unresolved. On XXXXX, OCR resumed our investigation of the complaint and sent a data request to the College. On XXXXX, the College provided OCR with a complete response to OCR's data request. OCR then conducted interviews. OCR also obtained information from the Complainant. Below is an analysis of the evidence obtained to date. Prior to the completion of OCR's investigation, the College expressed a willingness to resolve the complaint by taking the steps set out in the enclosed Resolution Agreement.

Background

XXXX

Allegation 1: XXXXX, an instructor made racially discriminatory statements in front of the whole class during every class session.

Legal Standard

A college's failure to respond promptly and effectively to racial harassment that it knew or should have known about, and that is sufficiently serious that it creates a hostile environment, is a form of discrimination prohibited by Title VI. A college may also violate Title VI if an employee engages in racial harassment of students in the context of the employee carrying out his/her responsibility to provide benefits and services, regardless of whether the college had notice of the employee's behavior. Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; physical conduct; or other conduct that may be physically threatening, harmful, or humiliating. Harassment creates a hostile environment when the conduct is sufficiently severe or pervasive as to interfere with or limit a student's ability to participate in or benefit from the college's programs, activities, or services. When such harassment is based on race, it violates Title VI.

To determine whether a hostile environment exists, OCR considers the totality of the circumstances from both an objective and subjective perspective and examines the context, nature, scope, frequency, duration, and location of incidents, as well as the identity, number, and relationships of the persons involved. Harassment must consist of more than casual, isolated incidents to constitute a hostile environment.

When responding to harassment, a college must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a college must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

Analysis

The Complainant alleged that the Instructor made derogatory statements about black people during every class session and did not make similar statements about other races. The Complainant XXXXX said the statements negatively impacted her ability to learn and upset her to the point that her physical health was affected. She said she did not feel comfortable returning to the Program and having the Instructor teach another class XXXXX

When OCR interviewed the Instructor, he denied that he made several of the alleged comments and said that others were taken out of context. He stated that he discussed cultural differences during the diversity chapter and that many of his examples were to teach the students about cultural awareness.

The Complainant filed an internal discrimination complaint that was investigated by the Dean of Student Services. OCR received and reviewed the two witness statements from other students that corroborated the Complainant's allegations and internal investigation notes from interviews with the Complainant, the Instructor, several other students, and another faculty member that the Complainant had spoken with about her concerns. OCR also interviewed the Dean of Student Services about the internal investigation and reviewed letters to the Complainant and the Instructor explaining the outcome of the investigation. XXXXX

Before OCR could conduct further investigation by interviewing the students in the class and any other witnesses, the College expressed a willingness to resolve the complaint through a voluntary agreement.

XXXXX The Agreement thus requires the College to continue to provide anti-harassment and non-discrimination training to all Program faculty and staff XXXXX.

Additionally, to address OCR's concerns regarding Allegation 1, the Agreement requires the College to provide the Complainant with the option of not taking any classes with the Instructor if she chooses to reenroll in the Program XXXXX and to identify a staff member who will serve

as the Complainant's point of contact for any concerns of discrimination, harassment, and retaliation by faculty or staff. The Agreement also requires the College to revise its policies and procedures to include revised definitions of discrimination and harassment and the definition of hostile environment and to provide training to relevant staff on the revised discrimination and harassment policies as well as how to investigate complaints involving discrimination and harassment.

Allegation 2: XXXXX, an instructor made age-related discriminatory statements in front of the whole class on multiple occasions.

Legal Standard

The Age Act regulation, at 34 C.F.R. § 110.10(a), provides that no person shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under a college's programs or activities on the basis of age.

When investigating an allegation of different treatment, OCR first determines whether there is sufficient evidence to establish an initial, or prima facie, case of discrimination. Specifically, OCR determines whether the college treated the complainant less favorably than similarly situated individuals of a different age group. If so, OCR then determines whether the college had a legitimate, nondiscriminatory reason for the different treatment. Finally, OCR determines whether the reason given by the college is a pretext, or excuse, for unlawful discrimination.

Analysis

The Complainant alleged that Instructor treated her and the XXXXX older students in the class differently by making derogatory statements about them during several class sessions. As an example, she told OCR that the Instructor said several times that older students XXXXX are not like the rest of the students and it is harder for them to learn. When the Complainant met with the Instructor in his office, he stated that all she may ever be is XXXXX because she was old and it might be too hard for her to learn and understand the material. She believed that his attitude caused him to treat her differently than students who were younger and that he discouraged her from asking questions in class. The Instructor told OCR that he did not recall making any statements about older students; he said there are sometimes different challenges regarding technology, but he did not believe or act as if older students are harder to teach. It is unclear as to whether the Complainant asserted any age-based allegations to the College; she told OCR that she thinks she did and the Dean of Students did recall the Complainant talking about age-related comments made by the Instructor, but there are no age-based allegations in the Complainant's written internal discrimination complaint.

Before OCR could conduct further investigation by interviewing the students in the class and any other witnesses, the College expressed a willingness to resolve the complaint through a voluntary agreement. XXXXX OCR notes that the College's presentation included several slides specifically on age-based perceptions and treatment. In addition, to address OCR's concerns regarding Allegation 2, the Agreement requires the College to provide the Complainant with the option of not taking any classes with the Instructor and having a point of contact at the College.

Allegation 3: XXXXX, an instructor denied the Complainant accommodations that had been approved and were on her accommodations sheet.

Legal Standard

The Section 504 regulation, at 34 C.F.R. § 104.43(a), provides that a qualified person with a disability may not be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any postsecondary aids, benefits, or services on the basis of disability. The regulation at § 104.44(a) requires a college to modify its academic requirements as necessary to ensure that such requirements do not discriminate or have the effect of discriminating on the basis of disability against a qualified student with a disability. The regulation at § 104.44(d) requires a college to ensure that no qualified individual with a disability is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills. OCR interprets the Title II regulation to require public colleges to provide academic adjustments and auxiliary aids to the same extent as required under Section 504.

Colleges may establish reasonable requirements and procedures for students to provide documentation of their disability and request academic adjustments and auxiliary aids and services. Students are responsible for obtaining disability documentation and for knowing and following the procedures established by the college. Once the student has provided adequate notice and documentation of his/her disability and the need for modifications due to the disability, the college must provide the student with appropriate academic adjustments and auxiliary aids and services that are necessary to afford the student an equal opportunity to participate in a school's program. However, the college is not required to make adjustments or provide aids or services that would result in a fundamental alteration of the college's program or impose an undue burden.

Analysis

The Complainant alleged that the Instructor did not allow anyone to record his lectures even though she had an approved accommodation of being able to record lectures. Based on OCR's data review and interviews with the Complainant and College staff, OCR understands that on the first day of class, the Instructor announced that he does not allow his lectures to be recorded. Two days later the Complainant left a copy of her accommodations form for the Instructor. The Complainant and the Instructor signed the form, but the Instructor did not discuss the accommodations with her as he was supposed to pursuant to the College's process. The Instructor said that the Complainant never raised any issue with him about not being able to record the lectures and that when they met XXXXX The Complainant told OCR that she felt too intimidated by the Instructor to ask him whether she could record the lectures after she gave him her accommodations form XXXXX.

There is no evidence to indicate that the Complainant discussed her concern about not being able to record the lectures with the Office of Educational Accessibility until XXXXX after the course had ended. But, her assigned Educational Accessibility counselor was out on leave for some of

the term so she may have attempted to speak with someone but was unable to; the evidence is unclear.

After the Complainant failed the course, she filed an internal discrimination complaint and a grade appeal alleging among other things, that the Instructor denied her accommodation to record lectures and that she was denied her testing accommodations for the first math test. The outcome of the internal discrimination complaint provided no remedy for the Complainant because the findings were that while the Instructor failed to provide testing accommodations on the first test, which the Complainant passed, there was no evidence that the Complainant “personally requested to tape record [her] lectures based on [her] Accommodation Sheet on XXXXX nor is there any evidence [she] spoke with [her] Educational Accessibility Counselor in regard to the taped lecture.” Her grade appeal was denied by the Interim Dean but decided in her favor by the grade appeal committee. The Complainant was notified XXXXX of the College’s decision to delete her grade from the course and offer her a refund.

During the grade appeal process, the Complainant was of the understanding that she would have to discuss her disability and accommodations with a panel of her peers. Eventually, after she raised a concern with the Provost, it was decided that the Complainant could speak with the Coordinator of Educational Accessibility and not have to discuss her disability and accommodations with the full panel of students and faculty. When asked whether there was a process in place to address similar situations moving forward, the Coordinator of Educational Accessibility said there was not. The Provost said that she would like to make it clear in the student handbook that students would not have to discuss their disability or accommodations with a grade appeal panel and instead could speak with the Coordinator of Educational Accessibility.

Before OCR completed its investigation, the College voluntarily agreed to address OCR’s concerns regarding Allegation 3 by revising its grade appeal procedure to clearly explain that students will not be required to discuss their disability or any accommodations in front of a panel of their peers. The College will also continue to provide disability services training to all staff and faculty of the Program.

Allegation 4: XXXXX, an instructor retaliated against the Complainant by giving her a failing grade in the course.

Legal Standard

The Title VI regulation, at 34 C.F.R. § 100.7(e), prohibits retaliation against any individual who asserts rights or privileges under Title VI or who files a complaint, testifies, assists, or participates in a proceeding under Title VI. Similarly, the Section 504 regulation, at 34 C.F.R. § 104.61, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Section 504 or who files a complaint, testifies, assists, or participates in a proceeding under Section 504. The Title II regulation, at 28 C.F.R. § 35.134, contains a similar prohibition against retaliation.

When analyzing a claim of retaliation, OCR will look at: 1) whether the complainant engaged in a protected activity (e.g., filed a complaint or asserted a right under a law OCR enforces); 2) whether the college took an adverse action against the complainant; and 3) whether there is a causal connection between the protected activity and the adverse action. If all these elements are present, this establishes an initial, or prima facie, case of retaliation. OCR then determines whether the college has a legitimate, non-retaliatory reason for its action. Finally, OCR examines whether the college's reason for its action is a pretext, or excuse, for unlawful retaliation.

Analysis

The Complainant alleged that the Instructor failed her XXXXX because she raised concerns with the Instructor regarding his allegedly racist statements. She explained to OCR that the Instructor changed the grades for other students by giving them additional points on their tests but unfairly graded her exams. The Instructor told OCR that he did change certain test grades for some students based on an item analysis of the test questions; some questions were invalidated and all students were given credit for them and other questions had more than one correct answer so some students received credit. The Instructor told OCR that he tried to explain to the Complainant that if she already received credit for a test question, then she was not going to receive extra points for that same test question, but that the Complainant did not seem to understand his explanation. The Complainant raised concerns about her test grades in her grade appeal letter as well, although she did not claim retaliation. The Interim Dean said she reviewed all of the test questions and found no grading errors.

Although it is clear that the Complainant had concerns about the Instructor's statements during the course, it is unclear whether she alleged race-based discrimination prior to receiving a failing grade or that the Instructor could have reasonably understood the Complainant's frustrations in the class to be based on his alleged racist behavior. But, assuming arguendo that the Complainant did engage in protected activity by asserting that she thought his statements were racist, OCR notes that the Instructor's action of giving her a failing grade in the course was adverse and that there could be a causal connection between the protected activity and the adverse action. The College stated that the legitimate, non-retaliatory reason was that the Complainant failed the course because she did not receive a high enough average on the three tests that were the key component of the grade for the class. Before OCR completed its investigation, the College voluntarily agreed to address OCR's concerns regarding Allegation 4 by offering an individual remedy, updating their policies and procedures, and conducting training.

Conclusion

Pursuant to Section 302 of OCR's *Case Processing Manual*, the College signed the enclosed Resolution Agreement on December 7, 2018 which, when fully implemented, will resolve the allegations raised in this complaint. The provisions of the Agreement are aligned with the allegations and issues raised by the Complainant and the information obtained during OCR's investigation, and are consistent with applicable law and regulation. The Agreement requires the College to: (1) provide the Complainant with two different course options if she chooses to

reenroll in the Program XXXXX and to identify a staff member who will serve as the Complainant's point of contact for any concerns of discrimination, harassment, and retaliation by faculty or staff; (2) revise its policies and procedures to include revised definitions of discrimination and harassment and the definition of a hostile environment; (3) revise its grade appeal procedure to explain that students will not be required to discuss their disability or any accommodations in front of a panel of their peers; (4) provide training to relevant staff on the revised discrimination and harassment policies and how to investigate complaints involving discrimination and harassment; and (5) continue to provide disability services training and anti-harassment and non-discrimination training to all staff and faculty of the Program. OCR will monitor the College's implementation of the Agreement until the College has fulfilled the terms of the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. A complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that a college must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

We appreciate the College's cooperation in the resolution of this complaint. If you have any questions, please contact Dana Russo, the OCR attorney assigned to this complaint, at (202) 453-6559 or e-mail Dana.Russo@ed.gov or Sandra Gibson, the OCR investigator assigned to the complaint, at (202) 453-5913 or e-mail Sandra.Gibson@ed.gov.

Sincerely,

Michael Hing
Team Leader, Team 1
District of Columbia Office
Office for Civil Rights

Enclosure

cc: Dr. Michelle Woodhouse via email: mwoodhouse@tcc.edu
Greer Saunders via email: gsaunders@vccs.edu