UNITED STATES COMMISSION ON CIVIL RIGHTS

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October 7, 2020

President Eli Capilouto
Office of the President
101 Main Building
University of Kentucky
Lexington, KY 40506

Dear President Capilouto:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, regarding an August training for student Resident Advisors (RAs).[1] An email from Lauren Doerner, Resident Life Assistant Director for Staff Training and Development, informed the Resident Advisors after a presentation on microaggressions and microinvalidations:

> This session will lead us into two *separate* breakout sessions – one for RAs who identify as Black, Indigenous, Person of Color and one for RAs who identify as White. You received an invitation to both sessions, but you are expected to attend *only one that corresponds best to your identity*.[2]

The session for students who identify as "Black, Indigenous, Person of Color" was called the "Healing Space for Staff of Color."[3] No written materials appear to have been provided for this session. The session for students who identify as white was called the "White Accountability Space." (Apparently whites were presumed "accountable" for some offense that necessitated "healing" for staff of color.) RAs who were participating in the "White Accountability Space" were directed to review an attached document entitled "Common racist behaviors and attitudes of white people" prior to the session.[4] The "behaviors and attitudes" in the document included:

- Believe that they have "earned" what they have, rather than acknowledge the extensive white privilege and unearned advantages they receive; believe that if people of color just worked harder . . .
- Not notice the daily indignities that people of color experience; deny them and rationalize them away with PLEs (perfectly logical explanations)

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[1] Kara Zupkus, University of Kentucky Forces RAs Into Segregated Trainings, 'White Accountability Space,' Young America's Foundation, Oct. 5, 2020, https://www.yaf.org/news/university-of-kentucky-forces-ras-into-segregated-trainings-white-accountability-space/.
[2] Email from Lauren Doerner, Assistant Director for Staff Training & Development, to UK Resident Advisors, Aug. 6, 2020, https://www.yaf.org/news/university-of-kentucky-forces-ras-into-segregated-trainings-white-accountability-space/.
[3] *Id.*
[4] *Id.*

- Accept and feel safer around people of color who have assimilated and are "closer to white"
- Blame people of color for the barriers and challenges they experience; believe that if they "worked harder" they could "pull themselves up by their bootstraps"
- Dismiss and minimize frustrations of people of color and categorize the person raising issues as militant, angry, having an attitude, working their agenda, not a team player, playing the "race card" . . .
- Focus on their "good intent" as whites, rather than on the negative impact of their behavior;
- Focus on how much progress we have made, rather than on how much more needs to change
- "walk on eggshells" and act more distant and formal with people of color
- Segregate themselves from people of color and rarely develop authentic relationships across race
- Dismiss the racist experiences of people of color with comments such as: That happens to me too . . . You're too sensitive . . . That happened because of ____, it has nothing to do with race!
- Exaggerate the level of intimacy they have with individual people of color
- Fear that they will be seen and "found out" as a racist, having racial prejudice
- Focus on themselves as an individual (I'm not racist; I'm a good white), and refuse to acknowledge the cultural and institutional racism people of color experience daily
- Look to people of color for direction, education, and coaching on how to act and what not to do
- Compete with other whites to be "the good white": the best ally, the one people of color let into their circle, etc.

In short, whites are "damned if they do, and damned if they don't."

The University of Kentucky has likely violated both Title VI and Title VII because the Resident Advisors are both students and employees. Title VI provides, "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*."[5] As the Southern District of Ohio has noted (which, like Kentucky, is under the appellate jurisdiction of the Sixth Circuit Court of Appeals), "entire entities receiving federal funds – whether governmental entities, school systems, or universities – must comply with Title VI, rather than just the particular program or activity that actually

[5] 42 U.S.C. § 2000d.

receives the funds."[6] Educational institutions, including universities, *are not allowed to segregate students by race.*

The Resident Advisors are employed by the University of Kentucky, which means that Title VII applies. Accordingly, this training likely violated Title VII's prohibition against segregating employees by race also. As a refresher, Title VII states:

> It shall be an unlawful employment practice for an employer . . . 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.[7]

There's no exception in Title VII that says, "unless you have good intentions." Rather, it provides that you may not segregate an individual by race in any way which would tend to adversely affect that person's status as an employee.

This list of "attitudes and behaviors" puts white Resident Advisors in an impossible position. They are being told that they cannot question a person of color's assertion that something – every bad thing in the world, really – is due to racism. To do so is to be guilty of racism themselves. Person of color: "I got a C on my essay. It's because I'm black." RA: "Maybe if you had started writing it sooner, you would have had more time to polish it." Nope, racism. Person of color: "The cashier in the student union was rude to me. It's because I'm black." RA: "That cashier has been rude to me in the past too." According to the handout, even sharing this innocuous personal experience is racism. No wonder that white people in this environment might "walk on eggshells and act more distant and formal with people of color." But then if the hapless white RA tries to "look to people of color for direction, education, and coaching on how to act and what not to do," that too is racist.

In addition, note that "Black, Indigenous, and Person of Color" are all grouped together (apparently, we all look alike) as victims of white supremacy – i.e., white people are presumptively bad/entitled, and non-white people of all races are their victims. Again, how can this not encourage non-white employees to be biased against and perhaps even racially hostile toward white employees under the guise of "challenging your relationship to race and racism"? As the Supreme Court noted in *Harris v. Forklift Systems*, "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult, that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,'

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[6] D.J. Miller & Associates, Inc., v. Ohio Dep't of Admin. Services, 115 F.Supp.2d 872 (S.D. Ohio 2000)(*quoting* Grimes v. Superior Home Health Care, 929 F.Supp. 1088 (M.D. Tenn. 1996).
[7] 42 U.S.C. § 2000e-2.

Title VII is violated."[8] The Court added, "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[9] The Ninth Circuit stated in *Vasquez v. County of Los Angeles*:

> To prevail on a hostile workplace claim premised on either race or sex, a plaintiff must show: (1) that he was subjected to verbal or physical conduct of a racial or sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create a hostile work environment.[10]

The Ninth Circuit more recently explained, interpreting the requirements of *Vasquez*:

> "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious)" are not sufficient to create an actionable claim under Title VII, but the harassment need not be so severe as to cause diagnosed psychological injury. It is enough "if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay in her position." We have held that such hostility need not be directly targeted at the plaintiff to be relevant to his or her hostile work environment claim.[11]

This training was created and required by the University of Kentucky. RAs likely feared to register any opposition for fear of losing their jobs, but given that these materials were leaked to the press, it seems indisputable that at least some student-employees found this conduct unwelcome.

This is nothing more than singling out people of a particular race as class enemies and forcing them to abase themselves before the reigning orthodoxy. In the old days, we called this totalitarianism, or more simply, idiocy.

Since the University of Kentucky apparently cannot avoid engaging in racial discrimination without outside help, a copy of this letter is being sent to the Office for Civil Rights at the Department of Education. They may wish to examine whether the University of Kentucky's apparent foray into racial discrimination is consistent with its obligations under law.

Sincerely,

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[8] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)(citations omitted).
[9] *Id.* at 22.
[10] Vasquez v. County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003).
[11] Reynaga v. Roseburg Forest Products, 847 F.3d 678, 687 (9th Cir. 2017) (citations omitted).

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Peter Kirsanow
Commissioner