



POLICY ANALYSIS FOR INVESTIGATORS AND DECISION MAKERS

Guidance for Evaluations and
Determinations

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Cosgrove

February 24, 2026

ABOUT US

Vision

We exist to create safe and equitable work and educational environments.

Mission

To bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

MEET YOUR FACILITATORS



Collin Baer

Collin Baer is a member of the Investigation, Hearing, & Appeal Services Team at Grand River Solutions. Collin provides investigation, written determination, and hearing services. Collin also facilitates training on topics such as trauma-informed investigations and report writing. In addition to providing these services, Collin is a team manager and supervises an internal team.



Megan Altman-Cosgrove

Megan Altman-Cosgrove is part of the Investigation, Hearing, & Appeal Services Team at Grand River Solutions. In her current role, she serves as a Title IX and civil rights investigator and a hearing officer.

AGENDA

● Evidence
Asking the right questions

● Common Hurdles

● Credibility/Reliability

● Findings and Analysis

● Sanctioning

EVIDENCE

Asking the right questions and evaluating the authenticity of evidence

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TYPES OF EVIDENCE

Direct Evidence

Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

Circumstantial Evidence

Evidence based on inference and not on personal knowledge or observation.

Corroborating Evidence

Evidence that differs from but strengthens or confirms what other evidence shows

EVIDENCE

Testimony

Text Messages

Social Media Posts
and Messages

Emails

Surveillance

Videos

Photographs

Police Body
Camera Footage

Swipe Records

Medical Records

Phone
Records

Audio
Recordings

EVALUATING THE EVIDENCE

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.

Is it authentic?

Is the item what it purports to be?

Is it credible/reliable?

Is the evidence worthy of belief?

What weight, if any, should it be given?

Weight is determined by the finder of fact!

RELEVANT EVIDENCE

Relevant means **related to** the specific allegations under investigation.

- Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred.
- Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

EVIDENCE THAT MAY BE RELEVANT

- Respondent's prior sex-based conduct used as "pattern evidence"
 - *Note: "pattern witness" is not protected by "rape shield" protections*
- Character evidence
- Expert witnesses
- **Key consideration?**

IS IT AUTHENTIC?

Question the person who offered the evidence

Request originals

Obtain originals from the source

Have others review and comment on authenticity

Are there other items that would corroborate?

THE “HARD” QUESTIONS

Details
About Sexual
Contact

Seemingly
Inconsistent
Behaviors

Inconsistent
Evidence/
Information

Details of
Work/Academic
Performance

Alcohol Or Drug
Consumption

Probing Into
Reports Of
Lack Of Memory

HOW TO GATHER SENSITIVE INFORMATION

LAY A FOUNDATION FOR THE QUESTIONS

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

BE DELIBERATE AND MINDFUL IN YOUR QUESTIONS:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

COMMON HURDLES

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INTOXICATION VS INCAPACITATION

WHAT ARE THE DIFFERENCES?

Intoxication

- Reduced coordination and inhibitions
- Impacts to vision
- Changes to one's eyes or physical appearance
- Reflex or behavior changes

Incapacitation

- Loss of coordination
- Vision impairment
- Speech and cognition impairment

KEY ASPECTS OF INCAPACITATION

Beyond drunkenness

Impaired judgment

Observable signs

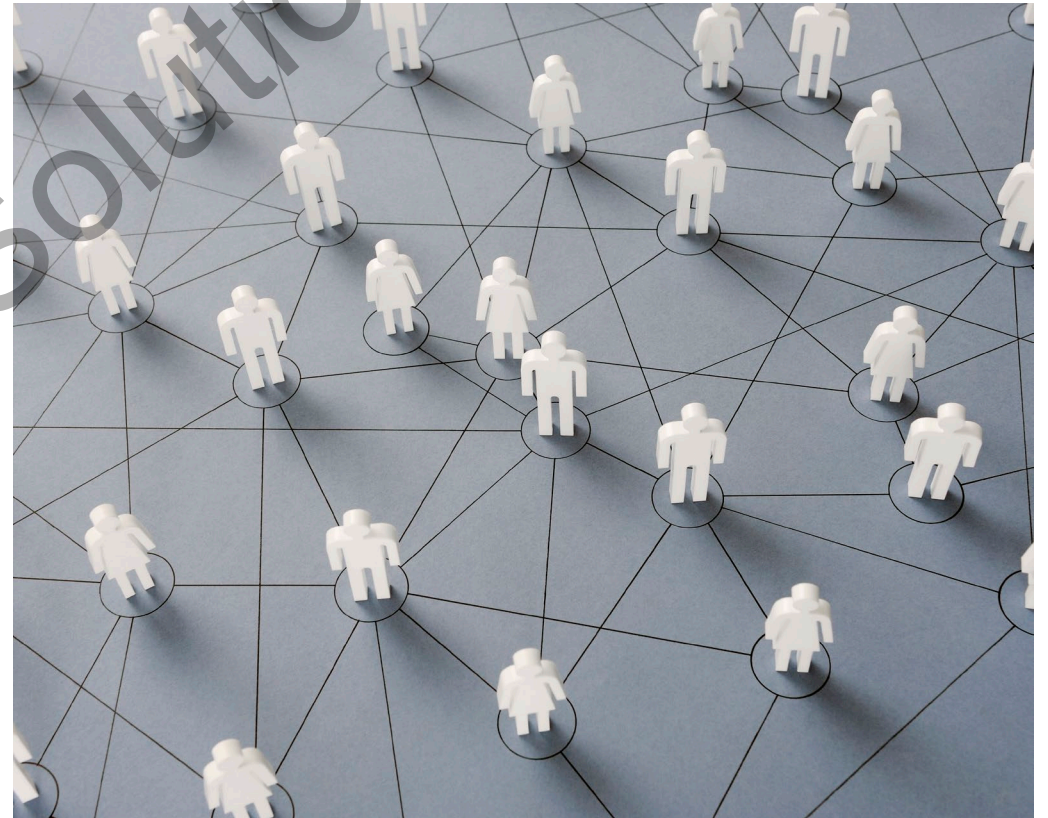
Physical resistance is NOT a requirement

PRIOR BAD ACTS

- Prior bad acts are not relevant to prove a propensity
- Prior bad acts can be relevant to assessing credibility and reliability

CONNECTING CONDUCT TO PROTECTED STATUS

- Discrimination...based on what protected status?
- Harassment...based on what protected status?
- Retaliation...based on what protected activity?
- Title IX complaints...was the conduct on the basis of sex?



DEFINING "RETALIATION"

In retaliation for what?

Does your policy specify what is a protected activity?

Does your policy define "adverse" or "materially adverse"?

Conduct does not necessarily need to meet the same threshold as discrimination or harassment.

CONDUCT THAT DOES NOT RISE TO A POLICY VIOLATION

- Now what?
- Do you have a plan for referring the concern to another office?
- Is there still a problem that needs to be resolved?



CREDIBILITY/RELIABILITY

Tools for evaluating credibility and reliability

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CREDIBILITY: THE PERSON IS
CONVINCING

RELIABILITY: THE PERSON'S
STATEMENTS CAN BE TRUSTED



ASSESSING CREDIBILITY AND RELIABILITY

No formula exists, but consider the following:

Ability to Recollect Events

Sufficiency of Detail and Specificity

Material Omission

Internal Consistency

Inherent Plausibility

Motive to Falsify

Corroboration

SUFFICIENCY OF DETAIL AND SPECIFICITY

Is the level of detail provided by the person reasonable and indicative of a genuine personal experience by the person?



INTERNAL CONSISTENCY/CONSISTENCY OVER TIME

- Did the person share the same version of events in all settings, including interviews, in written and/or verbal statements and between documentary evidence?
- Are there any discrepancies or contradictions?
- Is there a sufficient explanation for any discrepancies?



CONSISTENCY WITH OTHER EVIDENCE OR TESTIMONY



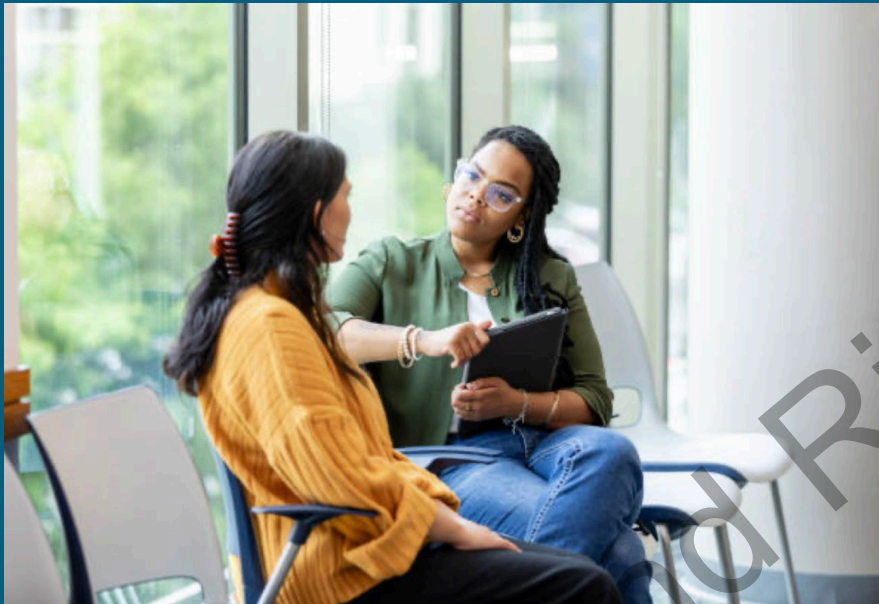
- Is the testimony or evidence consistent with the other evidence?
- Is the testimony or evidence inconsistent with the other evidence?
- Is there a sufficient explanation for any inconsistencies?

CORROBORATION

- Is there witness testimony (either by witnesses or people who saw the person soon after the alleged incident, or people who discussed the incidents with the person around the time they occurred) or documentary or physical evidence that corroborates the person's testimony?
- Is there witness testimony or documentary and/or physical evidence that are inconsistent with statements made during the interview or does not provide corroboration to the person's version of events?



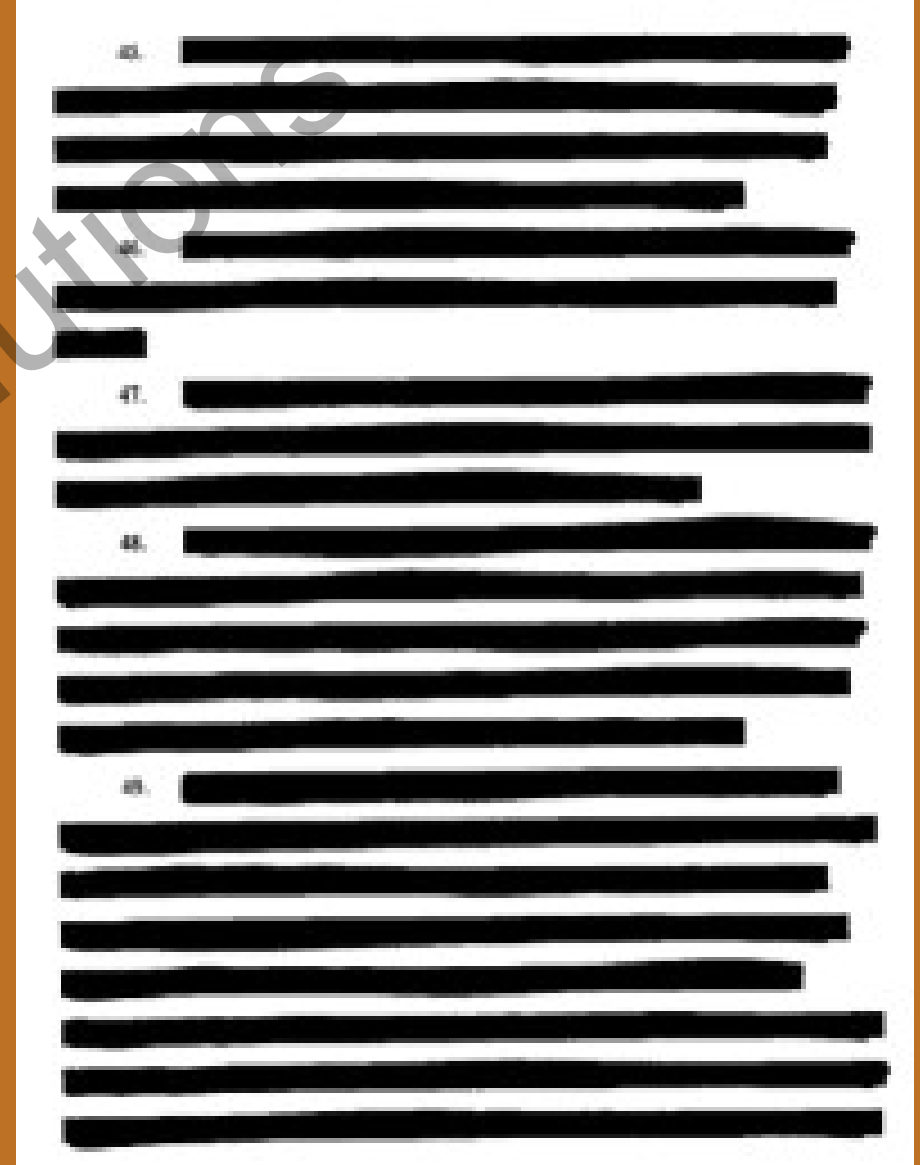
INHERENT PLAUSIBILITY



- Is the testimony believable on its face?
- Does it make sense?
- Could it have occurred?
- Does it make sense that this person knows this information?
 - What was their opportunity to view?

MATERIAL OMISSION

- Did the person omit material information?
- If so, what?
 - e.g., submitted partial text messages, or omitted text messages that could be perceived as unfavorable
- Is there a reasonable reason for the material omission?



MOTIVE TO FALSIFY

- Did the person have a reason to be untruthful other than the general desire to be believed, or to prevail?
- Did the witness openly volunteer information that is prejudicial to their interests or the Party?
- If so, does the declaration against interest bolster their credibility?
- Does the person have an articulable bias, interest or other motive? [e.g. an employee received a poor performance review, so she falsified a claim of sexual harassment against her boss].
- Alternatively, does the person have little personal gain in the outcome?
- What are the relationships between the parties?

PAST RECORD

- Is there a history of similar behavior in the past?
 - e.g., a supervisor had previous complaints of sexual misconduct
- If so, this might impact whether a statement should be believed.
 - For example, a respondent who states they never knew that a certain behavior was wrong, yet was written up for that same behavior, the history of similar past behavior makes the respondent's statement less believable and less reliable.

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ABILITY TO RECOLLECT EVENTS

- What is the extent the person was able to perceive, recollect or communicate the version of events?
 - e.g., the person reported they were intoxicated, or the person reported they were sleeping



CREDIBILITY/RELIABILITY ANALYSIS

STEP BY STEP

1. Determine the material facts based on the notice of allegations
2. Determine which material facts are undisputed and disputed
3. If any material facts are disputed, consider whether a credibility/reliability analysis will help reconcile the dispute

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FINDINGS AND ANALYSIS

Translating the facts into a fair and sound determination

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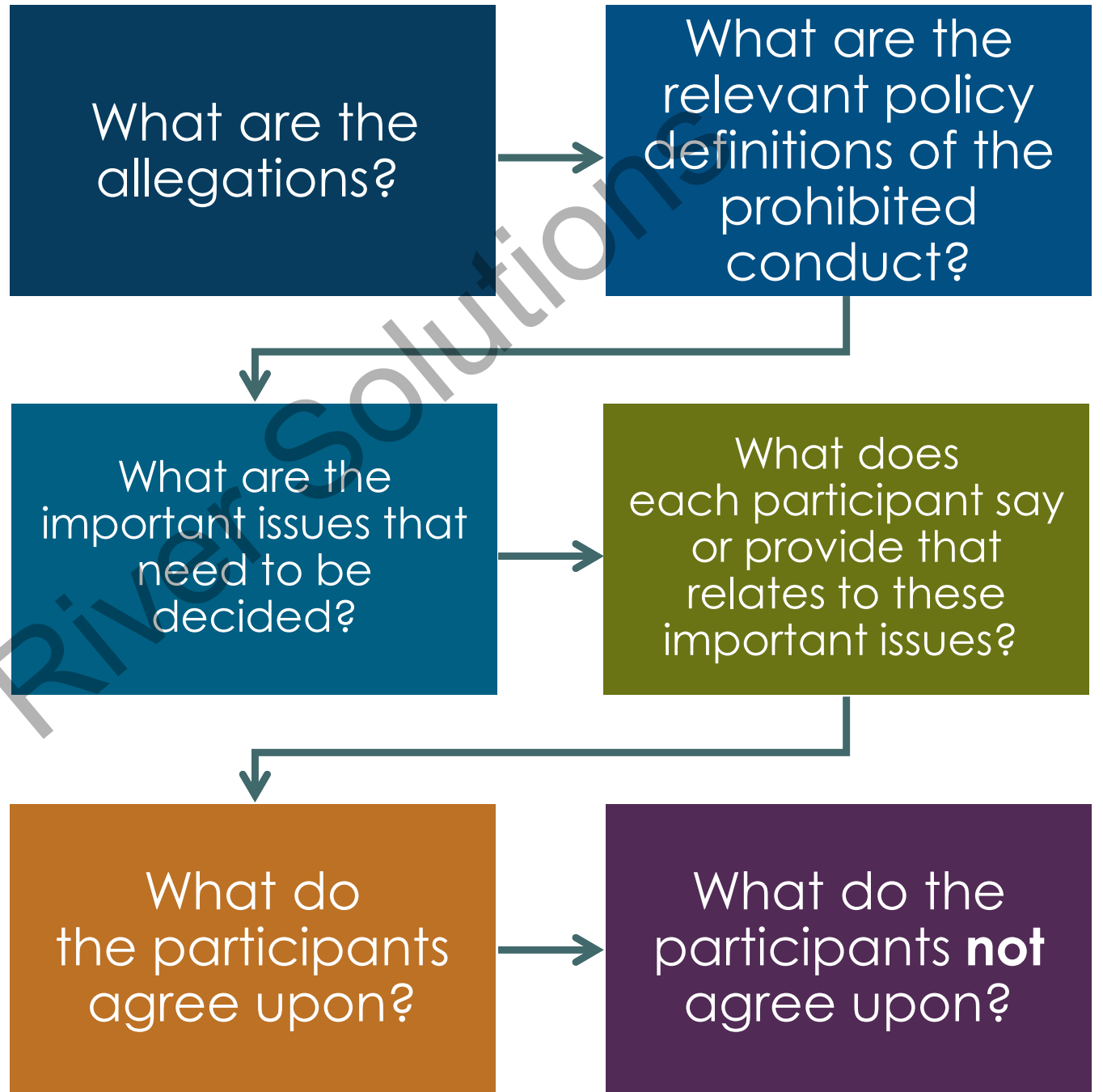
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WHAT IS THE SCOPE OF THE INVESTIGATION?

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OUTLINING THE ANALYSIS



EVIDENTIARY STANDARD


PREPONDERANCE OF THE EVIDENCE

Responsible —
"More likely than
not..."



There was sufficient, reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated.

Not responsible —
"Insufficient
evidence.."



There was insufficient reliable and credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated.

FINDINGS OF FACT

- The decision whether events, actions, or conduct occurred, or a piece of evidence is what it purports to be
- Based on available evidence and information
- Determined by a preponderance of evidence standard
- Determined by the fact finder(s)

Is it relevant?



Is it authentic?



Is it credible/reliable?



How much weight?



STRUCTURING THE ANALYSIS

- Break down the policy into elements
- Organize the facts that you've determined to be more likely than not true, by the element to which they relate



KEY ELEMENTS

- Summarize the undisputed material issues.
- Summarize the findings of fact for the disputed issues.
- Analyze whether each of the elements of the prohibited conduct have or have not been established.
- Conclude with whether Respondent, by the preponderance of the evidence, violated the prohibited conduct policy.

DETERMINATION

LET'S PRACTICE!

Using these policy definitions:

Definitions:

Discrimination: an adverse action or actions that intentionally or unintentionally excludes one from full participation in, denies the benefits of, or affects the terms and conditions of employment or access to educational or institutional programs because of protected class status.

Harassment: Unwelcome conduct that is based on Protected class status in which 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create an environment that a reasonable person would consider intimidating, hostile, or abusive.

Retaliation: a materially adverse action taken against someone because they have reported or opposed discrimination or harassment, or because they participated in an investigation or other proceeding under the policy.

DISCRIMINATION

Discrimination: an adverse action or actions that intentionally or unintentionally excludes one from full participation in, denies the benefits of, or affects the terms and conditions of employment or access to educational or institutional programs because of protected class status.

Did Complainant experience an adverse action?

Was Complainant denied benefits of employment OR were the terms & conditions of Complainant's employment impacted?

Was the above action taken because of Complainant's protected class status?

HARASSMENT

Harassment: Unwelcome conduct that is based on Protected class status in which 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create an environment that a reasonable person would consider intimidating, hostile, or abusive.

Was the conduct unwelcome?

Was the conduct based on protected status?

Was enduring the conduct a condition of continued employment OR was the conduct severe or pervasive enough to create an environment that a reasonable person would consider intimidating, hostile, or abusive?

RETALIATION

Retaliation: a materially adverse action taken against someone because they have reported or opposed discrimination or harassment, or because they participated in an investigation or other proceeding under the policy.

Did Complainant engage in a protected activity (as defined by policy)?

Did Complainant experience a materially adverse action?

Was there a causal connection between the protected activity and adverse action?

LET'S PRACTICE! (1)

FORMAL COMPLAINT/ALLEGATIONS

- Complainant is a 71-year-old male faculty member complaining of discrimination and harassment on the basis of age.
- Respondent is a 43-year-old female department chair and Complainant's supervisor. Respondent became department chair last year, and Complainant alleged that Respondent has been very disrespectful toward him ever since.
- The Dean had responded to a prior concern between the two parties, and Complainant is now alleging that they are experiencing retaliation.

LET'S PRACTICE! (2)

ALLEGATIONS / COMPLAINANT STATEMENT

- Complainant alleged that Respondent has made frequent comments to Complainant such as: "Sheesh, you've been here for 40 years?" "You're like a living time capsule." "You've been teaching here longer than I've been potty-trained!" and "Everything in this building is new, except for you."
- Respondent has also asked Complainant when he planned to retire. Complainant has reported that these comments have occurred at least weekly for the past year.
- Complainant said other faculty members have also made jokes about his age, after seeing Respondent treat Complainant this way. Complainant has stopped attending department meetings and other functions.

LET'S PRACTICE! (3)

MORE ALLEGATIONS / COMPLAINANT STATEMENT

- Complainant requested to teach a new online course, which would have included a generous stipend. Respondent assigned it to a first-year faculty member, saying that the newer faculty member was "more savvy with the technology" and "connected more with the students."
- After Complainant made a complaint to the Dean about a possible violation of the CBA in considering seniority in course assignments, Respondent no longer says hello or smiles when they pass the Complainant in the hall. Their offices are next door to each other and the Complainant states that this is very awkward.

LET'S PRACTICE! (4)

RESPONDENT STATEMENT

- Respondent denied any discriminatory motive for behaviors toward Complainant. She said that she was joking with Complainant to try to get him to lighten up. Respondent did ask about retirement because she is required to submit a five-year staffing plan. She did not ask any other faculty about retirement.
- Respondent stated that Complainant was just "grumpy" all of the time. Respondent said that she did not say hello because Complainant was always walking with his head down and frowning.

LET'S PRACTICE! (5)

EVIDENCE / FINDINGS

- The evidence showed that Respondent followed seniority guidelines for all other faculty course assignments and did not deny online courses to younger faculty.
- A review of evaluations from Complainant's introductory courses showed higher than average student rankings.
- After making a complaint to the Dean about a violation of the CBA in considering seniority in course assignments, the Dean stepped in and re-assigned the course to the Complainant.
- After Complainant reported his discrimination and harassment complaint to the Dean, Respondent apologized and has no longer made any comments to Complainant.

CONNECTING TO POLICY

If the conduct as alleged were substantiated, would this be a violation of the following policy definitions?

Definitions:

Discrimination: an adverse action or actions that intentionally or unintentionally excludes one from full participation in, denies the benefits of, or affects the terms and conditions of employment or access to educational or institutional programs because of protected class status.

Harassment: Unwelcome conduct that is based on Protected class status in which 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create an environment that a reasonable person would consider intimidating, hostile, or abusive.

Retaliation: a materially adverse action taken against someone because they have reported or opposed discrimination or harassment, or because they participated in an investigation or other proceeding under the policy.

SAMPLE ANALYSIS: DISCRIMINATION

To determine whether Complainant was subjected to discrimination, the preponderance of the evidence must show that he was subjected to an adverse action or actions that intentionally or unintentionally excluded him from full participation in, denied the benefits of, or affected the terms and conditions of his employment because of his age. Here, the evidence was sufficient to show that Complainant was subjected to an adverse action that excluded him from the full benefits of his position, in that he was denied the opportunity to teach a new online course, which carried a financial benefit.

The evidence was also sufficient to show that Respondent selected a younger, less experienced faculty member to teach the course, with the purported rationale that the newer faculty member was "more savvy with technology" and "connected more with students." However, the evidence showed that Complainant's course evaluations contained higher than average student rankings. Further, the evidence showed that Respondent followed seniority guidelines when it came to other course assignments, but not for this particular assignment, which had an adverse impact on Complainant but not his younger, similarly situated colleagues.

SAMPLE ANALYSIS: DISCRIMINATION

Additionally, the evidence was sufficient to show that Respondent made frequent comments referencing Complainant's age and longevity, which demonstrated a discriminatory animus against Complainant's age, indicating that it was more likely than not that Complainant's age was a motivating factor in Respondent's decision. Even though the Dean re-assigned the course to Complainant and therefore mitigated the effects of Respondent's decision, Respondent had still subjected Complainant to an adverse action that was more likely than not motivated by Complainant's age.

Therefore, the preponderance of the evidence is sufficient to show that Respondent subjected Complainant to discrimination on the basis of age.

SAMPLE ANALYSIS: HARASSMENT

To determine whether Complainant was subjected to harassment, the preponderance of the evidence must show that he was subjected to unwelcome conduct based on his age in which enduring the offensive conduct became a condition of continued employment, or the conduct was severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

The evidence was sufficient to show that Respondent made weekly comments over the course of a year that mocked Complainant's age. While Respondent stated that the remarks were intended as jokes, the evidence showed that they were unwelcome. The conduct ceased only after Complainant reported it, further supporting its characterization as unwelcome.

SAMPLE ANALYSIS: HARASSMENT

The evidence indicated that Respondent's comments also prompted similar behavior from other faculty members, which further contributed to a hostile environment and caused Complainant to withdraw from departmental activities. It is more likely than not that a reasonable person of Complainant's age would likely find such conduct hostile or abusive. The frequency and persistence of the comments indicated that the conduct was pervasive.

Therefore, the preponderance of the evidence is sufficient to show that Respondent subjected Complainant to harassment based on Complainant's age.

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SAMPLE ANALYSIS: RETALIATION

To determine if Complainant was subjected to retaliation, the preponderance of the evidence must show that a materially adverse action was taken against Complainant because he reported or opposed discrimination or harassment, or because he participated in an investigation or other proceeding under the Nondiscrimination policy.

Complainant alleged that he was subjected to retaliatory conduct after reporting a possible violation of the CBA in considering seniority in course assignments. While violations of the CBA are a serious matter, this by itself is not considered a protected activity under this policy, as the complaint did not include a report of discrimination or harassment. As such, this particular concern has been referred to Human Resources. Even if this complaint was considered a protected activity under the Nondiscrimination policy, the evidence was not sufficient to show that the alleged conduct taken against Complainant after the complaint would be considered a materially adverse action. Respondent's change in demeanor after the complaint may have caused discomfort, but those changes alone would not constitute a materially adverse action that would dissuade a reasonable person from making a complaint. The evidence was also insufficient to show any additional adverse employment actions after the complaint was made.

SAMPLE ANALYSIS: RETALIATION

Complainant's later report of discrimination and harassment certainly qualified as a protected activity under this policy, but the evidence did not show, and Complainant did not allege, that Respondent's treatment of him became worse or that additional adverse actions occurred following the discrimination and harassment complaint. Rather, the evidence showed that Respondent apologized to Complainant and the harassing comments stopped.

Therefore, the preponderance of the evidence is not sufficient to show that Complainant was subjected to retaliation.

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SAMPLE ANALYSIS: CONCLUSION

Based on the preponderance of the evidence, this investigation finds that Respondent's conduct constituted discrimination and harassment on the basis of age, but not retaliation.

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SANCTIONING

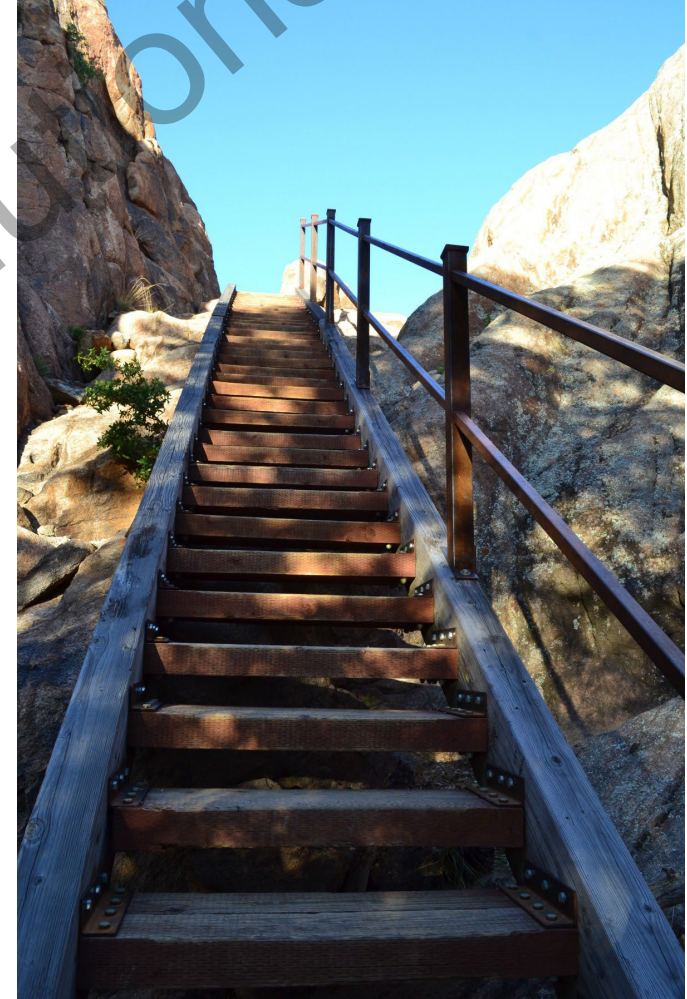
Contributing factors

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GOALS OF SANCTIONS/DISCIPLINE

1. End the prohibited conduct
2. Prevent its recurrence
3. Remedy the harm



DETERMINING THE PROPER SANCTION

- Consistency
- Does bias creep in?
- Remorse?
- Victim impact?
- Past conduct
- Foreseeability of repeated conduct



AGGRAVATING CIRCUMSTANCES

- Premeditation
- Predation
- Physical violence
- Repeated violation
- Multiple policy violations in one incident
- Harm to others
- Impact on Complainant and/or community
- Behavior continued after intervention
- Efforts to conceal or hide the incident
- Refusal to attend past trainings
- Past failures to comply with directives

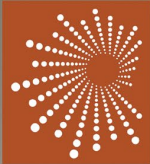




QUESTIONS?

COMPLIMENTARY SUBSCRIPTION

A top-down photograph of a desk with a blue notebook, a white pen, a pair of glasses, a cup of coffee, and a glass of water.

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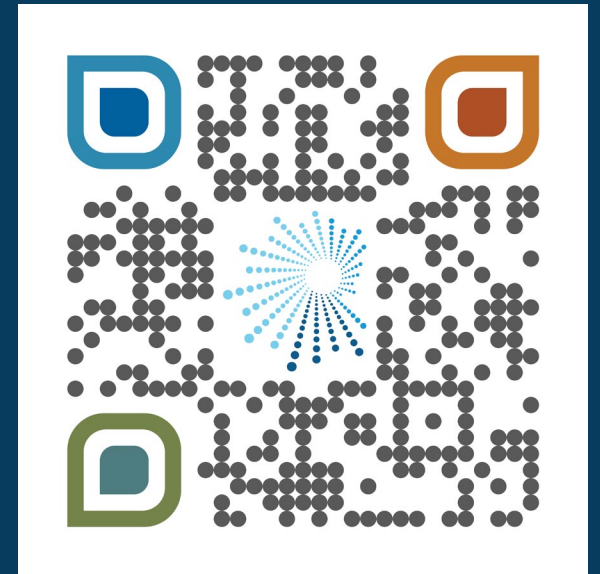


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