



***INVESTIGATOR TRAINING
REFERENCE MANUAL***

***THIS IS A REFERENCE DOCUMENT.
ANY INVESTIGATION SHOULD BE
CONDUCTED UNDER THE APPROVAL
AND SUPERVISION OF COUNSEL
AND/OR LEA ADMINISTRATION.***

The Division of Risk Management gratefully acknowledges the State of Utah Department of Human Resource Management (DHRM) who developed the outline for this Manual and developed many of the foundational concepts.

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Statement of Purpose

The purpose for this manual is to supply you with training materials on how to conduct investigations. The intent of this manual is to cover the issues surrounding investigations, pertinent laws and regulations related to discrimination, harassment, retaliation, and other matters investigators might be called upon to review, as well as practices for conducting effective and defensible investigations. These methods can be used for a wide variety of investigations, including abusive conduct, theft, ethics, performance, and safety. This manual addresses the following areas:

- Avoid legal landmines surrounding workplace investigations.
- Current laws governing harassment prevention.
- Terms and concepts of harassment, discrimination, retaliation, and more.
- Developing an effective strategic plan for your investigation.
- Developing interview questions to ask complainants, respondents, and witnesses.
- Conducting effective interviews of complainants, respondents, and witnesses.
- Weighing the evidence and making a decision.
- Documenting and drafting a final report.
- Providing guidance to managers/supervisors about managing the workplace during and after an investigation.

NOTE: These materials are FOR TRAINING PURPOSES ONLY. The content of this manual does not supersede or amend any laws, rules, policies, etc. If you have questions regarding a particular case or issue, consult with State Risk Management or legal counsel.

Investigations Overview

Why do Investigations?

What exactly do we investigate and why?

We investigate allegations of misconduct of an employer's policies or rules, or alleged violations of federal and state laws including but not limited to Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Utah Anti-Discrimination Act. Alleged misconduct may include abusive conduct, retaliation, bullying, hazing or harassment. There is no need to wait for a formal complaint if there is evidence of misconduct.

Actions triggering an investigation may include:

- Observations by employees or supervisors.
- A student complaint.
- Receipt of a regulatory agency complaint.
- Any other notification or indication indicating an individual has either participated in or been subject to violative conduct.

The main purpose of an investigation is to collect and document information in order to determine the facts of the complaint and to stop any violative conduct. During an investigation, the investigator analyzes the context of the behavior and obtains explanations of interpretations of statements, actions, or events. It is possible to find that no misconduct actually occurred, but it is impossible to know for sure unless someone collects, documents, and analyzes the facts.

Investigations and proper investigation procedures demonstrates a commitment to prevention efforts. It may also uncover weaknesses in policies and procedures and provide an opportunity to strengthen them. An entity's response to a complaint of harassment, discrimination, or retaliation will be highly scrutinized, especially if the complaint ends up in court. A well-planned and conducted investigation helps to mitigate potential liability.

Why do Investigations Correctly?

Normally an investigation should be completed within two weeks. If this is not possible, however, the primary parties should be notified and be provided with an estimated timeline. The conclusion of an investigation followed by appropriate action is not always the end of the situation. The complaining individual may assert inadequate action was taken and decide to proceed by filing a charge, grievance, or other type of complaint. Any involved party may claim the investigation was unfair or retaliatory and may file a charge, grievance, or other type of complaint. This makes it seem like a no win situation. In reality, a thorough, fair, and neutral investigation by trained investigators will help to minimize further proceedings.

Wrongful Termination

Serious misconduct, such as harassment, is often grounds for termination. Once again, a good faith, adequate investigation can protect the employer from damages, even if the "wrong" conclusion was reached and the employee needs to be reinstated.

What is a Reasonable Investigation?

A "reasonable investigation" has been mentioned several times. How do you know what the courts will view as reasonable? In *Silva vs. Lucky Stores, Inc.*, the California court set forth an example of what the court believed would constitute a reasonable investigation:

- The investigator was neutral and had been trained.
- The investigator interviewed the respondent, the victim, and all pertinent witnesses.
- The investigator reviewed all relevant documents.
- The investigator documented the investigation and prepared a written report.
- The investigator communicated the findings in a confidential manner to the interested parties.

These are good guidelines to follow and each will be discussed in sections of this manual, giving you a road map to a successful, thorough investigation. The most important thing to remember is: adequate investigations are timely, thorough, fair, and neutral.

DEFINITIONS OF TERMS AND CONCEPTS

Basic Theories of Discrimination:

Protected Classes

A protected class is a group of people who share common characteristics and are protected from discrimination and harassment by federal and state laws such as Title VII of the 1964 Civil Rights Act, as amended, the Utah Anti-Discrimination Act, and other federal and state laws.

Discrimination

Any adverse action taken by others based on a person's protected class status (race, religion, national origin, color, sex, age, pregnancy, disability or other statutorily established criteria.

Retaliation

The law forbids employees and employers from taking retaliatory action against any individual engaging in an activity protected by law, such as making a discrimination complaint on behalf of oneself or another, reporting the misuse of public funds, participating in an investigation or grievance process, etc.

Harassment/Hostile Work Environment

Any behavior or conduct based on an individual's protected class status which is pervasive, unwelcome, demeaning, ridiculing, derisive, or coercive and results in a hostile, abusive or intimidating work environment. Not every negative work environment may be attributed to harassment. In order to make a valid claim, the harassment or discrimination must be based on one or more of the person's protected class status. Generally, a single incident, single comment or other isolated incidents will not be enough to create an hostile environment.

Adverse Employment Action

Discrimination Claims: An adverse employment action, for purposes of a discrimination claim, is limited "to adverse actions that affect employment or alter the conditions of the workplace. These actions involve a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

For purposes of discrimination claims, adverse employment actions do not include disciplinary or corrective action standing alone or a change in job title without a change in salary, benefits or duties.

Retaliation Claims

For purposes of Title VII retaliation claims, the definition of an “adverse employment action” is broader than the definition for Title VII discrimination claims. Title VII’s anti-retaliation provision prohibits any action that might dissuade a reasonable individual from making or supporting a discrimination charge and thus, covers a broader range of employer conduct.

Gender Bias

Gender Bias involves decisions made or actions taken because of sex-based stereotypes about the nature and role of men and women, society's perception of the value of women and men, and what is perceived as women's and men's work. An example of gender bias is assigning men to lift all the boxes because lifting is "men's work" or forcing a female coworker to take minutes in a meeting because typing is "women's work".

Sexism

Sexism is defined as behavior, conditions, or attitudes that foster stereotypes of social roles based on sex. For example, a man who thinks that women are too emotional to be effective managers, or a woman who thinks that all men are chauvinists.

Note that sexism may be an attitude. There are no laws or policies that regulate a person's attitude, only their behavior.

Administrative Enforcement Agencies:

EEOC & UALD

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing Title VII and other federal civil rights laws. The Utah Anti-Discrimination Labor Division (UALD) of the Utah Labor Commission is the state agency charged with enforcing the Utah Anti-Discrimination Act. Procedurally, anyone who wishes to file an unlawful harassment complaint with the EEOC has 300 days to file from the day of harm and 180 days for the UALD.

Utah Law:

Utah Protection of Public Employees Act:

Utah law makes it unlawful for a public employer to take an adverse employment action against a public employee who:

1. Participated in an investigation, hearing, court proceeding, etc.; or
2. Objected to or refused to carry out a directive that the employee reasonably believed violated law, rule or regulation.

Because that employee communicated in good faith:

1. Waste or misuse of public funds, property, or manpower;
2. A violation or suspected violation of a law, rule, or regulation; or
3. Gross mismanagement, abuse of authority, or unethical conduct as it relates to a state government employer.

Precedent Setting Cases in Discrimination Law:

Griggs v Duke Power Co. - March 1971

Testing or measuring procedures are not precluded by Title VII so long as they are demonstrably a reasonable measure of job performance. Arbitrary, artificial and unnecessary barriers to employment that cannot be shown to be related to job performance are prohibited.

McDonnell Douglas Corp. v Green - May 1973

Established the burden-shifting analysis that forms the framework of every federal discrimination/harassment case. Complainant has the burden of establishing a prima facie case. Respondent has the burden of articulating a legitimate, non-discriminatory reason for its conduct. Complainant must be given fair opportunity to show Respondent's stated reason was a pretext for a discriminatory decision.

Meritor Saving bank v Vinson - June 1986

Identified two (2) types of sexual harassment - (1) harassment that involves the conditioning of employment on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. Established the hostile working standard as one that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

St Mary's Honor Center et al. v Hicks - June 1993

Respondent's burden to offer a legitimate, non-discriminatory explanation for its actions is a burden of production, not persuasion. The burden of persuasion remains at all times with Complainant.

Teresa Harris v Forklift Systems, Inc. - November 1993

Refined the definition of hostile work environment, concluding, "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." Whether an environment is "hostile" or "abusive" can be determined only by the totality of the circumstances. While a single factor (such as psychological harm may be taken into account, no single factor is required.

Oncale v Sundowner Offshore Services, Inc., et al. - March 1998

Sex discrimination consisting of same-sex harassment is actionable under Title VII. The objective

severity of harassment should be judged from the perspective of a reasonable person in the Complainant's position, considering all the circumstances.

Faragher v City of Boca Raton & Burlington Industries, Inc. v Ellerth - June 1998

When a supervisor subjects a subordinate to a significant, tangible employment action, the employer is vicariously, i.e., strictly, liable. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability for damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. No affirmative defense is available when the supervisor's harassment culminates in a tangible employment action.

Vance v. Ball - 2012

The United States Supreme Court defined "supervisor" for purposes of assessing liability for unlawful harassment under Title VII. The Court ruled that an employer will be vicariously liable for the actions of a supervisor "when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, a decision causing a significant change in benefits.'" The majority found that this "workable" definition of supervisor will provide much needed guidance to employers and employees even before litigation begins.

Bragdon v Abbott et al. - June 1998

HIV, even if asymptomatic, is a disability. Reproduction and the sexual dynamics surrounding it are major life activities. Whether a person has a disability under the ADA is an individualized inquiry.

Sutton et al. v United Airlines. Inc. - June 1999

The determination whether an individual is disabled should be made with reference to measures, such as eyeglasses and contact lenses, which mitigate the individual's impairment. Note: The 2008 ADA-AA requires employers to disregard mitigating measures when determining whether an individual is disabled.

Toyota Motor Manufacturing. Kentucky. Inc. v Williams - January 2002

In order to determine whether an individual is disabled under the ADA, consideration must be given to whether an individual's impairments prevent or restrict him from performing tasks that are of central importance to most people's daily lives, i.e., major life activities, compared to the average person in the general population. It is insufficient for individuals to merely submit evidence of a medical diagnosis of impairment. Instead, the ADA requires evidence that the extent of limitation caused by their impairment is substantial. The impairment's impact must also be permanent or long-term. Note: The 2008 ADA-AA states that the standard applied in Toyota is too high for determining whether an individual is disabled.

National Railroad Passenger Corporation v Morgan - June 2002

A Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts (disparate treatment) must file his charge within the 180 or 300-day period. In a hostile work environment (harassment) claim, provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered for the purposes of determining liability. The act need not be the last act.

Lucas v. Office of the Colorado State Public Defender - August 2017 (10th Circuit)

An “[a]dverse employment action” for purposes of a discrimination claim is limited “to adverse actions that affect employment or alter the conditions of the workplace.” (Citing *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007) (quoting *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62 (2006))). These actions involve a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”

Burlington Northern & Sante Fe Railway Co. v White - June 2006

An “adverse employment action” for purposes of a Title VII retaliation claim is broader than the definition of “adverse employment action” for a Title VII discrimination claim. The anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. The anti-retaliation provision covers those employer actions that would have been materially adverse to a reasonable employee or applicant. The proper formulation requires a retaliation plaintiff to show that the challenged action “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”

Thompson v. North American Stainless, LP – January 2011

Court found that Eric Thompson could pursue a retaliation claim for actions taken against him after his fiancé alleged gender discrimination. He was fired three weeks after the company was informed of her EEOC complaint. Applying its own Burlington standard the Court found that Title VII of the Civil Rights Act of 1964 prohibits third-party retaliation. The law’s anti-retaliation provision is not limited to actions that affect the charging employee’s employment. (see *Burlington N. & S.F.R. Co. v. White* (548 U.S. 53 (2006))).

Discriminatory Practices

Under Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and the Utah Anti-Discrimination Act it is illegal to discriminate in any aspect of employment, including:

- hiring and firing;
- compensation, assignment, or classification of employees;

- transfer, promotion, layoff, or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and disability leave; or
- other terms and conditions of employment.

Discriminatory practices under these laws also include:

- harassment on the basis of race, color, religion, sex, national origin, disability, or age;
- retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and
- denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

Employers are required to post notices to all employees advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

Other Discriminatory Practices Under Federal EEO Laws

Title VII

Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex.

National Origin Discrimination

- It is illegal to discriminate against an individual because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group.
- A rule requiring that employees speak only English on the job may violate Title VII unless an employer shows that the requirement is necessary for conducting business. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule.

Religious Accommodation

- An employer is required to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship.

Sex Discrimination

Title VII's broad prohibitions against sex discrimination cover:

- Sexual Harassment - This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment. (The "hostile environment" standard also applies to harassment on the bases of race, color, national origin, religion, age, and disability.)
- Pregnancy Based Discrimination - Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.
- Discrimination based on marital status.
- Unequal pay.

Age Discrimination in Employment Act

The ADEA's broad ban against age discrimination also specifically prohibits:

- statements or specifications in job notices or advertisements of age preference and limitations. An age limit may only be specified in the rare circumstance where age has been proven to be a bona fide occupational qualification (BFOQ);
- discrimination on the basis of age by apprenticeship programs, including joint labor-management apprenticeship programs; and
- denial of benefits to older employees.

An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

Equal Pay Act

The Equal Pay Act (EPA) prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of similar skill, effort, and responsibility for the same employer under similar working conditions. Note that:

- Employers may not reduce wages of either sex to equalize pay between men and women.
- A violation of the EPA may occur where a different wage was/is paid to a person who worked in the same job before or after an employee of the opposite sex.
- A violation may also occur where a labor union causes the employer to violate the law.

Titles I and II of the Americans with Disabilities Act

The ADA prohibits discrimination on the basis of disability in all employment practices. It is necessary to understand several important ADA definitions to know who is protected by the law and what constitutes illegal discrimination:

Individual with a Disability

An individual with a disability under the ADA is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. Major life activities are activities that an average person can perform with little or no difficulty such as walking, breathing, seeing, hearing, speaking, learning, and working.

Qualified Individual with a Disability

A qualified employee or applicant with a disability is someone who satisfies skill, experience, education, and other job-related requirements of the position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of that position.

Reasonable Accommodation

Reasonable accommodation may include, but is not limited to, making existing facilities used by employees readily accessible to and usable by persons with disabilities; job restructuring; modification of work schedules; providing additional unpaid leave; reassignment to a vacant position; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; and providing qualified readers or interpreters. Reasonable accommodation may be necessary to apply for a job, to perform job functions, or to enjoy the benefits and privileges of employment that are enjoyed by people without disabilities. An employer is not required to lower production standards to make an accommodation. An employer generally is not obligated to provide personal use items such as eyeglasses or hearing aids.

Undue Hardship

An employer is required to make a reasonable accommodation to a qualified individual with a disability unless doing so would impose an undue hardship on the operation of the employer's business. Undue hardship means an action that requires significant difficulty or expense when considered in relation to factors such as a business' size, financial resources, and the nature and structure of its operation.

Prohibited Inquiries and Examinations

Before making an offer of employment, an employer may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in the same job category. Medical examinations of employees must be job-related and consistent with business necessity.

Drug and Alcohol Use

Employees and applicants currently engaging in the illegal use of drugs are not protected by the ADA when an employer acts on the basis of such use. Tests for illegal use of drugs are not considered medical examinations and, therefore, are not subject to the ADA's restrictions on medical examinations.

Employers may hold individuals who are illegally using drugs and individuals with alcoholism to the same standards of performance as other employees. At the same time, the ADA provides limited protection from discrimination for recovering drug abusers and for alcoholics. An employer may not

discriminate against a person who has a history of drug addiction but who is not currently using drugs and who has been rehabilitated. An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.

The 2008 ADA Amendments Act

In enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage. While Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation had not been fulfilled. In 2008, Congress enacted the ADA Amendments Act that supersedes prior Supreme Court holdings that narrowed the broad scope of protection intended by the ADA (*Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)). The Amendments Act favors broad coverage of individuals to the maximum extent permitted by the terms of the Act. It is important to understand that "The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." As a result of the Act, more time is spent on determining whether an employer engaged in the interactive process and provided reasonable accommodations, rather than whether an employee is qualified as a person with a disability.

The Civil Rights Act of 1991

The Civil Rights Act of 1991 made major changes in the federal laws against employment discrimination enforced by EEOC. Enacted in part to reverse several Supreme Court decisions that limited the rights of persons protected by these laws, the Act also provides additional protections. The Act authorizes compensatory and punitive damages in cases of intentional discrimination, and provides for obtaining attorneys' fees and the possibility of jury trials. It also directs the EEOC to expand its technical assistance and outreach activities.

Lilly Ledbetter Fair Pay Act

The 2009 Lilly Ledbetter Fair Pay Act clarifies that the 180-day statute of limitations (300 days for EEOC) is reset with each violation. For example, a new act of discrimination occurs with every paycheck issued to a female that is less than the paycheck of a similarly situated male. Congress capped damages at up to two years. This law was made effective retroactive to May 28, 2007.

Commonly Used Prima Facie Cases

Background: The standard prima facie case for discrimination issues was established by the US Supreme Court in 1973, in *McDonnell Douglas Corporation v. Green*. Every prima facie case standard currently in use is some variation of this burden shifting analysis. The key to the whole investigative process is to apply the correct prima facie case to the allegations.

Basic Analyses

Standard Disparate Treatment Analysis

In order to establish a prima facie case of disparate treatment discrimination, the complainant must establish: 1) s/he is a member of a protected class; 2) s/he is qualified for his/her position; 3) s/he was subjected to an adverse employment action; and 4) similarly situated individuals not of the complainant's protected class were or would have been treated more favorably than the complainant. (IF there is direct evidence of discrimination, the 4th element would read: "4) there is a causal link between the adverse employment action and the complainant's protected class.")

Denial of Hire/Promotion Analysis

In order to establish a prima facie case of discrimination based upon a failure to hire or promote, the complainant must establish: 1) s/he is a member of a protected class; 2) s/he applied for a position with the employer; 3) s/he is qualified for the position for which s/he applied; and 4) the position was filled by someone not of the complainant's protected class OR 4) the complainant was not selected despite his/her qualifications; and 5) the employer continued to seek applicants for the position. (IF there is direct evidence of discrimination, the 4th element would read: "4) there is a causal link between the adverse employment action and the complainant's protected class.")

ADA Analyses

Standard Disparate Treatment Analysis

In order to establish a prima facie case of disability based disparate treatment discrimination, the complainant must establish: 1) s/he has an impairment that substantially limits one or more major life activities; OR 1) s/he is regarded as an individual with an impairment ... ; OR 1) s/he has a record of an impairment ... ; 2) s/he is able to perform the essential functions of his/her job, with or without a reasonable accommodation; 3) s/he was subjected to an adverse employment action; and 4) similarly situated non-disabled individuals were or would have been treated more favorably than the complainant. (IF there is direct evidence of discrimination, the 4th element would read: "4) there is a causal link between the adverse employment action and the complainant's protected class.")

Reasonable Accommodation Analysis

In order to establish a prima facie failure to accommodate case, the complainant must establish: 1)

s/he has an impairment that substantially limits one or more major life activities; OR 1) s/he is regarded as an individual with an impairment ... ; 2) s/he is able to perform the essential functions of his/her job, with or without a reasonable accommodation; 3) s/he requested an accommodation or the employer knew or should have known of the complainant's need for an accommodation; and 4) the employer failed to provide a reasonable accommodation. (Only individuals who HAVE a disability are entitled to a reasonable accommodation. Individuals who are associated with individuals with a disability, and those who have a record of a disability are not entitled to a reasonable accommodation.)

Harassment Analyses

Protected Class Harassment Analysis

In order to establish a prima facie case of discrimination based upon alleged protected class harassment, the complainant must establish: 1) s/he is a member of a protected class; 2) s/he was subjected to unwelcome, unwanted conduct of a [sexual, racial, religious, or whichever is applicable] nature; 3) the conduct complained of was based on the protected class membership; and 4) the harassment complained of was sufficiently severe or pervasive as to alter the terms and conditions of the complainant's employment and create a hostile working environment OR 4) the conduct is made, explicitly or implicitly, a term or condition of employment benefits or opportunities.

Constructive Discharge Analysis

In order to establish a prima facie case of discrimination based upon an alleged constructive discharge, the complainant must establish: 1) his/her employer engaged in discriminatory conduct [note the conduct complained of must be discriminatory]; and 2) the conduct created working conditions that a reasonable person would view as intolerable.

Religious Accommodation Analysis

In order to establish a prima facie case of discrimination based upon the denial of a religious accommodation, the complainant must establish: 1) s/he has a bona fide religious belief that conflicts with an employment requirement; 2) s/he made the employer aware of the conflict; and 3) the employer failed to provide an accommodation.

Retaliation Analysis

In order to establish a prima facie case of discrimination based upon retaliatory action, the complainant must establish: 1) s/he engaged in a protected activity (for example, opposed employment discrimination or participated in a discrimination proceeding, which include investigations); 2) the employer was aware of the opposition or participation; 3) a reasonable employee would have found the challenged action materially adverse; and 4) a causal link between the materially adverse employment action and the complainant's protected activity (the adverse action was taken because the employee engaged in protected activity.)

Disparate (adverse) Impact Analysis

In order to establish a prima facie case of disparate (adverse) impact discrimination, the complainant must establish: 1) the employer has a continuing policy or practice in place which is neutral on its face; and 2) the policy or practice has a disparate and adverse impact on members of the protected class.

Affirmative Harassment Defenses

In order to avoid liability if the harassing conduct was by non-supervisory personnel, the employer can raise two defenses:

1. The employer was unaware of the harassing conduct; OR
2. The employer took swift, remedial action to stop the harassing conduct.

In order to avoid liability if the harassing conduct was by supervisory employees, the employer can raise a single affirmative defense:

1. The employer exercised reasonable care to prevent and correct promptly any harassing behavior AND the complainant unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

NO AFFIRMATIVE DEFENSE IS AVAILABLE WHEN THE SUPERVISORY HARASSMENT CULMINATES IN A TANGIBLE EMPLOYMENT ACTION.

Affirmative Discrimination/Retaliation Defenses

As previously explained under the McDonnell Douglas burden shifting analysis, after a complainant meets the elements of their case, the employer has the burden of articulating a legitimate, non-discriminatory (or non-retaliatory) reason for its conduct.

The burden then shifts back to the complaining party to provide evidence that the employer's proffered reason is a pretext for discrimination/retaliation.

Ethical Considerations

Managing the Workplace during an Investigation

When a complaint is received the individual receiving the complaint should consult with legal counsel, HR or State Risk Management and determine what action needs to be taken and what communications need to be made. Such determinations should be made carefully on a case-by-case basis. Depending on the situation, management may choose to place the respondent on administrative leave, offer the complainant administrative leave, temporarily reassign the respondent, temporarily reassign the complainant, make no changes, etc. To ensure that a reassignment cannot reasonably be perceived as retaliation, a complainant should only be reassigned after very careful consideration of the particular situation, the complainant's desires, the proximity of the respective workspaces, etc.

During an investigation, no one should coach witnesses, the complainant, or the respondent about what to say during the process.

Documentation and other information related to the investigation should be securely maintained by the assigned investigators. Investigation records should be kept confidential and separate from the personnel file.

If anyone is contacted by an attorney for the complainant or the respondent, he or she should refer the attorney to the agency's legal counsel or to Human Resources.

All parties involved in the investigation should be treated with integrity, respect, and dignity. Instruct all parties that they may not take any actions that are retaliatory or may in any way appear retaliatory. This includes, but is not limited to, speaking with the complainant(s) about the allegations, speaking with any known witnesses or attempting to discover the identity of the complainant.

It is important to practice discretion but **never** promise confidentiality.

Managing the Workplace after an Investigation

Once a complaint has been investigated, a determination made, and action taken, the manager/supervisor is responsible to maintain a cohesive environment for the employees. With the exception of any remedial measures or accommodations necessitated by the investigation, all employees should be managed as if no complaint had been filed. Employees must be expected to continue to perform all job duties in a satisfactory manner.

Meeting separately with the complainant and respondent to conduct a debriefing after the investigation has been completed is always recommended. The meeting should not be conducted by the investigator(s). Both parties should be encouraged to contact a responsible individual with any ongoing or new concerns.

Regular follow-up with the parties, management, and the workgroup is an important part of preventing future problems and retaliation. Follow-up efforts, such as meetings with the individual who complained, should happen frequently at first and then can taper off.

Intake Methods and Process

Sample Intake Questionnaire

Person Interviewed

Interviewer

Date

Time

Exactly what happened?

1. In chronological order, who did or said what?

2. When did it happen?

3. Where did it happen?

4. Who was present?

5. Have you have any similar experiences with this person?

6. Why do you believe this occurred?

7. How do you think it have been avoided?

8. How did this make you feel?

9. Are there notes, documents or other evidence that would help to understand this situation?

10. Is there anyone else who has first-hand knowledge of this or other similar events?

11. Who else did you tell about this?

12. What would you like to have happen? What resolution are you seeking?

13. Identify any witnesses to interview and explain what you think they will tell me.

Interview End time

Advise complainant of the right to non-retaliation by any party involved in this investigation. Advise complainant of the requirement that they maintain confidentiality. Unless otherwise directed, they are to report to work and have only work-related contact with the respondent.

Names and Contact Information of Potential Witness(es)

Investigative Plans and Interviewing

Develop an Effective Strategic Plan for Your Investigations

The purpose of an investigative or strategic plan is to review existing information, identify the most important questions, and determine steps to gather additional information. This is important to help the investigator become familiar with the complaint and to ensure that important factual questions are being answered.

Format of the Strategic Plan

A strategic plan consists of four components:

1. Questions - used to gather information and explore allegations.
2. Persons - witnesses or others who can provide relevant statements.
3. Records - documents relevant to allegations and background information such as emails, work phone records, time sheets, etc.
4. Physical evidence - such as photographs, texts, clothing, room layouts, etc.

When completed, the strategic plan will identify the important questions to be asked and the persons and/or records likely to contain the answers.

There are two types of evidence in an investigation – Statements and Physical Evidence:

1. Statements are gathered by asking questions of individuals and documenting the responses.
2. Physical evidence is information gathered from records. These records include documents in existence at the time of the investigation, such as job descriptions and performance evaluations, and other records which may be constructed as a part of the investigation.

Preparing the Strategic Plan

Establish a timeline for the project, including each step that will be taken and a completion date. Consider how each phase of an investigation leads to or supports the next step in the process. Remain flexible in case one part of the process lasts longer than anticipated or overlaps with another part.

Be sure to recognize that the chronology of interviews can either undermine or enhance the success of the investigation. For example, the interview of employee A may be intentionally scheduled before employee B, so that B has no chance to influence A's statement. There are numerous possible variations on this scenario; think carefully about the underlying political network of relationships that may be an obstacle to your efforts. Also, make contingency plans for the occasional premature disclosure that may jeopardize your strategy.

Construction of a strategic plan begins with the complaint analysis. An investigator must frame the "ultimate question." The "ultimate question" is the main question you want answered at the end of the investigation (e.g., did the behavior occur as alleged?). Assume a denial and develop questions, which will answer the ultimate question.

These questions should be calculated to:

- affirm or rebut the allegation(s)/complaint;
- establish whether a policy/rule violation occurred;
- identify the respondent's defense;
- affirm or rebut the identified defenses;
- formulate appropriate and adequate analysis.

Identify and write names of persons to be interviewed

Once the important facts are identified, make a list of persons to be interviewed. If an individual's name is not known, he or she can be identified by job title (e.g., supervisor, co-worker) or other identifying information.

Identify records to be obtained and reviewed

Make a list of any potentially relevant records and documents.

Connect questions and records to persons

Once you have made a list of the questions you need to answer, identify who should be asked each question. Identify the persons who have or may have records and documents you need. Connecting questions and records to people will enable the investigator to determine who has what information, whether and where documentary evidence exists, and what weight to give documentary evidence.

Relevant records/documents may include:

Job Descriptions, Draft Documents, Emails, Instant Messages, Payroll Records, Disciplinary Records, Policies and Procedures, Performance Plans, Performance Improvement Plans, Text Messages, Cell Phone Records, Letters, Travel Documents etc.

Plan who will be interviewed in what order and where

Generally, it is best to interview the complainant first and then determine whether to interview witnesses or the respondent next. If there are multiple witnesses or respondent parties, you may want to enlist other trained investigators to conduct simultaneous interviews and avoid the possibility of witnesses or respondent parties collaborating to support each other's testimony--this would not be common, but the option should be considered if it enhances the effectiveness of the investigation.

Carefully think about where the interviews should be held. In deciding upon a location, consider things like proximity to workspace, potential disruptions, confidentiality needs, comfort, safety, and privacy.

It is important to conduct interviews as soon as possible and minimize the time lapse between interviews. Information should be captured while it is fresh in everyone's mind.

When the plan is completed, you may use the templates for intake and questions, or you may prefer to divide a sheet of paper into two sections, 1. Questions and 2. Answers. Prepare a sheet for each person you plan to interview, listing the questions on one side and leaving space for answers on the other. These simple techniques will facilitate a thorough interview and make note taking easier.

Prepare an Outline of Questions

Prior to any interviews, prepare a standardized outline of the questions to be used in open-ended witness interviews. This will ensure a thorough and consistent line of questioning.

If similarly situated witnesses are the subject of the same type of interview, you can compare and contrast the results from a standardized approach. However, be sure that you include sufficient opportunities for follow up questions to try to ensure that you obtain all relevant details.

Many investigators draft a set of standard questions that are used for all witnesses and separate supplemental questions that can be asked of witnesses who have knowledge of particular parts or events.

Asking Questions to Provoke Critical Information and Questions to Avoid

Use open ended questions (at the start): If you ask specific questions, you will get specific answers. During most of the interview, avoid the use of yes or no questions. Instead, ask questions that require the witness to open up.

Asking closed questions may be useful at the end of an interview to pin down the witness to a specific position. Note any discrepancies between questions when asked in a different way.

Develop the facts: In investigations regarding specific events, inquire about all events which occurred during the relevant time frame, in chronological blocks of time. Do not leave the chronological block until all the details necessary to recreate the scene have been established.

For each block of time, the investigator should cover:

- Exactly what occurred?
- When did it happen?
- Where did it happen?
- Who was present?
- Who else may know relevant information?
- How did it happen?
- Who did or said what?
- Why did it happen? Could it have been avoided? (these may be speculative, but it can give insight into the witness' state of mind and opinion on the matter)
- Are there any notes/documents/other evidence?

Ask the witness to list all individuals who have knowledge of any of the events. For each individual ask:

- What knowledge does the witness have?
- What is the source of the witness' knowledge?
- Did the individual hear the information from someone else?
- Did the individual see the physical evidence?
- Is there anything else you think I should know?

See the question templates provided at the end of the section.

Three Cardinal Rules of Witness Interviews

Understand your purpose for meeting with each witness

Knowing what information a witness can contribute will help you determine when you should meet with them, what background information you will need to prepare for the interview and, in some cases, whether an interview is really necessary. Some investigators fail to distinguish between conducting a thorough interview and wasting their time meeting with everyone in a work group when there is little likelihood that the work group will be able to contribute anything substantive to the investigation.

Be organized

Investigations are typically conducted at a very quick pace. If the investigation will be part of your duties over a period of time you may find it difficult to keep track of the materials germane to the investigation and those related to your regular work duties. It is important to take the following steps:

- Keep paperwork relating to the investigation separate from other work papers in order to ensure it is treated in a confidential manner;
- Schedule or postpone your regular work duties so they do not interrupt a witness interview; and
- Turn off your phone when you are conducting an interview.

Keep an open mind

During the course of your witness interviews you may encounter unexpected information about individuals in the workplace that may or may not relate to the matter being investigated. Don't allow yourself to become sidetracked from your purpose. Make a notation about the information so it can be addressed later, if necessary.

Physical Evidence

Physical evidence may come in many different forms. While the majority of evidence collected or provided will be on paper or emails, don't forget to review the case specifics to determine the need to collect something else (broken equipment, inappropriate displays, etc.). When you collect documents, collect both an electronic copy and a physical copy when possible. Electronic copies

contain metadata that shows when a document was created and/or modified and may be important to the investigation. Collecting this information may require you to involve your technology staff.

Essentials for a Strategic Plan

QUESTIONS	PEOPLE	RECORDS
<p>) Did alleged incident occur?</p> <p>) Were there witnesses?</p> <p>) Specifics: Who What When Where How?</p> <p>) What was charging party's response? Why?</p> <p>) Is there a supervisor I subordinate relationship which could be the basis for a tangible employment action charge?</p> <p>) Any other similar incidents?</p> <p>) When?</p> <p>) Any discipline for previous incidents?</p> <p>) Complainant background information.</p>	<p>Respondent Complainant Potential</p> <p>Witnesses: -Supervisor</p> <p>-Co-Workers</p> <p>-Others</p> <p>-Anyone who saw or heard incident?</p> <p>-Confidantes of complainant or respondent who may have been told at time of incident</p> <p>-Department unlawful harassment investigators</p>	<p>Posters, cartoons, letters, pictures, e-mails</p> <p>Preliminary Review File Training Records Personnel File (for recent actions)</p> <p>Organization Chart (for supervisor/subordinate relationships)</p> <p>Notes in planner of complainant, respondent, potential witnesses</p> <p>Previous unlawful harassment investigation files</p> <p>Emails, work phone records Physical evidence</p>

Sample Investigative Plan Template

Investigator:

Complainant:

Respondent:

Basis (protected category):

Issues:

1. Authority to conduct investigation.
2. Applicable policies, rules, legal theories and “prima facie” case.
3. Type of evidence needed.
4. Sources
5. Anticipate time frame for case activity and completion
 - a. Consider organizational schedule changes
6. What are Complainant’s allegations?
 - a. How has Complainant verified the allegation?
 - b. Who has corroborated Complainant’s allegations?
 - c. What physical evidence corroborates Complainant’s allegations
7. What is Respondent’s position regarding the allegations
 - a. How has Respondent articulated his/her defense or explanation of events?
 - b. Who has corroborated Respondent’s position?
 - c. What physical evidence corroborates Respondent’s position?
 - d. Does the respondent’s reason appear pre-textual (Fabricated to cover a discriminatory motive)?
 - i. If so, what specific facts caused you to form that conclusion?
8. Were other similarly situated employees treated differently than complainant? If so, who and how?
9. Documents to obtain
10. Witnesses to interview
11. Summary

Additional Notes/Comments:

Develop Interview Questions to Ask Complainants, Respondent, and Witnesses

Note the time each interview begins and ends. Try not to video or audio record your interviews or allow anyone else to do so, as these can be altered. If the person refuses to participate, note their refusal but continue the investigation. Not investigating is not a defense.

- Avoid making assumptions or stating personal conclusions in your discussions.
- Focus on their direct observations, not opinions or presumptions.
 - What did they actually see or hear?
- Keep the investigation and the facts it uncovers under strict need-to-know rules. Impress upon every participant the importance of keeping interview discussions strictly confidential.
- Conduct fact finding in a prompt and timely manner. It should take no more than three to five days to talk with all parties involved in the allegation. Ideally, all interviews should be conducted within 3 to 5 working days. But, thoroughness is more important than timeliness.
- Use your strategic plan to determine the scope of interview for each particular person.

The Complainant

The first interview will be an initial intake interview from the complainant. The initial intake is the investigator's first contact with complainant. It involves the identification and analysis of the facts from the complainant's perspective. Information must then be verified or refuted during the investigation. Open-ended questions are encouraged to maximize information.

- All the complainant's allegations need to be addressed in the investigation.
- It is best if the interview is conducted away from the flow of traffic so you have some privacy entering and leaving the room. Also, avoid rooms with windows where other employees can see what is going on inside.
- Let the complainant know they will be free from reprisals for bringing a complaint forward and tell them who they can contact should they feel that they are being retaliated against.
- If the interviewee goes off the subject, you must bring the focus back on the complaint. It is okay to address the other issues; however, it is important to stay on task with the investigation.
- Tell the complainant this allegation is being taken seriously and is being investigated thoroughly and as quickly as possible.
- If they have any questions or additional information they should feel free to contact you.
- Tell them when to expect the investigation will be completed.
- NEVER PROMISE CONFIDENTIALITY

When interviewing the complainant the following interview questions will help assist the investigation.

WHAT? It is important to identify as specifically as possible the words that were said, the gestures that were made, the way someone was touched, where the touch was located on the body, etc. This is not the time for euphemisms or for avoiding the details. What kind of workplace policy was potentially or allegedly violated for this employee? If the complainant is too embarrassed to verbalize specifics, try to have them act out the alleged incident while you verbalize for verification.

WHERE? Did the alleged incident(s) occur in the workplace, at a work-related function?

WHEN? When did the incident(s) take place and for how long has this behavior been present? Establish a timeline.

WHO? Who was involved in the incident(s)? Was there a prior relationship? How long have the parties known each other? In there a history of group or individual socializing?

WHY? Was it intended as a joke? Was there a pattern of previous episodes? What kind of climate/norms were operating in that work environment at the time of the alleged incident?

Once the previous major elements have been covered, you can focus on the following information:

- How did/does the complainant feel? How is the complainant dealing with this situation? Do they need some assistance from an Employee Assistance Provider service?
- Has the employee discussed this with anyone else? If so, can that person be contacted for a statement? Did the supervisor know about the incident, and if so, what was the outcome? Are there relevant documents?
- Was the respondent aware that the behavior was unwelcome? Was "no" stated at the time of the incident? If so, what was the reaction of the respondent when informed that his/her behavior was unwelcome? Has the complainant participated in or acquiesced to similar behavior with the respondent in the past? What was said or done immediately before the incident?
- Is there is a significant gap between the time of the alleged behavior and the report? If so, what is the reason for the complaint being made at this time?
- Is there a pattern of incidents that have gone unreported and/or uncorrected? Has this or something similar happened before? Was it reported? What was done? Has the complainant witnessed similar behavior by the respondent toward another employee or been told of a similar incident by another employee?
- What does the complainant want? What are the complainant's expectations?
- Ask supplemental questions to fill gaps in information.
- "Is there anything else you think I should know?" This gives the complainant a chance to reveal any additional information they want to share, which may lead to possible new witnesses, leads, or additional information you may not have otherwise gathered.
- Ask for background (secondary) information such as job title, work history, etc. Secondary information may become primary information in the Investigation.
- Advise the complainant to let you know if the behavior continues or if there are any reprisals.

The Respondent

Your approach to interviewing the respondent should be much like your approach to interviewing the complainant. You may find it difficult to remain impartial; however, remember that everyone you interview should be approached respectfully and with an open mind. Defensiveness is a natural response regardless of whether an individual actually participated in any misconduct. It is safe to assume that the respondent will respond defensively. If you can help the respondent get over feeling defensive, the interview will proceed more easily.

Mention that there has been a complaint implicating the respondent in possible violative conduct and you will be asking questions and gathering facts. The complainant's allegations will form the basis for your interview. Begin with neutral questions and proceed to questions that ask about the environment and the relationships between employees

In an harassment case, you need to collect sufficient information about the nature of the relationship between the complainant and the respondent to ascertain whether the behavior was or was not welcome. The same type of questions asked of the complainant should be addressed to the respondent.

When you talk with the respondent, keep these points in mind:

- Be serious and to the point. Begin with, "The purpose of this meeting is to talk about an allegation of harassment." Focus on the behavior, not the intention of the respondent. Tell them to respond to the specific complaint; i.e., "did you grab the breast of the complainant?"
- If possible, do not initially reveal the identity of the person who brought the complaint. Instead, describe the circumstances surrounding the complaint. For example, "Did you touch anyone who was standing by the water fountain around ten this morning?"
- Present the complaint or the observations to the respondent. Is there surprise? Anger?
- Be unbiased.
- Stay on the topic.
- Ask the person to respond to each allegation separately.
- If the person admits to the behavior, ask if they believed it was appropriate.
- When dealing with a respondent who denies the allegation, explain that you are gathering information from all parties and will be doing additional fact finding before making a determination.
- Always investigate a respondent's defense.
- Inform them that they may not retaliate, that they should have no contact with the complainant or witnesses during the investigation, and that they will be informed of the investigator's findings.
- Document the meeting with the respondent.

Following are examples of how to approach the respondent and additional information that you will need to obtain:

Tell them, "I'm here to investigate a complaint that you may have violated ["X" policy, "X" rule]." This will give you a chance to explain why you have brought this employee in for questioning.

"It has been alleged that you did ["X"]? What is your response to that allegation?" This gives the respondent an opportunity to tell their side of the story, an opportunity for you to tell them what the allegation is and to have them address the allegation. Ask them if they have ever been respondent of anything like this in the past.

Then move to the same type of what, where, who, when, and why questions used for the complainant in order to establish the respondent's version of what happened.

"Is there anything else you think I should know?" This gives the respondent a chance to reveal any additional information they want to share regarding the investigation, which may lead to possible new witnesses, leads, or additional information you may not have otherwise gathered.

Witnesses

Once you have completed thorough interviews of both parties, you usually will need to interview witnesses. You do not need character witnesses, only fact witnesses. When you interview a witness and you explain the investigator's role, be sure not to reveal any more detail regarding the allegations/complaint than is necessary. You also need to both be and appear neutral in interviews with witnesses. Witnesses will be sensitive to how you ask questions. If you exhibit a bias or point of view, they will pick up on it. Many witnesses would prefer not to be involved in an investigation. Treating them with courtesy and showing that you are fair and neutral can help them feel better about the process. You should also make sure to inform them of their right not to be retaliated against for participating in the investigation.

Once you have interviewed all the witnesses on your list, you will need to assess what you have learned and what you do not yet know. Some investigators write out a page for each allegation and list what evidence supports each allegation and what evidence weighs against it. However you organize the information, you need to decide if you have sufficient information to make a determination and if not, whether more, relevant information is potentially available. Perhaps there are witnesses you have not yet interviewed, or you may realize there were questions you did not think to ask a witness. You will need to determine how important the missing information is. Will it make a difference in your findings? Why or why not? If you cannot make such a determination, err on the side of caution and follow up. Also, consider rebuttal interviews for both the complainant and the respondent.

For each case you investigate you will create lists of possible witnesses to interview. The list should include people the complainant or respondent identified or asked you to talk to and anyone else you think might have relevant information.

Tips for interviewing witnesses

- Do not unnecessarily disclose information to witnesses, particularly those involved only peripherally.
 - Instead of, "Did you see John touch Mary?" try "Have you ever seen anyone touch Mary?" The investigator's job is to gather the facts, not to disseminate the allegations. Use open-ended questions in order to minimize information and maximize responses. This does not single out the respondent.
- If witnesses are reluctant to talk, find out why.
- Accommodate requests for an off-site location.
- Do not initially identify the complainant or the respondent. Say to the witness, "Your name has been given to us as a person who may have observed an incident. Describe your observations regarding an incident at () place and () time."
- Describe the situation and circumstances of the alleged harassment.
 - For example, "Were you in the hallway by the water fountain this morning?"

Example of how to approach a witness:

"I'm here to investigate a complaint of a possible violation of ["X" policy]. It doesn't involve you, but you may have witnessed something. I need to ask you some questions but first I want to explain the investigative process to you. I'll be taking notes. I'm going to keep this matter as confidential as possible and I need your cooperation in this. You must not talk to anyone about this investigation, the underlying allegations, or this interview while the complaint is being investigated. This includes talking to your co-workers about such matters." This helps explain to the witness why they are meeting with you and hopefully put them at ease as much as possible. It also directs the witness to keep the matter confidential.

"What, if anything, do you know about the relationship between the complainant and the respondent?" This is where you want to establish how the complainant and the respondent know each other, and how the witness knows them.

"Have you ever heard either of them say or do anything you'd consider inappropriate at work?" This gives the witness a chance to think of a time the respondent or even the complainant may have done anything inappropriate.

If they do recall a time you can ask the following questions:

- What exactly happened? This will allow the witness to recall the events that took place. Ask specific dates and times, and where the incident occurred?
- Ask supplemental questions to fill in the gaps of information.

"Is there anything else you think I should know?" This gives the witness a chance to reveal any additional information they want to share, which may lead to possible new witnesses, leads, or additional information you may not have otherwise gathered.

Effectively Conduct Interviews of Complainant(s), Respondent(s), and Witness(es)

Planning For the Interview

- When do you start the interview process? Once a complaint has been made it is important to start the interview process promptly. The more serious the charges, the more urgent it is that the investigation begin immediately. Ideally, all interviews should be conducted within 3 to 5 working days. But, thoroughness is more important than timeliness.
- What is an appropriate location? Hold the interview where interruptions will be minimal and where the interviewee will be most comfortable answering questions freely. Because of the sensitive nature of an unlawful harassment investigation, the interviews need to take place in a private setting.

- What documents and physical evidence will need to be reviewed? Include any written statements about the harassment that employees may have made. Assemble copies of pertinent emails, cards, letters, pictures, or any visual evidence of harassment, if applicable. Store all physical and electronic evidence in a secure and private location.
- Whom should you interview? List the individuals you plan to interview and put them in a tentative order, noting the approximate amount of time each interview should take. Remember to allow enough time for the important interviews, especially because new issues can and will come up in your investigation. The complainant should almost always be interviewed first.
- Who should be present during interviews? Generally, your investigative partner should be with you during all interviews. You should allow any witness or individual to have someone with them in the interview, but that individual may not answer for the individual being questioned and may not disrupt the interview.
- Can comments be made off the record? No statement to an investigator can be made totally confidential. Investigators have an affirmative responsibility to report completely and fully to management all relevant results of the investigation. Also, if an investigator(s) is subpoenaed by the courts, they will be required to tell everything they know.
- How can you encourage reluctant witnesses to be cooperative? Gentle persuasion is the only option. Remember always that you are conducting interviews, not interrogations. Review with the employee the allegedly-violated rule, policy, or statutory provision and how important it is that everyone be able to work in an environment which is free from the particular misconduct at issue. It is important to explain that this provides them with protection from reprisal.

*****SAMPLE FOR TRAINING PURPOSES ONLY*****

**SEXUAL HARASSMENT INVESTIGATION INTERVIEW QUESTIONS
FOR (name of respondent)**

Interview Date:
Interview Place:
Interview Time:
Employee Job Title:
Time in that position:
Supervisor:

It is alleged that you created a hostile work environment for a co-worker based on sex by exhibiting the following conduct toward him/her in the workplace:

Beginning in late July 2018 and continuing to late November 2018, it is alleged that you made comments to him/her, many on a daily basis, which were offensive and/or intimidating. Such comments included the following:

It is alleged that you asked him/her personal questions such as about his/her age. You would constantly ask, "Why don't you date?" The (fe)male co-worker would say, "It's none of your business. I'm a private person." You would ask, "Don't you get sexually frustrated?" and, "Are you gay?" You would tell him/her not to write you up for your comments.

Questions:

1. Did you ever ask a (female or male) coworker why s/he did not date?
2. Did you ever ask if s/he got "sexually frustrated?"
3. Did you ever ask her/him if s/he was gay?
4. Did you ever tell him/her not to write you up for your comments?

INTERVIEW STRATEGIES ROLE PLAY

Complaint:

Julia Laurent, an accountant in your finance section, files a complaint stating that on two occasions her supervisor has "harassed" her. Earlier in the week, she attended a meeting where her supervisor made a presentation using a laser pointer. On two occasions during this meeting, her supervisor, Phil Avery, pointed the laser beam at her chest. She was embarrassed by this during the meeting and afterwards when two coworkers mentioned the incident to her. Julia feels strongly that Phil did this intentionally.

The second incident of harassment occurred earlier that day when she received an email from Phil wherein he had attached a document entitled "Men's Rules for Women." This document included several very crude statements and she was offended. A couple hours after sending this document, Phil asked if she enjoyed it. When she replied that she didn't find it to be appropriate for the workplace, Phil told her to "lighten up." This same email went to other section members according to

the properties on the email.

Questions for Phil:

Laser Pointer:

1. Do you conduct presentations at work?
2. Tell me how you conduct your presentations.
3. Do you use a laser pointer when you make presentations?
4. Do you ever point at staff members with your laser pointer?
5. Do you recall a recent staff meeting where you pointed at any staff members?
6. Do you currently supervise Julia Laurent?
7. How long have you been Ms. Laurent's supervisor?
8. Describe your working relationship with Ms. Laurent.
9. Do you recall pointing a laser pointer at Ms. Laurent during a staff meeting?
10. Why would Ms. Laurent claim you had pointed at her with a laser pointer during a recent staff meeting?
11. Why would Ms. Laurent claim that you pointed at her chest with a laser pointer during a staff meeting?
12. Why would two coworkers claim that you pointed at Ms. Laurent's chest with a laser pointer during a staff meeting?

Inappropriate Email:

1. Do you send out email jokes or other materials to coworkers?
2. Have you emailed a document entitled "Men's Rules for Women" to coworkers?
3. Do you think this email was appropriate for the workplace?
4. Did you discuss this email with Ms. Laurent?
5. Did you ask Ms. Laurent if she had read the email attachment?
6. Did you ask Ms. Laurent if she enjoyed the email?
7. Did you tell Ms. Laurent to "lighten up"?

Other Questions:

1. Is there anything else you would like to add that would help us with this investigation?

Determining Witness Credibility and Evidence Evaluation

Weigh the Evidence and Make a Decision

Determine the Credibility of Involved Parties

Many errantly believe that if there are no independent witnesses, there can be no substantiated finding. In many cases, there are no witnesses. It is the investigator's job to uncover as much evidence as possible. If the only available evidence is the statement of the complainant and the respondent, a determination must be made based on credibility.

In some cases the respondent will admit to the allegations or you will be able to determine if a misunderstanding occurred based on different descriptions of similar facts. However, your job as an investigator becomes more difficult when you cannot reconcile the allegations with the response and the only possible conclusion is that someone is lying. Credibility determinations may be the only basis you have to work with when the respondent denies all allegations and there are no direct witnesses.

Oftentimes, an investigator may be inclined to follow his/her "gut instincts" when trying to choose between two conflicting stories. Don't rely on gut instincts; rather, rely on objective facts.

Many people also believe that they can accurately read body language and tell if someone is lying. In fact, it is virtually impossible to make accurate credibility determinations based on demeanor. A truthful witness may be nervous about being interviewed. An experienced liar can be very good at remaining poised and making eye contact while weaving a tale.

Some people also think that if a story has any discrepancies, these discrepancies are indicative of lying. Discrepancies may not be the result of lies, but rather reflect normal lapses in memory. Of course, a witness' memory lapses might be significant in assessing whether his or her version of events is accurate. However, you should not put too much emphasis on demeanor alone and you should consider the significance of, and possible reasons for, the discrepancies.

In questioning a person about the relevant issue, look for the following:

Verbal evasion - Interviewee will not directly answer the question.

Example: Using a linguistic loophole, e.g., the fact that a word has multiple meanings, to avoid answering the question. Asking specific direct questions makes verbal evasion more difficult. If after a few repetitions of a direct question the interviewee still will not provide a direct, non-evasive answer, it is reasonable to conclude that the person is not being truthful.

Deceptive verbal responses - Answers that appear to be denials, but are actually couched in ambiguous or qualifying language.

Example(s): Phrases such as "not really," "I guess," "I think," "as far as I know." Or the interviewee may not answer the question at all by saying something like, "I wasn't even there," "Why would I do

something like that?" or "It couldn't have been me." When you receive such responses, you should ask the question again, possibly in another way, and give the interviewee an opportunity to answer you directly.

Indirect admissions - Sometimes a respondent will provide an indirect admission by pointing the finger at someone else who, in the respondent's opinion, has done something equally bad or worse than what he or she is alleged to have done.

Example: "Look, you wouldn't believe the stuff other guys say around here."

In this case, you should refocus the respondent to answering questions about his or her own behavior. However, before doing so, you may follow the thread a bit first. First of all, you may learn something about the work environment; and secondly, the respondent may feel more comfortable admitting to engaging in behavior when putting it in the context of "what others do."

Factors to Consider in Credibility Assessments

As mentioned earlier, if there are conflicting versions of relevant events, the investigator will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

Believability: Is the testimony believable as given? Does it make sense? Does the testimony given match other known facts of the event? If you reached such a conclusion, what specific factors support that conclusion? If a judgment is going to be made, the investigator(s) should be able to articulate specific, concrete reason(s) for why they are coming to that conclusion.

Motive: Did the person have a reason to lie?

Corroboration: Is there witness testimony (such as testimony by eyewitnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

Past record: Did the respondent have a history of similar behavior in the past? If so, were they disciplined for that behavior?

None of the above factors are determinative as to credibility. For example, the fact that there are no eyewitnesses to the alleged harassment does not necessarily defeat the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the respondent engaged in similar behavior in the past does not necessarily mean that he or she did so again.

Compile and Analyze Physical and Documentary Evidence

It is important to gather and review documents before you start the investigation. Include any written statements about the harassment and photographs or copies of any visual harassment, if applicable. You should look at the original document; however, you will not necessarily retain it. Most people like to hold onto their original documents. Making an accurate photocopy and returning the original to the party is an acceptable practice. If you become aware of additional documents or physical evidence as the investigation progresses, you should obtain them. Also check personnel files to ascertain

whether there have been past complaints of harassment and make a determination as to whether the earlier incidents are relevant to the current complaint. Assemble copies of pertinent emails, cards, or letters. Keep clean copies of every document you receive. Store all physical and electronic evidence securely. Evidence should be kept in a private (locked) location. This could be a file cabinet in your office or in another location in the Human Resources office. Use the same precautions as you would for confidential personnel information.

Other examples of evidence you may gather include:

- Telephone bills from work phones, work cell phones or pagers that may provide corroboration of contact between the parties; email or other correspondence generated in the workplace or received by the complainant. There is no expectation of privacy when using state-owned equipment.
- Physical evidence such as pictures, gifts, articles of clothing, etc.

In evaluating documents as evidence, consider the following points:

- Who prepared the document?
 - A document prepared by an unrelated third party is usually more reliable than a document prepared by one of the parties involved in the dispute.
- Was the document prepared in the normal course of business?
 - Such a document often is more reliable than one created after a party decides to bring a complaint or after the respondent is on notice of the complaint.
- When was the document prepared?
 - A document prepared shortly after a conversation or event generally is given more consideration than one prepared later.
- Who had custody and control of the document?
 - The chain of custody, which establishes whether someone else had an opportunity to create or change a document (or any piece of evidence), can be critical to the value the investigator should give the document.
- How consistent is the document with other documents prepared by the same person?
 - Review personnel files or supervisory files of the complainant and the respondent in the process of making a determination. These files often contain background information on employee discipline, such as verbal or written warnings, that may be important in your evaluation of the circumstances of the relationships of people involved in the complaint.

Document and Draft a Report of Investigation (ROI)

Determining What Occurred - Findings

As an investigator, you will need to make a determination whether ***each*** allegation occurred as alleged. There are three (3) distinct findings that you can reach:

1. The allegation occurred as alleged;
2. The allegation did not occur as alleged; or
3. There is insufficient evidence to determine whether the allegation occurred as alleged.

Be specific as to what you are finding. Using language like that given above, make a finding for each element of the complaint, explaining the specific evidence supporting the finding.

Determining If a Policy/Rule Violation Has Occurred - Conclusions

Courts interpret laws, so DO NOT conclude the law was violated. Use words like "inappropriate comments about religion were made" rather than there was religious discrimination. You or someone else designated by the employer may make a determination as to whether there was a violation of rule or policy. Good language to use would be "more likely than not, there was [or was not] a violation of policy."

KNOW AND UNDERSTAND THE DIFFERENCE BETWEEN FINDINGS AND CONCLUSIONS. A "FINDING" IS A STATEMENT OF WHETHER A SPECIFIC ALLEGATION OCCURRED AS ALLEGED. A "CONCLUSION" IS A STATEMENT OF WHETHER THE CONDUCT IN A SUBSTANTIATED, SPECIFIC FINDING VIOLATED A POLICY OR RULE.

Document and Draft Final Report

Concluding the investigation with a well-crafted written report helps ensure that each aspect of the investigation has been thoroughly examined and documented. A well written report articulates the specific allegations being investigated, sets out the investigator's findings and conclusions in clear language, and create an official record of what the investigator found and why.

Write the report as you go. The process of writing the report forces the investigator to take a hard look at the evidence. It is often not until this stage that you realize more evidence is needed, or that a certain witness wasn't asked a key question. While you are writing the report, you still have the opportunity to go back and re-question individuals. Writing the report also means that you must put into words the basis of your findings. This process may lead you to question and perhaps change some of your conclusions.

Overview of Written Determination of Findings

The Report of Investigation takes important and deciding facts and presents them in a form which can easily read and understood. Report every fact used to determine your findings and draw your conclusions. The primary purpose of a final report is to inform the individual adjudicating the matter of the important facts and conclusions drawn from the investigation. The final report, along with the investigator's notes and other documents, should be securely maintained in the manner appropriate for highly sensitive personnel documents. The investigative file is protected under GRAMA and must be kept separate from the personnel files.

A final Report of Investigation is the last step in the case analysis process. The final report demands a full and complete understanding of the allegations of the complaint, defenses and responses. It also requires the author be able to identify and apply relevant enforcement guidance, policies, procedures, and rules. Writing the final report, therefore, obligates the author to reevaluate and analyze the investigation. Be thorough but not too thorough. Limit the investigation and the report to the scope of the complaint(s).

Components of a Final Report

A list of standard components in a Report of Investigation appears below. If your entity routinely creates Reports of Investigation, It is suggested that cases be numbered sequentially. The components include:

- “PROTECTED” document classification.
- Heading, title, date, and case number.
- Procedural Status: This section includes a concise statement of each issue/complaint investigated, the date(s) the complaint(s) was made, identifies the investigators, complainant(s), respondent(s), witnesses, documentary or other evidence reviewed, and the person who authorized the investigation. The statement should be brief and clear.
- Background Information: A brief summary of the allegations and any relevant contextual history. This section is used to “set the stage” for the substantive discussion and analysis of the allegations. It should include a summary of the allegation, including the date of occurrence, name of the person filing the complaint, and specific allegations. This section should provide enough information for the reader to gain sufficient context of the allegations, history, relationships, and any necessary tangential information.
- Statement of Allegation(s) (Complaint): A succinct and separate statement of **each** allegation.
- Summary of Respondent’s Response: A summary of the respondent’s response to **each** separate allegation.
- Witness Statement(s): A summary of relevant information provided by witness(es). Include facts that either corroborate or rebut the allegations.
- Findings: A “finding” refers to specific behavior in a specific allegation and states whether or not it occurred as alleged. The report should include a separate finding for **each** allegation or complaint. If there is sufficient evidence to conclude the conduct occurred as alleged, the appropriate finding is that the allegation is substantiated. If there is sufficient evidence to conclude the conduct did not occur as alleged, the appropriate finding is that the allegation is not substantiated. Allegations where there is insufficient evidence to conclude whether or not the conduct occurred as alleged are found to be inconclusive. Findings are significant and critical components of the report. This section should

articulate the reasoning behind each finding, reconcile credibility issues, resolve any conflicting statements by the respondent or by the complaint, and include any other relevant information relied upon to make a finding.

- **Conclusions:** The Conclusions section is where you weigh the facts and state a conclusion as to whether a violation of policy or rule occurred. A conclusion is a statement as to whether the conduct referenced in a finding violated a rule or policy. It is quite possible to have one or more substantiated findings and to conclude that there was no violation of rule or policy.

Other Considerations

Based on facts uncovered in the investigation, conclusions may be drawn that a violation of policy or rule did occur, did not occur, or evidence is insufficient to determine whether a violation occurred. The investigator's role is to find the facts, not to recommend disciplinary or other management action. Agency management has the responsibility to decide what action to take based on the findings and conclusions.

Other Management Issues: In response to open-ended questions, employees may give you information critical for management to know, but not necessarily relevant to the investigation. Other information the investigator deems appropriate should be appended to the Report of Investigation as an Addendum, but not included in distribution of the Report. The Addendum can be organized by party (when there are multiple parties) or by allegation. Here you will detail what you were told and by whom, but not evaluate or weigh the evidence.

Distribute the report to the fewest people possible on a need-to-know basis. Prepare an executive summary as well as the full report. The summary will outline to the person who authorized the investigation a brief statement of facts, the findings and conclusions.

Communications with Parties Following Investigation

Write a letter to both the complainant and the respondent stating whether or not the allegations were substantiated. DO NOT provide them a complete report as it is protected under GRAMA. An investigator should not comment regarding actions management intends to take or has taken in response to the information revealed by the investigation. You should include this statement in your letter: "The investigative report and findings have been submitted to [AGENCY] Administration for their review. Management will make decisions regarding any appropriate action based upon the foregoing findings."

Sample Report of Investigation Template

Information in italics exists only to "cue" the reader or to make commentary. It should be deleted prior to template use

PROTECTED

Internal Investigation Report

[date]

I. Procedural Status *(Include all of the following information)*

Issue: *Was the complainant subjected to harassment in violation of (Your Agency Policy and Procedure #)?*

Date of Complaint(s):

Investigators: *(Names, Titles & Agency)*

Complainant(s): *(Names, Titles & Agency)*

Respondent(s): *(Name, Title & Agency)*

Witnesses: *(Names, Titles & Agency)*

Documentary or Other Evidence Reviewed: *(Source, Type)*

Investigation Authorized (Requested) by: *(Name, Title & Agency)*

II. Background Information *(A brief summary of any relevant contextual history. This section is used to "set the stage" for the discussion of and the analysis of the allegations. It should provide enough information for the reader to gain sufficient context of the allegations and any necessary tangential information.)*

(Complainant and Respondent are coworkers in the contracting section of the Department of (entity). Both share similar administrative responsibilities and both have been assigned to the same team for approximately two (2) years. Complainant alleges that over the past several months Respondent has begun making derogatory remarks about her. Some of Respondent's remarks have been directed at Complainant, while some have been general comments. Complainant asserts her supervisor is aware of Respondent's behavior, since it has occurred in staff meetings when the supervisor was present. Complainant has not spoken with either Respondent or her supervisor about Respondent's behavior, and is interested only in having the Respondent's behavior stop.)

III. Statement of Allegation(s) *(Complaint) (A succinct statement of each allegation)*

Allegation 1: *(Complainant alleges Respondent called her a "miserable troll" on at least three (3) separate occasions between October 1, 2018 and October 15, 2018.)*

Allegation 2: *(Complainant alleges that during a team meeting on November 3, 2018, Respondent said to the attendees that Complainant should buy a new TV with the tolls she collects from people crossing her troll bridge.)*

Allegation 3: *(Complainant alleges that during a team meeting on November 15, 2011, Respondent said to the attendees that Complainant's husband must have divorced her because she's such a troll.)*

IV. Respondent's Response(s) *(A summary of the respondent's response to each allegation. Admission or denial of each allegation)*

Allegation 1: *(Respondent admits to referring to others as "miserable trolls" but never Complainant.)*

Allegation 2: *(Respondent admits attending the meeting and making a comment about trolls, but denies that it was directed toward Complainant.)*

Allegation 3:

V. Summary of Other Evidence Considered

A. Witness Statement(s) *(Summary of relevant information provided by witness(es))*

Jane Jones

(Jones stated Respondent "swore a lot" in the office and "really liked using the word 'troll'." Jones never witnessed or overheard Respondent direct any derogatory, profane or offensive remarks at Complainant. Complainant, however, did tell Jones that Respondent was "the coworker who most resembled a troll.")

*John Smith
Sally Short*

B. Other Evidence Reviewed *(Summary, source, and type of any relevant evidence reviewed)*

VI. Finding(s)

A "finding" refers to specific behavior in a specific allegation and concludes whether or not it occurred as alleged.

If there is sufficient evidence to conclude the conduct occurred as alleged, the appropriate finding is that the allegation is substantiated. If there is sufficient evidence to conclude the conduct did not occur as alleged, the appropriate finding is that the allegation is not substantiated. Allegations where there is insufficient evidence to conclude whether or not the conduct occurred as alleged are found to be inconclusive. In this section the investigator should articulate the reasoning behind each finding. Commentary should be made regarding issues of credibility, any conflicting statements by Respondent or by Complainant, any documents reviewed by the investigator, and other relevant factors used in making a finding. It would be insufficient, for instance, for the report to reflect, "Complainant was found to be more credible than Respondent," or that "The witness did not appear to be credible." Commentary must be made as to why Complainant is more credible than Respondent or why the witness is not credible.

Allegation 1: (Though Respondent denies ever referring to Complainant, as a "miserable troll," statements from all three (3) witnesses confirm Respondent routinely referred to women as "trolls" when he was upset. Respondent admitted to his use of the term "troll" in front of Complainant. One (1) witness overheard Respondent's use of the term "troll" during the week of October 8 - 15, 2018, though the witness did not observe whether the term was directed at any particular individual. Complainant's recall of the three (3) alleged verbal assaults by Respondent was specific enough as to time, location, and circumstance to grant credibility. Additionally, Respondent's personnel file contains a February 12, 2017 Written Warning for Respondent's use of profane and demeaning language to coworkers.

There is sufficient evidence to conclude the conduct in Allegation 1 occurred as alleged. This allegation is substantiated.)

Allegation 2:

Allegation 3:

VII. Conclusion(s)

(It is important to remember that in an Investigative Report, Findings are not the same as Conclusions. A Finding refers to a specific behavior(s) in a specific allegation. A Conclusion is a statement as to whether the conduct referenced in the Finding violated a Rule or policy. It is quite possible to have one or more substantiated findings and to conclude that there was no violation of Rule or policy)

In order to conclude the alleged conduct violated (Your Agency Policy), governing harassment, the evidence must be sufficient to show that the complainant was subjected to behavior or conduct based, in this case, on her sex/gender, that was unwelcome, pervasive, demeaning, ridiculing, derisive, or coercive, and resulted in a hostile, offensive, or intimidating work environment. The evidence is sufficient in this case to conclude that the conduct engaged in by Respondent was in violation of the above cited rule or policy.