

HUSCH BLACKWELL

Civil Rights Investigator Training

Enhancing Skills in Addressing
Non-Title IX Discrimination Complaints

Presenters



Elizabeth Samples

Partner, Husch Blackwell
Kansas City, MO Office
816.983.8271
Elizabeth.Samples@huschblackwell.com



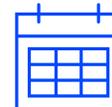
Anne Cartwright

Partner, Husch Blackwell
The Link Virtual Office
816.983.8351
Anne.Cartwright@huschblackwell.com

HUSCH BLACKWELL

Agenda

- Institutional Considerations
- Legal Foundations and Obligations
- Grievance Resolution Process
- Investigations and Decision-Making
- Report Structure and Content



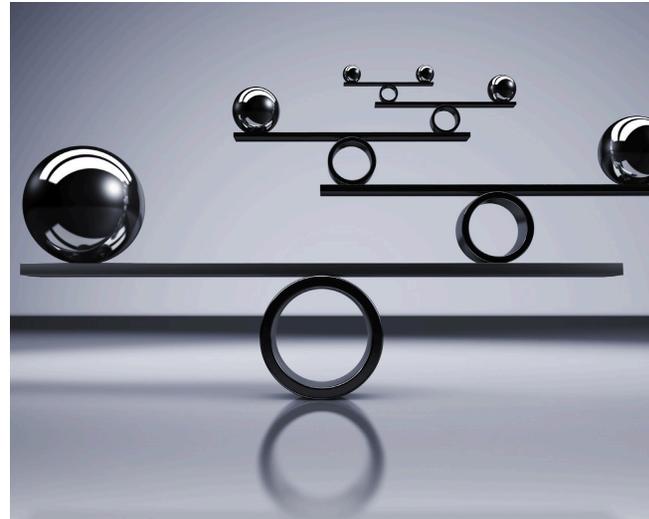


Institutional Considerations

Important Institutional Considerations

Why does this matter?

- Care for community
- Public Relations
- Policy (contract)
- Enforcement Action (Avoid and Respond)
- Litigation



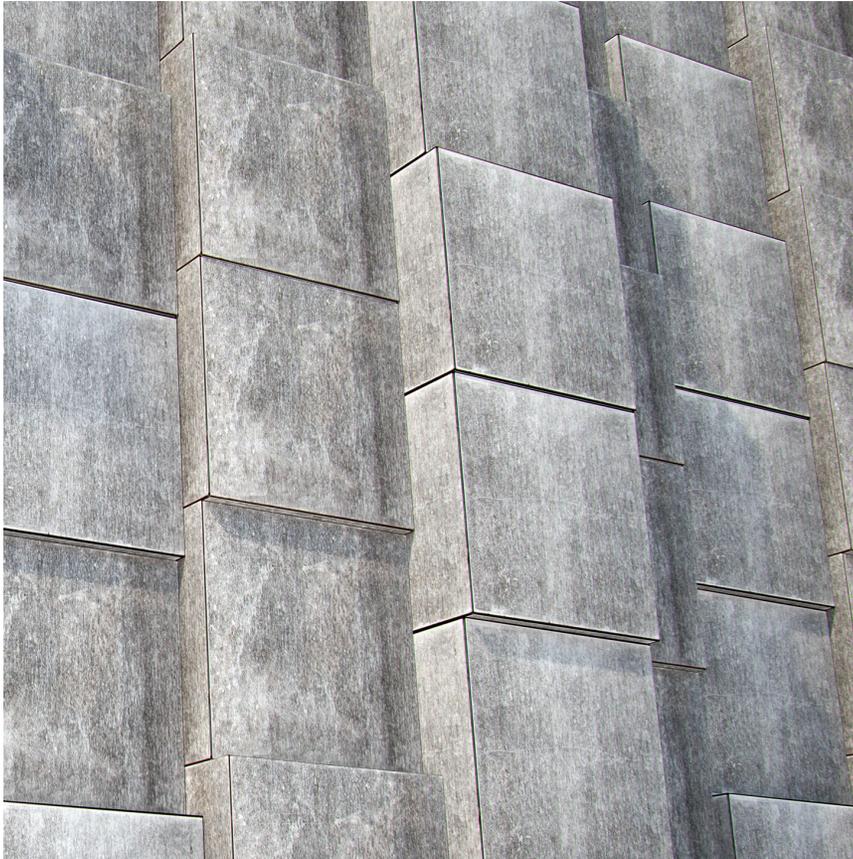
Role of Various Offices

- Depending on how report is received and nature of the allegations, multiple offices may be involved
- Know who to ask to weigh in on scope/procedure
- Matter may include referral or parallel investigations/resolutions
- Ensure various stakeholders know processes and understand need for communication

Questions/Discussion

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP



Legal Foundations and Obligations

Key Law & Regulations

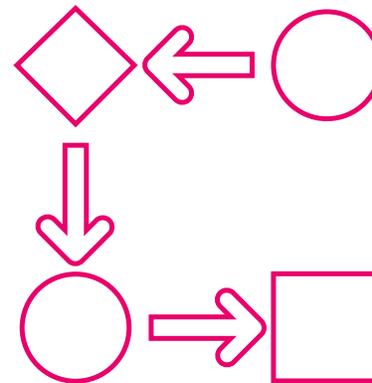
- Americans with Disabilities Act (ADA)
- Section 504 of the Rehabilitation Act
- Title VI of the Civil Rights Act
- First Amendment
- Religious Liberty Laws
- State and local laws, agency rules

State Statutes, Local Laws, and Agency Rules

- Many states, localities, and agencies (e.g., ED, HHS, state agencies) have nondiscrimination rules that may apply
- May add nondiscrimination categories/definitions
- May have grievance procedure requirements
 - These requirements are **usually** much more flexible than Title IX's prescriptive procedures

What is discrimination?

- Adverse treatment of a person based on a protected category
- Limits or excludes the person from participating in the institution's education program or activity or denies or limits the benefits thereof



Types of Discrimination

Programmatic Discrimination

Individualized Discrimination

Harassment

Failure to Accommodate

What is programmatic discrimination?

- When discrimination occurs in a systematic way due to an *institutional* policy or practice
- Programmatic discrimination adversely affects persons as a group or by category, rather than by individualized decision
- Programmatic discrimination is usually *not* attributed to an individual perpetrator (i.e., “respondent”)

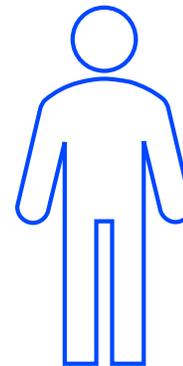
Example

An institution's business school creates a special mentorship program that pairs students with a mentor who is a successful business executive. Only male students of a racial minority are allowed to participate. The program significantly improves the odds of a participant receiving a job on graduation. In addition to the mentor relationship, the program includes special seminars held on campus, paid travel to a national summit, a small scholarship, and a plaque awarded to the participant at the program's conclusion.



What is individualized discrimination?

- A particular decision is made, or particular action taken, that results in adverse treatment of a particular person that limits or excludes them from participation or denies or limits benefits
- Typically, individualized discrimination has an identifiable “respondent” who makes the discriminatory decision



The ADA

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

ADA – Title I

- Title I: Prohibits private employers from discriminating against qualified individuals with a disability regarding employment
- Qualified individuals are those who can perform the essential functions of the job with or without reasonable accommodation
- Employers are required to provide reasonable accommodations to qualified individuals with a disability who can perform the essential functions of the job with or without accommodation, but not if such an accommodation would constitute an undue hardship

Example

A staff member in the Student Services Office requires medication for a disability that causes extreme nausea approximately 45-60 minutes after ingestion. The staff member requests a 45-minute break when nausea occurs.



ADA – Title II

- Title II: Prohibits disability discrimination by public entities (including public schools)
- “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity”
- A public entity’s programs, activities, and services, viewed in their entirety, must be readily accessible to, and usable by, persons with disabilities

Example

Complaint alleges that school district segregates students with disabilities into classes and in the cafeteria and limits their ability to select certain courses. The complaint also alleges that the district does not provide modifications to allow students to participate in non-academic and extracurricular activities.



ADA – Title III

- Title III: Prohibits “places of public accommodation” from discriminating “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”
- Includes private schools and colleges and universities
- Must make reasonable accommodations in policies, practices, and procedures

Example

A private college requires freshmen and sophomore students to live on campus and purchase a meal plan. The college does not allow modifications to these requirements for students who have severe allergies or who have accommodations allowing them to live off-campus for disability-related reasons.



Section 504 of the Rehabilitation Act

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

Section 504 of the Rehabilitation Act

- The first statute to require disability accommodations (1973)
- Makes it illegal for the federal government, federal contractors, and any entity receiving federal assistance to discriminate on the basis of disability
- “No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity”
- Implementing regulations at 34 C.F.R. Part 104

Adverse treatment

- Treating someone differently based on disability status

Harassment

- Treatment on the basis of disability that is sufficiently severe/pervasive to deny access to programs

Failure to provide reasonable accommodations

- Failure to engage in interactive process or provide approved accommodations

Example

Basketball player filed a complaint alleging the coach made her discuss her grades publicly, speak about her medical issues in front of the team and made comments about the player's disability status during her exit interview. The basketball player also alleged that after making her complaint to the equity office, her playing time decreased and the coach engaged in harsher coaching towards her.



Section 504/ADA Grievances

- Students have the right to file a grievance/complaint:
 - When the student believes reasonable accommodations should be granted but were denied
 - When the student believes accommodations have not been implemented properly
 - When the student believes they have been discriminated against based on their disability

Example

Student filed a complaint alleging that a professor encouraged them to drop a course because of frequent absences. Student alleged the college did not engage in the interactive process with them to provide academic adjustments, and the college did not excuse their disability-related absences. During their intake meeting, student said professor also made derogatory comments to the student about their absences and told the student they should decide if they are “up to the challenge” of meeting the program requirements.



Example

Complaint alleges that school district does not grant excused absences for medically prescribed appointments. In addition to challenging the blanket policy imposing unexcused absences, the complaint alleges the district did not refer students for evaluation or re-evaluation in cases of repeated absences for therapy appointments.



Title VI of the Civil Rights Act

HUSCH BLACKWELL

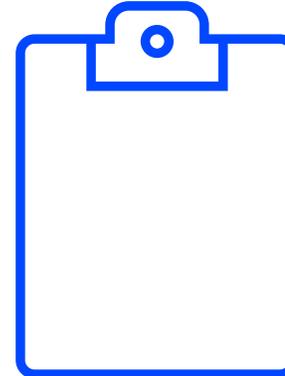
© 2024 Husch Blackwell LLP

Title VI

- Title VI of the Civil Rights Act states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d
- Implementing regulations are at 34 C.F.R. Part 100

Application

- Title VI prohibits discrimination based on:
 - Race
 - Color
 - National origin
- Applies to both public and private institutions that receive federal funding



Institutional Obligations Under Title VI

- Operate in a non-discriminatory manner
- No retaliation against anyone who participates in any complaint action under Title VI
 - Recipients of federal funds are prohibited from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title VI
- Schools must promptly and effectively address alleged acts of discrimination, including harassment

Discrimination and Complaints: Program and Activities

Admissions	Recruitment	Financial Aid	Academic Programs	Student Treatment and Services
Counseling and Guidance	Discipline	Classroom Assignment	Grading	Vocational Education
Recreation	Physical Education	Athletics	Housing	Employment

Discrimination Under Title VI

Intentional Discrimination

- Alleges that a recipient intentionally treated persons differently or otherwise knowingly caused them harm because of their race, color, or national origin.

Disparate Treatment

- Alleges that a facially neutral policy or practice had a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale.

Harassment Under Title VI

- Harassing Conduct:
 - Unwelcome conduct that may include verbal abuse, graphic or written materials, physical assault, or other conduct that may be threatening, harmful or humiliating
- Hostile Environment Harassment :
 - Unwelcome conduct based on race, color, or national origin that, based on the totality of the circumstances, is:
 - Subjectively and objectively offensive; and
 - So severe or pervasive that it
 - Limits or denies a person's ability to participate in or benefit from the recipient's education program or activity

Example

Complaint includes instances of alleged racial harassment occurring in classrooms and on the bus over the course of two years. Allegations include references to confederate flags in slide presentations unrelated to discussion the course, use of racially derogatory terms and students shaking the bus as Black students exited the bus. Complaint includes references to students reporting several instances over the course of two years, but the district record-keeping does not reflect documentation of such reports.



Example

College student alleged repeated racial harassment, including an incident in which an instructor slapped the student's hand and asked if their response was typical of individuals of their race. Student experienced ongoing stress, and their attempts to resolve the issue through the University's complaint system failed. During the resolution discussion, student shared information about impact on the student, but that process did not include fact gathering about the race-based nature of the instructor's conduct and comments.



OCR Fact Sheet on Protecting Students from Discrimination on Shared Ancestry or Ethnic Characteristics (January 2023)

Title VI's protection from race, color, or national origin discrimination extends to students experiencing discrimination, including harassment, based on actual/ perceived:

Shared ancestry or ethnic characteristics

Citizenship/residency in country with dominant religion/distinct religious identity



Includes discrimination against students of any religion, such as students who are Jewish, Christian, Muslim, Sikh, Hindu, or Buddhist, when alleged discrimination involves, e.g.:

Slurs or stereotypes

Appearance or dress

Foreign accent, foreign name, or speaking a foreign language

Example

Multiple students complained to office of institutional equity about campus protests regarding conflict in the Middle East. The complaints include information about campus protests being confrontational and physically violent. Multiple students have expressed concern about fear related to additional protests.



OCR Dear Colleague Letter (May 2023)

If a hostile environment exists based on shared ancestry, and

The school knew or should have known,

OCR will evaluate immediate and effective steps reasonably calculated to:

- End the harassment
- Eliminate any hostile environment and its effects
- Prevent harassment from recurring

Harassment Expansion:

OCR Dear Colleague Letters (November 2023, March 2024) & Fact Sheet on Harassment (July 2024)

Sufficiently severe, pervasive, or persistent so as to interfere/limit ability to participate/benefit

Assessed based on totality of circumstances (context, nature, scope, frequency, duration, and location of the harassment, as well as the identity, number, age, and relationships-power differential)

Subjectively and objectively offensive

May occur when conduct of multiple offenders, taken together, meets the definition above

Need not be directed at a particular individual

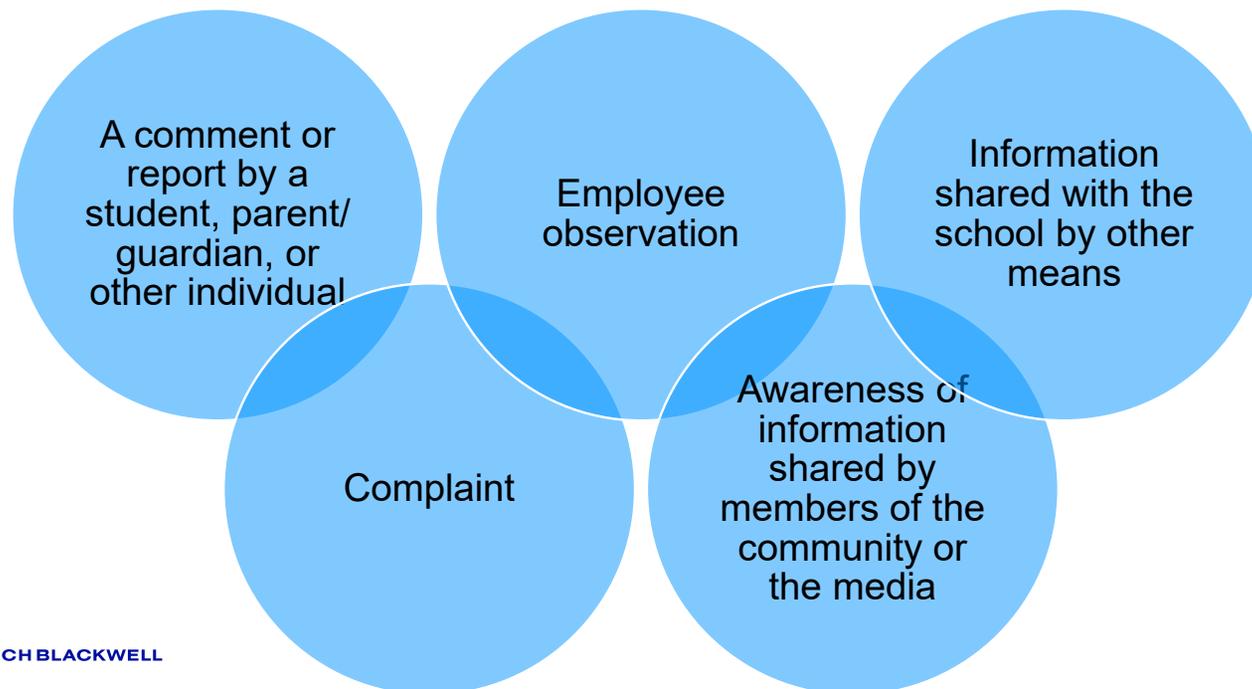
May be based on association with others of a different race, color, or national origin

May be physical, verbal, graphic, other conduct that may be threatening, harmful, or humiliating

May occur in classrooms, residence halls, hallways, athletics facilities, bathrooms, on the internet, and on social networking sites and apps

Knew or Should Have Known:

OCR Dear Colleague Letters (November 2023, March 2024) & Fact Sheet on Harassment (July 2024)



Overlapping Interests

- Expression:
 - Beginning in November 2023 DCL: OCR interprets its regulations consistent with the requirements of the First Amendment to the U.S. Constitution, and all actions taken by OCR must comport with First Amendment principles.
 - No OCR regulation should be interpreted to impinge upon rights protected under the First Amendment or to require recipients to enact or enforce codes that punish the exercise of such rights.
- Non-discrimination:
 - Consideration of OCR focus
- Safety

OCR Resolution Agreements: Example

Findings

- Specific incident did not involve antisemitic conduct
- In response to incident and others, university took proactive steps (multiple public statements, offering resources, convening meeting with campus Jewish and Muslim leaders, increased security patrols, investigative staff training)
- 35 incidents in 18 months showed evidence of growing hostile environment
- University failed to assess whether collective incidents created hostile environment or misapplied legal standard

Requirements

- New/revised policies
- Climate surveys
- Continue to provide training to investigators
- Annual training for all faculty, staff, and students
- File review: Every instance 2022-2024, analyze results, create action plan subject to OCR approval
- Provide OCR with information regarding complaints of alleged discrimination through 2025-26, address OCR feedback

Themes from Resolution Agreements

Individual incidents:

- May not lead to policy violation finding (insufficient evidence to investigate, lack of preponderance)
- May involve protected speech (discipline not appropriate)
- May be appropriately addressed (e.g., findings, discipline, supportive measures for complainant)

Incidents must be considered collectively:

- Respond to each incident
- Assess for overall environmental impact (broad consideration of hostile environment)
- Remediate as possible
- Continuing monitoring

First Amendment/ Expression

HUSCH BLACKWELL

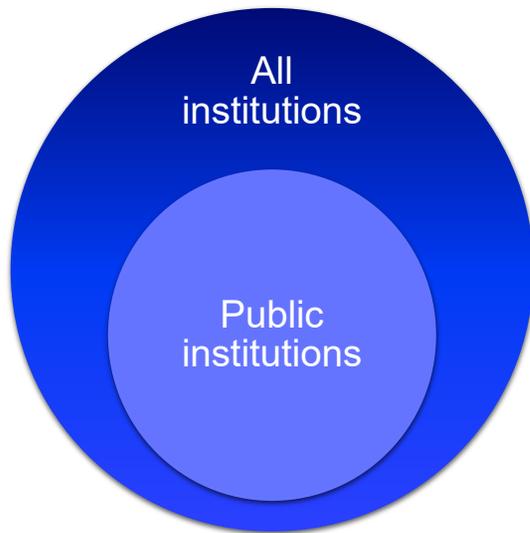
© 2024 Husch Blackwell LLP

The First Amendment

“Congress shall make no law respecting

- an establishment of **religion**, or **prohibiting the free exercise** thereof;
or
- **abridging the freedom of speech**, or of the press; or
- **the right of the people peaceably to assemble**, and **to** petition the government for a redress of **grievances.**”

“First Amendment” Rights and Institutions



HUSCH BLACKWELL

- Public schools are subject to Constitutional obligations
- All schools are subject to **applicable**
 - Other laws
 - Contractual duties (e.g., grant agreements)
 - Policies and procedures (often not a contract but often other reasons to follow)
 - Some exemptions (e.g., religious institutions)

What is protected speech?

- ***Protected***

- Spoken words
- Written words
- Expressive imagery and art
- Clothing with messages
- Expressive performance
- Photography/video recording
- Monetary contributions
- Others?

- ***Not Protected***

- Defamation, slander, and libel
- “Fighting words”
- “True threats”
- Incitement
- False advertising
- Child pornography
- Obscenity
- **No general protection for offensive, inappropriate, nasty, etc. “hate speech”**

Examples

Students at a public high school wear black armbands to protest the Vietnam War.

A citizen standing on a public sidewalk films police arresting a homeless person.

A website publishes fake and satirical news articles mocking current politicians and world leaders.

A student at a public college engages in religious speech on the sidewalk in front of the main administration building.



What are some key Freedom of Speech concepts?

- Hierarchy of speech (added protections for political, religious, and matter-of-public concern speech)
- Viewpoint discrimination (targeting speech because of the viewpoint it expresses)
- Speech forum (indicates how much regulation/restriction permissible)
 - Traditional/nontraditional public forum (e.g., public outside spaces or places designated as public fora)
 - Limited forum (e.g., typically, classrooms)
 - Closed forum (e.g., offices)
- Reasonable time, place, manner restrictions
- Government speech
- Non-expressive qualities of speech

Example

A local religious group comes onto the campus of a public university and marches on a public sidewalk with signs that have various anti-gay and anti-trans messages including statements indicating “[God] Hates ____.”



Example

A public university's student code of conduct prohibits students from engaging in acts that impede administrative processes. Students hold a protest that involves speech criticizing various decisions made by the president. The students are charged with a conduct violation. If the students had engaged in speech praising the president, they would not have been charged.



What other conduct may be protected by the First Amendment?



Assembly

Meetings

Protests



Academic Freedom

Speech in academic setting
pertinent to subject matter



Grievances



Exercise of religion

Practical Point

**May protected expression nevertheless violate law?
Policy?**

Example

Private Catholic University students staged an encampment pro-[choice or life] demonstration outside of the only residence hall. Protestors were located on the lawn of an adjacent chapel, where the public is invited to worship every Sunday. Protestors worked with the Dean of Students to coordinate the protest (security, garbage disposal, quiet hours), but protestors could be heard singing protest songs from residence hall windows during the day.

PCU's protest policy encourages peaceful protest and civil discussion of controversial issues, and protects expression of opinions, even if offensive to others. PCU admits students of all faiths. PCU also prohibits harassment based on religion.

Some students who disagreed with the protestors' position sought the guidance of the Dean of Students because they felt threatened, and that they were experiencing hostile environment harassment based on their religion.

PCU determined that the protestors did not violate PCU policy; but the investigator found that—due to other circumstances directly related to PCU programs involving protestors—some students experienced a hostile environment based on religion. PCU audited its civil rights complaints, conducted a climate survey, offered increased supports and educational symposia, and waived its on-campus living requirement.

HUSCH BLACKWELL



Religion

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

What federal laws protect religious liberty at institutions?



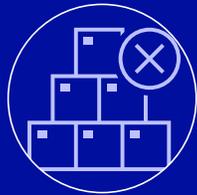
Title VII

- Title VII prohibits **employment** discrimination based on “religion”
 - Prohibits classic discrimination by adverse treatment **as well as** failure to accommodate
 - Applies to **both** public and private institutions

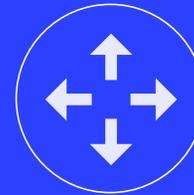
Titles II and IV of the Civil Rights Act

- **Title IV:** Prohibits religious discrimination against students in public institutions
- **Title II:** Prohibits religious discrimination by places of public accommodation
 - **Some** case law suggests that this could apply to (at least) portions of higher education institutions (including private institutions)

Adverse Treatment Discrimination vs. Failure to Accommodate



Adverse treatment: Treating adversely with respect to the terms and conditions of employment/participation where religion is the “motivating factor” in the adverse treatment



Accommodations: Exceptions to allow exercise of sincerely held religious beliefs or practices absent an undue hardship/legitimate safety concerns

- **Undue hardship:** Substantial increased costs in relation to the conduct of employer’s particular business



Example

Muslim student worker at public university faces repeated, subjectively and objectively offensive, joking and denigration from co-workers about student's faith. Student complains but supervisor fails to act. Student develops anxiety and dreads coming to work. Student worker has experienced hostile work environment actionable under (at least) Title VII by employer.



Example

Private University, a secular institution, operates a conference center open to the public. PU has allowed religious organizations to host conventions in the center, but denied permission to members of another religious organization only because the organization’s beliefs are “too controversial.” There is a risk that PU is engaged in prohibited religious discrimination.



What does it mean to have a sincerely held religious belief?

- Personal, genuinely held belief
- Religious belief does not have to be:
 - Validated by a religious leader (priest, pastor, rabbi, imam, etc.) to be genuine
 - Part of organized religion
 - Orthodox to the employee's claimed faith
 - Absence of religion (e.g., atheism) may be protected
- Religious belief can still be sincere even if recently adopted or occasionally violated

Example

A College student ambassador professes belief in the *Gospel of the Flying Spaghetti Monster*, a “carbohydrate-based religion” in which congregants are known as “Pastafarians” and wear colanders on their heads (originally a spoof). College requires ambassadors to wear College baseball caps so they can be visible on tours. The ambassador requests to wear instead a colander painted in the College’s colors and logo. College’s policies include a student religious accommodation policy, and state law suggests private colleges are must not discriminate based on religion. There is some risk to denying the ambassador’s request for accommodation.

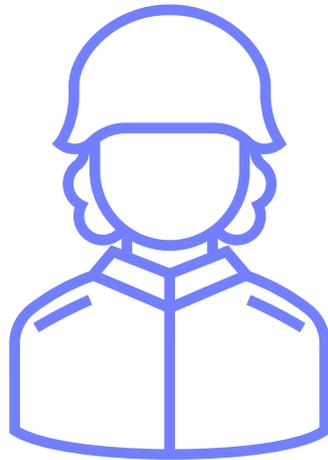


Other Considerations

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

Veteran and Armed Service Protections



- In most cases, prohibitions are on discriminating against an individual because they were (vs. were not) within the category
- Issues include:
 - Leave
 - Aid administration
 - Disparate treatment

Consider All Potentially Applicable Policies and Procedures

Nondiscrimination statements

General nondiscrimination policies

Protected-status-specific (e.g., disability, religion, expression/speech/academic freedom, veteran/military)

Assembly

Protest

Campaign

Signage

Security

Investigation, discipline and grievance (may vary)

Alternative resolution

Questions/Discussion

HUSCH BLACKWELL

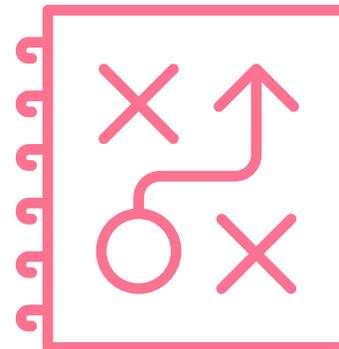
© 2024 Husch Blackwell LLP



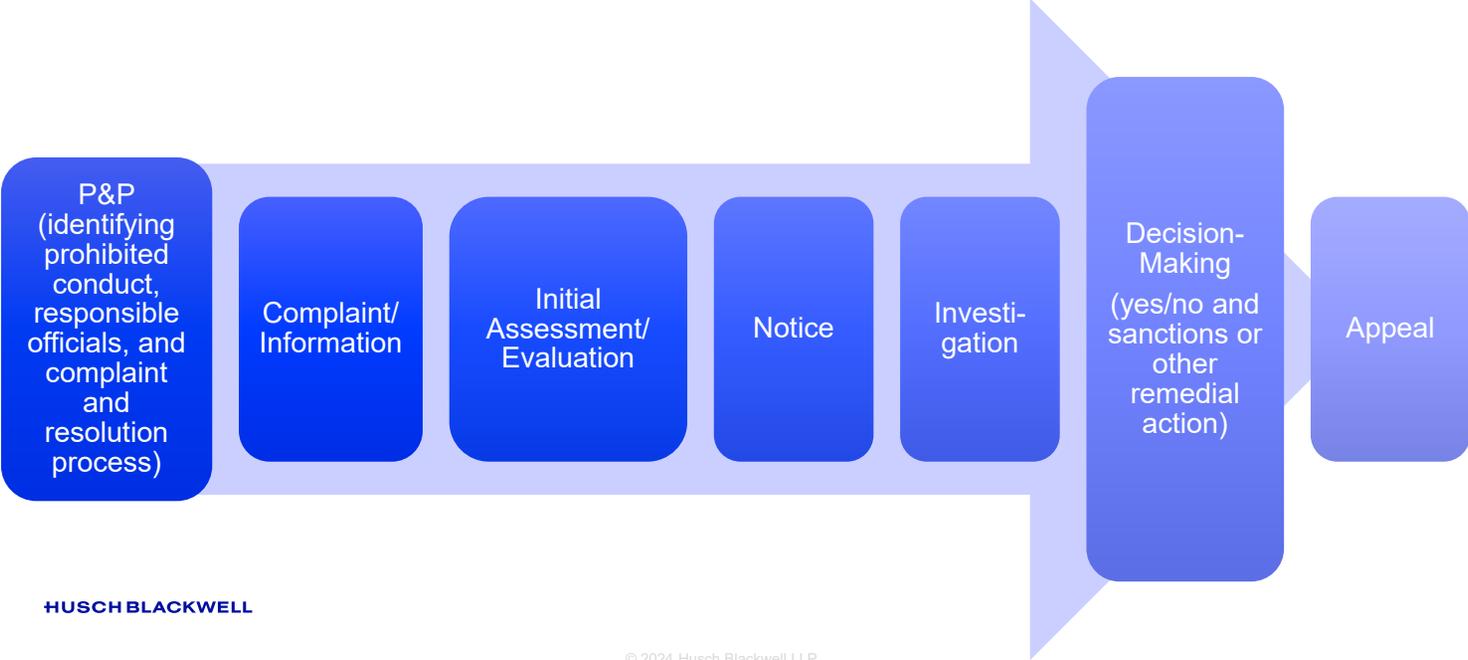
Grievance Resolution Processes

Critical Consideration

- Relevant process will vary:
 - By institution
 - By type of alleged discrimination
 - By jurisdiction
 - By relevant regulators
- Consult as appropriate to determine appropriate path



Common Grievance Process



Discretionary Process Considerations

- Scope
- Definitions
- Reporting options
- Retaliation
- Confidentiality
- Notice requirements (timing, content)
- Alternative resolution options
- Special procedures for complaints against senior administrators
- Investigation procedures:
 - Interviews with parties, witnesses
 - Review of evidence
 - Opportunities to be heard
- Advisors
- Discipline, sanctions, remedial measures
- Timelines for completion and extensions

Due Process/Fundamental Fairness Considerations

- ***Those accused of violations receive:***

- Notice of the allegations against them, and
- An opportunity to be heard

- ***Applicability:***

- Public institutions: U.S. (and state) constitutions
- Public and private: Similar protections applicable often provided in case law, statute/regulation, and/or policies



Policy and Procedure Flexibilities

- Consider any need to deviate from statements throughout grievance process
- Ensure appropriate exercise of discretion
- Document reasoning
- As process unfolds, consider need to communicate

Resolution Team (Common Members)



Initial Assessment

- Process by which concern is directed to appropriate office/process
 - Often, not role of investigator
- Consider whether available information calls for formal investigatory response
 - Presence of complainant (could be institution) and/or (depending on issue and relevant law/guidance) reason to believe violation occurred
 - Substance of allegations as compared to policy/standard requirements

Initial Assessment Considerations

- Basic facts
- Immediate safety
- Privacy
- Rights & options
- Resources and/or supportive measures
- Clery (reporting, warning)
- Preserving evidence
- Process options

When/why do we “investigate” something?

- Reason to believe policy/standard **may** have been violated
- Evidence (both inculpatory and exculpatory) needed to determine fairly whether violation occurred
- Provide decisionmaker (may be the investigator) with information allowing a determination
- Particularly where some action may be necessary to address any violation found to have occurred



How do we conceptualize an investigation?



Identify complainant and subject(s) of the investigation



Identify the specific types of misconduct implicated

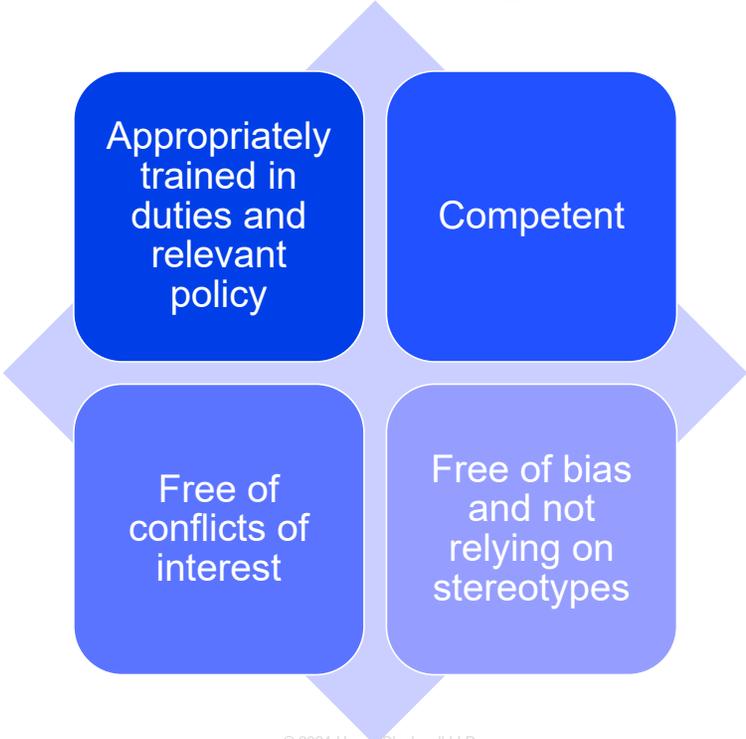


Identify relevant policy(ies)/procedure(s) at issue



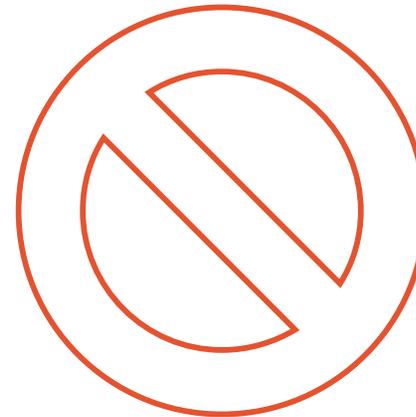
Identify the core alleged conduct at issue for which we need evidence

General Requirements for Civil Rights Investigators



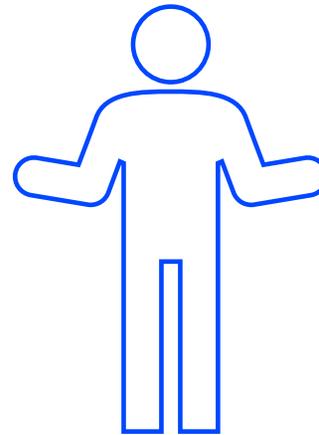
What is a conflict of interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position



What is bias?

- A prejudice, predisposition, or inclination in favor of or against a thing, group, or person
- Team members must be free of bias against complainants or respondents generally, or a specific complainant or respondent



Alternative Resolution Options (Generally Policy Dependent)

Potential methods:

- Mediation
- Facilitated discussions
- Restorative justice
- Attorneys for parties negotiate

Potential terms:

- Apology
- Restrictions on contact, participation, or presence
- Training or education
- Withdrawal or resignation
- Negotiated discipline or sanctions
- Climate assessment

Best practices:

- Consider requirements of policies and procedures
- Share information about process with parties in advance
- Describe what will happen if alternative resolution fails
- Use trained facilitators
- Document, document, document

Appeals

Common sample grounds:

- A procedural irregularity affected the outcome
- New evidence, not reasonably available at the time of determination, that could/would have affected outcome
- Conflict/bias by officials involved in investigation/determination that could/would have affected outcome

Best practices:

- Policy should identify any available appeal process
- Appeal officer who is not otherwise involved in the investigation
- Written submissions and decision

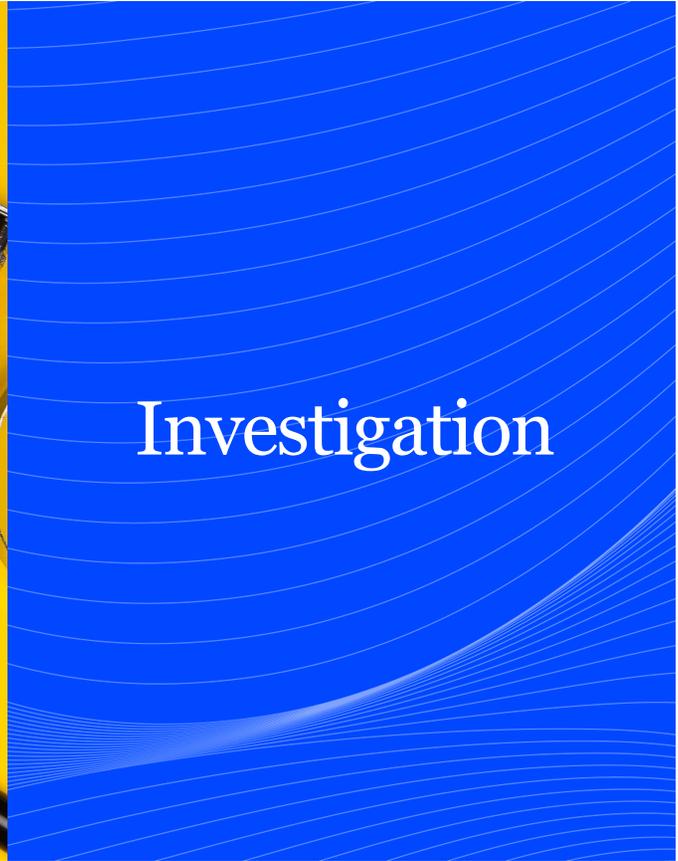
Investigation considerations:

- Available appeal(s) and grounds (potential arguments and information relevant to deciding appeal)
- Appeal official(s) (audience)

Questions/Discussion

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP



Investigation

Review and Know Institutional Policy



SCOPE



PROHIBITED
CONDUCT
DEFINITIONS



PROCEDURAL STEPS
AND OTHER RIGHTS
OF THE PARTIES
(NEXT SLIDE)

Policy-Dependent Rights of Parties

Notice elements
(including
supplemental notices)

Support
(advisors/attorneys)

Access to evidence

What kind of
report/decision(s)
received

Opportunities to
respond to allegations,
evidence,
determinations

Process free of bias
and conflicts of interest

What is the purpose of an investigation?

For the institution

To collect relevant inculpatory and exculpatory evidence

Sufficient to permit an impartial decision-maker to determine

Whether or not the reported policy violation occurred

Investigation Planning

- ***Assignment of investigator***
 - Who?
 - Free from conflict of interest
 - How many?
- ***Develop Investigation Plan:***
 - Scope/Applicable Policy
 - Witnesses, documents/evidence, etc.
 - Maintain working timeline

Effective investigators...

Create	Document	Act	Keep	Treat
Create an investigation plan	Document all steps taken throughout investigation	Act promptly (eye on timeframes)	Keep parties informed	Treat each investigation as if work will be scrutinized by an outside third party (OCR, court, opposing counsel, etc.)

Creating an Investigation Plan

- Formulate comprehensive investigative plan at the onset and adjust accordingly as investigation proceeds
- Who to interview and in what order
- Evidence to gather/scope
- Pull all relevant policies/procedures
- Notices (appropriate detail; **amend as necessary**)
- Interim measures
- Timeline
- Periodic updates to parties
- Document any delays

Benefits of Investigation Plan

- Ensures investigations are conducted consistently
- Ensures steps are not missed
- Allow for possibility of revisions/additions
 - Remember amended notices
 - Address and refer cross-complaints



Interviews

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

How do we collect evidence in an investigation?



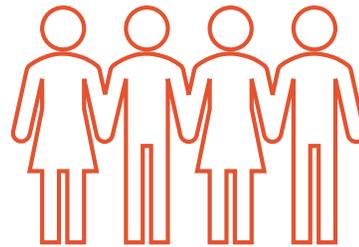
Interviews of parties and
witnesses



Collection of non-testimonial
evidence

Who do we interview in an investigation?

- Parties
- Fact witnesses
- Maybe character witnesses
- Maybe experts



What's the difference between a fact witness and a character witness?

- A **fact witness** has personal knowledge about specific facts that are relevant to determining whether or not a given act of misconduct occurred.
- A **character witness** does not possess knowledge of specific, relevant facts but instead speaks to a person's general character traits or their general disposition.

Example

Hardeep accuses Jamie of discrimination on the basis of ethnicity. Hardeep claims that Jamie repeatedly made disparaging remarks about Hardeep's religious and ethnic attire. One of Hardeep's friends, Campbell, was present when Jamie made one of these remarks to Hardeep and heard Jamie make a derogatory comment.



Example

Gloria has known Jamie since high school. Gloria can testify to their belief that Jamie is a “caring person” who would “never” intentionally discriminate against anyone.



“Elements” of the policy

- The policy language defines the behavioral standard (i.e., the rule)
- Identify the elements of the policy
- Example: Anti-retaliation policy
 - What are the elements?
 - In other words, what facts must be proven to establish a violation?

What are some general principles about interviewing?

Timing	Conduct interviews as soon as reasonably possible to maximize the most accurate memories
Setting	Choose a private and quiet setting
Role	Maintain and explain your role as a neutral fact-gatherer; not a prosecutor; not a defense attorney
Prepare	Anticipate questions that you will be asked and have responses ready

Essential groundwork

- Plan your sequence
- Prepare your “must ask” questions
- Bring materials
- Take inventory of previous communications
- Know who’s coming
- Anticipate questions from the party



How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

Beginning – Demeanor & Tone



Establish rapport



Acknowledge that the process can be difficult



Talk about your experience conducting investigations



Where possible, offer choices



Listen vs. Interview vs. Interrogate



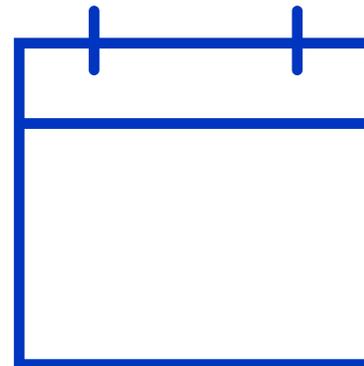
Questions welcome



Breaks as needed

Practical considerations for interviewing

- Focus on elements of alleged violation and disputed facts
- Consider appropriate ways to guide off-track witnesses



Questioning tips

Use policy language
when discussing
allegations

Neutral language
(Avoid
labels/judgments)

One question at a time

Rephrasing

Open-ended vs. leading
questions

Utilize silence

What are common unknowns to the subject of an interview?

- Who is the interviewer?
- What is the interviewer investigating?
- Am I the one in trouble?
- What is the interviewer going to ask me about?
- What is the interviewer going to do with the information I provide?
- When will I learn what happens next?
- Is this confidential?

Things helpful to say in every interview . . .

- “If I ask a question you don’t understand, please tell me.”
- “If I ask a question and you don’t know the answer, it’s okay to say you don’t know.”
- “If you think I’ve misunderstood anything you say today, please tell me.”
- “I want to get as much information as possible, so please be detailed in what you share. And if I don’t ask about something you think is important, please tell me.”
- “To do my job, I need accurate information. So, I always remind every witness that it’s important to tell the truth.”

When Asking Questions . . .

Non-verbal communication

- Convey care, concern, and interest to both sides and to witnesses
- Make eye-contact

Verbal communication

- Avoid questions that imply the alleged conduct occurred or did not occur
- Avoid questions that blame or judge the complainant
- Avoid questions that blame or presume violation by respondent

How do we ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use “facilitator” words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of specific questions until necessary
- Avoid leading questions

What are “invitation” questions?



“Can you please tell me what happened that night?”



“Can you walk me through what happened?”



“In your own words, can you tell me what occurred?”



“Can you describe what you saw that day?”

What are
“facilitators”?



What are “cued” invitations?

“You mentioned that Can you tell me more?”

“You said that Can you elaborate?”

“You said they ‘made fun of’ you. Can you tell me more about how they made fun of you?”

“If I understood you right, you said that after Can you tell me what happened in between?”

What about leading questions?

- Leading questions imply the anticipated answer through the question itself
- Pose a significant risk of influencing the testimony and compromising impartiality (perceived or actual)
- Should generally be avoided by institutional actors

Examples

You must have felt shocked and disgusted when they did that, right?

And because you have been harassed before, it must have been especially hurtful when it happened again?

So, you feel that you had permission to post the information because they had seen someone else do it too?



Interviewing minors

- Adhere to state laws and district/school policies
- Conduct the interview in a safe, private space
- Straightforward and age-appropriate questioning
- Begin the interview with rapport building
- Documentation is critical

Setting Healthy Boundaries

1

Establish clear boundaries with students early on.

2

Do not engage in peer-like behavior with students.

3

Be consistent.

4

Do not “play favorites.”

5

Inform administration if student(s) do not respect boundaries.

May an investigation collect and rely on privileged information?

- Generally, only if a party waives the privilege
- An institution generally should not attempt to pierce a subject's:
 - Attorney-client privilege
 - Confidential health communications
 - Confidential counseling communications, etc.

Example (1 of 2)

During the initial investigation interview, the complainant discloses that they went to the counseling center the very next morning after the alleged incident. The investigator asks: “What did you tell the counselor? It’s important for me to know this, as it could corroborate your account.”



Example (2 of 2)

During the initial investigation interview, the complainant discloses that they went to the counseling center the very next morning. The investigator says: “Your conversations with the counselor are confidential, and you have the right to keep them confidential. I’m not going to ask about them, but you do have the right to waive confidentiality if you think there is something important that you want me to know.” The complainant asks, “Well, do you think I should waive confidentiality?” The interviewer responds, “I can’t answer that for you, but I do think that’s something you could discuss with your counselor.”



What are other potential landmines for interviewers?

- Disproportionate questioning of one party over the other
- Being overly solicitous to one party
- Asking questions that create the appearance the investigator is a prosecutor or defense attorney
- Asking questions predicated on stereotypes or bias
- Revealing the likely outcome through questions
- Not addressing credibility issues through interviews

Example

At the outset of the complainant’s interview, the investigator says: “I just want to thank you for being here today. I know it takes a lot of courage and that this is likely very difficult for you. I have some questions that I need to ask, but if any of them make you uncomfortable, just let me know. I want you to be as comfortable as possible.”

Before questioning the respondent, the investigator says simply: “I have a few questions for you. If anything I ask doesn’t make sense, I’ll expect you to let me know.”



Example

While questioning the respondent in a race discrimination case, the investigator says:

“You received training on the nondiscrimination policy, right?”

“And you remember from training that certain comments may constitute race discrimination, right?”

“And so you knew, when you made that comment to the complainant, that you would be discriminating against them on the basis of their race, right?”



Difficult Issues in Questioning

- Remember to ask the difficult questions
- And questions that bear on credibility
- Although it may be difficult to ask certain questions, remember you are providing the parties and opportunity to share information supporting or refuting the allegations

Example Questions for Protest Hypothetical

- Did you attend the protest?
- How long did the protest last?
- What did you observe about the protest? What could you see/hear?
- Where were the protesters located? What were they saying?
- Did they have signs? What did the signs say?
- What components of the protest were concerning to you?
- Did the protesters make comments or engage in behaviors that you perceived to be targeting individuals of certain religious beliefs?
- Do you view the pro-[choice or life] position of the protesters as targeting your religious beliefs? Which ones?
- How did the protests impact you?



Sample questions to assess credibility

“You previously said that you did not remember who Complainant was. However, you later mentioned that you remembered Complainant because he was wearing a ‘hat’ in class all the time. Can you please explain why you initially said you did not remember Complainant?”

“In your complaint, you stated that this incident occurred on September 3. During our initial interview, you mentioned this incident took place over the course of several weeks in November. Can you please specify what the date was?”



How should interviews be recorded?



A common practice is to take contemporaneous notes and promptly convert the notes into a coherent interview summary/memorandum



Audio recording with or without subsequent transcription is becoming more common for serious cases with the potential for litigation

Example: Interview Practice

Hardeep (he/his/him), a Sikh student in the college's ROTC program, has received religious accommodations to wear his turban and maintain his beard. During a mandatory ROTC training exercise, Hardeep is told by the commanding officer, Officer Blake, that his turban and beard are not in compliance with uniform standards, despite Hardeep's prior accommodations. During this conversation, the commanding officer makes a derogatory comment to Hardeep about his turban and beard and makes comments implying that Hardeep will not be successful in the program if he continues to need "special treatment." Despite having one of the highest marks in the program, Hardeep is not chosen by the commanding officer for a special appointment at a campus event.



Example Questions for Complainant (Subjectively and objectively offensive)

- Tell me more about what Respondent Officer Blake said about your appearance.
- What did Respondent say about your future success in the program?
- What was your reaction to Respondent's comments?
- How did you feel after hearing these comments?
- How did Respondent's comments impact you?



Example Questions for Complainant (Severe and pervasive)

- **Have there been any other interactions with Respondent that you found troubling?**
- **In as much detail as you can recall, tell me the specific language used by Respondent.**
- **Did Respondent make these statements during one conversation, or over the course of multiple conversations?**
- **Why do you think you were not selected by Respondent for the special position?**
- **What impact does not receiving this appointment have on your education/career?**



Example Questions for Complainant (Limits or denies participation)

- **What impact did not receiving the special position appointment have on you?**
- **Did you have any additional classes with Respondent after he made those comments? If so, did you continue to attend those classes?**
- **Has this impacted your experience in the Program? In what way?**



Non-Testimonial Evidence

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

What is non-testimonial evidence?

- Video
- Photos
- Documents
- Emails
- Text messages
- Law enforcement records
- Social media posts
- Relevant objects (journals, drugs, devices)
- Information on comparators

What are the sources of non-testimonial evidence?

Parties

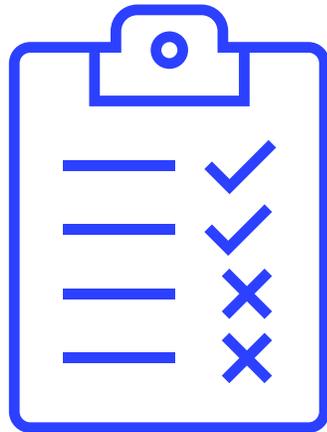
Witnesses

Institutional personnel
and offices

Online

Third-party entities

How do we document non-testimonial evidence?



- Track
 - Where or from who did we get it?
 - When did we get it?
 - What form did we get it?

Gathering Evidence on Comparators

- Type of non-testimonial evidence that may be used to determine if it is more likely than not that discrimination has occurred
- Examples:
 - Salaries
 - Promotions
 - Termination data
 - Team rosters
- Will likely require collaboration with other institutional departments and personnel
 - Only share as much information as is needed – be mindful of confidentiality

Investigation Interview Scenario

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

Scenario: Mock Interview

(Same hypothetical as before)

Hardeep (he/his/him), a Sikh student in the college's ROTC program, has received religious accommodations to wear his turban and maintain his beard. During a mandatory ROTC training exercise, Hardeep is told by the commanding officer, Officer Blake, that his turban and beard are not in compliance with uniform standards, despite Hardeep's prior accommodations. During this conversation, the commanding officer makes a derogatory comment to Hardeep about his turban and beard and makes comments implying that Hardeep will not be successful in the program if he continues to need "special treatment." Despite having one of the highest marks in the program, Hardeep is not chosen by the commanding officer for a special appointment at a campus event.

HUSCH BLACKWELL

Mock Interview Questions

- How will you prepare for your interview with Respondent?
- What will you do to build rapport as the interviewer?
- As the interviewer, how will you build out your outline?
- As the interviewer, what documents will you review to prepare for the interview?
- Are there any individuals you will want to talk to before Respondent?

Questions/Discussion

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP



Decision-Making: Assessing the Evidence

How do(es) decision-maker(s) decide a case?



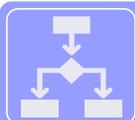
After investigation, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for relevance, weight and credibility



Resolve disputed material issues of fact under the standard of evidence adopted by the institution



Using the facts as found, apply the policy's definitions to those facts to determine whether a policy violation occurred

“Standard of Evidence”



Measure by which a policy violation is determined

(As to each element of a violation, what needs to be shown?)

HUSCH BLACKWELL



Set by policy (sometimes law, regulation, guidance)



E.g.,

Preponderance of the evidence (more likely than not)
Clear and convincing evidence
Beyond a reasonable doubt



Preponderance of the evidence most common

How do we know when the investigation has “sufficient” evidence?

- Has the respondent admitted to the misconduct?
- Is it clear the material facts are undisputed?
- Is there definitive non-testimonial evidence?
- If none of the first three, have reasonably available avenues of inquiry been exhausted considering the likely consequences of an adverse finding?

What is relevance of evidence?

- Evidence is relevant if:
 - It has a tendency to make **a fact** more or less probable than it would be without the evidence; and
 - The **fact is of consequence** in determining the action
- Relevance must be determined considering the form of violation alleged

Example

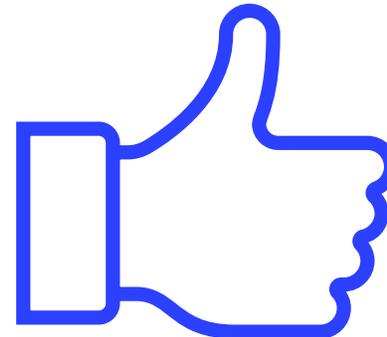
Student accused anti-war Political Science Professor of discriminating against Student last term with a failing grade due to Student's status as a veteran of the war in Afghanistan after Student defended military action in class.

- **Witness says, "Student was arrested for domestic abuse this term."**
- **Professor explains that Student earned poor grades on assignments before Professor learned of Student's veteran status and on the multiple-choice final, such that Student "earned" the F.**



What is credibility of evidence?

- The extent to which something is believable, trustworthy, or convincing
- Critical where
 - **Material** facts are disputed
 - Witnesses/evidence inconsistent on **material** facts
- Not necessarily binary/absolute



How do we assess credibility?

Plausibility—Believable?

Corroboration—Other evidence?

Consistency

Demeanor

Motive to falsify

Contemporaneous

First-hand knowledge

Influence of others

Bias (overt/unconscious)

Behavior after the report

Example

Witness Campbell saw Hardeep leaving the ROTC instructor's office and observed that Hardeep was crying and appeared distraught. Witness Campbell reported that Hardeep left the instructor's office at approximately 11:25 a.m. Hardeep says he sent a text message to their friend right after leaving the office, telling their friend the instructor is "a racist jerk."

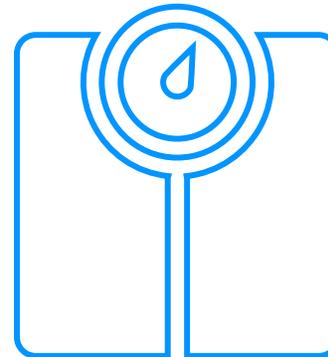
Credibility considerations:

- **Did Campbell talk to Hardeep about this investigation before the interview? (Bias, motive to falsify, or—even unconscious—influence)**
- **Is there evidence of the text message between Hardeep and their friend? If so, when was it sent? (Consistency)**
- **Is there any surveillance evidence showing Hardeep crying outside the office? (Corroboration)**



What is weight of evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative (tending to prove a proposition) than other evidence
- Weight may vary depending on a range of factors, including credibility



How do we assess weight?

Unrefuted

Objectively proven

Corroborated

Level of detail

Expertise

Direct vs. circumstantial

Personal observation vs. general knowledge or hearsay

Credibility

Direct vs. circumstantial

Direct — Actual evidence of a fact, circumstance, or occurrence proves a fact in question without presumption or inference

- E.g., testimony of a witness who actually observed and perceived event in question (see, hear, touch)

Circumstantial (indirect) — Information which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred

- E.g., a receipt suggesting a party was not where they claimed to be at a material, particular time

Circumstantial



HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

Direct



HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

What is hearsay?

- Hearsay — Statement (written or oral) offered by someone other than the speaker offered to prove fact in question
 - Longstanding evidentiary principle that hearsay has less weight than personal knowledge
 - Some hearsay is more reliable than other hearsay, e.g.,
 - Statement contemporaneous with the event in question
 - Excitable statement uttered in the moment being perceived

Example: Weight

Witness testified they heard complainant call respondent by a discriminatory epithet outside a residence hall as witness was arriving. Witness reported clearly seeing the parties' faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring. Witness testified they know the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness arrived at the residence hall, and witness's call log indicates the call was received at 11:05 pm.



Other Evidentiary Considerations

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

How do we assess “I don’t remember”?

True loss of memory may occur due to, e.g.:

- Trauma
- Passage of time
- Lack of attention

Balance

- Memory loss alone does not equate to a lack of credibility
 - Recollection/testimony need not be linear
- Possible to remember some information and not other information
- Inexplicable memory loss as to adverse details, while memory of helpful details, may indicate a lack of credibility
- May go to weight

Tricky Evidence

- Consult policies, procedures, and appropriate officials as needed

Medical, psychological, and other protected records

- Protected information generally not considered absent consent of protected party
- Legal/regulatory restrictions may apply

Refusal to answer/testify

- Generally, not in and of itself evidence
- Negative inference **may/not** be permissible
- Consider other available evidence

“New” evidence

- May impact weight/credibility

Also Tricky – AI-Generated or Potentially Altered Evidence

Consider

- Unnatural lighting or shadows, blurry areas, inconsistent skin tone/texture/movement
- Inconsistencies
- Contrary evidence or inconsistency with other evidence
- Detection technology
- Any relevant procedures (e.g., for AI-detection, separate disciplinary procedures)

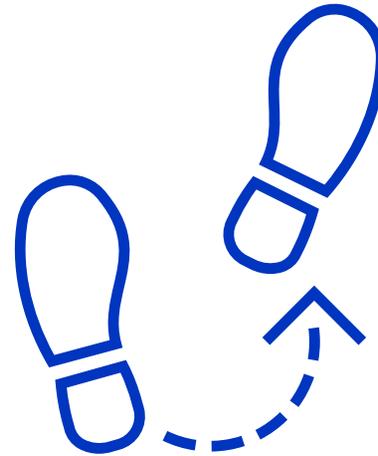
Determination

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

Determination

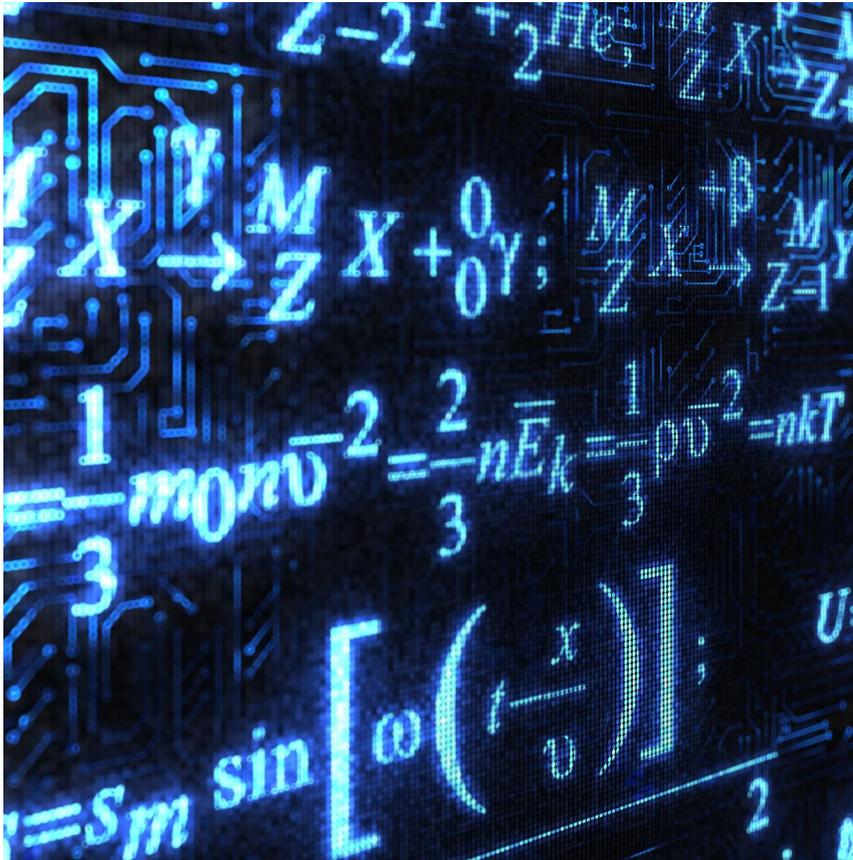
- Decision as to whether/not prohibited misconduct occurred
- Moves matter to next procedural step
- Record of following process
- Documents fair process
- Provides parties and subsequent decision-makers (if applicable) with information



Questions/Discussion

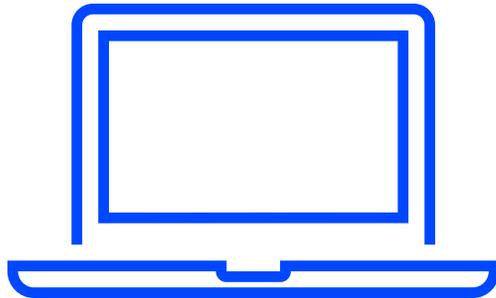
HUSCH BLACKWELL

© 2024 Husch Blackwell LLP



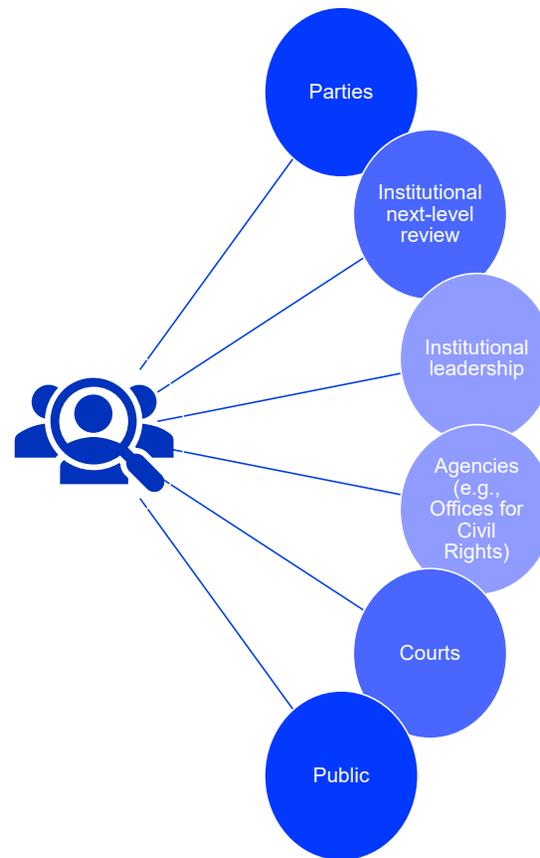
Report Structure and Content

What is the purpose of an investigative report ?



- Outline/summarize the allegations of potential misconduct
- Describe a timeline of the investigation
- Fairly summarize relevant evidence
- Potentially include analysis and determination

Who is our audience?



Practical Point

Not all matters, or policies/procedures, require an exhaustive, detailed report. Consider institutional practice, policy/procedure, and resources; and consult other officials as needed to determine optimal approach.

Critical Elements

- Preliminary case information
- History of the case
- Allegations/potential violations
- Applicable policies/procedures
- Evidence gathered/considered
- Standard of proof
- (If applicable) Evidence/Facts: Factual findings, credibility/weight assessments
- (If applicable) Decision-maker:
 - Analysis and conclusion regarding responsibility
 - Sanctions
- Next steps (e.g., hearing, procedures/grounds for appeal)

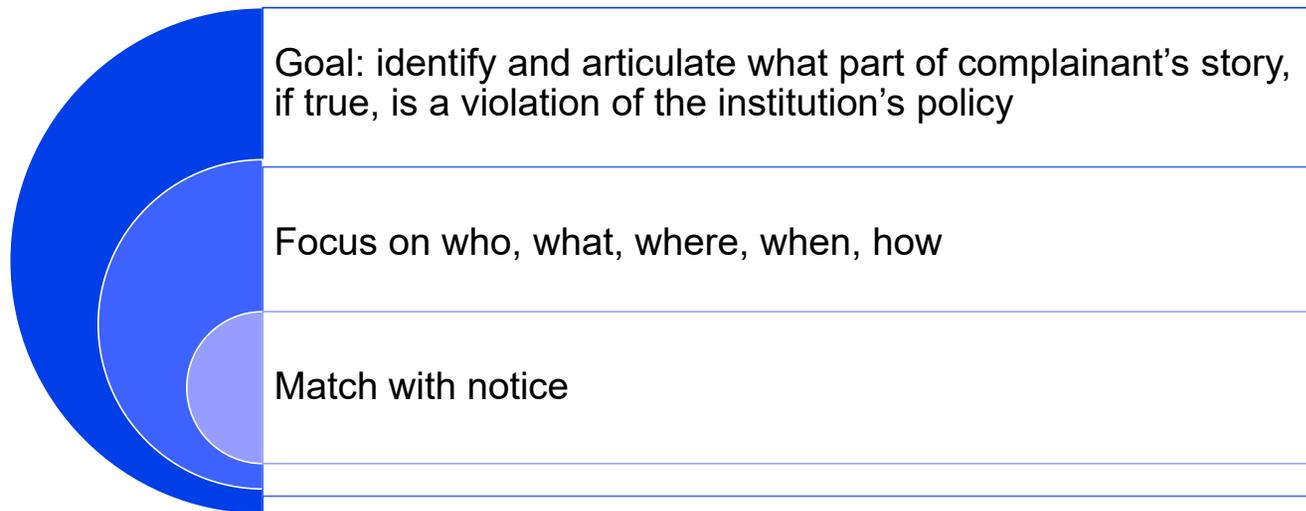


Framing Allegations

Student Taylor (she/her/hers) alleges that nursing instructor Dr. Smith engaged in disability discrimination. Specifically, Taylor alleges that when she started taking Dr. Smith's emergency medicine class in the Spring semester, Dr. Smith refused to honor Taylor's approved testing accommodation and said, "Giving accommodations to students in this class defeats the purpose of prepping you for work in emergency medicine." Dr. Smith denied the comment and said Taylor's grade reflected the quality of her work. This report summarizes the investigation of this matter and all relevant evidence, as specified in the University's ADA/Section 504 Policy.



Summarizing allegations



Practical Point

The alleged misconduct identified in the investigation report should align with the that identified in the initial written notice (and any supplemental notices) provided to the party(ies) pursuant to procedural notice requirements.

Applicable policies & procedures

Reference all applicable policies and procedures, including specific language which is pertinent to the allegation

- E.g., include relevant definitions

Attach full copy of current policy and procedures to report

Example

Taylor's complaint implicates potential disability discrimination.

Disability Discrimination

"No otherwise qualified individual with a disability shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..."

Disability Accommodations

"Students will be given a letter to provide to University officials responsible for courses or activities where accommodations are to be provided. It is the responsibility of those relevant officials to provide the accommodations as written. Officials may contact the Office of Disability Services for questions regarding granted accommodations."



History of the case



Example

- 10/3/2024:** Complaint filed by Taylor
- 10/7/2024:** Initial written notice provided to parties
- 10/10/2024:** Interview of Taylor
- 10/17/2024:** Interview of Dr. Smith
- 11/15/2024:** Evidence file provided to parties and advisors
- 11/25/2024:** Responses to evidence file received from both parties



Evidence Gathered/Considered

Facts that matter	Goals	How to do this?
<ul style="list-style-type: none">• Consider elements of alleged policy violation• Which facts are relevant to each element?• Which are disputed and undisputed?	<ul style="list-style-type: none">• Investigators: identifying disputed/undisputed material facts• Decision-makers: reaching resolution of disputed material facts	<ul style="list-style-type: none">• Show your work• Explain as needed (e.g., if emphasized by a party) irrelevant information not considered• Decision-makers: Explain your credibility assessments

How do we summarize party and witness statements and evidence?



Consider whether witness-by-witness, chronology, topic, or other format best aligns with policy, procedure, and clarity considerations



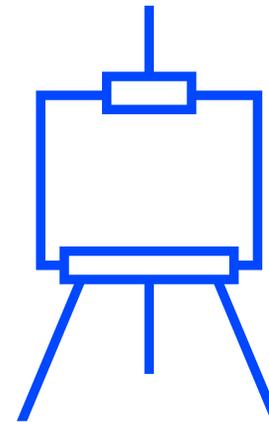
Summarize statements and evidence related to *material* facts



If a transcript of the interview or a full memorandum of interview is included, summary can be relatively brief

How should other information be included?

- Summarize
- List/append as exhibits (as possible)



Example

Taylor provided dozens of text messages that Taylor sent to her friends in the days after meeting Dr. Smith during office hours. Those text messages are included as Exhibit 1. Of note is a text Taylor sent to a friend shortly before noon on March 15, in which Taylor wrote, in pertinent part: “You won’t believe what Dr. Smith said to me today. That prof is super rude. CALL ME.”



What are some key tips?

- Avoid sanitizing parties' and witnesses' language; use quotes if needed
- Avoid euphemisms that create ambiguity
- If credibility observations are included, explain the basis for them
- Avoid speculation – if something is unknown/undeterminable, state as much (if material, consider further investigation)
- Use objective, formal writing
- Complete sentences with sound grammar and correct spelling
- Professional font with professional margins and headings
- Use a standard form and format where possible

Practical Point

Have another person consider/proofread the investigation report before it is finalized. (In most cases/preferably, not someone who is otherwise involved.)

Example

Taylor described that Dr. Smith made derogatory remarks about Taylor's disability.

vs.

Taylor described that Dr. Smith said, "ADHD is not a real disability" and, "Students who need accommodations should not be in nursing."



Example

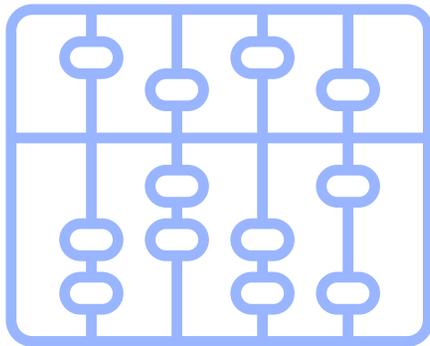
Taylor then indicated that, after Dr. Smith made the disparaging remarks, Dr. Smith would not provide Taylor with her approved accommodation.

vs.

Taylor indicated that she asked Dr. Smith to let her schedule a time for a quiz so that she could receive extended testing time, and Dr. Smith responded that they “would not allow Taylor to take the quiz outside of class” nor could Taylor “ever receive extended testing time” in one of Dr. Smith’s classes.



Assessment of credibility



- Describe your reasoning: Line up *facts* relevant to credibility
- Consider relevant factors (e.g., plausibility, motive to falsify, etc.)

Example

During the interview, Taylor appeared highly credible.

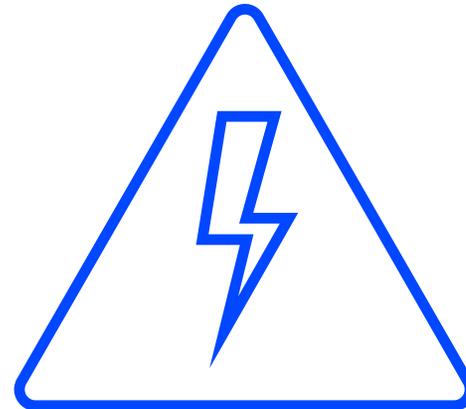
vs.

Taylor was consistent throughout our discussions as to the words stated by Dr. Smith. When I asked questions to which Taylor did not know the answer, Taylor readily admitted as much. Taylor's testimony about the core incident was clear and detailed. Taylor's account aligns with witness statements and text messages as to the timing of the discussion in Dr. Smith's office. Dr. Smith denied making statements as alleged by Taylor. However, as detailed above, one witness in Dr. Smith's office recalled hearing them make similar statements about granting accommodations to nursing students. On the issue of whether Dr. Smith indicated to Taylor in their office that nursing students should not receive accommodations, I find Taylor credible.



What are some other landmines to avoid?

- Injecting stereotypes or bias
- Including external facts not derived from the investigation
- Including ethical or moral judgments
- Including prohibited or improper content



Example

In this investigator's experience, it is common for persons who have been close friends for a long time to bend the truth and/or lie to cover up for their friends. Therefore, the investigator generally deems the testimony of Taylor's friends to be less credible than other witnesses who are not Taylor's friends.



Example

According to information the investigator independently located on the website www.healthfacts.com a person who already suffers from generalized anxiety disorder may experience exacerbated injury from comments about their protected status. Therefore, I conclude it is likely that Respondent's conduct had a particularly injurious effect on Complainant as compared to someone who did not already suffer from a mental health condition.

vs.

Complainant offered a written statement from her licensed healthcare provider that she has generalized anxiety disorder which was exacerbated after the encounter with Respondent.



How should you address the parties' criticisms of the investigation?



Incorporate new or salient points as necessary



If a party demanded more interviews or collection of other evidence, and you elected not to pursue, explain why

Example

Taylor complained that the length of this investigation was longer than the target noted in the policy and that this report should have been issued sooner. However, Taylor made her complaint at the time of midterms, after Dr. Smith had gone abroad for several weeks and key witnesses were gone from the University's campus. Given the gravity of the allegations, the investigator determined it was important to conduct in-person interviews, if possible, to best assess credibility. This necessarily delayed the investigation into the next calendar year.



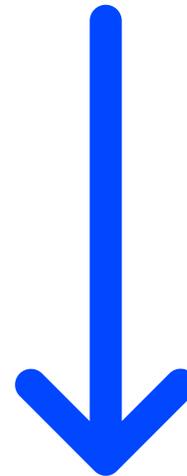
Example

Together, Respondents to the allegation that they engaged in disruptive conduct by protesting on January 6 identified 18 witnesses, including some faculty members, who would purportedly testify variously that, for example, Respondents are generally animated in expressing themselves but never “yell”; that they respect the operations and rules of the College; and that they never intend to harm anyone. However, because there was no indication any of these 18 witnesses had personal or direct knowledge of the events on January 6, the Investigator determined that these witnesses would not have relevant information.



How should we structure of the analysis section?

- Will vary
- Consider following (C)IRAC form
 - (Conclusion, briefly)
 - Issue (restate question that must be answered)
 - Rule (policy/procedure elements)
 - Analysis (resolving factual disputes under the standard of evidence to the rule and application of those facts to the rule)
 - Conclusion (simple, definitive statement as to whether the policy standard was violated)



Example

Considering the evidence summarized above, the Decision-Maker must determine whether a preponderance of the evidence supports a finding that Dr. Smith engaged in disability discrimination against Taylor by denying Taylor granted accommodations.



Example

Thus, the Decision-Maker finds that a preponderance of the evidence indicates that:

- Respondent Student, an athletics employee, posted from the University’s athletics social media account—immediately after the announcement of the verdict in which another institution was found responsible for race discrimination against a student athlete—that “Some people need to stop blaming their genetics for poor performance”;
- Respondent demanded that newly recruited student athletes spray paint [racial epithet] on Complainant’s door;
- Respondent intentionally violated team rules in practice, injuring Complainant; and
- Complainant immediately thereafter took a leave from the team.

As such, the Decision-Maker finds it is more likely than not that Respondent engaged in racial harassment by [insert language mimicking definition of prohibited racial hostile environment harassment from relevant policy(ies)]. Therefore, Decision-Maker concludes that Respondent violated [policy(ies)] by engaging in racial discrimination against Complainant.



Questions/Discussion

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

Report-Writing Scenario

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP

Hypothetical Complaint

Hardeep (he/his/him), a Sikh student in the College's ROTC program, has received religious accommodations to wear his turban and maintain his beard. He also has a disability and received accommodations for extended testing time. During a mandatory ROTC training exercise and despite Hardeep's prior religious accommodations, Hardeep is told by the commanding officer, Officer Blake, that Hardeep's turban and beard are not in compliance with uniform standards. During this conversation, the commanding officer makes a derogatory comments to Hardeep about his turban and beard and makes comments implying that Hardeep will not be successful in the program if he continues to need "special treatment." Despite having one of the highest marks in the program, Hardeep is not chosen by the commanding officer to officiate a campus event—an honor traditionally given to those with the highest marks. Additionally, during a recent exam, an instructor of a required course, Dr. Smith, failed to provide Hardeep with the extended time to which he was entitled, causing him to perform poorly. When confiding in another ROTC student, Jamie, about this incident, Jamie told Hardeep, "The instructor was probably worried you were hiding test answers in your turban." Hardeep has also experienced other derogatory remarks from some ROTC staff and students about his religious attire, suggesting that it is incompatible with military discipline. Hardeep files a complaint with College's Equity Office, alleging disability, religion and national origin discrimination.

HUSCH BLACKWELL



Issues



Complainant and Respondent Dr. Smith's Statements

- **Complainant's Statements**

- I liked Dr. Smith's class a lot until they refused to give me extended time on my exam. I did OK on prior quizzes, but knew that this material for the October 6th exam was tough and I would need the extra time to focus.
- The accommodations office approved my accommodation, and I'm pretty sure they told Dr. Smith that I needed the extended time. But they never gave it to me.
- No, I never talked to Dr. Smith about my accommodation until we met in Dr. Smith's office.
- We talked about it in Dr. Smith's office, I think it was in October. But I don't really remember what I said because I was pretty upset about my grade.

- **Dr. Smith's Statements**

- Yes, I recall this incident because the student was very upset about it.
- I wasn't even aware he had an accommodation.
- I only become aware of a student's accommodation if they hand me a letter notifying me about it. He never gave me one, I am sure of that.
- Students have to schedule their own exams with extended time with the testing center and I have no part in that. If he didn't schedule it, that's on him.
- Hardeep came to my office to talk about his grade on October 14th. I remember it clearly because it was my anniversary and it was unusual to have a student yelling at me like that.
- This conversation was the first time I'd ever heard that he had an accommodation. He'd been doing great in class, so I had no idea.

Draft Report – Allegations Re: Dr. Smith

How can we make this better?

Complainant, a student, had an accommodation for class. Complainant claims that Respondent did not provide his accommodation during a test. Complainant alleged disability discrimination based on the Respondent's failure to accommodate.

Complainant said that Respondent was aware that Complainant needed his accommodation. Respondent denies any knowledge of Complainant's accommodation and claims that it was the Complainant's responsibility to coordinate his accommodation. Complainant and Respondent agree that they spoke about the test accommodation in Respondent's office, but Complainant does not recall what was said. Respondent stated that Complainant was angry during the conversation.

HUSCH BLACKWELL

Improved Version – Allegations Re: Dr. Smith

Complainant Hardeep is a student in the College's ROTC program, and Respondent Dr. Smith is an instructor of a course required by the ROTC program. Complainant alleges that Dr. Smith failed to accommodate Complainant's approved extended testing time accommodation during an October 6 exam in Dr. Smith's class.

Complainant stated that the accommodations office approved Complainant's extended testing time accommodation, but Complainant did not know for certain if the accommodations office informed Dr. Smith of Complainant's accommodation. Complainant acknowledged that in prior exams in Dr. Smith's course, Complainant did not request or utilize his extended testing time accommodation. Complainant stated that he did not remember exactly when he discussed his accommodation with Dr. Smith, and estimated that the conversation took place in Respondent's office in October. Complainant acknowledged that he was upset during this conversation and did not recall what he said to Dr. Smith.

Dr. Smith said they understood that the College's policy is for students to provide faculty with a letter notifying the faculty of the student's accommodation in advance. Dr. Smith stated they were unaware of Complainant's accommodation until Complainant came to their office on October 14 to discuss it. Dr. Smith stated that, during this conversation, Complainant was "very upset" and "yelled" at Dr. Smith about Complainant's grade on an exam. However, Dr. Smith said that prior to this exam, Complainant had been doing well in his class. Dr. Smith noted that students are always required to schedule their own testing accommodations, but said that Complainant never notified Dr. Smith of Complainant's accommodation, nor did he schedule his test with the testing center.

Complainant and Respondent Officer Blake's Statements

- **Complainant's Statements**

- I will never forget what Officer Blake said to me – that I'd never succeed in the program because I was getting special treatment for my beard and turban. Except Officer Blake didn't call it a turban, and kept calling it a "hat."
- Blake said this to me on September 12 around 3 p.m., which was right after our weekly training exercise.
- Then a week later, another student who I knew has gotten worse grades than me was chosen by Blake for a special appointment. Everyone said that special appointments were chosen based on grades, and I had the best grades in the program so this just didn't make sense.

HUSCH BLACKWELL

- **Officer Blake's Statements**

- I barely even recall this student.
- I have a lot of students that I have to talk to about not complying with our attire requirements. I only remember this one because he kept wearing a hat in class every day, even after I talked to him about it.
- We have strict rules about attire because these kids can't expect to be coddled once they're in active duty. This won't fly in the real world.
- I don't remember telling him that he wouldn't be successful. But like I said, I don't even really remember him. I talk to a lot of students.
- I choose special appointments based on grades and personality.
- How was I supposed to know he had a religious accommodation for that stuff?

Draft Determination – Officer Blake Credibility Assessment

How can we make this better?

Respondent's memory of a conversation with Complainant was poor, and the information witness Connor remembered from that conversation supports a contention that Respondent discussed Complainant's attire. Respondent also initially denied remembering who Complainant was, but then recalled a specific conversation with Complainant. Respondent is not credible. Complainant, on the other hand, recalled the specific statements and date of the conversation. Complainant is credible.

Because this is a he said/she said case, and Complainant is more credible than Respondent, it is more likely than not that Respondent engaged in national origin/religious discrimination.

Improved Version – Officer Blake Credibility Assessment

Complainant stated that the conversation with Respondent Officer Blake took place on September 12 at around 3 pm. Complainant alleged that Officer Blake stated that Complainant would never succeed in the program because Complainant was getting special treatment for his beard and “hat.”

Officer Blake did not deny telling Complainant this. However, during Officer Blake’s interview for this investigation, Officer Blake referred to Complainant’s turban as a “hat.” Officer Blake also recalled that Complainant wore a “hat” every day. This indicates that it is Officer Blake’s practice to call Complainant’s turban a hat.

Given the evidence offered by Complainant and Officer Blake’s corroboration, paired the absence of contrary evidence, it is more likely than not based on this evidence that Officer Blake told Complainant he would not be successful in the program because of his beard and “hat” (in reference to Complainant’s turban).

HUSCH BLACKWELL

Complainant and Respondent Jamie's Statements

• **Complainant's Statements**

- Jamie is always making weird jokes to people and sometimes crosses the line. I'm not a big fan.
- I wouldn't have normally confided in Jamie but Jamie was in the hallway after I had an argument with Dr. Smith about my grade. I told Jamie what happened and Jamie laughed it off and made a joke about my turban and how I was cheating. I don't remember exactly what was said, though.
- I didn't really know what else to do so I just laughed. But it definitely made me feel uncomfortable.
- People in the ROTC program have disliked me from day 1. At first I thought they were jealous because I did well, but now I think it's because I'm Sikh.
- I've heard students and staff making all sorts of nasty comments. I can't recall anything specific, though.

HUSCH BLACKWELL

• **Jamie's Statements**

- Yeah I remember talking to Hardeep about him not getting extra time. Seems a little unfair that people get extra time on tests but what do I know.
- We're not friends but we get along okay. He's too serious about ROTC though, in my opinion.
- I don't recall exactly what I said, but I think I made a joke. That's just my personality – I try to make people laugh. I could tell he was really upset about what happened with the professor and I wanted to cheer him up.
- Hardeep laughed at what I said and we talked a little bit more about class stuff.
- No, I didn't joke about his turban. I would never do that.
- I've never heard anyone in class make jokes about his religion.

Analysis and Conclusions of Jamie's Responsibility

How can we make this better?

Even though Respondent Jamie is credible and denies making the joke about Complainant's turban, Complainant is more credible and provided evidence that Respondent made the joke and has a history of making such jokes. As a result, it is more likely that Respondent made the inappropriate joke to Complainant and thus Respondent is determined to be responsible.

Improved Version of Conclusions of Jamie's Responsibility

Complainant and Respondent Jamie agreed that they had a conversation after Complainant received a bad grade on an exam, and in this conversation, Jamie made a joke to Complainant. Though Complainant's initial report included an exact statement, Complainant later stated the reported joke was "something like" what Jamie said. Ultimately, neither Complainant nor Jamie provided evidence that they indicated reflected the specific statement Jamie allegedly made.

Complainant and Jamie did not identify any witnesses who heard the alleged statement, and neither party provided additional evidence. Though both stated that Jamie regularly makes jokes, they did not provide information suggesting that consideration of the other jokes would be relevant as to whether it is more likely than not that the joke made to Complainant was inappropriate. As a result, the preponderance of the evidence does not demonstrate that Jamie told Complainant that he was not permitted to receive his testing accommodation because the professor was scared Complainant would hide the answers in his turban. Thus, the evidence does not show that it is more likely than not that Respondent Jamie engaged in national origin discrimination against Respondent by making the joke as alleged.

Questions/Discussion

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP



Takeaways

Big Picture



Recognize applicable law and policies, especially elements informing investigation (procedures, scope, information-gathering)



Identify your role and collaborate with personnel and departments as appropriate



Conduct appropriately prompt, fair, and thorough investigation



Gather evidence (testimonial and non-testimonial)



Document everything, including through clear, thorough reports that consider your audience(s)



Feedback encouraged! Please complete surveys!

The background of the slide is a solid blue color with a pattern of thin, white, wavy lines that create a sense of motion and depth. The lines are more densely packed in some areas and more spread out in others, creating a dynamic, fluid effect.

HUSCH BLACKWELL

© 2024 Husch Blackwell LLP