

electrical training ALLIANCE
2019 NTI
C Group

Harassment Investigations

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AGENDA

- What is unlawful harassment?
 - Hostile Work Environment
 - Sexual Harassment
 - Quid Pro Quo
- What is unlawful retaliation?
- Conducting investigations
 - Steps involved
 - Interview tips
 - Responses and reports

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**EEO LAWS AND
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Liability of a JATC/AJATC For Acts of Its Employees

- If an apprentice suffers an adverse “tangible employment action” *by an instructor or a Committee employee*, then the Committee is liable
- Where there is no “tangible action” the JATC/AJATC is liable for the acts of its employees *unless* it
 - Had a written harassment policy and
 - The apprentice did not use it *or*
 - The apprentice complained and the Committee took prompt remedial action.

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Liability for the Acts of Co-Workers, Classmates or Third Parties

- A JATC/AJATC is liable for unlawful harassment of apprentices by others *if it knew or should have known the alleged harassment, and the Committee failed to take immediate and appropriate corrective action*
- This includes conduct by co-workers, fellow apprentices, customers or employees of other companies

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Overlap Between the Committee and Contractors

- During on-the-job training, contractors have the primary responsibility to prevent and address discrimination and harassment against their employees, including apprentices.
- The Committee also has the duty to ensure that their apprentices are not subjected to discrimination and harassment on the job, and that contractors handle complaints appropriately.

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Harassment

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The Harassed Vet

- *Nicole is a second year apprentice who is African-American. She entered the apprenticeship program after she was honorably discharged from the Army. Nicole had been working for several months at one site before she was terminated for insubordination.*
- *When Nicole was called before the Committee, she described constant, daily harassment by a supervisor, the journey worker (Greg) and another apprentice (Gary). Some of it was sexual jokes, but there were also racist comments, use of the N word about other people, negative comments about women in the industry and repeated minor hazing (such as removing the gas cap on her truck). Nicole asked them numerous times to stop.*

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The Harassed Vet

- *Nicole says she is used to dealing with sexual jokes, but got fed up over racial remarks and hazing. When she finally complained to the General Manager, he laughed. Nicole cussed him out, and was fired.*
- *During the Committee's investigation the other apprentice, Gary, initially denied all allegations. After the journey worker gave a statement that Gary was involved, Gary admitted that he was involved in some hazing and pranks, but denies making any racial slurs or sexual conduct.*

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The Harassed Vet

• **Questions:**

1. Did this conduct create a hostile work environment?
2. Is the Contractor or the Committee liable for what happened on the job?
3. Did Gary engage in unlawful harassment or other violations of the Program's rules?

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Defining Harassment

- Words, conduct or action, especially repeated or persistent
- That is directed at a specific person or group
- That makes them uncomfortable, upset, offended, threatened, intimidated, belittled, annoyed or causes emotional distress
- And serves no legitimate purpose

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What is Not Harassment

- Individuals may be upset, annoyed, angered, etc. by the words or actions of classmates, instructors, co-workers or supervisors, but that does not mean it is "harassment."
- If there is a legitimate purpose or intent, it is not "harassment". Examples:
 - Constructive criticism of work performance, delivered in a reasonable manner
 - Management or supervisor decisions or directions an apprentice disagrees with
 - Co-workers' political opinions

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Bullying versus Unlawful Harassment

- Bullying or abusive behavior are types of unacceptable harassment, but not are not illegal. Examples of bullying include:
 - Otherwise legitimate demands or decisions conveyed in an abusive way
 - Abusive or objectionable behavior directed at many or most employees, such as the screamer, the cusser, the supervisor who plays favorites, or the supervisor who make unreasonable demands an everyone.
 - The co-worker or classmate who picks on others, usually those perceived as weak
- However, if the bullying or abusive conduct is based on protected characteristics, it is *discrimination*

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Harassment as Discrimination

Harassment based on protected characteristics

<ul style="list-style-type: none"> • Gender • Pregnancy • Race • National origin • Genetic information 	<ul style="list-style-type: none"> • Sexual orientation or gender identity (LGBTQ) • Religion • Age (over 40) • Disability
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- Retaliation for “protected” conduct
- Federal, state or local laws may protect other characteristics or conduct

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Harassment by Words

- Offensive or derogatory slurs or names.
- Racial, ethnic, religious jokes.
- Offensive or demeaning comments.
- Abusive or offensive language or tone directed at a person because of their race, gender, religion, etc.
- Similar comments in texts, email, on social media

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Harassment by Conduct

- Favoritism to others because of their race, national origin, or other protected characteristics
- Disparate treatment in work assignments, scheduling, assistance, performance reviews
- Teasing and tricks
- Physical aggression or abuse
- Hazing

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Harassment by Images or Other Means

- Offensive pictures, images or displays
 - A noose hung as a racial threat
 - A Nazi flag displayed with an intent to intimidate Jews or other minorities
- Cartoons, memes
- Emoji's in a text

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When is Discriminatory Harassment Unlawful?

- Harassment based upon protected characteristics or protected conduct may violate federal law or other laws when:
 - It is so frequent or severe that it creates a hostile work environment *or*
 - it results in an adverse action on the job or during related instruction

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When is it a Hostile Environment?

- **Repeated unwanted** behavior or conduct based upon a person's protected characteristics or conduct
- That has the effect of unreasonably interfering with an individual's work performance or creating an offensive work environment.
- Does not need to involve loss of economic benefits, but if it does, that is likely to be found unlawful
- In extreme cases where the conduct was so outrageous that a reasonable person would be compelled to quit, that can be a "constructive discharge"

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When is it a Hostile Environment?

- Usually it takes more than one offensive comment or action to be considered harassment, because a reasonable person would usually not find one comment so offensive that it unreasonably interferes with the employee's work performance.
- However, a single incident can be so egregious that it could create a hostile working environment.

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Harassment Doesn't Require a Target

- Discriminatory harassment and a hostile environment can be created even if behavior is not directed at one person or a group.
- This is especially true for sexual harassment. A culture of "boys will be boys" or locker room talk can be offensive and demeaning to women and other men even if not directed at them. It can also create a climate that makes other forms of sexual harassment or assault more likely
- But it is equally true if the same types of comments were being made based upon race, national origin or any other protected characteristics

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“Locker Room Talk”

- Brad, Jack and Lou are 1st Year apprentices who bonded quickly because they all played varsity sports in high school. Before and after class or during breaks they can always be found talking about sports and sex, with frequent comments about their sexual conquests and desires, and sexual jokes and remarks, frequently about each other. They also employ a wide range of non-verbal sexual gestures. This conduct also occurs when they happen to be assigned to the same job site.
- Susie is one of the few 1st Year female apprentices. Susie has been trying to avoid Brad, Jack and Scott so she would not become their target.

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“Locker Room Talk”

- Susie finally confides to her friend Scott, another 1st Year, how upset she has been about this atmosphere. Scott is pretty quiet and studious. In High School he was into building electronics, not sports. Scott has also heard and been offended by the constant sexual banter.
- After Susie talked to Scott, he went up to the three guys, and told them to cut out the locker room talk at the Training Center because it was offending other apprentices.
- Brad called him a pussy, Jack asked if he was gay or still a virgin, and Lou suggested Scott perform an unnatural act.

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“Locker Room Talk”

- **Questions:**
 1. Is “locker room talk” appropriate in a Training Center? What about on a construction site?
 2. Susie and Scott were not targets of any comments until Scott said something. Is this still sexual harassment?
 3. Does it make a difference if Brad, Jack and Lou say they were just playing around with each other, and not trying to target or offend anyone else?
 4. Would it make any difference if Scott was straight or gay?

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Harassment After Hours and Outside Work

- Harassment can also occur “after hours” and outside of work. It does not need to physically occur at work or at the Training Center to have a negative impact at work on or the apprenticeship program. Examples:
 - Pursuit of colleagues or subordinates outside work, include texting, stalking and social media
 - Complaints of comments or behavior between two co-workers
 - Offensive remarks or conduct after hours by or witnessed by instructors or supervisors
- Harassment does not have to physically occur at work or the Training Center to have a negative impact

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Sexual Harassment

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Cindy’s Unwanted Admirer

- *Cindy, a 20 year old second year apprentice, is known as “one of the guys.” She can cuss and joke with the best of them.*
- *Carl is a new apprentice, in his 40s, who was placed in second year based on his recent military experience. Carl can’t take his eyes off Cindy, and that is obvious to everyone. Carl asked Cindy out several times after class, and she said no.*
- *Then Carl started sending Cindy regular texts outside school. She ignored them at first, but when they got sexually explicit last week she blocked his number. Cindy has also had to block Carl from her Facebook page, from following her on Twitter, on Tinder and other Apps.*
- *Cindy comes to the JATC to complain about Carl’s behavior. Cindy considers Carl to be a stalker, feels threatened and intimidated, and does not want to be in the same room or worksite.*

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Cindy's Unwanted Admirer

- **Questions**
 1. Is Carl's behavior sexual harassment?
 2. Has Carl's behavior created a hostile environment at work or school?
 3. Cindy has not called the police yet. Does that make a difference?

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Gender Harassment and Sexual Harassment

- Gender-based Harassment
 - Negative gender comments or stereotypes
 - Negative treatment based upon on pregnancy, child care obligations
 - Negative treatment based upon failure to meet other gender roles (men and women)

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Sexual Harassment

- A sub-set of harassment that involves *conduct of a sexual nature*
 - *verbal, physical, visual*
- Both men and women can be victims
- The rules cover same-sex sexual harassment

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When Is It Sexual Harassment?

When it:

- Is unwelcome *and* repeated, persistent or severe.
- Interferes with a person’s ability to perform or disrupts the workplace.
- Creates an atmosphere in which others are uncomfortable with the harasser.

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“Unwelcomeness”

- Joking, comments or physical conduct is not “harassment” if it is consensual or welcome by *both/all* participants.
- This is *subjective*. Just because an employee flirts or jokes with some co-workers does not mean he/she wants that from you—or from others.

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Quid Pro Quo Sexual Harassment

- Requiring or threatening to require sexual conduct or a dating relationship as a condition of
 - Hiring/indenture
 - Promotion, raise, easier work assignments
 - Keeping a job or staying in the program
- Adverse action in retaliation for an applicant or apprentice refusing to have a sexual or dating relationship.

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Cindy's Complaint Part 2

- *A month ago, in response to Cindy's original complaint, the Training Director cautioned Carl that Cindy was feeling uncomfortable, and that he should keep his distance from her at school. The Training Director also told Cindy she would try to make sure Cindy was not assigned to the same job site as Carl.*
- *Last night Carl showed up at a local bar where Cindy and some other apprentices were drinking and dancing. Carl had been drinking heavily. He came onto the dance floor, put his arm around Cindy, puller her tight, put his hand on her rear and tried to kiss her. Cindy pushed him away. A couple of other apprentices jumped in a roughly dragged Carl out of the bar.*

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Cindy's Complaint Part 2

- *Cindy comes to complain. She says she does not want to press charges yet, but does not want to be in the same room as Carl.*
- **Questions**
 - Did Carl violate your policies?
 - Would you take any further action?

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The Managers Who Do Not Get It

- *Randy is a foreman in his forties who is always telling lewd jokes, surfing porn on his phone, calling women "honey" or "babe." He will often comment on a woman's body or make joking propositions, offering back rubs. He a "hugger" and often throws his arm around men and women. Randy has been married for twenty-five years and "everyone" at work who knows him knows that he is just kidding around. They say with a laugh "that's just Randy being randy. He's harmless."*

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The Managers Who Do Not Get It

- *A few years ago, there was one apprentice, Lisa, who complained to the JATC about Randy. The former Training Director made arrangements so that Lisa would not be assigned to that shop.*
- *Last month Julie, a third year apprentice, was referred to this shop. She objected to Randy's comments during her first week, repeatedly asking him several times a day to stop. When she complained to one of the owners, he replied that if Julie did not like it, she should not come back. Julie stormed off the jobsite.*

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The Managers Who Do Not Get It

- **Questions:**
 1. Is Randy's behavior sexual harassment? Did he create a hostile environment?
 2. Is the Contractor liable?
 3. What should the JATC do?

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Retaliation

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Toxic Tammy

- Tammy has been difficult since her first year. Her skills are mediocre and she has a negative attitude on the job. She is always complaining about the work load. When she is disciplined or counseled she is quick to complain about sex discrimination. Prior investigations found no discrimination. Tammy also has a pattern of absenteeism, but most of the time she provides doctor's notes. She has a diagnosis of fibromyalgia.
- No contractor has been willing to terminate, she's always "laid off". At this point her reputation is so bad that few contractors are willing to take her.

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Toxic Tammy

- Over the past few months you have received accurate work reports documenting Tammy's weaknesses from a contractor who finally terminated her for unsatisfactory performance. Tammy comes in to complaint that the contractor is discriminating against her.
- Questions
 1. Should the Committee terminate Tammy?
 2. What are the risks?
 3. What more could be done to reduce any risks?

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What Are "Protected Activities"?

- Filing a complaint of discrimination or retaliation with the Committee, or with any outside agency (such as DOL, a State Apprenticeship Agency, or the EEOC)
- Assigning or participating in a federal or state EEO proceeding
- Exercising rights under DOL EEO regulations of the Committee's EEO Policies
- Opposing any discriminatory practice in our apprenticeship program

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Retaliation can take Many Forms

- Examples include:
 - Transferring the Complainant to another location or department, or changing hours, without his/her consent
 - Sending the Complainant home without pay
 - Accusing the Complainant of lying
 - Ordering the Complainant not to contact the police, HR, Corporate
 - Threats of unspecified actions
 - Harassment

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Retaliation Can Take Many Forms

- Other Examples
 - Disciplining a Complainant for other violations of policy disclosed during the investigation
 - Threats or actual demotions, negative evaluations, denial of or lower pay raises, or termination
 - Shunning or refusing to work with the Complainant
 - Gossiping or making negative remarks about the Complainant

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Punishing Paula

- *Paula was assigned to a site working with Harvey, a journey worker. Paula put up with his sexual comments and propositions for a week before she complained. The Contractor wrote Harvey up and reassigned Paula to work with Reilly.*
- *Reilly and Harvey are good friends. Reilly has been making Paula's life even more miserable with additional work, unreasonable demands, criticism and then a negative work report. Paula complained again of harassment and retaliation, but the Contractor found no violation. Then Paula was laid off.*

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Punishing Paula

- **Questions**

1. Has Paula been subjected to retaliation?
2. Who is potentially liable here?

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Conducting Harassment and Other Investigations

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The Customer

- *Linda, a fourth year apprentice, comes in to report that when she was on a job yesterday, a senior manager for the developer was walking the site with the engineer. She claims the manager was making sexual propositions. When she told him to stop, he cussed her out and made some racist remarks.*

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The Customer

- **Questions:**
 1. What should be done with Linda's Complaint?
 2. What should the JATC or Contractor do, if anything, with the customer?
 3. How is this the same, or different, than if the remarks were from an employee or manager of the contractor or other trades on the job?

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Contractor Investigations

- Contractors have the right and obligation to investigate complaints by or about their employees, including apprentices; that contractor should take the lead on complaints involving OTJ conduct.
- The JATC should be permitted to shadow that investigation.
- The Contractor's determination is not binding on the JATC.

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The Local

- The Local has its own internal complaint processes and its role in protecting employee rights under the CBA.
- The JATC's investigation and handling of apprentice issues should be separate from anything done by the Local.

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Red Flag Complaints

- Any allegation of physical assault or unwanted touching
- Any sexual remarks or conduct
- Any reference to negative words or comments about protected classes
- Any claim of discrimination or unfair treatment because the employee is _____ (insert category)
- Use of the term "hostile environment"

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Yellow Flag Complaints

- By or about anyone who has complained of discrimination or harassment in the past
- Allegations of "unfair" treatment or favoritism
- Complaints of conduct that is uncomfortable

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Janet's Assault Pt. 1

- *Janet is an attractive 19 year old African American 1st year apprentice. She calls the office to say that at the end of last night's class she was talking with the instructor who was asking her about her personal life, and whether she had a boyfriend. She was uncomfortable and ended the conversation. She then went to the ladies room. Janet claims the instructor was waiting outside, put his arm around her and grabbed her breast. She struggled away, ran outside and quickly drove away. She says she went home and told her mother.*
- Questions
- How do you respond to Janet?
- What steps do you take next?

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First Response to Harassment Complaints

- LISTEN. IMMEDIATELY.
- Assume the allegation is true. What does the Complainant need or want right then? In the next few days?
 - Medical assistance?
 - Protective actions to keep the alleged harasser away?
 - Change in schedule?

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First Response to Harassment Complaints (cont.)

- Reassure the person that the complaint will be promptly investigated.
- Do not take any actions that might be considered retaliatory.

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Janet's Assault Pt. 2

- *The Instructor, Kevin, is in his 50s. He has been teaching for many years. He is married. There have never been any prior complaints about him and you have never had any reason to question his honesty. Kevin admits that he was talking to Janet after class, but says he was just asking her about how she was doing on the job. He denies the alleged assault. You make some discrete inquiries, and there were no other witnesses*
- Questions
 1. What else could you do to investigate?
 2. How do you resolve this credibility issue?

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Typical Steps

- Interview the Complainant
- Review relevant documents
- Interview the Respondent
- Interview witnesses
- Re-interview Complainant and Respondent if needed to clarify facts
- Make credibility determinations

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Typical Steps (cont.)

- Document the investigation and conclusions
- Consider informal resolutions where appropriate
- Follow through on recommendations/resolutions
- Complete promptly—a few days to a week
- Ensure no retaliation

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Maria's Report

- *Maria is a third year apprentice. After listening to the recent news reports on workplace harassment, she meets with the Training Director to report sexual harassment on the job. She describes two different job sites. One was a two years ago, and the alleged harasser was a supervisor. She says he made numerous sexual comments, patted her rear and asked her for oral sex.*
- *The other occurred four months ago and involved an apprentice and the journeyman who were constantly making comments about her body and their fantasies about her. She threatened to report them, and they finally stopped.*

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Maria's Report

• **Questions**

1. Would you investigate both of these complaints?
2. Any differences in how you would investigate them?

- **Variation 1:** Instead of coming to the Training Director, Maria gets on Facebook and posts details of both incidents, including names. You hear about this from apprentices and the contractor. When you call Maria in she says that she did not come to you because she does not want the JATC to do anything, she just wanted to out those who had mistreated her.

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The Steps of an Effective Investigation

Choose the right investigator

- Normally the Training Director
- Will often want two people present for key interviews
- Considerations for using attorneys for serious claims
 - Cost
 - Independence & credibility
 - Privilege issues

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The Steps of an Effective Investigation

Plan the investigation

- Address attorney/client privilege issues
- Obtain and review relevant documents
 - Include email or other relevant communications
- Review internal procedures
- Choose the order of interviews, locations and format
- If basic allegations are known, consider obtaining background on the complainant and respondent
- Prepare interview outline(s)

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The Steps of an Effective Investigation

Interview or re-interview the Complainant

- Conduct a complete review of all allegations and any claimed damages
- Determine what actions the Complainant wants to be taken
- Explanation for any delay
- Draft and have the Complainant sign a summary of the allegations

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The Steps of an Effective Investigation

Interview the Respondent(s)

- Conduct a complete review of all allegations
- Identify witnesses and documents
- Permit a written response

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Interviewing Tips and Techniques

- **Do not promise confidentiality**
- Friendly, comfortable, non-judgmental
- Fact-finding
- Open-ended, non-accusatory
- Related to topics of investigation
- Related to documents reviewed
- Do not interrogate or prejudge the interviewees

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Interviewing Tips and Techniques

- Explain the scope of the investigation and the timetable
- Explain to witnesses that they are expected to cooperate in the investigation
- Start by having the witness provide a full story or statement

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Interviewing Tips and Techniques

- Start with open-ended questions and get more specific as the interview goes on
- Try to go through matters in chronological order
- Who, What, Where, When, Why, and How
- Pay particular attention to possible cultural differences or to differences associated with age or social background

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Interviewing Tips and Techniques

- Ask all witnesses about
 - Possible relevant documents
 - Other witnesses
 - Any individuals that may be able to verify all or parts of their story
 - Others who may have been subjected to discrimination or harassment in the past by the Respondent
- Ask the witness whether there are other questions that you should have asked

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After the Interview of the Complainant and the Respondent

Assess options for conciliation or resolution without formal findings or full-scale investigation

- In some cases, all necessary facts can be determined from the first interviews.
- There may be options for “informal” resolution.

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After the Interview of the Complainant and the Respondent

Decide what to do next

- Do you need to do further investigation to determine what happened and make a credibility determination?
- It is not sufficient in a “he said, she said” case to conclude that there is no way to tell who is lying, and therefore do nothing.

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The Steps of an Effective Investigation

Follow-up interviews if needed

- Other witnesses, supervisors
- Identify inconsistencies in the facts
- Further probe motives if not previously clear
- Give the Complainant and Respondent an opportunity to rebut new allegations or address inconsistencies or omissions

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The Steps of an Effective Investigation

Summarize factual findings and make credibility determinations

- Why prepare a written report?
 - Easier to analyze/appreciate risks
 - Reference for follow-up & future investigation
- Include a statement of privilege (if done by or being communicated to counsel)
- Full and accurate description of findings

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The Steps of an Effective Investigation

Determine Responses

- Does this need to go to the Committee for action or discipline?
- What steps are needed with contractors or other third parties?
- Need to consult with your attorneys first?

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The Steps of an Effective Investigation

What to do with the results

- Determine the level of sanctions
- Consider Non-Disciplinary Options:
 - Counseling (i.e., referral of Respondent to counseling; pay for Complainant's counseling)
 - Additional training of Respondent(s)
 - Additional training of others
 - Ongoing monitoring

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The Steps of an Effective Investigation

Communicate results

- Discuss findings with the Complainant and Respondent
- Describe any appeal rights

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Key Points to Keep in Mind

- Take all complaints seriously
- Document investigation
- Ensure no retaliation
- Follow-up as necessary

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Questions?



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