



CONDUCTING INVESTIGATIONS FOR ALLEGATIONS OF WORKPLACE DISCRIMINATION AND HARASSMENT

Lori Makin-Byrd & Collin Baer

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MEET YOUR FACILITATORS



**Senior Solutions
Specialist**

Collin Baer

Collin Baer is a Senior Solutions Specialist at Grand River Solutions. He brings 22 years of experience conducting workplace investigations and providing professional services in higher education, for state governments, and for private corporations. Collin has worked exclusively in the higher education space since 2018, conducting harassment, discrimination, retaliation, and sexual misconduct investigations; in addition to frequently providing training in these areas. Collin received his Bachelor's degree in Criminal Justice from the University of Nebraska.



**Senior Solutions
Specialist**

Lori Makin-Byrd

Lori Makin-Byrd is a Senior Solutions Specialist at Grand River Solutions where she serves as an interim and permanent Title IX Coordinator. Lori previously served as the Senior Advisor to the President for Civil Rights and Title IX Coordinator. Lori has overseen all student conduct processes and student conduct policies, served as primary investigator on employee misconduct investigations, and served as a full-time Psychology faculty member. She received her Bachelor's degree from Oberlin College and her Master's degree in Clinical Psychology from the University of Arkansas.

ABOUT US

Vision

We exist to create safe and equitable work and educational environments

Mission

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

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

AGENDA

- **Defining Harassment, Discrimination, and Retaliation**
Differentiating from Title IX
- **Intake and Preliminary Assessment**
- **Campus Partners, Supportive Measures, and Other Resources**
- **Investigative Processes**

DEFINING HARASSMENT, DISCRIMINATION, AND RETALIATION

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TITLE IX VS. TITLE VI, VII, POLICY

- When covered by the 2020 Title IX Regulations, you *must* use the Title IX process.
- For all other cases, use process set out in your policy. It must be:
 - Equitable
 - Prompt
 - Comply with state law
 - Comply with any standards set by case law in your federal court circuit

HARASSMENT

(Title VII / EEOC):

- Unwelcome conduct that is based on Protected Class status
- Harassment becomes unlawful when:
 - 1) Enduring the offensive conduct becomes a condition of continued employment, or
 - 2) The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive

1. Was the conduct unwelcome?
2. Was the conduct based on protected status?
3. Was enduring the conduct a condition of continued employment ? (OR)
4. Was the conduct severe or pervasive? (AND)
5. Would a reasonable person consider the conduct intimidating, hostile, or abusive?

DISCRIMINATION

(differential treatment)

An adverse action or actions that

- intentionally or unintentionally
- excludes one from full participation in, denies the benefits of, or affects the terms and conditions of employment or access to educational or institutional programs
- because of Protected Class status

1. Was Complainant a member of a protected class?
 - (we are all members of many protected classes, but this also needs to be specified in the allegations)
2. Was Complainant subjected to an adverse action?
3. Was Complainant denied benefits of employment/educational program? OR
4. Were the terms and conditions of Complainant's employment/education impacted?
5. Was the above action taken BECAUSE of Complainant's protected class?

DISCRIMINATION

(disparate impact)

Policies or Practices that disproportionately exclude or adversely impact groups of individuals within a protected class, even if the policy/practice is intended to be neutral.

1. Disparate impact: Does the adverse effect of the policy or practice fall disproportionately on a certain protected class?
2. Justification: If so, does the record establish a substantial legitimate justification for the policy or practice?
3. Less discriminatory alternative: Is there an alternative that would achieve the same legitimate objective but with less discriminatory effect?

RETALIATION

Retaliation occurs when an employer takes a *materially adverse action* because an applicant or employee engages in a *protected activity*.

Protected activity

Generally, either participating in an EEO process or reasonably opposing conduct made unlawful by an EEO law

Materially adverse action

Any action that might deter a reasonable person from engaging in protected activity

1. Did Complainant engage in a protected activity?
2. Was Complainant subjected to a materially adverse action?
3. If so, was the materially adverse action taken BECAUSE of the protected activity?

SEXUAL HARASSMENT (Hostile Environment)

Unwelcome conduct (on the basis of sex) determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

1. Was the conduct unwelcome?
2. Was the conduct "on the basis of sex"?
3. Would a reasonable person find the conduct severe, pervasive, AND objectively offensive?
4. Would the conduct deny a reasonable person equal access to the institution's education program or activity?

IS THIS HOSTILE ENVIRONMENT SEXUAL HARASSMENT?

You receive a 3rd party report from a staff member who heard some rumors about a coworker in a different department, Dani.

Dani is constantly receiving sexually explicit photos via Snapchat from another coworker. Dani has asked them to stop numerous times. When they attend meetings together, this individual often approaches Dani before or after the meetings to make jokes of a sexual nature. This has happened about three times in the past two weeks. Dani usually laughs it off and continues with her work.

Why? Why not? What other information would you need to know? What questions need to be answered?

ANALYSIS GRID: LIST THE ELEMENTS

Sexual Harassment

Was the conduct unwelcome?	Was the conduct "on the basis of sex"?	Would a reasonable person find the conduct severe, pervasive, AND objectively offensive?	Would the conduct deny a reasonable person equal access to the institution's education program or activity?



What constitutes a
sufficient nexus to
initiate an
investigation?

INTAKE AND PRELIMINARY ASSESSMENT

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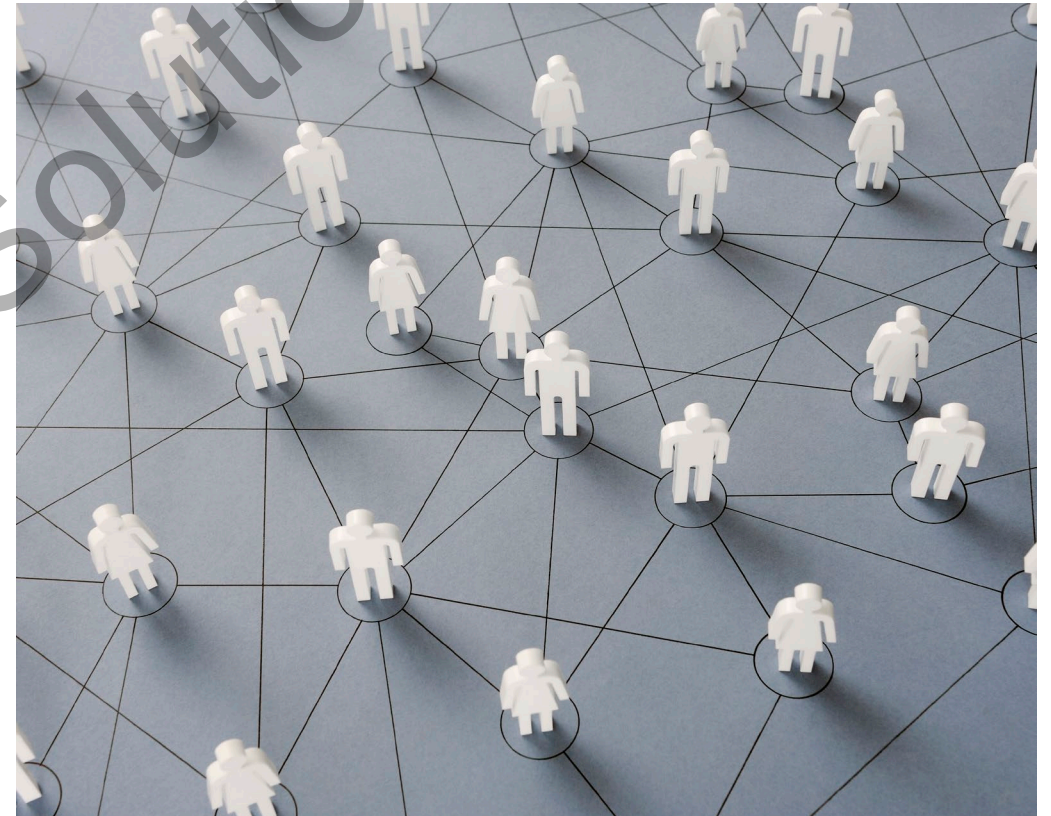
GOALS OF THE INTAKE MEETING

- Review supportive measures and pathways for resolution
- Gather enough information to connect conduct to policy
- Ask about the impact on the Complainant
- Discuss the options for resolution or retention of the complaint
- Be forthcoming about responsibility to move complaint forward (if applicable)
- Safety? Threat assessment referrals? Clery?



CONNECTING CONDUCT TO POLICY

- The allegation is only as strong as your connection to the policy
- Conduct/behavior needs to be correlated to the alleged policy violation. If the behavior as alleged is true, which policy would it fall under? Title IX? Harassment and Discrimination Policy? Other campus policy?



CONNECTING CONDUCT TO POLICY

What do you do?

- You receive a report from a Dean that a faculty member is complaining of discrimination and harassment on the basis of age; Respondent is the department chair. The Dean dealt with a prior concern between the two parties themselves; the faculty is now saying that they're experiencing retaliation.
- Intake: Complainant is 71; Respondent is 43. Respondent became department chair last year and has been very disrespectful ever since.
- What information do you need?
- What are your next steps?

COMPLAINANT STATEMENT

Additional information:

- Respondent has made frequent comments ("Sheesh, you've been here for 40 years?" "You're like a living time capsule." "You've been teaching here longer than I've been potty-trained!" "Everything in this building is new, except for [Complainant].")
- Respondent has asked Complainant when he planned to retire.
- Complainant has reported that these comments have occurred at least weekly for the last year.
- Complainant requested to teach a new online course that the department is offering, which would have included a generous stipend. Respondent assigned it to a first-year faculty member right out of grad school, saying that they were "more savvy with the technology" and "connected more with the students."
- After making a complaint to the Dean about violation of the CBA in considering seniority in course assignments, the Dean stepped in and re-assigned the course to the Complainant.
- Respondent apologized and has no longer made any comments to the Complainant. They also do not say hello or smile when they pass the Complainant in the hall. Their offices are next door to each other and the Complainant states that this is very awkward.

CONNECTING TO POLICY

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

Definitions:

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

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

Retaliation: a materially adverse action taken against an applicant or employee because they have engaged in a "protected activity."

ANALYSIS GRID: LIST THE ELEMENTS

Discrimination

Did they experience an adverse action?	Did that action exclude them from full participation in, deny the benefits of, or affect the terms & conditions of employment or access to educational or institutional programs?	Because of protected status?	

ANALYSIS GRID: LIST THE ELEMENTS

Harassment

Was the conduct unwelcome?	Was the conduct on the basis of a protected status?	Does enduring the offensive conduct become a condition of continued employment?	Was the conduct severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive?

ANALYSIS GRID: LIST THE ELEMENTS

Retaliation

Did the complainant engage in a protected activity?	Are they experiencing a materially adverse action?	Is there a causal connection between the protected activity and adverse action?

CAMPUS PARTNERS, SUPPORTIVE MEASURES, AND OTHER RESOURCES

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WHO ARE YOUR CAMPUS PARTNERS?

- Human Resources
- Disability Services
- Deans/Chairs
- General Counsel
- Ombuds
- Who else?



SUPPORTIVE MEASURES & ACCOMMODATIONS

Can/should you offer supportive measures and resources as you would in a Title IX case? What would be different?

Reminder: Supportive measures, interim measures, etc. are not "accommodations." Accommodations for disabilities should be handled through the appropriate administrator/office.



INFORMAL RESOLUTIONS & EDUCATIONAL CONVERSATIONS

What does the
Complainant
want?

What options are
available?

Is an
investigation
necessary?

INVESTIGATIVE PROCESSES

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COMPLAINANT STATEMENT

Additional information:

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- Respondent has asked Complainant when he planned to retire.
- Complainant has reported that these comments have occurred at least weekly for the last year.
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WHAT EVIDENCE TO GATHER?

TITLE IX REQUIRES

1. Sharing of evidence that is "directly related"
2. Gathering of all "relevant" evidence

ALL OTHER DHR CASES

1. Evidence review may not be required but is always a best practice. Without it, difficult to support whether Respondent had meaningful opportunity to respond.
2. Case law and EEOC guidance suggest need to gather all relevant evidence

“RELEVANT” EVIDENCE

For Title IX cases: The Department of Education declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

“Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

CREDIBILITY: THE PERSON IS
CONVINCING

RELIABILITY: THE PERSON'S
STATEMENTS CAN BE TRUSTED



ASSESSING CREDIBILITY AND RELIABILITY

No formula exists, but
consider the
following:

Ability to Recollect
Events

Sufficiency of
Detail and
Specificity

Material
Omission

Internal
Consistency

Inherent
Plausibility

Motive to
Falsify

Corroboration

CREDIBILITY/RELIABILITY ANALYSIS

STEP BY STEP

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

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ANALYSIS AND FINDING



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EVIDENTIARY STANDARD

PREPONDERANCE OF THE EVIDENCE

Responsible —
"More likely than
not..."



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

Not responsible —
"Insufficient
evidence.."



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

FINDINGS OF FACT

What is your finding?

A finding of fact is:

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

Let's try it:

- Respondent denied any discriminatory motive for behaviors toward Complainant. They said that they were joking with the Complainant to try to get them to lighten up.
- Respondent did ask about retirement because they are required to submit their five year staffing plan. They did not ask any other faculty about retirement.
- Respondent stated that the Complainant was just "grumpy" all of the time. They said that they didn't say hello because the Complainant was always walking with their head down and frowning.
- A review of evaluations from Complainant's introductory (first year) courses showed higher than average student rankings.

STRUCTURING THE ANALYSIS

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



KEY ELEMENTS

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

DETERMINATION

CONNECTING TO POLICY

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

Definitions:

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

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Retaliation: a materially adverse action taken against an applicant or employee because they have engaged in a "protected activity."

SAMPLE ANALYSIS: DISCRIMINATION

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

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

SAMPLE ANALYSIS: DISCRIMINATION

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

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

SAMPLE ANALYSIS: HARASSMENT

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

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

SAMPLE ANALYSIS: HARASSMENT

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

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

SAMPLE ANALYSIS: RETALIATION

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

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

SAMPLE ANALYSIS: RETALIATION

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

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

SAMPLE ANALYSIS: CONCLUSION

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

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SPECIAL CONSIDERATIONS

- Accommodation cases (Disability, Pregnancy, Religion)
 - Examine the interactive process
 - Was the requested accommodation reasonable?
- Hate speech and other forms of bias: where is the line between harassment and protected speech?
- Importance of identifying similarly situated comparators in discrimination cases.
- Hostile work environment cases without a single particular Complainant.

QUESTIONS?



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THE RIVER CONNECT is a virtual community of experts and colleagues gathered together to help each other process the complexities of the work.



A place to

communicate
share
educate
learn

for HIGHER EDUCATION
PROFESSIONALS working in
Title IX, Equity & Clery





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Team Are Doing.**

- Delegated Roles
- Investigations
- Hearings & Appeals
- Alternative Resolutions
- Program Review
- Policy & Procedures
- Consulting & Coaching



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Titles VI, VII, IX



Clery
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Hazing Act



ADA/504
&
Digital Accessibility



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CASE MANAGEMENT SOFTWARE

Case Tracker

Titles VI, VII, IX & Equity
Software Solution

by Grand River Solutions



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by people like you**

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Case Tracker allows you to:

- track and manage your cases
- communicate with campus stakeholders without compromising case privacy, and
- provide parties with the ability to follow the status of their case



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