



ATTORNEYS AT LAW

Resolving Discrimination, Harassment, and Title IX Complaints: Workshop for Investigators and Review Committee Members

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Presentation Agenda

1. Why Investigate?
2. NDSU's Complaint Procedures
3. Conducting an Investigation
4. Documenting Interviews
5. Decision Time – Making a Determination
6. Drafting a Thorough Preliminary Determination Report
7. Review Committee Issues



Legal Obligation to Conduct Investigations

Clery Act Amendments - (a.k.a. Campus SaVE Act")

Requires universities to:

- Adopt certain institutional policies to address and prevent campus sexual violence, such as to train pertinent institutional personnel.

Legal Obligation to Address Discrimination

Title VI (28 CFR 42.105(a)(1))

Every application for Federal financial assistance . . . shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by **an assurance** that the program will be conducted or the facility operated **in compliance with all [non-discrimination] requirements** imposed by or pursuant to this subpart.

Legal Obligation to Conduct Investigations

Title IX (34 C.F.R. Part 106.8(a))

Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, **including any investigation of any complaint** communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part.



Legal Incentives to Conduct Investigations

Title VII (29 CFR 1604.11(d)) (employees)

Sex Discrimination Guidelines by way of example

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that **it took immediate and appropriate corrective action.**

An investigation is action an employer can take to demonstrate immediate and appropriate action.

Legal Liability for Failing to Conduct Investigations

In *Shank v. Carleton College* (filed May 2, 2016), the Complaint alleges that the college **failed to follow its own written policy** and requests **injunctive relief** (education and training on procedures):

From the Complaint

- *The filing of a formal Complaint . . . should have triggered a thorough investigation under . . . the sexual misconduct policies.*
- *To this day, Plaintiff is unaware of the steps, if any, . . . [taken] to investigate the rape.*
- *Plaintiff never met with an investigator, as required under . . . [the] sexual misconduct policy.*
- *. . . Plaintiff never received a copy of the requisite investigator's report*

NDSU's Commitment to Conduct Investigations

NDSU Policy Manual, Section 156, Discrimination, Harassment, and Retaliation Complaint 1.3

NDSU has committed itself to the establishment and adoption of procedures to resolve complaints of discrimination . . . **A central purpose of these complaint procedures is to provide a system at NDSU to conduct adequate, reliable, and impartial investigations of complaints of discrimination.**



In Sum....Why Conduct Investigations?

Legal Obligation/Liability – Required by law and NDSU’s policy.

Affirmative Defense – if an employer can demonstrate it exercised reasonable care to prevent or correct harassment by a supervisor, it has an affirmative defense to claims of vicarious liability.

Effectuate Educational Mission – Policy 156, 1.2: “NDSU is committed to providing a safe and non-discriminatory learning, living, and working environment for all members of its university community.” Investigating and correcting conduct that detracts from mission helps maintain a high-quality learning environment.

NDSU's Complaint Procedures

“Policy 156”



North Dakota State University
Policy Manual

SECTION 156
DISCRIMINATION, HARASSMENT, AND RETALIATION COMPLAINT PROCEDURES

SOURCE: NDSU President

1. INTRODUCTION

- 1.1 North Dakota State University (NDSU) prohibits discrimination in its employment decisions and educational programs and activities on the basis of age, color, gender expression/identity, genetic information, marital status, national origin, physical or mental disability, pregnancy, public assistance status, race, religion, sex, sexual orientation, spousal relationship to current employee per SBHE Section 603.2, status as a U.S. veteran, or participation in lawful activity off NDSU's premises during nonworking hours which is not in direct conflict with the essential business-related interests of NDSU. (See NDSU Section 100, Equal Opportunity and Non-Discrimination Policy).
- 1.2 NDSU is committed to providing a safe and non-discriminatory learning, living, and working environment for all members of its university community. Specifically, NDSU is committed to taking action to:



Overview of Policy 156

- Introduction/definitions (discrimination, harassment, protected classes).
- Procedure for filing a Complaint.
- Remedial measures (pre-final determination).
- Preliminary review of the Complaint.
- Informal resolution procedures.
- Formal resolution procedures (conflict of interest, investigation, final determination, disciplinary action, appeals); and
- Discretionary investigations.

Key Definitions – Protected Classes

- Age
- Color
- Gender Expression/Identity
- Genetic Information
- Marital Status
- National Origin
- Physical Or Mental Disability
- Pregnancy
- Public Assistance Status
- Race
- Religion
- Sex
- Sexual Orientation
- Spousal Relationship to Current Employee per SBHE Section 603.2
- Status as a U.S. Veteran
- Participation in lawful activity off premises during nonworking hours that is not in direct conflict with the essential business-related interests of NDSU



Key Definitions – Discrimination

Different or unequal treatment of an individual (or group), based on one or more of the protected classes of the individual (or group), except as where permitted or required by law, that negatively affects their education, employment, or other participation in educational programs and activities.



Key Definitions – Harassment

A **form of discrimination**; unwelcome oral, written, graphic, or physical conduct, based on one or more of the protected classes of an individual (or group), that is:

1. sufficiently severe, persistent, or pervasive so as to **unreasonably interfere** with their education, employment, or other participation in educational programs and activities; OR
2. that creates a working, learning, or educational program and activity environment that **a reasonable person would find hostile, intimidating, or abusive.**

Key Definitions – Harassment, cont.

Harassment may include, but is not limited to, threats, physical contact or violence, offensive jokes, insults or put-downs, slurs or name calling, vandalism/graffiti, or offensive objects or pictures.

Petty slights, annoyances, and isolated incidents (unless very serious) typically **do not** rise to the level of harassment.



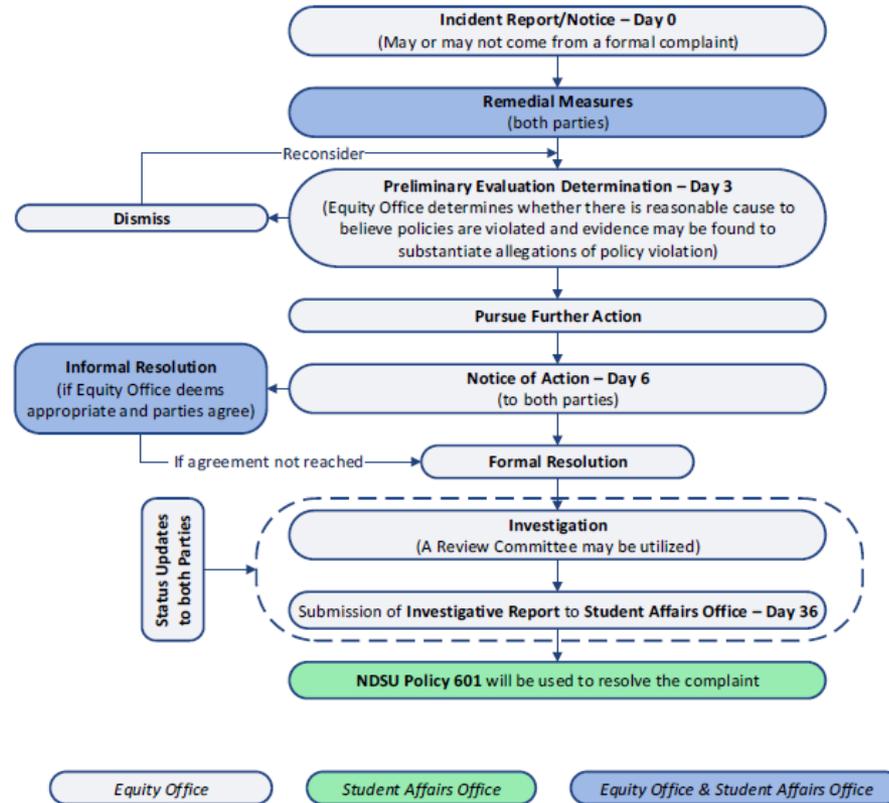


Key Definitions – Retaliation

Any individual (or group) reporting discrimination or otherwise participating in these procedures is entitled to **protection from retaliation** as a result of their activity under these procedures. Retaliation may include, but is not limited to, intimidation, harassment, reprisal, or other negative changes in education or employment.



NDSU POLICY 156 EO/Title IX Investigation Process Chart for Student Cases (modeled after ATIXA)

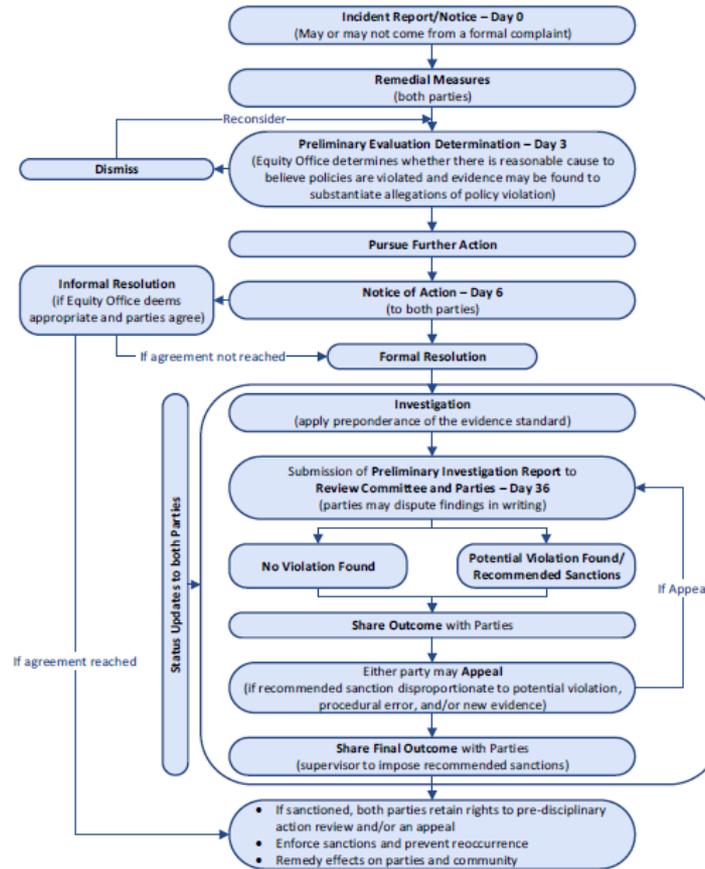


Excluding any appeal, the formal resolution process will be completed within 60 calendar days of the date the discrimination complaint was filed unless there are extenuating circumstances. Any reason for an extension to the 60 calendar day deadline will be communicated in writing to the Parties.

Must use a preponderance of the evidence standard in any Title IX proceedings, including any fact-finding and hearings.
<https://www2.ed.gov/about/offices/list/ocr/docs/ga-201404-title-ix.pdf>

Both parties must be notified, in writing, of the outcome of both the complaint and any appeal.

NDSU POLICY 156 EO/Title IX Investigation Process Chart (modeled after ATIXA)



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Overview of the Complaint Process

Complaint

- Complaint is filed (typically within 180 days of most recent incident but may be exceptions).
- May be an anonymous report (see 3.1.5).
- **Third-party complaint? Who is the “Complainant?”**

Remedial Measures

- May have an immediate obligation to “take reasonable steps to remedy the harm to those affected by discriminatory conduct.”
- For example, a no-contact order, residence/parking modifications, referrals to campus resources.



Overview of the Complaint Process

Preliminary Evaluation (Equity Office)

- Must issue decision within 3 business days from receipt of Complaint.
 - If additional information is requested, 3 days from receipt of additional information.

2 Options

- Dismissal or pursue further action.
- Grounds for dismissal:
 - No facts alleging discrimination/harassment; or
 - Appropriate remedy already achieved.



Overview of the Complaint Process

Preliminary Evaluation

If pursuing further action. . .

- Both parties will receive a **Notice of Action**:
 - Names of parties
 - Basis of the Complaint
 - Statement prohibiting retaliation
 - Notice to provide requested information/documents in a timely manner
 - Description of resolution processes





Overview of the Informal Process

Optional Process

- Equity Office **may** inquire if parties are interested.
- Parties have 3 business days to decide.
 - Must have mutual agreement and any party may withdraw consent to participate.
- 30 calendar days to complete (unless extenuating circumstances).
- If resolved, Equity Office drafts informal resolution agreement for parties to sign.
- No appeal available.



Overview of the Formal Process

- Commences when:
 - Either party elects to use the formal resolution process;
 - The parties fail to reach a resolution under the informal resolution process; or
 - The Equity Office determines the informal resolution process is **inappropriate or inadequate** as applied to a particular discrimination Complaint, e.g. sexual assault.



Overview of Formal Process - Investigation

- 5 business days to commence investigation after providing the Notice of Action.
 - Must include (1) interviews with each party; (2) interviews with witnesses; and (3) a review of evidence.
- Equal opportunity for parties to access and present evidence during the investigation. Both parties will be provided with periodic status updates.
- After investigation, the investigator drafts a **preliminary determination report**.
- 30 calendar days to complete investigation and report (unless extenuating circumstances).

Overview of Formal Process – Review Committee

Formal Process

- Investigative report may be disputed by parties within 5 business days.
- Review committee – 10 days to meet after report issued:
 - Make final determination; and, if required,
 - Recommend disciplinary action.
- Formal process completed in 60 days (unless extenuating circumstances).



Overview of Formal Process – Appeals

- 5 days after final determination; filed with Equity Office.
- Grounds for an appeal include:
 - The recommended disciplinary action is substantially disproportionate to the findings;
 - Procedural error led to an improper final determination; and/or
 - New evidence that was previously unavailable should be considered as it could have had a significant impact on the final determination.
- Appeals process completed in 10 days from submission of appeals form.

Discretionary Investigation Policy

“The Equity Office reserves the right to **initiate an investigation** under these procedures **at its discretion** in the absence of a discrimination complaint or report of discrimination in order to fulfill NDSU’s commitment to taking action to stop discrimination, remedy its effects, and prevent its recurrence.”





Investigation Objectives

- Ascertain witnesses/involved individuals
- Collect facts and relevant evidence
- Determine who, what, when, where, why, and how
- Evaluate credibility
- Identify and eliminate extraneous information
- Make recommendation

The Investigator

- Investigators must be:
 - **Analytical** (detail oriented, able to gather and organize facts and make recommendations);
 - **Credible** (fair, trusted, skilled in investigative role);
 - **Knowledgeable about discrimination/harassment** (understand legal implications, able to identify discrimination in context of work/school environment);
 - **Impartial** (not connected to parties/outside the “chain of command”);
 - **Able to handle confidential/sensitive information;** and
 - **Self Reflective** (what are your own biases, what may affect your objectivity).



When to Use Multiple Investigators

- **One investigator:**
 - Conserves financial resources
 - Avoids redundancy in small investigations
 - Creates consistency in interview/reviewing evidence
- **Multiple Investigators:**
 - Complex issues or numerous parties/witnesses
 - Compare impressions/differing perspectives
 - Gender issues – male/female perspective
 - May be intimidating for parties/witnesses
 - Corroboration/confirmation
 - Involves more resources, including time



Preliminary Considerations

- What exactly are you investigating?
- Designate the scope (on a preliminary basis) of your investigation.
- Prepare an outline of what you need to know in order to investigate the particular issue(s).
- Prepare a timeline/chronology.



Document Gathering

- Policies/Procedures to Gather
 - Discrimination/EEO/Harassment Policies
 - Whistleblower Policies; Retaliation Policies
 - Codes of Conduct (student/faculty)
 - Social Media/Off-Campus Conduct/Violence Policies
 - Tenure/Promotion Policies
 - Faculty and Student Relations Policies
 - Dept./Univ. Policies/Procedures (e.g., grading)
 - Union Contracts (grievance procedures, conduct standards)

Document Gathering

- Keep copies of these policies in the file – overtime, policies/contracts may change. In the event of litigation, having the correct version of the policy handy is useful.



Preliminary Evidence Gathering

- Complaint may indicated **sources of evidence**:
 - **Card access logs** (showing entry/exit in certain locations).
 - **Security video footage.**
 - **University-owned electronics** – email, etc.
 - Police or campus **security reports** (may establish timing or document a related event)
 - Either party may **give access** to other relevant electronic data.

Legal Issues Related to Investigations

<u>Polygraphs:</u>	No state law; Never in employment context.
<u>Videos:</u>	Allowed to use non-surreptitious surveillance to monitor employee honesty or performance. Allowed to videotape with no audio.
<u>Tape Recording:</u>	Allows secret taping.
<u>Computer Monitoring Including e-mail:</u>	Allowed. State and Federal wiretapping laws likely apply.

Scheduling Interviews

- Pick a **neutral location** that is private, appropriate size and seating, distraction-free, stocked with Kleenex.
- Choose a space that will allow the interviewee to have direct access to the door during the interview, i.e. **don't "trap" the interviewee** in a room with you.
- Do **NOT** schedule the complainant and the accused in **back-to-back interviews** at the same location (especially if there is a no-contact order).





Tips on Asking Questions

- Avoid typing – use paper to take notes.
- Start with easy questions (hometown, year in school, position title/job responsibilities).
- Do not disclose information unless there is a need to know.
- Focus on chronology (usually).
- Try not to make assumptions.
- Do not ask trick questions.
- Provide **verbal prompts**, e.g., then what?; how come?; describe that, and **non-verbal prompts**, e.g., nodding your head, eye contact, silence, to encourage disclosure.



Tips on Asking Questions

- Use caution when empathizing – remain professional, respectful, and neutral. Convey concern through comments about the difficult nature of the interview or the interviewee’s emotions, e.g., I can see that you are upset; I realize these are hard questions.
- Avoid yes/no questions unless you specifically want a short, definite answer. Begin questions with who, what, when, where, why, how, etc.
- Be mindful when asking “why” – it can sound judgmental, especially if used as a one-word question. Re-phrase these “why-questions” to “tell me about your decision to ...” or “what factors caused “_____” to happen.”



Clarifying “IDK”

If an interviewee states, “**I don’t remember**” or “**I don’t know**,” what exactly do they mean?

- I was in a position to hear/see, but I don’t remember (or know) if that specific behavior/event occurred.
- I don’t remember (or know), because I wasn’t in a position to hear/see or I have no recollection of that time period.

Q: Did you see Jane Doe looking upset the night of the party? A. I don't know.



- Do you remember seeing Jane at the party? At what time approximately?
- Where was she when you saw her? Across the room/near you?
- Did the two of you talk to each other? If yes, how many conversations did you have that night? What did you discuss? How did she act each time?
- Do you think you could have missed seeing her if she was upset?

Pre- Interview: Create an Introduction

- Cover the same information at the beginning for consistency and to ensure you give each interviewee ALL of the information.
- Consider documenting that you have provided this introductory information, e.g. check off information as you provide it; make a note in your records, have interviewee sign, etc.





Sample Pre-Interview Introduction

- Confirm voluntary participation.
- State that you have an obligation to conduct this interview.
- Describe your role as investigator (fact finding, recommendations).
- Explain you will be taking notes.
- State no recording for investigator or interviewee.
- Ask witness for discretion in sharing contents of interview.
- Inform interviewee of confidentiality limitations.
- Identify who may access information from the interview.
- Give the interviewee copies of relevant policies.
- Review the retaliation policy with the interviewee.
- State that you may need to re-interview them later.
- Ask if the interviewee has any questions.



Interviewing the Complainant (“C”)

- Allow the C to tell their account, using their own words.
 - Don’t interrupt with questions (yet)....just let the account come out.
- After the initial telling, start at the beginning of the account and ask questions re: chronology/additional details.
- Finally, review the account you have heard, and in doing so, ask final clarifying questions and ask the C to correct inaccuracies/add details.



Interviewing a Traumatized Individual

- When trauma occurs, the prefrontal cortex will frequently shut down leaving the less advanced portions of the brain to experience and record the event.
- The more primitive areas of the brain record experiential and sensory information, but do not do very well recording “who, what, when, and where” information.
- An interview that focuses on details/facts may cause C to report inaccurate or inconsistent information



Forensic Experiential Trauma Interview

- The FETI interview designed to gather more psychophysiological evidence than traditional interview techniques.
 - Psychophysiological evidence is defined as “evidence which tends to prove or disprove the matter under investigation based on psychological and physical reactions Examples would include, but are not limited to: nausea, flashbacks, muscle rigidity, trembling, terror, memory gaps, etc.”
- Effective technique for victim, witness, and some suspect/subject interviews.
- May enhance an interviewee’s ability to recall, reduce inaccuracies, and increase cooperation and participation.

The FETI Process

- **Acknowledge** the victim's trauma and/or pain.
- Ask the victim/witness what they are **able** to remember about their **experience**.
 - Able: relieves pressure of “what do you remember”
 - Experience: focus is on interviewee's actual experience; relieves pressure of trying to figure out or remember details that are important to the investigation.
- Ask about their **thought process** at particular points.
- Ask about **tactile memories** such as sounds, sights, smells, and feelings before, during, and after the incident.



The FETI Process

- Ask how **experience affected** them physically and emotionally.
- Ask what the **most difficult part** of the experience was for them.
- Inquire what, if anything, the interviewee **cannot forget** about their experience.
- Finally, clarify **other information and details** (e.g., who, what, where, when, and how) after facilitation and collection of the forensic psychophysiological experiential evidence.



Interviewing the Accused (“A”)

- What if A (or a witness) refuses to participate?
 - Acknowledge A’s decision in writing.
 - Provide copies of policies/procedures/rights.
 - Provide notice of the consequences (e.g. lack of information from A may affect final determination and may be subject to discipline if in violation of policy).
 - Provide any deadlines for changing mind.
 - Provide campus resources, if A would like to discuss decision – e.g., student legal services, counseling.
 - Provide opportunity to submit a written statement or other information.





Interviewing the Accused (“A”)

- Denial/acting defensive is a common reaction.
- May be indignant, stressed, frustrated, angry, confused . . .
- May have many questions about rights/process/outcomes.
- May ask about legal counsel or union representative (at or before the interview).
 - Considerations: Is counsel permitted to participate in/observe the interview? How will A’s decision to seek counsel/union representative affect rescheduling the interview/process?
- Counsel, if present, may not participate in the interview.



Interviewing the Accused (“A”)

- Reminder: do not disclose information (witness names/details) unless there is a need to know.
- Try to let A share details first to avoid “putting words in his/her mouth.”
- Don’t restate allegations and get a response (admit/deny).
- Follow the “regurgitation rule.”



Interviewing the Accused (“A”)

- Ask about each allegation alleged in the Complaint.
- Remember to ask if A is aware of any witnesses or evidence that may support his/her position.
- Don’t ask “did you harass/discriminate. . .” Ask about concrete actions.
 - What did you do/say?
 - How did the Complainant respond?
 - What did you mean/intend when you said/did ____?
 - Did the Complainant respond or react?



Interviewing the Witness (“W”)

- Witnesses – anyone with knowledge of the situation.
- Be aware of potential witnesses that A and C may overlook or try to avoid naming, e.g. a roommate, an assistant, or a graduate teaching assistant who may have useful information.
- No character witnesses – not appropriate information.
- Typically – firsthand knowledge (not hearsay/“through the grapevine” knowledge).





Interviewing the Witness (“W”)

- Get W’s background information.
- Try to elicit information from W before disclosing names, etc.
 - Ask W if he/she knows why he/she was named as a W.
 - Ask whether W has observed any misconduct.
 - If W has no clue, try using events/dates to elicit information without disclosing details.
- Limit disclosure of information to only need-to-know info; May include C and A’s names/general allegations.



Interviewing the Witness (“W”)

- Ask about the source of information – firsthand, secondhand, saw it, heard it, read it on Facebook, etc. (this may identify additional witnesses and help determine credibility of info).
- Ask if witness to identify any other potential witnesses.
- Assess C and A’s relationship through W’s responses.
- W may have concerns; be prepared to respond: Can I refuse to participate? Will someone be terminated/disciplined because of me? Am under investigation? How will you use my info? Who will know I participated?



Concluding the Interview

- Remind witness of confidentiality.
- Remind witness of non-retaliation.
- Remind witness what you will do with information.
- Remind witness no expectation of privacy, but emphasize that you will seek to be discreet.
- Provide contact information for follow-up information.



- A witness wants to tape record.
- Complainant, witnesses or accused breaks down sobbing.
- Complainant, witnesses or accused makes threatening comments.
- A witness reveals other even worse misconduct.
- You discover a bad faith report.

Special Topics

- Retaliation in Higher Education
- Legal Claims Arising Out of Investigations





Stopping an Investigation

In a December 2016 Resolution Letter and Resolution Agreement, the OCR evaluated sexual harassment complaints filed against Elmira College from 2012 to 2015.

In this complaint, the College ceased its investigation when the individual accuser asked for the investigation to discontinue.

The OCR advised that when an accused does not wish to proceed, the institution should conduct an independent evaluation of whether it can honor the request while “still providing a safe and non-discriminatory environment for all students.”

For example, the investigation turned up a complaint where a student reported to her RA that she was raped by three members of a College athletics team. The University improperly discontinued the investigation at the request of the Accuser, without evaluating if it could still provide a safe environment for all students without looking into the incident.



Retaliation

What is protected conduct?

- Any activity under Policy 156.
 - Making a Complaint under Policy 156.
 - Participating in an investigation.
 - Any other activity.

Retaliation: intimidation, harassment, reprisal, or other negative changes in education or employment based on protected conduct.

Legal Claims Arising Out of Investigations

- Invasion of Right to Privacy (Intrusion on seclusion; Publication of private facts; Appropriation of image)
- First Amendment/Speech
- Defamation
- Assault and Battery
- False Imprisonment
- Negligent or Intentional Infliction of Emotional Distress



Documenting Interviews





Documenting Interviews - Considerations

When creating interview notes (pre and post interview), consider the following:

- Does this document need to be created?
- What purpose will this document serve in the investigative process?
- Who will (or may) see this document?
- Will this document be a part of litigation?
- How will this document be retained?



Additionally:

- Destroy hand-written notes after making an accurate summary.
- Type summary after interview so information is fresh and your recollection is clearest.

Privileged Documents

Sort out any attorney-client privilege issues before you document. If the privilege will be claimed, clearly mark the documents.





Interview Notes

- Your name, date, person interviewed, start/end times.
- Review of your pre-interview introduction information.
- Each major question asked and the response.
- The “who, what, when, where, and why” of all events.
 - Be detailed and specific about the alleged behaviors.
- Quotes are useful for critical information.
- How situation has affected C.
- Identify any documents or policies reference in the interview.



Post-Interview Review

The Sooner The Better:

- Type interview notes (pros and cons) (Typing can be distracting during interviews/Retyping handwritten notes may alter the original meaning of the notes.) Correct inaccuracies/typos.
- Consider allowing C and A an opportunity to correct your notes.
- Review most relevant information and evaluate its role in the investigation.

Post-Interview Review

Document Separately From Interview Notes!!

Record your **impressions and credibility determinations**;
and

Identify **follow-up actions** or **additional information** needed.

Good vs. Bad Documentation

Good documentation is based on objective facts and details, not summary conclusions or opinions.

BAD: On numerous occasions, John Doe called Jane Smith names in front of other staff members. Jane finds this demeaning. John is an idiot.



Decision Time – Making a Determination



Yes, No, Maybe . . .

Pursuant to Policy 156, after the investigation, the investigator “will draft a preliminary determination report that states **whether the individual (or group) against whom the discrimination complaint was filed is responsible for the discrimination**, including the harassment or retaliation, by a preponderance of the evidence. The report will also include, at a minimum”

Yes, No, Maybe . . .

“. . . a summary of the relevant information gathered during interviews and otherwise that informed the preliminary determination.”





Standard of Proof

The Level of Certainty and the Degree of Evidence Necessary to Establish Proof

Policy 156 states the standard of proof is a:

**PREPONDERANCE
OF THE EVIDENCE.**



Preponderance of the Evidence

In other words . . .

“[I]n order for an individual (or group) against whom a discrimination complaint was filed to be held responsible for discrimination, it must be determined that it is **more likely than not** that the individual (or group) violated NDSU’s Equal Opportunity and Non-Discrimination Policy.”

Preponderance of the Evidence

Office of Civil Rights (“OCR”) = Title IX standard.
Courts = Title VII standard.

According to the OCR:

“The ‘clear and convincing’ standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred) is a higher standard of proof” and is **NOT** acceptable.

(Dear Colleague Letter 2011 – Withdrawn last week!)





Making a Determination Based on Evidence

- Identify **protected class status**.
 - (Retaliation) Identify the protected conduct.
- Identify **problematic conduct**.
 - Determine whether conduct was welcomed or unwelcomed?
 - Did C communicate that the conduct was unwelcomed?
 - Submission does not mean “welcomed.”
- OCR suggests both looking at the conduct **objectively** and **subjectively** to determine if it was welcomed.



Making a Determination Based on Evidence

- Identify **problematic conduct**, cont.
 - Assess whether conduct was voluntary or coerced.
 - How frequent/severe was the conduct?
 - How did C perceive the conduct?
 - How would a reasonable person perceived the conduct?
 - (Retaliation) Was A aware that C engaged in protected conduct?
- Determine whether the conduct is **based on** of protected status.
- Identify any **negative effects** as a result of problematic conduct.
- Did A have any **legitimate reason** to engage in the conduct?



Evaluating Credibility

Find indicia of truth or reliability that make evidence **more probable than not**:

- Search for **corroboration** (or lack of) in evidence.
- Make **credibility determinations**, as needed:
 - Consider interviewees' reactions, body language, tone of voice, overall demeanor, motivations (to lie/prior relationships, etc.).
 - Consider the interviewee's account of events: Logical? Plausible? Forthcoming or reluctant to share? Did the interviewee's facts, chronology, and perception of events reasonably match the others? Any admissions or denials? Consistent throughout the interview?



The Final Decision

Using your **judgment**, apply the **preponderance of the evidence** standard; and **make the final determination**.



Inconclusive Findings

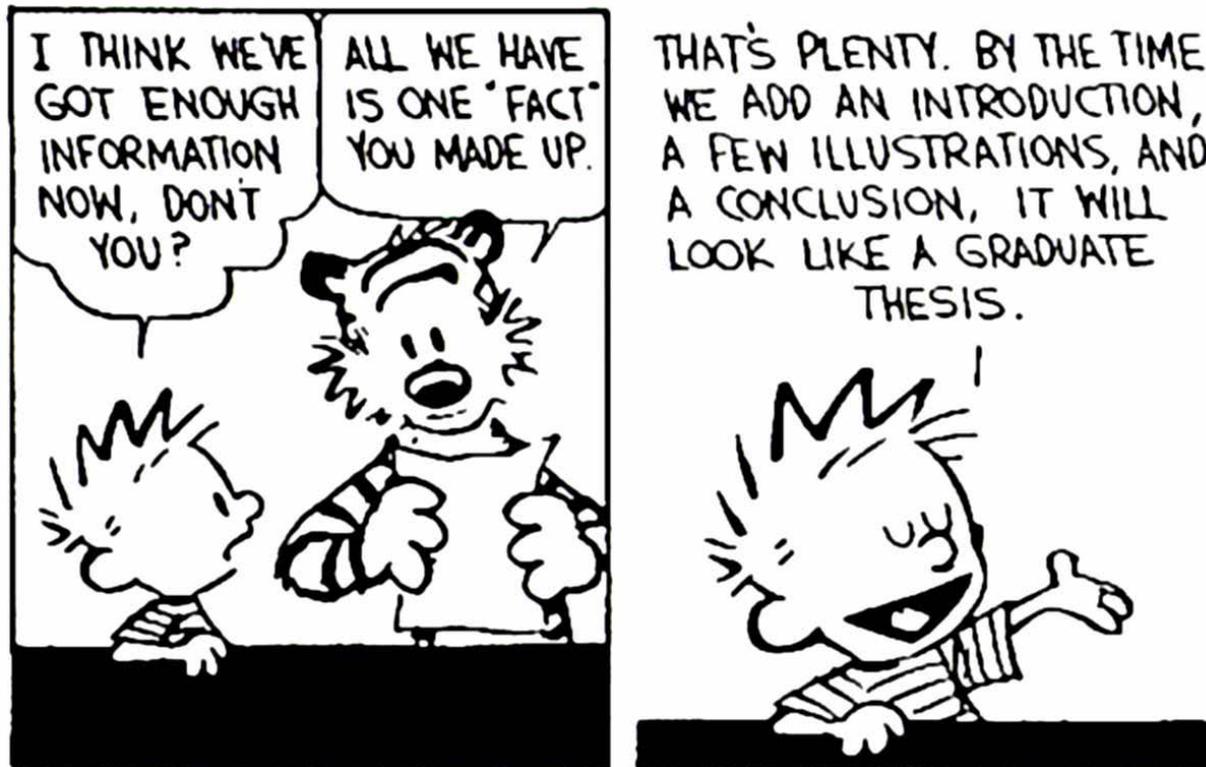
An investigation is **inconclusive** if:

- Corroborating evidence is contradictory or nonexistent;
- **AND**
- Credibility determinations do not resolve these issues.

Documenting Inconclusive Findings

Thoroughly **document investigative efforts** to corroborate testimony and determine credibility. Do not rely on a disagreement between C and A or lack of an eyewitness to explain an inconclusive finding.

Drafting A Thorough Preliminary Determination Report



How Good Is Good Enough?

- **Reasonable** and in **good faith**.
- Conclusion reached **honestly** and **supported by evidence** gathered during an investigation that includes **notice** to the wrongdoer and a **chance for a meaningful response**.





Related Case: *John Doe v. University of Cincinnati* (Nov. 2016)

In this recent dispute, the U.S. District Court for the Southern District of Ohio granted a preliminary injunction preventing the University from disciplining a student for violating a campus Code of Conduct in relation to a sexual assault.

- The Court held that the University denied the accused student due process by not allowing him to cross-examine his accuser.
- The Court clarified by noting that the accused did not have a right to be present at a hearing or to directly cross-examine the accuser, but should at least be provided with the opportunity to submit **questions** for cross-examination per the relevant student code.



The Preliminary Determination Report

- Include the burden of proof used; summarize the evidence; evaluate credibility; describe the corroboration for findings; and explain the conclusions reached.
- Don't exclude contradictory evidence unless there is credible evidence to discredit it or the proffering witness. If you discredit the witness, explain through contradictory, credible evidence or by describing witness demeanor.

Words of Caution

- Avoid loaded words or legal terms, e.g. “clear violation,” or “harassment.”
- Eliminate *mea culpas*.
- Don’t use of terms, abbreviations, and acronyms that readers may not be familiar with.
- Avoid or provide facts to clarify vague words , e.g., “sometimes” or “emotional.”



Review Committee's Role

- At the discretion of the Equity Office, the Review Committee may be utilized to provide feedback on a preliminary investigative report.
- Within 10 days of the issuance of the preliminary investigative report, the Review Committee will meet to finalize the report.
- At this meeting, the Review Committee members will review the preliminary investigative report and any written response to the report submitted by the parties.



Review Committee's Role (cont.)

- The Review Committee is tasked with making the final determination (the **Final Investigative Report**) regarding the outcome of the investigation.
- If the Review Committee is unable to make a recommendation based on the information before it, it may request, in limited circumstances, that the investigator gather additional information:
 - In this event, each party will be provided with the additional information gathered and given the opportunity to respond in writing.



Final Investigative Report

- The Final Investigative Report shall contain a statement regarding a determination whether a violation occurred, as well as a recommendation of pursuing charges.
 - For complaints involving students, if there is reasonable cause to believe a violation has occurred, the recommendation shall be to pursue charges;
 - If there is no reasonable cause present, the complaint shall be dismissed.
- The Final Investigative Report for employees will include recommended action, if any action is deemed to be necessary, as well as a finding to whether the conduct in question occurred.

Filing the Report

- Due 30 calendar days of initiation of the comprehensive investigation (unless extenuating circumstances).
- Provide the report to the parties and the review committee. (Consider sending with a return receipt or other verifiable receipt method).
- Parties have 5 business days from receipt of the report to dispute the preliminary determination and/or any information found in the report in writing.



Thank You for Participating.

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