



Association of
Title IX Administrators

Civil Rights in Education: Consent, Credibility, Retaliation, and Disparate Treatment

Training and Certification Course

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Management Solutions



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Content Advisory

The content and discussion in this course will necessarily engage with issues of harassment, discrimination, violence, and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX and Title VI practitioners may encounter in their roles, including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

Introduction



This training focuses on the skills and techniques needed to analyze complex constructs in civil rights complaints within education settings.



Participants will learn how to apply policy in investigations and determinations with precision and develop comprehensive and defensible rationales.



Our goal is to prepare Investigators and Decision-makers to use structural frameworks in civil rights resolution processes to strengthen their work product and ensuring fair and consistent processes.

Course Notes

This course:

- Uses ATIXA model policy definitions
- Assumes that Investigator role is separate from the Decision-maker (DM) role
- Contains information and strategies relevant to evaluating many types of civil rights complaints
- Provides opportunities for cross-training between Investigator and DM roles



Applying Policy in Investigations and Determinations

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Civil Rights Policies in Education

- Policies are composed of individual elements
- Policy elements guide investigations and determinations
 - Question development
 - Evidence analysis
 - Bias reduction
- Policies, at times, have gaps that must be addressed by the Investigator or DM



Parsing the Policies

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Models of Proof Technique

- Models of proof allow Investigators and DMs to parse policies into their individual elements, including breaking apart lengthy or complicated provisions
 - Determine each essential element
 - Conduct analysis for each element
 - Ensure analysis is consistent with the entirety of each policy
- **Example:** Stalking

- ☐ A Respondent engaging in a course of conduct
- ☐ On the basis of sex
- ☐ Directed at the Complainant
- ☐ That would cause a reasonable person to fear for the person's safety, or
 - ☐ The safety of others, or
 - ☐ Suffer substantial emotional distress

Example: Parsing the Policy

Discriminatory Harassment:

Unwelcome conduct on the basis of actual or perceived protected characteristics which, based on the totality of the circumstances, is subjectively and objectively offensive, and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the Recipient's program or activity



Element Identification

Policy Elements

- Unwelcome conduct
- On the basis of actual or perceived protected characteristics which,
- Based on the totality of the circumstances, is
- Subjectively and objectively offensive, and
- Is so severe or pervasive,
- That it limits or denies a person's ability to participate in or benefit from the Recipient's program or activity



Conceptually Related Elements

Analyze the elements to understand the relationship between different elements

- Unwelcome conduct
 - on the basis of actual or perceived protected characteristics which,
- Based on the totality of the circumstances, is
 - subjectively and objectively offensive, and
 - is so severe or pervasive,
- That it limits or denies a person's ability to participate in or benefit from the Recipient's program or activity



Policy Interpretation

- Civil rights policies often have components (terms of art) with commonly understood meanings
 - E.g., “course of conduct” inherently requires two or more acts
- Some definitions are nuanced
 - E.g., “severe,” “persistent,” “pervasive,” “objectively offensive”
 - Subjective vs. objective analysis
- Must also consider:
 - Relationships between words
 - Intersections with other policies

Policy Interpretation (Cont.)

- Additional sources may influence policy interpretation, including:
 - State and federal statutes, regulations, and case law
 - Office for Civil Rights (OCR) guidance
 - Equal Employment Opportunity Commission (EEOC) guidance

Policy Parsing Considerations

Common Meaning

Is there a commonly accepted use for a term or phrase?

Defined Meaning/Jargon

Is the term defined by policy or is it a term of art?

Punctuation

Are there commas, periods, semi-colons, or other punctuation?

Connectives

Does the policy use “or,” “and,” or other connectives?

Timing Words

Does the policy use words like “during” or “while”?

Visual Deconstruction

Is there a visual depiction that would be helpful?

Multiple Deconstructions

Is there more than one way to parse a policy?

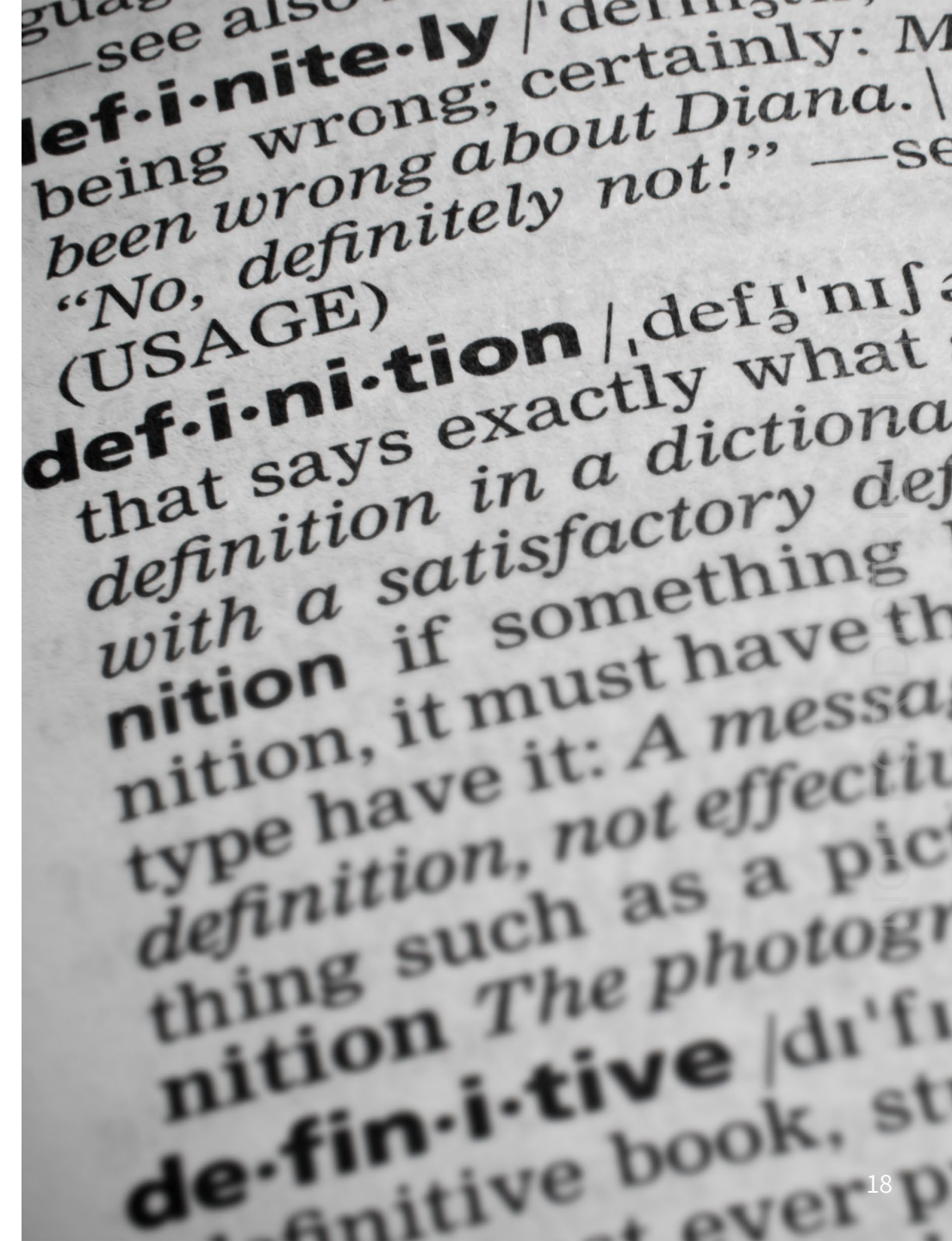
Common Meaning

- Policies may use terms that have an ordinary meaning as part of a larger definition
 - E.g., Incapacitation
 - Includes: “being disoriented, helpless, asleep, or unconscious...”
- Rely on the policy definition section
 - Sometimes common meanings may have specific definitions within the policy
 - E.g., student, retaliation



Defined Meaning and Jargon

- Check policy for a definitions section
- For undefined terms, ask legal counsel and/or Title IX/VI Coordinator
- Examples:
 - Reasonable person
 - Severe, pervasive, persistent, objectively offensive
 - Substantial emotional distress
 - Violence
 - Sexual degradation, gratification, humiliation
 - Shared ancestry

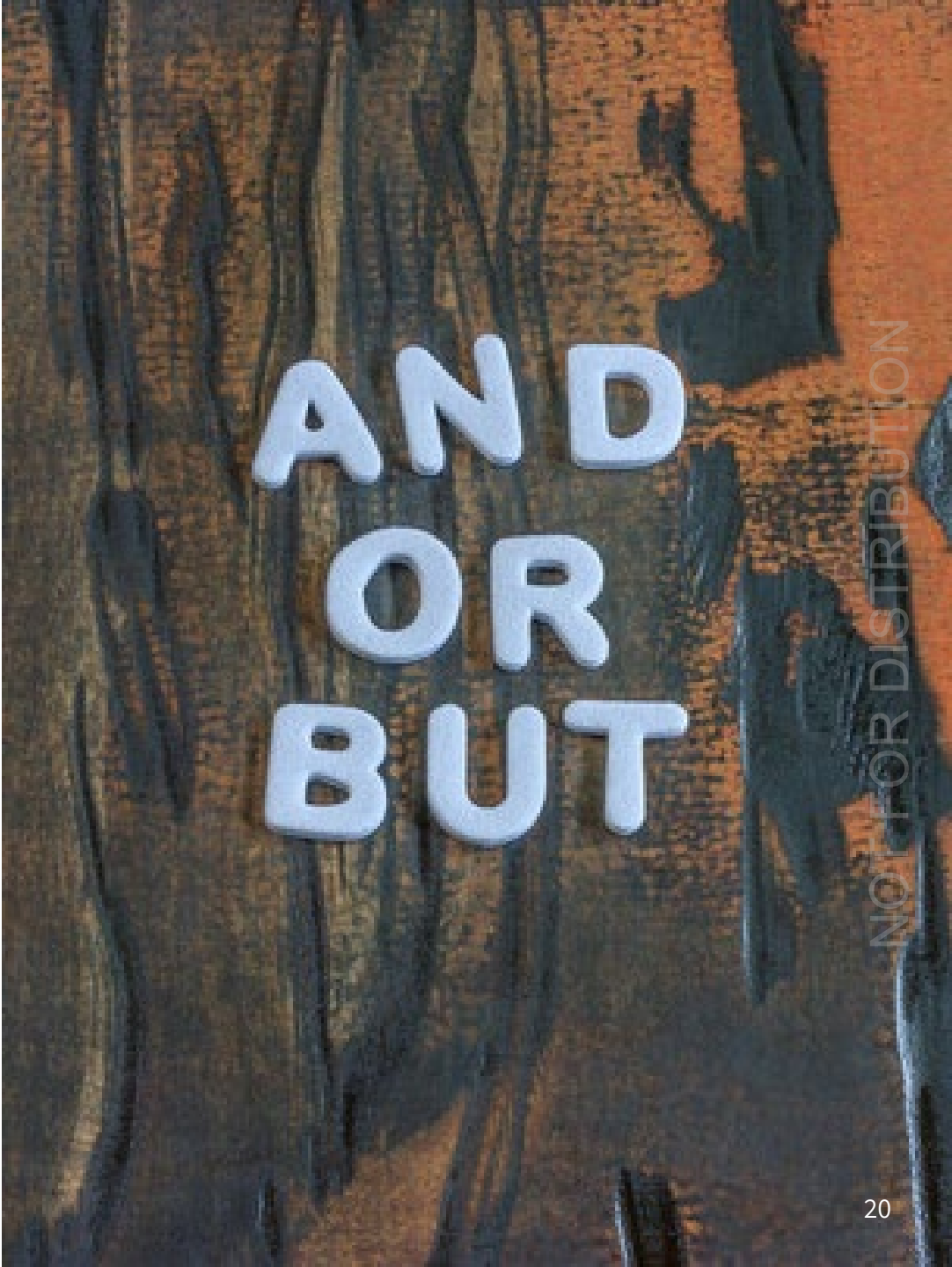


Punctuation

- Natural break points between ideas
- Distinguishes clauses or elements
- Example: **Fondling**
 - “The intentional touching of the clothed or unclothed body parts, without the consent of the victim, for the purpose of sexual degradation, sexual gratification, or sexual humiliation, including instances where the victim is incapable of giving consent because of age or incapacity due to temporary or permanent mental or physical impairment or incapacity”

Connectives

- Connectives that expand or limit
 - And
 - Or
 - “Including but not limited to...”
- Example: Discriminatory Harassment (Title VI)
 - “Unwelcome conduct...is subjectively **and** objectively offensive, **and** is so severe **or** pervasive...”
- Example: Domestic Violence (Title IX)
 - “...is a current **or** former spouse **or** intimate partner of the Complainant...”



AND
OR
BUT

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Timing Words and Other Strategies

- Timing words
 - Consent:
 - “consent may be ratified...at some point **during** the interaction...”
 - “A person cannot consent **while** asleep or unconscious...”
- Visual deconstruction
 - Models of proof, flowcharts, rubrics
- Multiple deconstructions
 - Compare and contrast which parsing models make the most sense



Multi-Allegation Complaints

- For multi-allegation complaints, models of proof and other parsing techniques provide structure and organization
 - Multi-allegation complaints may involve policies with overlapping and/or concurrent elements
- Models of proof and other organizational techniques ensure:
 - Investigation and determination is comprehensive
 - No element is accidentally missed
- Include similar considerations for complaints involving counter-complaints, retaliation allegations, or collateral misconduct
- Where multiple policies are charged, determine if the charges are overlapping, stand-alone, or both, for purposes of analysis
- Consider whether starting with the narrowest or broadest policy makes the most sense

Policy Parsing as a Tool

- Adopting policy parsing techniques streamlines the resolution process
- Clarifies role and reduces redundancies between roles

Investigators

- Develop questions for each element
- Gather and organize evidence related to each element, providing an analysis roadmap for DMs
- Assemble a structured investigation report, organized by each element
- **Goal:** Enable DM to determine whether evidence shows all necessary elements are met for each alleged policy violation

Decision-Makers

- Identify gaps in evidence and develop questions for disputed policy elements while preparing/planning questions
- Connect relevant evidence to each disputed element during deliberation phase to reach a determination
- **Goal:** Determine whether sufficient relevant, credible evidence supports a finding for each disputed policy element

Activities: Parsing the Policy

Element Identification: Retaliation

Use the Retaliation definition below and identify:

- The individual elements
- Any conceptually related elements
- Additional parsing techniques that may be useful

Retaliation

“The Recipient or any member of the Recipient’s community, taking or attempting to take materially adverse action, by intimidating, threatening, coercing, harassing, or discriminating against any individual, for the purpose of interfering with any right or privilege secured by law or policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the policy and associated procedures”

Element Identification: Individual Elements

Retaliation Individual Elements

- The Recipient or any member of the Recipient's community,
- taking or attempting to take materially adverse action,
- by intimidating, threatening, coercing, harassing, or discriminating against any individual,
- for the purpose of interfering with any right or privilege secured by law or policy, or
- because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the policy and associated procedures

Element Identification: Conceptually Related Elements

Retaliation conceptually related elements

- The Recipient or any member of the Recipient's community,
- taking or attempting to take materially adverse action,
 - by intimidating, threatening, coercing, harassing, or discriminating against any individual,
- for the purpose of interfering with any right or privilege secured by law or policy, or
 - because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the policy and associated procedures

Scottie and Hailee – Complaint

- Scottie and I met at orientation and became friends because we had a couple classes together and are both from Buffalo.
- A few weeks ago, Scottie tried to kiss me, and I told her that I was not interested in that kind of relationship.
- Since then, I've stopped texting Scottie, but she has continued to send me so many text messages.
- She's also come by my room several times a week and even will come to the coffeehouse right off campus where I work a few shifts a week. She doesn't order anything, either. I just want it to stop.

What policies might apply?

Scottie and Hailee – Element Identification

Stalking:

- A Respondent engaging in a course of conduct,
- on the basis of sex,
- directed at the Complainant,
 - that would cause a reasonable person to fear for the person's safety, or the safety of others; or
 - suffer substantial emotional distress
- **How might an Investigator develop questions for each policy element?**
- **How might a DM apply facts to each policy element?**

Scottie and Hailee – Investigator Questions

How might an Investigator develop questions for each policy element?

- **Element:** A Respondent engaging in a course of conduct
 - Ask Hailee for the date and time of each reported incident and develop an incident timeline
 - Ask Hailee for text message screenshots with date and time stamps; verify by retrieving text messages from Respondent
 - Ask Hailee's roommate and/or coworkers about the incidents for corroboration
- **Element:** Would cause a reasonable person to fear for their safety
 - Ask Hailee how each interaction made them feel
 - Ask witnesses about their impressions of Scottie's behavior
 - Look to the text messages to determine whether the messages contain any threats of violence or whether it is clear that the communication is unwelcome

Scottie and Hailee – DM Determinations

How might a DM apply facts to each policy element?

- **Element:** A Respondent engaging in a course of conduct
 - DM would consider:
 - Parties’ and witnesses’ testimony about the number of incidents
 - Video footage from residence halls or the coffeehouse
- **Element:** Would cause a reasonable person to fear for their safety
 - DM would consider:
 - Hailee’s testimony about how Scottie’s behavior made her feel
 - Witness testimony about Scottie’s behavior and Hailee’s response
 - Text message contents and frequency

Policy Constructs: Disparate Treatment and Retaliation

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Disparate Treatment Defined

Disparate treatment exists when an individual treats another person **differently**, or takes an **adverse action**, because of that person's actual or perceived protected characteristic (e.g., sex, race, disability)

Examples:

- Access to resources
- Athletics
- Grading
- Hiring
- Pay
- Promotion/performance reviews
- Program access
- Responsibilities/job assignments
- Shifts
- Student conduct outcomes

ATIXA's Model Policy Definition

Disparate Treatment Discrimination:

- Any intentional differential treatment of a person or persons that is based on a person's actual or perceived protected characteristic and that:
 - Excludes a person from participation in;
 - Denies the person benefits of; **or**
 - Otherwise adversely affects a term or condition of a person's participation in a Recipient program or activity

Disparate Treatment Construct

Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?

Step 2: Does the Respondent offer a non-discriminatory reason for the different treatment/adverse action?

Step 3: Is there evidence that the offered reason is legitimate, or is it a pretext for discrimination?

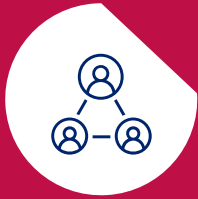
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Disparate Treatment Analysis

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Step One: Disparate Treatment Elements

Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?



1(a)

Does the complaint implicate at least one protected characteristic?



1(b)

Does the complaint identify different treatment/an adverse action?



1(c)

Does the complaint assert that the different/adverse action was taken because of the protected status?

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Investigators

Step Two: Non-Discriminatory Reason

- Collect evidence related to any non-discriminatory explanation for the different treatment or adverse action
- Interview the Respondent about the allegations to elicit an explanation:
 - Ask about the **why** behind the alleged adverse action or disparate treatment
 - “Why didn’t Simon get tenure?”
 - “Why did John get tenure when Simon didn’t?”
 - Gather any evidence that supports the stated reason(s)
- Seek corroboration of any offered non-discriminatory reason(s)
 - Analyze the Respondent’s offered reason in light of relevant evidence
 - Statistical evidence may also be used to rebut a discriminatory motive

Investigators

Step Three: Pretext Analysis

- If the Respondent offers a non-discriminatory reason for the different treatment or adverse action, then seek relevant evidence to determine if that reason is legitimate
 - **Pretext:** When different treatment or an adverse action occurred for discriminatory reasons, but an individual nonetheless asserts that there was a legitimate reason
 - Is the Respondent's stated reason just pretext for discrimination?
- Provide the Complainant with an opportunity to respond to the Respondent's reasoning
 - Use follow-up interview(s) to identify any evidence that may rebut the Respondent's reasoning
 - Direct evidence
 - Other witnesses or documents
- Consider other sources to thoroughly investigate whether the reasoning is pretextual

Decision-Makers

Steps Two and Three

- Identify non-discriminatory reason(s) and pretext evidence in the record
 - Investigator should have done so, too, but do not assume the Investigator caught everything
 - Search for gaps or evidence that is missing or in need of further clarification
- Analyze the relevant evidence and weigh non-discriminatory reasons against any pretext evidence
 - Pretext often relies on a credibility assessment, including inherent plausibility
 - Is the non-discriminatory reason credible in light of the evidence?
- Mixed motives for adverse actions are possible
 - If any one of the motives is discriminatory, even if other motives are non-discriminatory, a policy violation occurred; same if some explanations are pretextual and others are not

Resolving Disparate Treatment Complaints

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Assessing Motive

- Investigators and DMs should look for direct evidence of a motive, including in:
 - Respondent statements or statements made on Respondent's behalf indicating bias
 - Can include evidence that Respondent failed to take appropriate corrective actions to resolve known discriminatory practices or policies
 - May come from Complainant or witness statements
 - Documentary evidence
 - Emails, performance reviews, text messages, grading patterns, etc.
- Previous satisfactory job performance can also support an inference of discrimination for termination or sudden, unexplained changes in performance evaluation
- Discriminatory motive evidence can also exist when **similarly situated individuals** who do not identify with the protected characteristic on which the complaint is premised are treated more favorably (Comparator Analysis)

Similarly Situated Individuals

- **“Similarly situated”** is not precisely defined, but can be helpful evidence in complaints where **direct evidence** is **unavailable or limited**
- Individuals may be similarly situated in one context but not another
- Investigators and DMs must determine which individuals, in the same context as the Complainant, should likely receive the **same treatment** as the Complainant
- Consider the scope of the complaint
 - If a student is reporting an individual faculty member, similarly situated students may be the other students in that course and students in the faculty member’s other courses
 - If an employee is reporting a vice president’s bias in hiring/promotion, similarly situated employees may be other divisional employees

Similarly Situated Individuals (Cont.)

- If there are no individuals in the same position as the Complainant, consider other individuals in the most similar situations
 - Make the **most relevant comparisons possible** based on the available evidence
 - Do not force a comparison where there really is no comparator
- Generally, the similarly situated comparison is most useful if the similarly situated individuals **are not** part of the Complainant's protected group

Example: Satisfactory Job Performance

- Discriminatory intent may also be identified by viewing the adverse action in relation to a person's prior performance
 - This is not fool-proof, since past performance does not guarantee future performance, but it's an indicator

Example:

- Before annual evaluations, the director shares with her supervisor that she's pregnant
- In each of the past three years, the director has received rave reviews in her annual evaluation
- She has previously been told that she will be up for a promotion during her fourth year and is a "shoe-in"
- Based on this year's annual evaluation, the director was given a performance improvement plan (PIP) instead of a promotion

What else would an Investigator or DM need to know?

Common Non-Discriminatory Reasons Used as Rebuttal

Respondent may provide evidence that:

- Complainant's allegations are **factually incorrect**
- Complainant has been **improperly compared** to individuals not similarly situated
- Complainant was compared to **some**, but not **all**, similarly situated individuals
- Actions were based on **favoritism**
- Complainant improperly interpreted or relied on statistical data, and such data **does not raise an inference** of disparate treatment
- Not **all** members of the same protected group have received disparate treatment

Common Non-Discriminatory Reasons Used as Rebuttal (Cont.)

Respondent may provide evidence that:

- A Complainant was **not qualified** for a position
- A Complainant was qualified for a position but asserts that another person was selected because that person was **better qualified or a better fit**
 - Qualifications can be multifaceted and subjective, so this the argument requires close examination

Mixed motives for adverse actions are possible

- If any one of the motives is discriminatory, even if other motives are non-discriminatory, a policy violation occurred

Inference/Rebuttal/Pretext Construct

- When a Complainant's evidence raises an inference of discrimination, the Respondent (or other evidence) can rebut that inference with legitimate non-discriminatory explanations, which are then assessed for pretext
- Inferences arise from direct evidence of disparate treatment, from similarly situated analysis, or from the totality of the circumstances
 - Assessing totality of the circumstances requires a review of the body of evidence to create a unified, reasonable inference of discriminatory intent
- Where a Complainant fails to raise an inference of disparate treatment through the investigation process, policy should give the TIXC/TVIC the opportunity to dismiss the complaint

Disparate Treatment Questioning Guidelines

- Must assess (1) whether the action(s) occurred; (2) the motivation for the action(s); and (3) whether any differential treatment is subject to discipline or is subject to remedial action
- At the outset, explain to the interviewee how a disparate treatment investigation is structured, so they understand the context for questions/evidence you are seeking
- Investigators and, if applicable, DMs should:
 - Start with broad questions and follow up when appropriate
 - Use policy definitions to drive questioning
 - Use trauma-informed questioning skills
- Investigators should avoid:
 - Accusatory or argumentative questions
 - Confusing questions

Disparate Treatment Questioning Guidelines (Cont.)

Broad, open-ended questions may lead to more pointed specific questions

- “What forms the basis for your disability-based discrimination allegation?”
- “What do you think Respondent will say about why they engaged in the alleged action(s)?”
- “If the Respondent were to assert that your complaint is more about their management style than discrimination, how would you respond to that?”
- “In your email, you wrote that women are lazy and emotional. What was the context for that comment?”
- “The Respondent stated that he denied your application to run for student government because you did not file your paperwork on time. What are your thoughts on that?”

Michelle and Tim – Complaint

- Michelle, a Black woman currently employed at State University (SU), applied for SU's new Chief Information Officer (CIO) role
- The job posting required experience with a specific student information software, as well as a minimum of three years of supervising other IT professionals
- Michelle met all the requirements for the position but was not hired
- SU hired Tim, a Black male
- Tim previously worked at SU before Michelle arrived and left for a tech start-up in the finance sector
- Tim had no experience with the specific student information software and hadn't yet supervised other IT professionals
- Michelle initiated a complaint, arguing she was discriminated against on the basis of sex

Michelle and Tim – Respondent Response

- Tyrone, who supervises the CIO role, asserts that he offered Tim the job because they're friends from when Tyrone was SU's AVP for administration and Tim worked in the IT office
 - Tyrone never worked directly with Michelle and opted to hire his friend
- Has Tyrone provided a **non-discriminatory** reason for not hiring Michelle?
- What evidence might be available and relevant?



Michelle and Tim – Discussion

- Tyrone claimed his decision was based on favoritism for his friendship with Tim
- Michelle responds that Tyrone's argument is pretext
- Michelle offers two coworkers as witnesses to Tyrone's statements about how he does not trust women in IT roles because his mother is completely inept when it comes to technology
 - Tyrone counters that these comments were made in jest
 - Witnesses provide evidence that Tyrone made such comments more than once

Does the evidence suggest that Tyrone's offered reason was pretext?

What questions might you consider asking?

Resolving Retaliation Complaints

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Retaliation:

ATIXA's Model Policy Definition

- The institution or any member of the institutional community,
- Taking or attempting to take materially adverse action,
 - By intimidating, threatening, coercing, harassing, or discriminating against any individual,
 - For the purpose of interfering with any right or privilege secured by law or policy; or
 - Because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the policy and associated procedures

Retaliation Construct

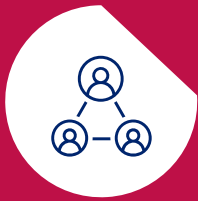
Step 1: Does the complaint satisfy the required elements for a retaliation complaint?

Step 2: Does the Respondent offer a non-retaliatory reason for the adverse action?

Step 3: Is there evidence that the offered reason is pretext for discrimination?

Step One: Complaint

Step 1: Does the complaint satisfy the required elements for a retaliation complaint?



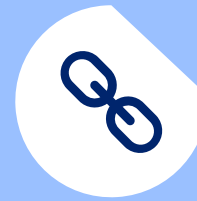
1(a)

Does the complaint
implicate a protected
activity?



1(b)

Does the complaint
identify an adverse
action?



1(c)

Does the complaint
assert that the adverse
action was because of
the protected activity?

Step 1(a): Protected Activity

- Engaging in **protected activity** is a required element of all retaliation claims
 - Without the protected activity, being mistreated is not enough to constitute retaliation
- Examples of a protected activity:
 - Making a report of discrimination or harassment
 - Submitting a complaint
 - Assisting someone reporting discrimination or filing a complaint
 - Participating in the resolution process (e.g., investigation, meetings, hearings)
 - Protesting discrimination (including contemplating making a complaint; can include Whistleblower activity)
- Retaliation claims can protect parties, witnesses, advisors, and even those involved in resolving complaints

Step 1(b): Adverse Action

- If there is protected activity, move on to the next step:
 - **Did an adverse action occur?**
- An **adverse action**, in the retaliation context, could also include behavior that would deter a reasonable person from engaging in protected activity
 - E.g., bringing a complaint or supporting allegations of discrimination
- Very broad definition
 - Could be based on action or non-action

Step 1(c): Causation Element

- If there is protected activity and adverse action, move on to the next step:
 - **Does a causal connection exist between the two?**
- While causation is required, **direct** evidence of motive or intent is not required
 - Often only indirect evidence is available
 - Consider whether the individual performing the adverse action knew of the protected activity
 - Timeline evidence



Adam – Complaint

- Adam is an Admissions Counselor
- Adam filed a complaint with the Equal Opportunity Office alleging that the Vice President of Enrollment Management, Adam's skip-level supervisor, created a hostile work environment for Jewish employees in the division
 - This would qualify as **protected activity**



Adam – Discussion Part 1

- While the resolution process was ongoing, Adam received new territory assignments
 - Originally, Adam had been assigned to the Northeast, where he lives
 - The Northeast territory is highly prized, as many major cities are clustered near one another, leading to less travel
 - Adam's new territory is the Pacific Northwest, which includes Idaho, Washington, Oregon, Alaska, and parts of Northern California
- Adam reported the territory reassignment to the Equal Opportunity Office, asserting that his supervisor, the Director of Enrollment, was retaliating against him for reporting the Vice President

Could this be considered an adverse action?

What additional information is needed to make that determination?

Adam – Discussion Part 1 (Cont.)

Is there a causal connection between complaint and the territorial reassignment?

- Consider whether there is any direct evidence
 - Ex: The VP directed the Director in an email to give Adam the worst territory assignment because Adam filed the complaint
- Consider the indirect evidence
 - The reassignment occurred during the Title VII process resolving the original complaint
- Consider whether the Director of Enrollment knew about Adam's complaint
 - Ex: The Director possessed handwritten notes from a 1:1 with the VP that contained a reference to Adam's complaint.

Step Two: Non-Retaliatory Reasons

Examples:

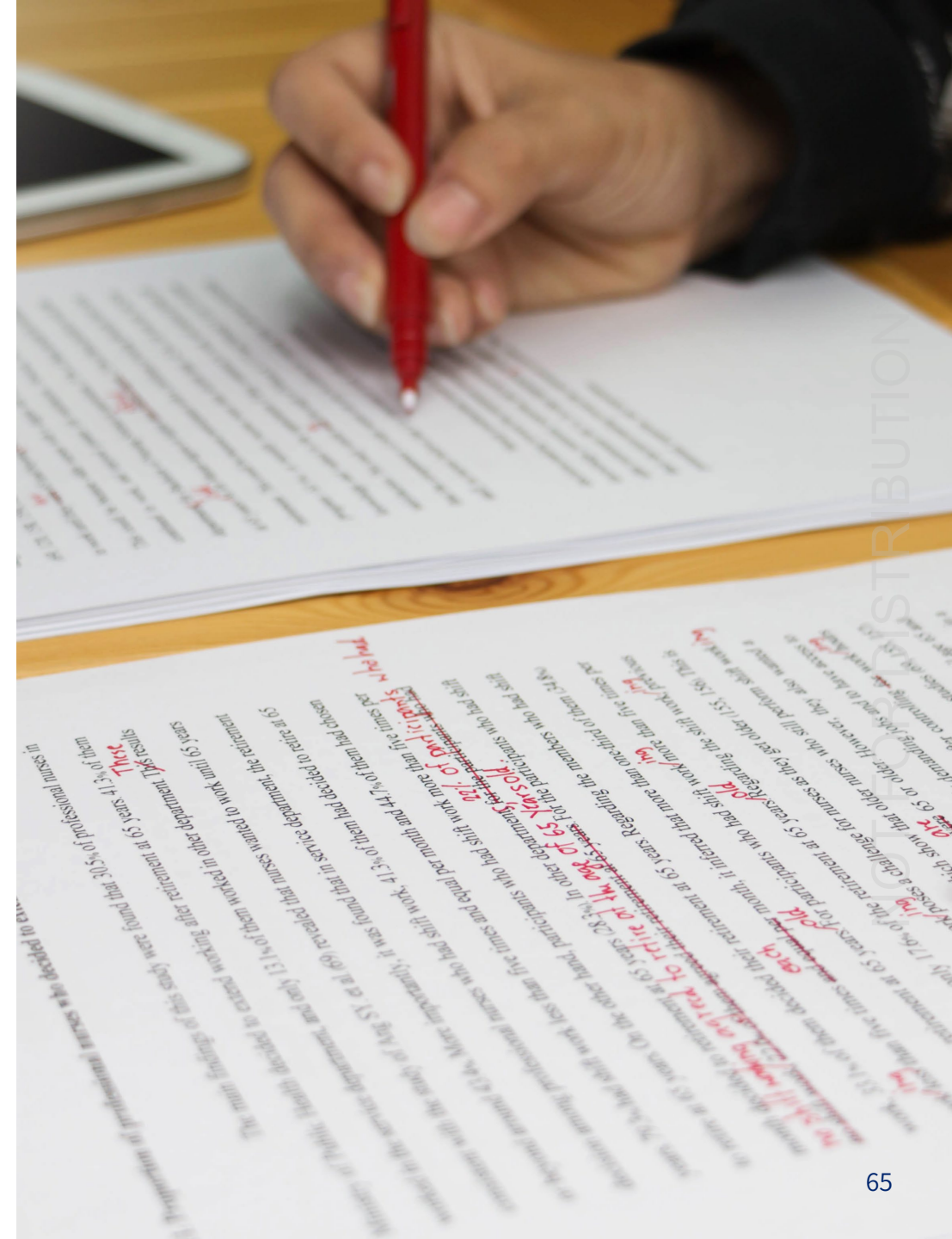
- Pre-emptive complaint
- Poor academic or work performance
- Inadequate qualifications for role or position
- Other candidates are better qualified
- Evidence of misconduct and/or history of misconduct
- Insubordination
- Budget cuts or hiring freezes
- Does not qualify for requested accommodation or adjustment

Consider using similar questioning techniques as discussed in the Disparate Treatment section



Evidence of Pretext

- **Recall:** When determining whether a given explanation for the adverse action is pretextual, consider whether:
 - The explanation makes sense
 - Other actions taken are inconsistent with the explanation
 - The explanation is inconsistent with past policy or practice
 - There is evidence of other individuals being treated differently in similar situations
 - There is witness testimony, including experts
 - **The timeline of events aligns**



Adam – Respondent Response

- Assume the three elements for retaliation exist for Adam's complaint
- Next, determine whether the Director of Enrollment had a **non-retaliatory reason** to reassign Adam to the Northwest territory
- The Director of Enrollment offered the following in their interview:
 - Adam was not hitting the goals outlined for the Northeast territory
 - The Northeast territory, historically, is the College's primary source of applicants, so the College could not have an underperforming counselor assigned to it
 - The move out of the Northeast territory was also meant to be motivational, as the Director assumed Adam would want to earn the Northeast assignment back

Adam – Complainant Response

- Consider, next, whether the Director’s alternative explanation for the adverse action is **pretextual**
- Upon hearing the Director’s explanation, Adam reported:
 - None of the staff in Adam’s position are hitting the goals outlined for their territories
 - Enrollment shortages and budget shortfalls have led to territory goals increasing by 10-20%
 - Adam asserted that he was performing at the same level as his peers

Evidentiary Considerations

- There are very specific steps to investigating and deciding a retaliation claim
 - Use the Retaliation Construct to structure the investigation report or outcome rationale to ensure comprehensiveness
- Build a timeline
 - When did the protected activity take place? The adverse action
 - Close in time adverse action can create a rebuttable inference of retaliation
 - Who knew what, when? When were key statements made?
 - When were key documents created?
- Assess evidence for causal connection between the protected activity and adverse action
 - Significant focus on an **objective analysis** of the Complainant's allegations
 - Whether a reasonable person would believe the action to be adverse

Retaliation Complaint Decision-Making

- First, the DM will need to determine whether the evidence supports a finding that the allegations occurred as alleged
- Then the DM will apply the Retaliation Construct to determine whether the alleged conduct meets each policy element
 - There may not be evidence for each step of the construct
 - Ex: The Respondent may not provide a non-retaliatory reason because they say that the alleged adverse act did not occur
 - Include both objective and subjective perspectives within your analysis
 - Credibility (Is a non-retaliatory reason pretextual?)
- Parse the policy

Retaliation Boundaries

- Not all adverse actions connected to a complaint are retaliatory
- Non-retaliation policies protect individuals who are engaged in protected activity from adverse action because of that protected activity
- Retaliation is not required to be based on a protected characteristic
 - The underlying protected activity must be based on a protected characteristic; thus, the retaliation is based on that protected characteristic

When “Retaliation” Isn’t Retaliation

Example:

- Amanda decides to destroy Carl’s reputation because he raped her
 - She calls him a rapist in public spaces and hangs flyers with his photo and the word “rapist” printed on them
- This is **not** retaliation, but it might be hostile environment sexual harassment
- Amanda is not acting adversely toward Carl because he is a Respondent, but because she believes him to be a rapist
- Raping someone is not a protected activity

Consent Analysis

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Consent:

ATIXA Model Policy Definition

- Informed, knowing, and voluntary – freely given, no duress, no fraud
- Active, not passive
 - No means no, but nothing also means no
 - Yes means yes, but yes to what?
- Creates mutually understandable permission
- Immediately prior to or contemporaneous
 - Exceptions
 - Prior consent ≠ future consent
- Consent can be withdrawn at any time
 - Withdrawal must be clearly communicated verbally or non-verbally
 - Activity must stop reasonably immediately

Consent in Context



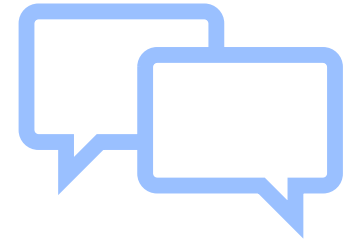
**Newer
relationships**



**Long-term
relationships**



**First-time sex/
hookups**



**Relationships
without
established norms**

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Consent Principles

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Key Consent Principles

- Context often matters more than anything else
- Consent can, in fact, be implied because reasonable **reciprocation** (without leveling up) is consensual
 - Unreasonable reciprocation
- Interactions that start in ways where consent is ambiguous can establish consent later in the interaction by **ratification**
- Individuals can put any conditions on consent that they want, even if unreasonable – but there must be agreement
- Reasonable person analysis

Consent and Kink

- If parties evolve their own norms for communicating consent, they should be held to their own norms (e.g., kink)
- **Kink:** a variety of consensual, non-traditional sexual, sensual, and intimate behavior (e.g., role playing, objectification, breath play, fire play, bondage, dominance, submission, masochism (BDSM))
 - “Consensual non-consent”
 - Consenting parties form a mutual agreement that at least one partner will pretend to not consent to sexual activity
 - Significant trust between the parties is required
 - Full consent is established prior to any sexual activity
 - Kink may involve intentional, consensual pain/force/violence

ATIXA Consent Construct

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Overview of the Construct

1. **Force:** Was force used by the Respondent to obtain sexual or intimate access?
2. **Incapacity:** Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated?

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity

3. **Consent:** What clear Complainant words or actions gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

Force

Was force used by the Respondent to obtain sexual or intimate access?

- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force
- Consider the impact of power dynamics
- Consider the implications of consented-to force, as in BDSM interactions/relationships

What types of evidence might be relevant to a force analysis?

Types of Force

- **Physical violence** (e.g., hitting, restraint, pushing, kicking)
 - May also involve alleged violations of other policies (e.g., harm to persons, violation of law)
- **Threats:** anything that gets someone to do something they wouldn't ordinarily have done absent the threat
 - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat
- **Intimidation:** an implied threat that menaces and/or causes reasonable fear
 - Requires the same threat analysis as above
- **Coercion:** the application of an unreasonable amount of pressure for sexual access
 - Consider isolation, frequency, intensity, and duration
 - Differentiate coercion from seduction and coercion from negotiation

Incapacity

Was the Complainant incapacitated?

- **Incapacitation:** a state where an individual cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
 - Unable to understand who, what, when, where, why, or how
 - Incapacity ≠ impaired, drunk, intoxicated, or under the influence
 - Situational awareness
 - Consequential awareness

What types of evidence might be relevant to an incapacitation analysis?

Incapacity, Cont.

- What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non-prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious
- Blackouts are frequent issues
 - Blackout ≠ incapacitation (automatically)
 - Blackout = working memory functional; short-term memory not retained
 - Partial blackout must be assessed as well
 - Although memory is absent in a blackout, verbal and motor skills may still function

Evidence of Incapacity

- **Potential Context Clues**
 - Slurred speech
 - Odor of alcohol on the breath
 - Shaky equilibrium; disorientation
 - Passing out/unconsciousness
 - Throwing up
 - Known blackout
 - Outrageous or unusual behavior (requires prior knowledge)
- Incapacitation determination is made contextually **in light of all the available relevant evidence**



Prior Knowledge Construct

- Did the Respondent previously know the Complainant?
 - If so, was the Complainant acting differently than in previous similar situations?
- Evaluate what, if anything, the Respondent observed the Complainant consuming
 - Use a timeline analysis
- Determine if the Respondent provided the Complainant with any substances

Incapacity Analysis

- If the Complainant **was not** incapacitated, move to the Consent Analysis
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know, **AND**
 - The Respondent would not have reasonably known of the Complainant's incapacity = no policy violation, move to Consent Analysis
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it** = policy violation
 - The Respondent **should have known it (reasonable person)** = policy violation
 - The Respondent's own intoxication cannot be used as a defense

Consent Analysis

What clear words or actions by Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

- Is there any relevant sexual or intimate pattern or history between the parties?
- What verbal and/or non-verbal cues were present during any acts or portion of the encounter that the parties agree were consensual? Non-consensual?
 - Contemporaneous communication
- Critical to gather evidence regarding detailed and specific intimate behaviors
 - Ensure the investigation report reflects accurate anatomical references
 - Ex: Some individuals with female genitalia refer to their external genitals as their “vagina” although the correct term is “vulva”

Case Study: Blair and Carlos

- Blair and Carlos met at a movie. They started “talking.”
- One night, Blair and Carlos went out drinking. After the bars closed, they went to Blair’s room.
- Blair was very drunk, and engaged in sex with Carlos, despite Carlos’s protests.
- Carlos was not as drunk as Blair.
- Blair argues that even if she might have had non-consensual sex with Carlos, it’s not her fault because of how drunk she was.
- She believes she was so drunk that she didn’t even know she was having sex with Carlos, let alone that it was something Carlos didn’t want.

**How would you approach investigating or deciding this complaint?
What aspects of the consent construct are implicated?**

Credibility Assessments and Determinations

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Credibility Role

- Credibility plays a significant role in making a final determination
 - Word-against-word complaints
 - Complaints with significant testimonial evidence and little documentary evidence
 - Weighing evidence and sources of evidence

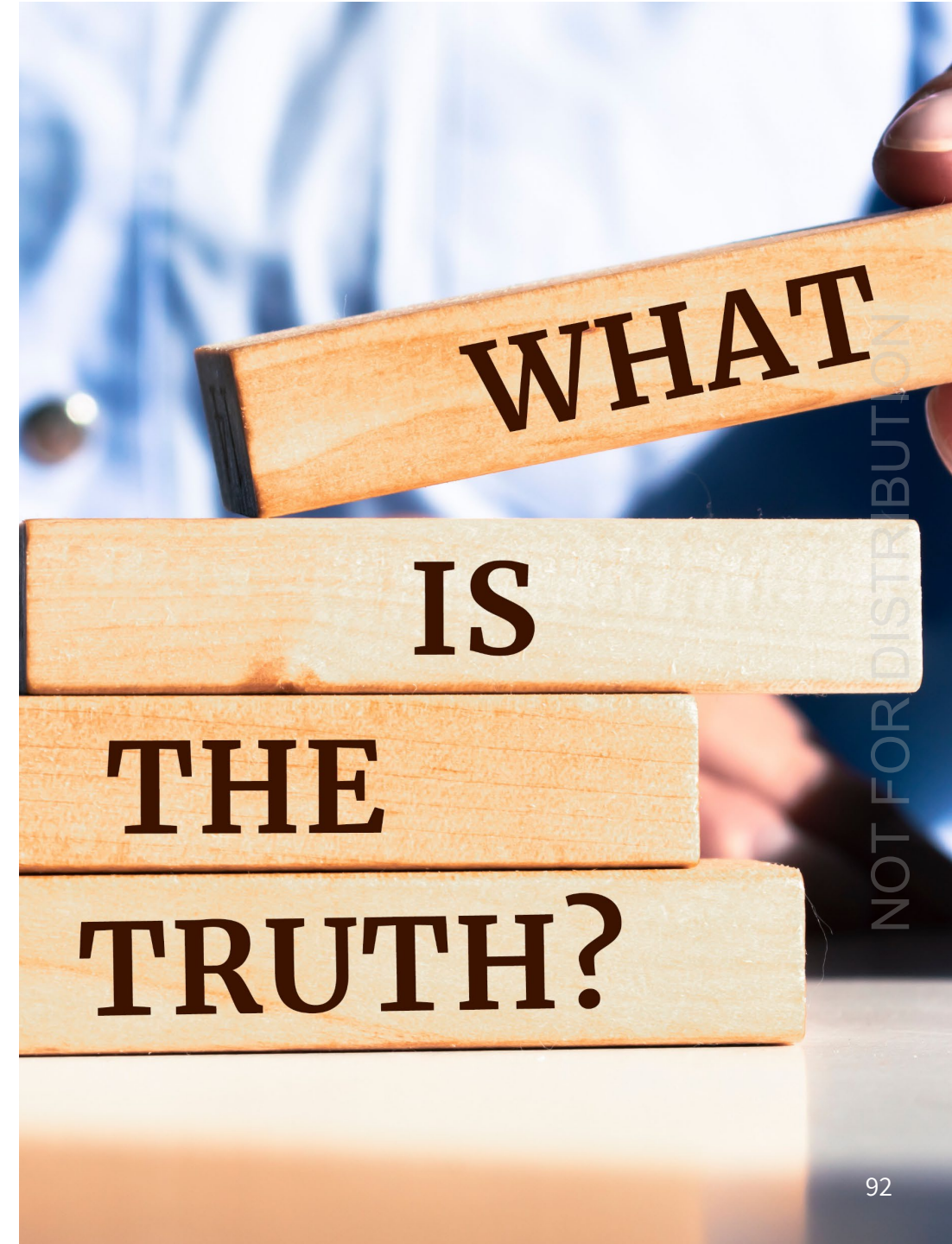


Credibility Factors

- Credibility determinations involve evaluating the extent to which evidence is accurate and reliable
 - Credibility is largely a function of **corroboration** and **consistency**
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Inherent Plausibility**
 - Does the explanation make sense?
- **Motive to Falsify**
 - Do they have a reason to lie?
- **Past Record**
 - Is there a history of similar behavior?
- Not about truth or honesty
 - An assessment of evidence, not of the Parties or witnesses themselves

Inconsistencies, Affect, and Credibility

- Differentiate between **more** versus **inconsistent** versus **contradictory** information if an individual's account changes
- Variations in testimony on minor or insignificant details should not significantly impact credibility
- A person's affect ≠ evidence
 - Use caution relying on demeanor, too
- Avoid the “once a liar, always a liar” trap



Credibility in Investigations and Decision-Making

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Credibility in Investigations

- **ATIXA recommends** Investigators stop short of analyzing or making findings regarding credibility – Instead, they should provide a written credibility assessment in the investigation report
 - The Investigator should not:
 - Make conclusions about whether a person or evidence is credible
 - Compare credibility (saying someone or something is more or less credible than something else)
- The investigation report credibility section provides an evidentiary roadmap for the DM
 - Outlines factors that a DM could determine bolster or detract from the credibility of evidence/witnesses
 - Identifies critical areas of evidentiary alignment and contradiction

Example:

Credibility in Investigation Reports

- In her conversations with Witness 1 and the Investigator, Complainant consistently described the emotional and mental effects her experience with Respondent had on her, as well as her interpretations and understanding of the series of incidents
- Complainant provided screenshots of text messages that corroborated her account and that were also consistent with the documentary evidence Respondent provided
- Witnesses corroborated specifics of Complainant's account, such as her decision to stop using the building restrooms and that Respondent was attempting to secure more overtime hours for her

Credibility Considerations

- Relationships between witnesses and parties do not inherently make someone more or less credible
 - If relevant, these relationships should be tied to the evidence they provided not presented as a stand-alone basis for a credibility determination
- If a witness's account is consistent with a party's account, that can bolster the credibility of that party's account
 - If the witness has a basis for having the information that they know
 - It is less likely that this would bolster the credibility of the witness
- Inconsequential memory gaps/errors are usually not determinative of credibility

Credibility and Consistency

Consider the following:

- Internal consistency (within the same statement)
- Consistency across multiple statements and retellings
- Consistency with other witness accounts
- Materially consistent (vs. minor inconsistencies)
- Prior statements or history
- Consistency with objective evidence

Credibility and Corroboration

Consider the following:

- Corroboration:
 - By other witnesses (especially objective witnesses)
 - Of timeline (e.g., schedules, known events, attendance records)
 - Through patterns
- Compare to:
 - Written evidence (e.g., emails, texts, writings, messages, social media posts)
 - Physical/digital evidence (e.g., photos/videos, metadata, surveillance footage)
- Impartiality levels of corroborative information

Example:

Credibility in Decision-Making

- As part of my findings and determination, as outlined below, I considered the credibility of the evidence provided by each party and witness. No witnesses were present with Complainant and Respondent in Respondent's room, so the only direct evidence of what occurred is the testimony of the parties.
- Complainant's account was internally inconsistent. These inconsistencies negatively impact Complainant's credibility. This does not ultimately indicate that Complainant's account is untrue; however, I must determine what occurred based on what the preponderance of the evidence supports – and here, Respondent's account has internal consistencies and external corroboration that, generally, mean that his account is more credible based on the available evidence compared to Complainant's account, for the reasons described above and expounded on below.

Activity: Credibility Analysis

Credibility Activity – Complainant

- **Complainant:** I was minding my own business in the student center when Respondent approached me and told me that my people were committing genocide. I had my yarmulke with me because I had just come from temple with my family, and Respondent grabbed it, yelled, “Jews are all complicit in murder,” and threw it at me. It landed on the floor.
- **Witness 1:** Complainant came over after having dinner in the student center and looked in rough shape. He told me that Respondent had confronted him about being a Jew and yelled at him in front of others. I did not recall seeing Complainant’s yarmulke that evening. I consider Complainant a friend.

Credibility Activity – Complainant (Cont.)

- **Witness 2:** I saw Complainant and Respondent in an argument in the student center. Complainant appeared to be eating. I heard Respondent call Complainant a murderer or something like that. Complainant stood up during the argument. Respondent grabbed something off the table, but I couldn't see much else. I didn't hear anything about genocide, but Respondent had on a shirt with the Palestinian flag, so I can guess.
- **Identify evidence that supports the Complainant's credibility and evidence that detracts from the Complainant's credibility**
- **Discuss how you would approach writing a credibility analysis in an investigation report**
- **Discuss how you would approach writing a credibility analysis in a determination**

Credibility Activity – Respondent

- **Respondent:** I had just come from a protest in the city center, so I was a little amped up, and the news broke that same day that Israel had broken the ceasefire. I saw Complainant sitting alone in the cafeteria and I remembered he had torn down my signs inviting students to the protest. So yeah, I confronted him. I asked him how it felt to be associated with a genocidal country and asked him whether he felt his Prime Minister was a murderer. I didn't touch his yarmulke. I don't even remember seeing it.
- **Witness 3:** I went with Respondent to the protest. When we got back to the student center, I went to go grab some food. I heard shouting, but by the time I got my food, I saw Respondent grab his phone off the table and walk out the door as Complainant grabbed his bag and left in the other direction.

Credibility Activity – Respondent (Cont.)

- **Student Center video footage:** The Parties are visibly having an argument, but the recording provides no audio. Witness 2 is visible on the footage but is sitting on the other side of the seating area. Witness 3 walks out of the door, following Respondent, after the Parties separated. Respondent picked something up off the table, but the footage does not clearly show a yarmulke or phone.
- **Identify evidence that supports the Complainant’s credibility and evidence that detracts from the Complainant’s credibility**
- **Discuss what you would expect to see for a credibility analysis in an investigation report if you were the Decision-maker**
- **Discuss how you would approach writing a credibility analysis in a determination**

Rationale Writing

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Defining Terms

- **Rationale:** The basis for a decision
 - Can include the explanation for a finding, a determination, and any sanctions imposed
- **Finding:** A determination of the facts that occurred, by the standard of evidence
 - What happened?
- **Determination:** Made by applying relevant evidence to the policy and determining whether a policy violation has occurred, based on the standard of evidence
 - Did what happened violate policy?
 - Also referred to as a **decision** or **outcome**
 - Yes or no question for each alleged policy violation
 - May result from a decision/hearing process and/or an appeal
 - May include sanctions or remedies, if appropriate

Findings and Determinations

Investigators

- Recommended findings (discouraged in TIX sexual harassment complaints)
- Recommended outcomes (discouraged in TIX sexual harassment complaints)

DMs

- Credibility determinations
- Final determinations and sanctions/remedies
- Appeal determinations and remand instructions

Findings of Fact

- Typically made by DM
- Presume non-responsibility
- Based on the evidence, determine what is most likely to have occurred (applying the standard of evidence) for each allegation
- Review of all evidence relevant to the allegation
 - Including evidence related to credibility
- Weigh the evidence for and against
- Parties will typically agree on some evidence but disagree on others
- “The preponderance of the evidence supports a finding that XYZ [did/did not occur]”

Determinations

- To reach a determination, review the allegation and the implicated policy
- Parse the policy and relevant definitions (e.g., consent) into individual elements
- Apply findings to each policy element
- Review relevant findings and credibility for each element
 - Weigh evidence against the requirements for each policy element
- “The preponderance of the evidence [supports/does not support] the finding that Respondent violated ATIXA University’s Nondiscrimination Policy against Discriminatory Harassment”

Written Rationale Sections

- Summarize allegation(s)
- Include all policies potentially violated
- Review evidence, noting which evidence was relied upon and which was not:
 - If relying upon evidence to make a determination, cite it in the rationale
 - If it is not written down, the analysis did not happen
 - Thoroughness is crucial
 - Parse the policy
 - Highlight the evidence used to make the determination
 - If not relying on something, say so, and state why

Written Rationale Sections (Cont.)

- Analyze and determine credibility
 - Make credibility comparisons and conclusions, if required by policy
- Make and explain the factual findings, according to the standard of evidence
- Make and explain the final determination, according to the standard of evidence
- State any sanctions imposed and the basis for choosing them
 - May include precedent, prior history, aggravating and mitigating factors, evaluation of cumulative or collateral violations, pattern behavior, acceptance of responsibility, Complainant's request, etc.
- Add appeal procedures, if applicable

Rationale Writing: Examples and Best Practices

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Finding Excerpt Example 1

- Mia and Ava have both alleged that Kiki has engaged in Fondling.
- Mia provided a detailed description of the events involved in her allegation, some of which Ava corroborated. Mia's description of how she, Kiki, and Ava were walking in the hallway during the time of the incident, including her explanation of Kiki's hand starting out on Mia's shoulder before moving to Mia's waist, then ultimately to Mia's buttocks, was plausible and consistent with her original report. Mia also reported that Kiki was touching Ava's buttocks at the same time, which Ava corroborated, further bolstering the credibility of Mia's statement.
- Mia's account is both corroborated by Ava and plausible, and therefore credible. I do not find Kiki's denial to be as credible, in part because Kiki did not provide any evidence or information other than denying the allegations during the investigation. Therefore, the preponderance of the evidence supports that the incident occurred as Mia alleged.

Finding Excerpt Example 2

- Although Complainant consistently testified that Respondent grabbed and hit Complainant's groin area over his clothes both in public and in private, his credibility is diminished by the lack of corroborative evidence
- Several of the incidents are alleged to have occurred in the hallway during passing periods; however, security video footage from the hallway during the time of the alleged incidents provided no evidence of physical contact between Complainant and Respondent
- None of the other witnesses, including those in the hallway and those in the bathroom, testified that they saw Respondent touch Complainant's groin

Finding Excerpt Example 2, Cont.

- Additionally, Respondent explicitly denied touching Complainant's groin area throughout the process, although he did admit to using his phone and a vape while in the bathroom, against his own interest. Respondent's testimony aligns with that of the other students in the bathroom, including Complainant's friends.
- Therefore, the preponderance of the evidence supports a finding that Respondent did not touch Complainant's clothed body parts.

Determination Excerpt Example, Part 1

- Given my findings that Kiki intentionally touched Mia’s buttocks, the element of the “intentional touching of the clothed or unclothed buttocks” is met by the preponderance of the evidence.
- Mia’s statement that Kiki “squished” her buttocks provides evidence that the touch was intentional; a “squish” in the context described is very unlikely to have been accidental.
- Kiki did not provide any evidence to the contrary. Kiki only denied the allegation, which provides insufficient evidence to weigh against Mia’s credible account.
- As a result, the preponderance of the evidence supports that the touch was intentional.

Determination Excerpt Example, Part 2

- As to whether KiKi touching Mia's buttocks was without consent, the policy states, "Consent means clear, knowing, and voluntary words or actions that indicate permission for a specific sexual activity"
- Mia said the contact was without consent, so the question becomes whether Mia gave Kiki consent to touch her buttocks through clear words or actions
- There is no evidence of any discussion of consent, and the record does not contain any evidence that Mia used clear words or actions to consent to Kiki touching her buttocks
- There is likewise no evidence that Kiki asked whether she could touch Mia's buttocks
- Given Mia's credible account and the lack of any evidence that the touching was consensual, I find the preponderance of the evidence supports that the buttocks touching was without consent

Determination Excerpt Example, Part 3

- I have found that the preponderance of the evidence supports Mia's allegation that the buttocks touching constituted contact with a "private body part," was intentional, and was without Mia's consent
- Therefore, based on Complainant's consistent and credible testimony, Respondent's statements, and Witnesses 1, 3, and 5's testimonies, I determined that the preponderance of the evidence **supports** a finding that Respondent violated ATIXA University's Policy prohibiting Sexual Assault – Fondling

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Rationale Writing Best Practices

Outcome Letters

- Write in active voice
- Analyze all policy elements
- Commonly 5-15+ pages in length, depending on complexity
- Write a separate rationale for each Respondent if more than one is involved
 - This does not have to result in two separate letters, but each Respondent should be individually analyzed (consider whether separate letters make sense)
- For panel decisions
 - Write with one voice, not a committee, though all panelists should contribute to and/or review the rationale
 - Do **not** issue dissents, concurring opinions, or indicate what the “vote” was (e.g., 2 to 1)

Rationale Writing Best Practices (Cont.)

- Even if the investigation report offers a recommended finding/rationale, DM should make an independent finding and provide a rationale
- When there are multiple alleged violations, the rationale should address each allegation on its own merits
 - Findings on specific violations (e.g., sexual assault) often inform determinations for other violations, (e.g., dating violence charged on the same facts) but some allegations may overlap, in part, but stand alone in other respects
 - Include a rationale for each alleged policy violation
- Follow an internal review protocol (typically TIXC or legal counsel)
 - Second perspective on thorny findings or analysis
 - Second reader to enhance clarification, identify gaps

Questions?

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