



Conducting Effective Workplace Investigations

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Outline

Prompt and Thorough

Impartiality

Planning the Investigation

Collecting Evidence

Writing the Report



Introduction

Effective investigations are the basis of sound decision-making. BYU – Hawaii depends on the skills of investigators to collect and organize facts in a way that will allow the university to make good decisions.

What makes an investigation effective?

Follow written policies and procedures

Prompt

Thorough

Impartial

Policies and Procedures

NONDISCRIMINATION AND EQUAL OPPORTUNITY POLICY

- Protected classes
- Equal Opportunity
- Harassment
- Retaliation

DISCRIMINATION COMPLAINT PROCEDURES

- Receiving reports
- Assigning investigator
- Preliminary Assessment
- Formal Complaint and Notice
- Investigation
- Report
- Resolution and Discipline

Investigations Timeline

Training, EthicsPoint, and mandatory reporter policies are all designed to ensure that misconduct gets reported.

Is there an allegation that, if true, would be a violation?
What is the applicable policy?

Collecting evidence needed to determine the facts

Report Received

Investigator

Pre-Assessment

Formal Complaint

Investigation

Must be properly trained, impartial, unbiased, and free of conflicts of interest.

The complainant's written statement of the allegations.



Investigations Timeline (cont'd)

Identify necessary elements of the claim. List of witnesses and documents.

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Organize evidence in a binder or Box file.

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What gets communicated to
(a) the parties and
(b) the decisionmakers.

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Investigation Plan

Notice

Gathering
Evidence

Draft Report

Report Summary

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Confirm complainant's approval of applicable allegations; give notice to respondent of claims against them.

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Findings of fact.
Conclusions.



Receiving Reports

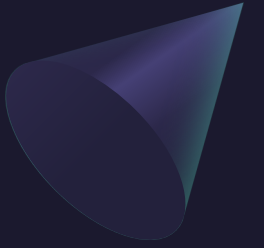
REPORTS

- Always respond promptly to notify of receipt.
- Determine who is reporting.
Complainant, Anonymous, or Third Party?

RESPONSE

- Take allegations seriously
- Provide reassurance of confidentiality and non-retaliation
- Explain next steps
- Assign investigator

Investigators



TRAINED

- Should know policy
- Should be trained and/or have experience in investigations (consider complexity of case)
- Should have subject area expertise or experience
 - Sexual harassment
 - Financial
 - Violence

IMPARTIAL AND UNBIASED

- Close relationship with any party?
- Past dispute with any party?
- Understands the university's interest in full and fair investigations.
- Biased in favor of complainants or respondents?

CONFLICTS OF INTEREST

- Anything that investigator or a close family member would stand to gain depending on outcome?
- Any reason the potential investigator would be hesitant to reach difficult findings?
- Too busy to do investigation promptly?

Investigators

- Are well-trained, objective, and neutral;
- Have the authority, independence, and resources required to receive, investigate, and resolve complaints appropriately;
- Take all questions, concerns, and complaints seriously, and respond promptly and appropriately;
- Create and maintain an environment in which employees feel comfortable reporting harassment to management;
- Understand and maintain the confidentiality associated with the complaint process; and
- Appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any).

Prompt and Thorough

Can an investigation really be both prompt and thorough?

What is prompt? (it depends)

PROCEDURAL DEADLINES

"The Investigator will, in good faith, attempt to conclude the investigation within **sixty days** of receiving the Complaint."

"Within **fourteen days** of receiving the Investigator's determination ... , the Responsible Administrator will determine the resolution of the Complaint, including the imposition of any disciplinary sanctions."

EXCEPTIONS

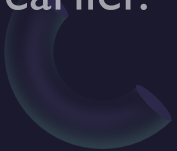
- Seriousness and complexity;
- Allegations of continuing misconduct;
- Number, availability and cooperation of witnesses;
- Need for special expertise (e.g., financial audit; law enforcement).



Written investigation plan

- Start with a written plan.
- Continuously reviewed and updated.
 - Witnesses. List the contact information and all attempts to reach them.
 - Documents. List and describe what you need.

Capture the information in one location in the most organized manner possible. This process will streamline your investigation and ensure important matters do not fall through the cracks. It will allow you to remember your processes and methodology if called upon to review an investigation you did two years earlier.



Note-taking

- Contemporaneous handwritten notes;
- Typewritten notes translated from handwritten notes;
- Typewritten notes;
- Signed statements from investigator's notes;
- Written statements by interviewees;
- Reading back witness statements; and
- Audio or video tape.



Recording interviews

PROS

- Provides a record of the questions, answers and tone;
- Allows interviewer to focus on interviewee, rather than note taking; and
- Protects parties from certain allegations.

CONS

- Hurts rapport;
- Transcribing is costly and time-consuming;
- Maintenance of the recording after the investigation;
- Who has access to tapes?
- Control over dissemination; and
- Technical difficulties.



Investigation Files

WORKING BINDER

- Notes and information related to your investigative plan;
- Contact and notification information;
- Relevant policies;
- Witness notes;
- Documents received from management, the respondent, the complainant, witnesses, and others;
- Charts and graphs of allegations and responses;
- A detailed chronology (consider linking to evidence).

WITNESS BINDER

Divided into sections related to each witness, including:

- preparatory questions for the witness;
- interview notes;
- documents related to the witness.



Impartiality

Starting and staying objective and unbiased

Interim Action

Who decides?

- The investigator? Decision-maker? Supervisor? Legal counsel?

In what cases might interim action be necessary?

- Violence or threats of violence (threat assessment experts often discourage leaves in this instance);
- Allegations of sexual assault or physical touching;
- Ongoing concerns of misconduct, such as harassment; or
- Allegations of possible criminal misconduct, such as embezzlement, theft, or substance abuse.

Interim Action

When should it occur?

- Always?
- Before or after notification to the respondent?

What should be communicated to the respondent, complainant and others about the reasons for and the nature of the leave?



Informal Resolution

MAY RESOLVE MANY CASES

- Goal of is to conclude the matter to the satisfaction of both parties quickly and confidentially.
- Either party may enlist the assistance of Human Resources.
- Often encouraged; never required.

NOT ALWAYS APPROPRIATE

- when the misconduct involves violence or other criminal behavior,
- when acts of harassment are severe or have become pervasive



Party advisors

“Both parties will have the same opportunity to be accompanied by another individual at any Review proceedings as permitted under the applicable appeal or review provisions. However, no attorneys will be permitted to attend or otherwise participate in any university meeting, hearing, or other proceeding of any kind that may take place under these Review procedures.”

Not allowed to **obstruct** the process, influence or coach the witness, or otherwise be an active participant in the investigation. Establish this at the beginning.

Must maintain the same level of **confidentiality** about the investigation as the party or the witness.



Conducting the Investigation


Finding facts and reaching conclusions

Preliminary Assessment



EXAMINE THE REPORT

“Upon receiving a Report of Discrimination, the Investigator will promptly perform a preliminary assessment based on the facts reported to determine whether they provide reasonable cause to believe discrimination ... may have occurred.”



REVIEW THE POLICY

A thorough examination of the applicable policies will help the investigator to

- (a) frame the scope of the investigation and
- (b) understand the questions that need to be answered by the investigation.

CONSULT THE ATTORNEY

- Develop a list of the elements that must be shown to find a violation.
- Develop a list of questions that must be answered to make the needed findings.

Example: Nondiscrimination and Equal Opportunity Policy : Harassment

“The university strives to provide employees and students with a working and educational environment free from all forms of unlawful discrimination, including unlawful harassment. Federal law prohibits harassment when it is based on the victim’s membership in the Legally Protected Categories identified above and the harassment becomes so severe or pervasive that it creates a hostile environment for work or for participation in other programs and activities of the university. Unlawful harassment that creates a hostile environment is prohibited at the university.

In addition to this prohibition against unlawful harassment, the Church Educational System Honor Code requires students, employees, and others subject to its provisions to “maintain the highest standards of . . . consideration of others in personal behavior” and to “[r]espect others.”



Example: Nondiscrimination and Equal Opportunity Policy: Harassment

“The university strives to provide employees and students with a working and educational environment free from all forms of unlawful discrimination, including **unlawful harassment**. Federal law prohibits harassment when it is based on the victim’s **membership in the Legally Protected Categories** identified above and the harassment becomes so **severe or pervasive** that it creates a **hostile environment for work or for participation** in other programs and activities of the university. Unlawful harassment that creates a hostile environment is prohibited at the university.

In addition to this prohibition against unlawful harassment, the Church Educational System **Honor Code** requires students, employees, and others subject to its provisions to “maintain the highest standards of . . . consideration of others in personal behavior” and to “[r]espect others.”



Example: Nondiscrimination and Equal Opportunity Policy: Harassment

1. Was there **unlawful harassment**?
2. Was it based on the victim's **membership in a Legally Protected Category**?
3. Was it **severe or pervasive**?
4. Did it create a **hostile environment**
 1. **for work, or**
 2. **for participation in other programs and activities** of the university?
5. If not, does it need to be addressed under the **Honor Code**?

Example: Nondiscrimination and Equal Opportunity Policy: Harassment

1. Was there **unlawful harassment**?

Unwelcome conduct that is both subjectively and objectively offensive

2. Was it based on the victim's membership in a Legally Protected Category?

3. Was it severe or pervasive?

4. Did it create a hostile environment

1. for work, or

2. for participation in other programs and activities of the university?

5. If not, does it need to be addressed under the Honor Code?

Example: Nondiscrimination and Equal Opportunity Policy: Harassment

1. Was there unlawful harassment?
2. Was it based on the victim's membership in a Legally Protected Category?

Race, color, national origin, religion, sex (including pregnancy), age (40 and over), disability, genetic information, or veteran status. Religious exceptions? LGBTQ included?

3. Was it severe or pervasive?
4. Did it create a hostile environment
 1. for work, or
 2. for participation in other programs and activities of the university?
5. If not, does it need to be addressed under the Honor Code?

Example: Nondiscrimination and Equal Opportunity Policy: Harassment

1. Was there unlawful harassment?
2. Was it based on the victim's membership in a Legally Protected Category?
3. Was it **severe** or **pervasive**?

How many times did it happen? What happened each time? How far apart were the incidents? Was the workplace “permeated with discriminatory speech or conduct?”

4. Did it create a hostile environment
 1. for work, or
 2. for participation in other programs and activities of the university?
5. If not, does it need to be addressed under the Honor Code?

Example: Nondiscrimination and Equal Opportunity Policy: Harassment

1. Was there unlawful harassment?
2. Was it based on the victim's membership in a Legally Protected Category?
3. Was it severe or pervasive?
4. Did it create a **hostile environment**
 - I. for **work**, or
(did it affect the employee's ability to do their job, or unreasonably interfere with their work performance?)
 - I. for participation in other **programs and activities of the university**?

Did it create an intimidating, or hostile, or offensive working environment? Did it occur someplace where the university exercised control over both the respondent and the context?
5. If not, does it need to be addressed under the Honor Code?

Example: Nondiscrimination and Equal Opportunity Policy: Harassment

1. Was there unlawful harassment?
2. Was it based on the victim's membership in a Legally Protected Category?
3. Was it severe or pervasive?
4. Did it create a hostile environment
5. If not, does it need to be addressed under the **Honor Code**?

Did the respondent fail to “[r]espect others, including the avoidance of profane and vulgar language.

Was the conduct dishonest? Is the complainant being dishonest? Can we address this without violating non-retaliation provision?

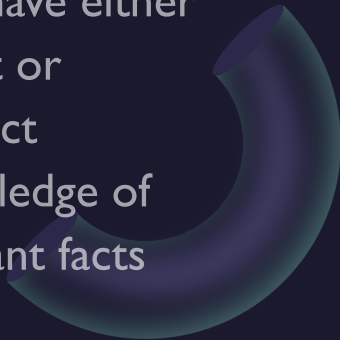


Witnesses: Whom do you interview?



Fact Witness

Can have either direct or indirect knowledge of relevant facts



Character Witness

can attest to or verify the reputation and character of a party or witness

Similarly Situated

may have had experiences similar to those of the complainant

Expert

specialized knowledge or expertise in a particular area

Thank You

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