

## *Analyzing a 1B.1 Investigation Report*

- NOTE: An investigation may concern more than one allegation. Each allegation may have more than one basis.

### *What is discrimination?*

Note: Familiarize yourself with the elements of discrimination

## *What is discriminatory harassment?*

Note: Familiarize yourself with the elements of discriminatory harassment before you read the facts/analysis.

- \_\_\_\_\_ conduct or communication;
- \_\_\_\_\_ actual or perceived protected class;
- That has a \_\_\_\_\_ or \_\_\_\_\_ have a negative effect on the complainant or the workplace or the educational environment

## *What does discriminatory harassment include?*

The elements of discriminatory harassment include:

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- \_\_\_\_\_ sexual advances, requests for sexual favors, sexually motivated

*Key elements of Sexual Harassment (quid pro quo)*

- The complainant must be a member or a protected class
- He/she was subject to \_\_\_\_\_ harassment in the form of sexual advances or requests for sexual favors
- Submission to unwelcome sexual advances was an express or implied \_\_\_\_\_ for receiving job benefits or his/her refusal resulted in a tangib0038Tc(11)Tj/TT6120TD0Tc0

## *Key elements of Discrimination*

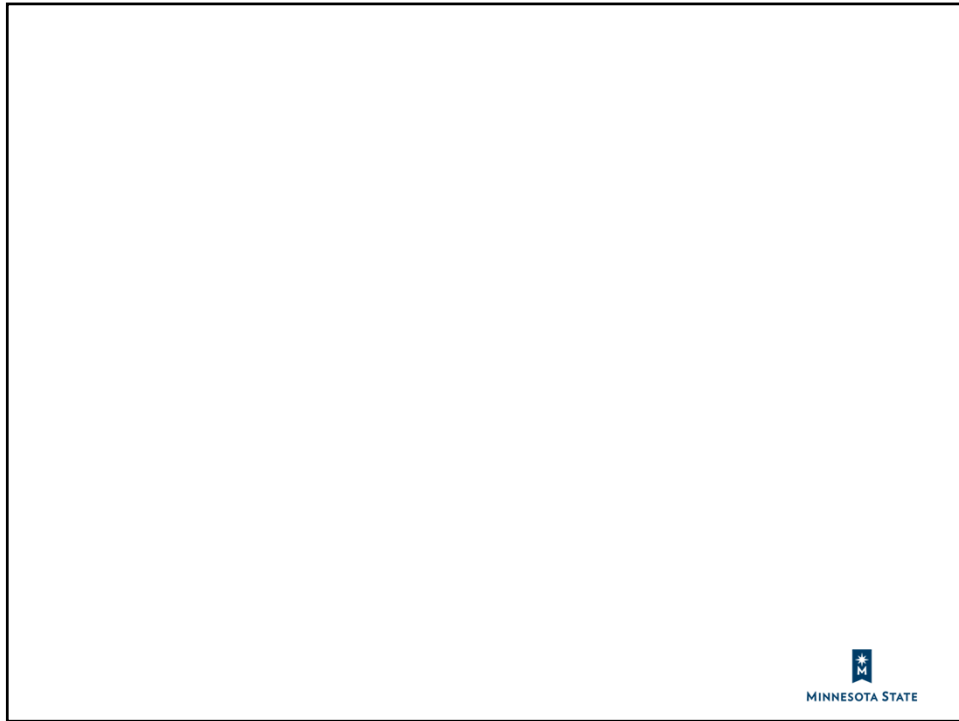
- Is there evidence that the behavior was based on a protected class? (*i.e.*, race, gender, religion, age, etc.)
- How were other similarly situated individuals treated?
- Was the behavior based on a protected class?





## Consensual Relationships

- An employee of Minnesota State shall not enter into a consensual relationship with a student or an employee over whom the person exercises direct or otherwise significant academic, administrative,



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### ***Designated Officer or Title IX Coordinator's Role***

- An individual designated by the president or chancellor to be primarily responsible for conducting an initial inquiry.
- Determines whether to proceed with an investigation under the 1B.1 or 1B.3;
- Can investigate and write investigation report; or
- Coordinate the investigation of reports and complaints of discrimination/harassment in accordance with the 1B.1 policy, 1B.1.1 procedure, 1B.3 policy and 1B.1.1 procedure.

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## *Investigator's Role*

- Carefully documents all information gathered in the complaint
- Determines strategies to support resolution
- Makes referrals necessary
- Consults with the Title IX Coordinator/Designated Officer if it is believed interim steps

### *Role of the Decisionmaker*

- Determine whether there is any real or perceived conflict of interest
- Make sure the investigator has complied with Minnesota State procedures
- Receives and reviews the investigation report
- Decides whether policy has been violated based on information provided in the report.

### *Role of the Process Advisor*

- Provide information by helping students understand their rights and responsibilities under the policy, procedure, and student code of conduct.
- Provide assistance by aiding students in organizing their information to be used during an investigation and reviewing materials shared through the investigation process.
- Provide support by helping students find resources and counseling services that may benefit them and by being present/sitting with the student when they participate in the investigation and resolution process if the student

## *Reporting*

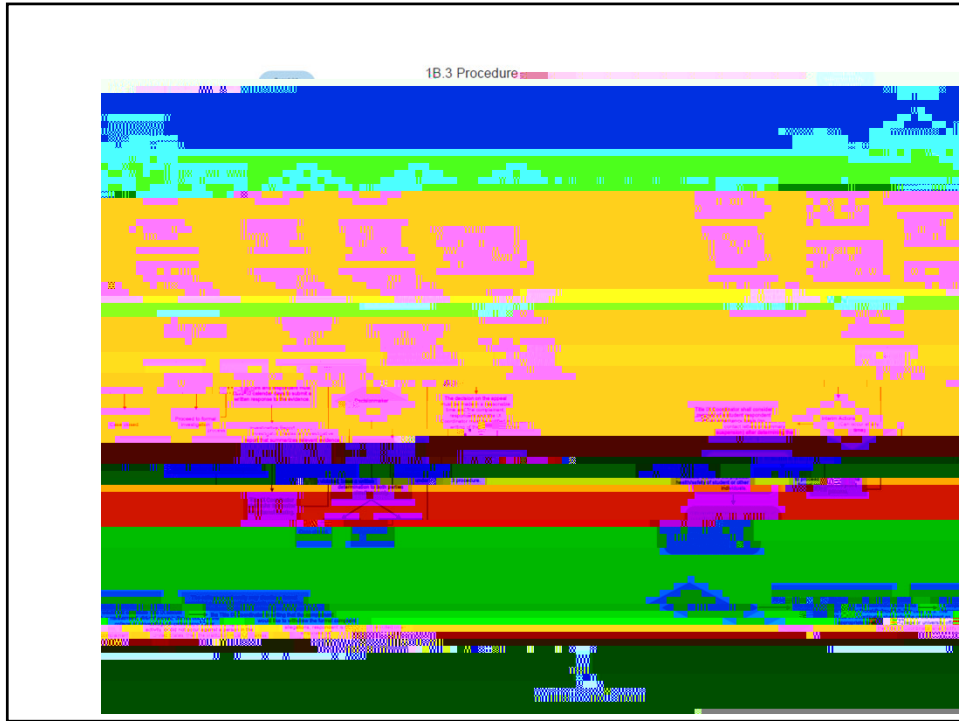
- Faculty, staff and student employees who receive complaints of sexual harassment or sexual misconduct are obligated to report complaints to the Title IX Coordinator

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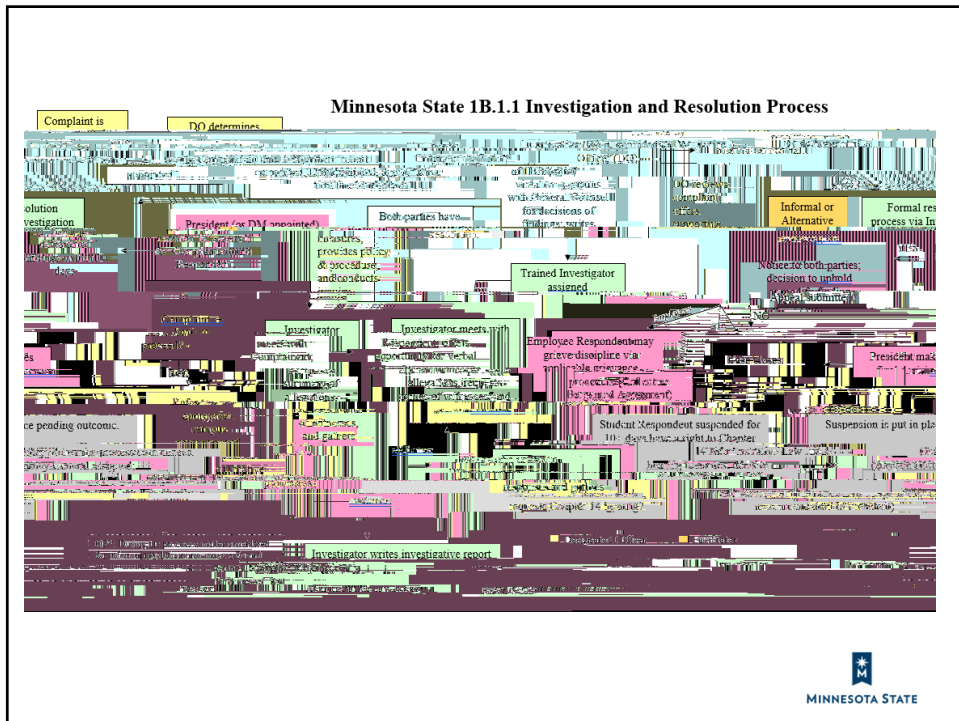
## *Why is it so important to report to the Title IX Coordinator?*

- The University has a duty to promptly respond to all complaints of sexual harassment and sexual misconduct; whether on or off campus incidents.
- If a student does not wish to report to law enforcement, we will respect that. However, we should encourage the student to seek medical attention/emotional support.
- The purpose is to prevent sex discrimination on campus, promptly address reported incidents, limit the effects of harassment on the educational environment, and prevent its recurrence
- Role is to
  - Prevent reoccurrences and
  - Remedy effects

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# Affirmative Consent

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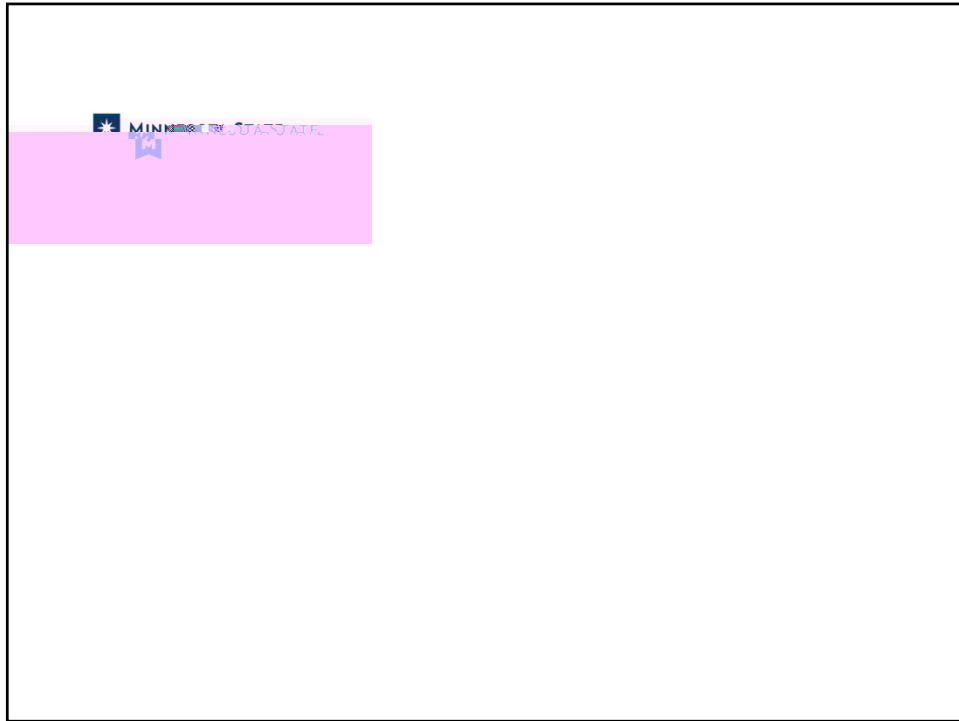
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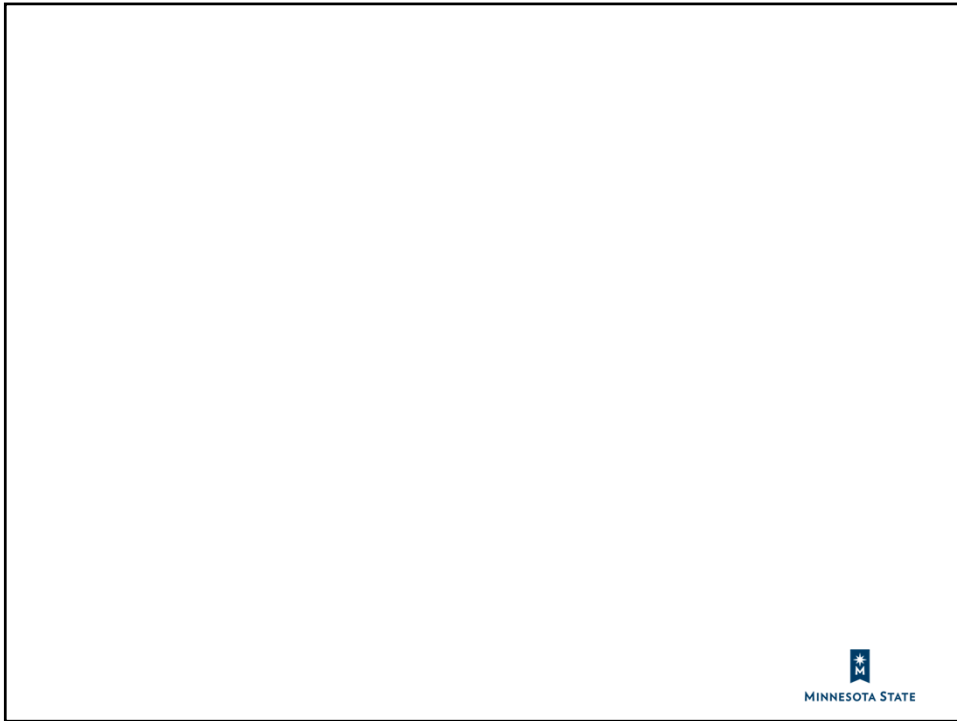
- A state where a person cannot make an informed and rational decision to engage in

- Whether the complainant was incapacitated and, therefore, unable to give consent to sexual activity.

- If the investigator finds complainant was incapacitated, investigator must evaluate respondent's level of knowledge of the level of incapacitation.
- Assess whether the respondent knew or reasonably

- Respondent observed Complainant asleep or unconscious
- Respondent observed Complainant unable to communicate due to physical or mental condition
- Respondent observed Complainant ingest alcohol and/or drugs, rate of ingestion, time of consumption
- Respondent observed Complainant's physical and verbal behaviors
- Respondent was told about the amount of alcohol and/or drugs Complainant ingested
- Respondent's actions like assisting Complainant after Complainant threw

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- Unwanted Phone Calls
- Unwanted Voicemails
- Unwanted Text Messages
- Spying
- Sending unwanted gifts
- Letters
- E mails
- Social

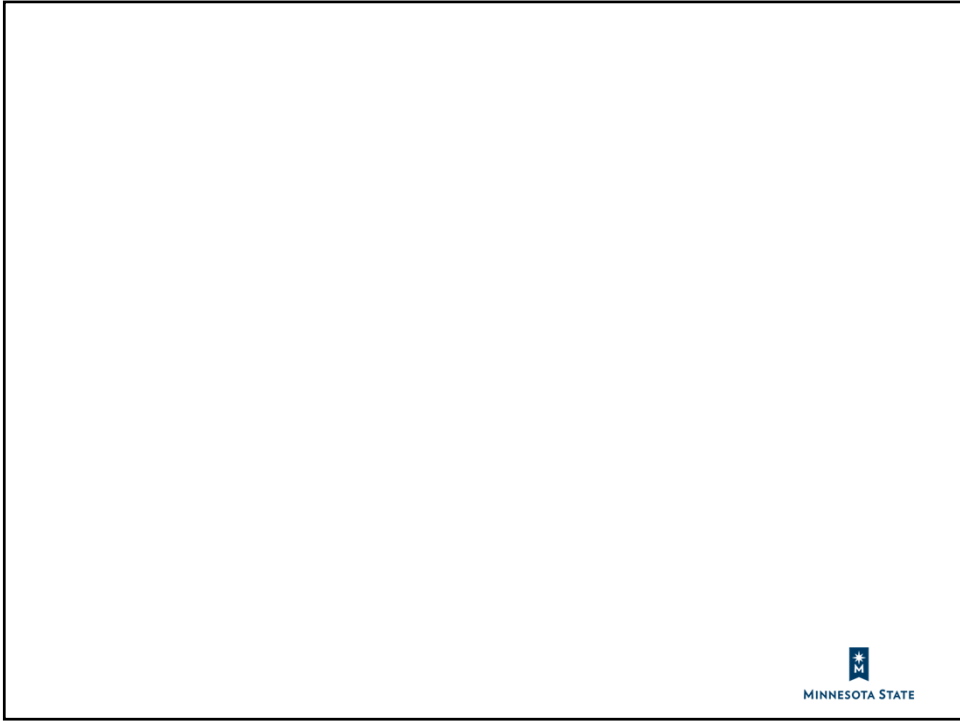
- Physical harm or abuse (or threats of physical harm or abuse);
- Arising out of a personal intimate relationship.

Note: While this is called dating/relationship violence, this category includes more casual intimate relationships.

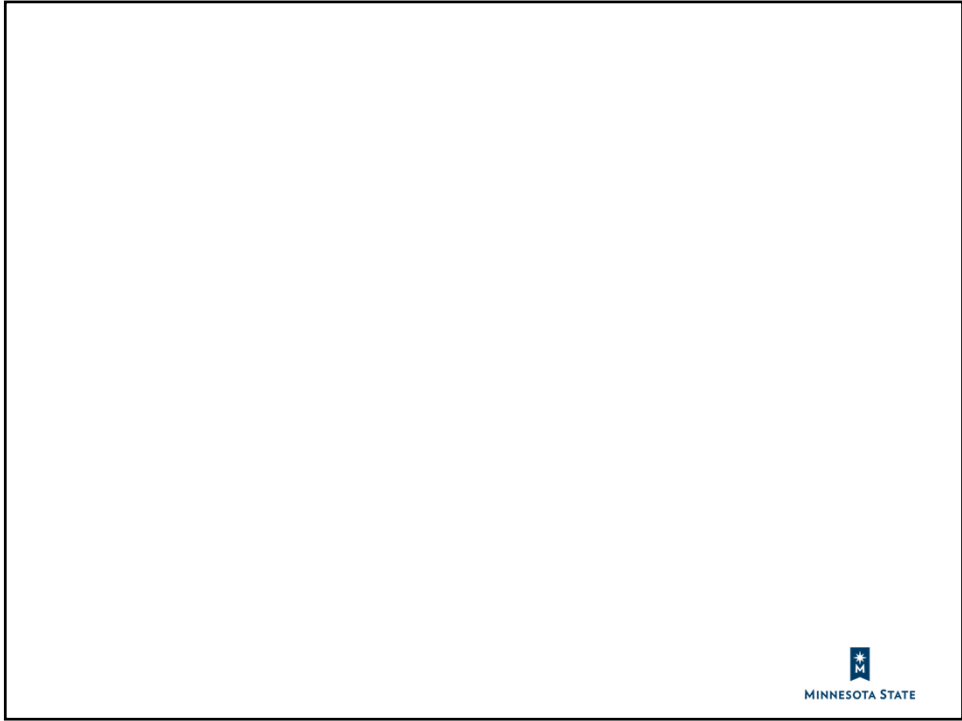
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- Statutory Rape
- Invasions of sexual privacy
  - Shower/bathroom peeping (technology assisted or otherwise)
  - Distribution/posting of sexual images (may be sexual harassment)
- Catch all

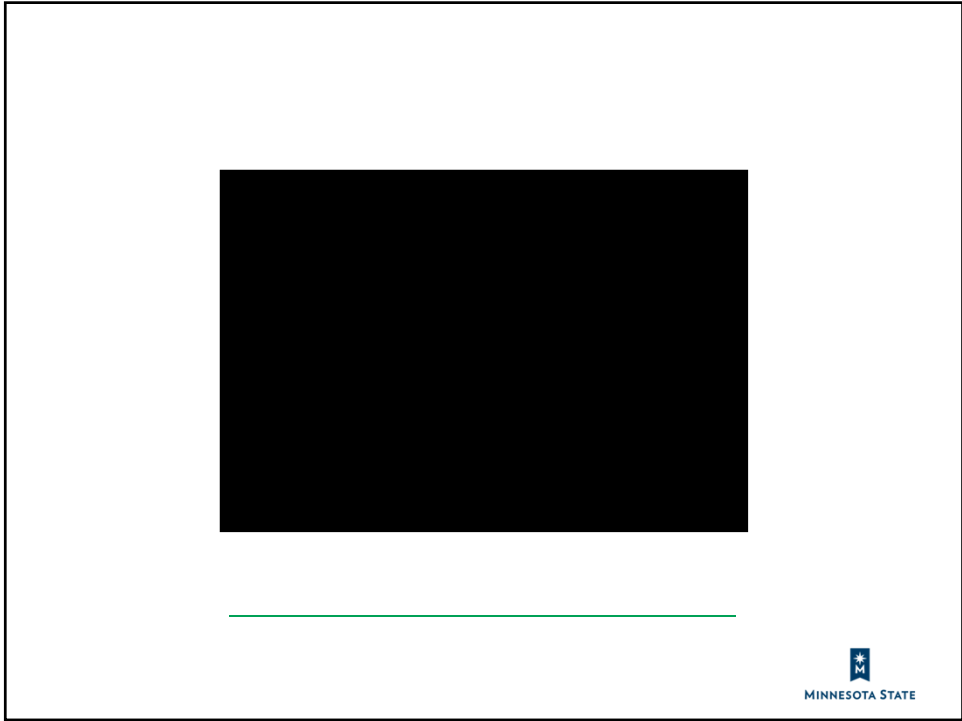
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*Information that may be helpful*



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- What can we do to counteract it?
  - Implicit biases are malleable and can be unlearned
  - Be conscious of the reality of implicit



- The subject matter of these cases is often personal and very intimate
- Most of us hold our own conscious beliefs and practices when it comes to this content area and it is important not to intentionally or unintentionally cast your lens on the matters you investigate
  - Your own sexual experiences
  - Moral or religious views about sex
  - Comfort level in using terms – subject

- Disclosure Notice
- Investigation report cover page
  - Date, Report for, Report by, Nature of investigation, Complainant(s), Respondent(s)
- Table of Contents (If lengthy report or many exhibits)
- Rationale or basis for investigation
- Methodology for the investigation
- Summary of complainant(s) allegation(s)
- Summary of witness statement(s)
- Summary of respondent(s) statement(s)
- Assessments of credibility
- Findings of fact
- Investigative analysis
- Conclusion



## *Discipline*

- Prompt



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### Someone who:

- Has the authority (director delegated)
- Accepts the responsibility
- Will be able to testify and is a good witness
- Lacks bias or ill will



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- Read the allegations or complaint to see what the report should cover
- Review the elements of the offense
- Read the report thoroughly to identify gaps or unanswered questions
- Do the facts in the report completely address each element of the offense? (If not, send it back)



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- Is there anything missing? E.g., relevant information (If yes, send it back)
- Are there inappropriate conclusions in the report (If yes, send it back)
- Was the subject offered a union representative?



- Did the investigator give the subject an opportunity to respond to each specific charge?

The right of an employee to tell their "side of the story" is central to





Determine if additional steps should be taken before making a decision

- Additional investigative measures
- Request additional information, e.g., written response from complainant and/or respondent
- Meeting complainant, respondent or other involved individuals



- Data Practices Act Notice
  - f* Non Bargaining Unit Employee Representation Rights
- May be accompanied by a D0353002 T45 .301 rg -10.805 -1.495 TD 0 Tc>Tj 56 0 TD







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- Is the bargainingunit



### Burden of Proof

- 99% beyond a reasonable doubt (criminal court matters)
- 75% clear and convincing evidence (civil court matters)
- 51% preponderance of evidence; e.g., more likely than not (most public institutions)
- <51%



- Take corrective action for 1B.1 violations
- Refer non 1B.1 work problems or student misconduct to appropriate resource
- Complainant's preference is informative but not controlling



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- Action must be sufficient to:
  - f* Ensure harassment/discrimination will stop and not recur
  - f* Send clear messages that policy is meaningful and applies to everyone
- Factors
  - f* Severity of conduct
  - f* Degree of harm to complainant and others
  - f* Has the conduct potentially created a class of complainants?
  - f* Has offender a history of alleged behavior?



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- Progressive (or corrective) discipline is designed to correct an employee's behavior so that the misconduct does not occur or is not repeated
- For egregious acts of misconduct, progressive discipline need not be strictly followed
- Review CBA disciplinary provisions



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#### Just Cause

- Did the employee know and understand there would be consequences for violating the rule or standard?
- Was the violated rule or standard reasonable?
- Was the pre disciplinary investigation fair and objective?
- Did the investigation result in sufficient proof of violation of the rule or standard?
- Was employee treated consistently with similar situation employees?
- Was the penalty appropriate for the offense?



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### Penalty Assessment Form

- Aggravating Circumstances
- Mitigating Circumstances



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- Has the employee engaged in protected or concerted activity?
- Is the employee on (or recently taken) a job protected leave?
- Did any aspect of the subject's identity appear to influence investigative/disciplinary outcomes?
- Has the decision maker made inappropriate statements about the employee?
- Is the employee alleging illegal conduct?



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### Components of Disciplinary Letter

- Level of discipline
- Reason(s) for discipline
- Past warnings and/or discipline the employee has received
- Opportunity for a meeting, when appropriate



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### Components of Disciplinary Letter – cont'd

- Corrective action required of employee
- Referral to EAP if applicable
- Consequences of failure to measurably improve
- Employee's appeal rights



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### Distribution of disciplinary letter

- Employee
- Personnel file
- Union? Check CBA

### Service of disciplinary letter in person or via mail

- Check CBA if certified mail required
- Move It Securely with the delivery receipt box checked



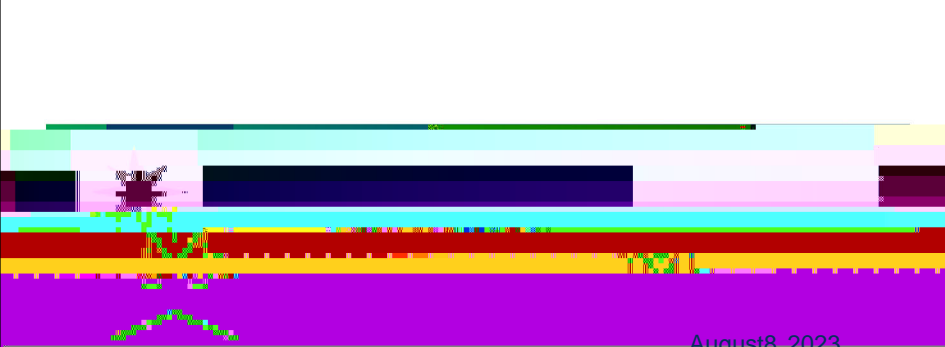
### Followup to Discipline (by supervisor)

- Work with employee to correct deficiencies
- Give employee a written plan of correction? It should be specific and include a timetable for improvement.
- Monitor employee's progress
- Document changes or continued problems
- Followup with EAP referral, if your practice is 5% or less









August 8, 2023  
Office Of General Counsel

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# Decision Making in Student Respondent Cases

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## Duty

- If a school knows or reasonably should know about student on student discrimination or harassment that creates a hostile environment, the school must take action to eliminate the discrimination or harassment, prevent its recurrence, and address its effects.



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## Board Policy 1B.1 and System Procedure 1B.1.1

- One systemwide Policy and Procedure.
  - Students and employees.
- Investigator/Decision Maker Model.
  - Investigator.
  - Decision Maker.
  - Appeal.
  - Ch. 14 or CBA.

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- Analytical Order.
  1. Policy Violation.
  2. If yes to 1, then sanction.
- Look for corroborating information.
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## Sanctions

- Remember Basic Duty.
  - Eliminate discrimination/harassment prevent its recurrence, and address its effects.
- All possible conduct codes sanctions available (Dean of Students can be a resource).
- Factors
  - Seriousness of Behavior.
  - Previous Disciplinary History.
  - On going threat?
  - Remorse.
  - Similarity to past discipline.
  - Other factors?

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- Warning.
- Probation.
- Loss of Privileges (for example, removal from residence life; restriction from campus other than for class).
- Required training.
- No contact.
- Suspension.
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## Decision Letters

- Process map at your campus.
  - Each letter sets up the next letter (i.e., decision letter sets up internal appeal; appeal decision sets up Ch. 14 if applicable).
- Some rationale for:
  - Finding on policy violation.
  - Sanction.
- No retaliation; appeal.
- Referto services available to parties?

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## Board Policy 1B.3 and System Procedure 1B.3.1

- One systemwide Policy and Procedure.
  - Students and employees.
- Previously the same as 1B.1.1 but now modified because of new Title IX regulations.
- Modified Investigator/Decision Maker Model.
  - Investigator.
  - Ch. 14 Hearing and then report and recommendation to Decision Maker.
  - Decision Maker.
  - Appeal or CBA.

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- See System Procedure 1B.3.1, Part 7, Subpart D, 3.
- Receive and review ALJ report and recommendation.
- Consult with assigned AAG or OCR representative.
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Contact Information  
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