



Observe and Report Effectively: Best Practices for Conducting Workplace Investigations and Documenting Employee Misconduct

Presented by:

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Overview

Angelique A. Cramer is Senior Counsel in Lozano Smith's San Diego office. Her practice focuses on labor and employment aspects of public agency law, and student issues faced by public school districts.

Experience

Ms. Cramer frequently advises school districts, community colleges, charter schools, and auxiliary organizations. She provides counsel on labor relations, collective bargaining negotiations and employment contracts. She also advises clients on employee hiring, discipline, layoff, termination, grievance processing, and leaves, and often drafts PERB and agency filings. In addition to her labor and employment experience, Ms. Cramer regularly reviews board policies, settlement agreements, and charter petitions.

Education

Ms. Cramer received her Juris Doctor from the University of San Francisco School of Law, where she earned a Business Law Certificate with Honors. She received a Bachelor of Arts in Political Science from the University of Notre Dame.

Practices

Labor & Employment
Student
Community Colleges

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Admissions

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Experience

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Education

Ms. Edem received her Juris Doctor from Temple University, Beasley School of Law, and earned a Bachelor of Arts in Political Science from the University of California, Irvine. During law school, Ms. Edem served as the Corresponding Secretary for Temple Law's Black Law Students Association ("BLSA") and a student mentor for incoming law students of color. In addition, Ms. Edem was one of the founders of the Adopt-A-School-Initiative ("AASI") program. AASI was co-sponsored by Temple Law's BLSA and the Juvenile Division of the Philadelphia District Attorney's Office. Through AASI, Ms. Edem and other minority law students conducted programs within a West Philadelphia elementary school to promote self-reflection, community engagement, and educational and professional success for sixth grade students.

Practices

Labor & Employment
Litigation
Investigations
Student

Education

J.D., Temple University, Beasley School of Law
B.A., University of California, Irvine

Admissions

California

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- Charter School
- Community College
- Facilities & Business
- Governance
- Investigations
- Labor & Employment
- Litigation
- Municipal
- Public Finance
- Public Safety
- Special Education
- Student
- Technology & Innovation
- Title IX

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Topics

- Workplace Investigation Foundations
- Best Practices for Internal and Independent Investigations
- Investigating Discrimination, Harassment, and Abusive Conduct
- Investigation Reports
- Documenting Employee Misconduct

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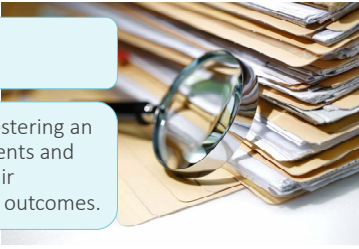
Workplace Investigation Foundations

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Why are Investigations Important?

Legal Compliance

MORE IMPORTANTLY – fostering an environment where students and staff are safe to share their concerns, creating better outcomes.



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To Investigate? Or Not to Investigate?

- Sometimes you do NOT need an investigation.
- Some investigations are more informal and may result in a summary but not a full investigative report.
- A complaint that is filed anonymously may be investigated depending on the specificity and reliability of the information.

Special considerations:

- Administrative Leave
- Minor Witnesses
- Sex/Gender of Investigator
- Representation
- Parallel Police Investigation

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Timeliness for Workplace Investigations

“The investigation should be started and conducted promptly, as soon as is feasible. Once begun, it should proceed and conclude quickly. However, investigators also must take the time to make sure the investigation is fair to all parties and is thorough.”

- Department of Fair Employment and Housing (“DFEH”), Workplace Harassment Guide for Employers


*DFEH is now known as the California Civil Rights Department (“CRD”)

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'Investigators **must** take the **time** to make sure the investigation is thorough.'



- Defining scope
- Planning next steps
- Preparing interview questions
- Documenting interviews
- Obtaining evidence
- Writing a comprehensive report

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Responsibilities of the Investigator:

Administers a fair investigation of formal complaints	Does <u>not</u> make a determination of responsibility
Interviews parties and witnesses	Must be trained
Reviews evidence	Must be impartial, unbiased, and free of any conflicts of interest
Provides parties the opportunity to inspect, review, and respond to all evidence gathered, and considers their responses	<u>May be asked to recommend findings to the decision-maker</u>
Creates an investigative report that summarizes <u>relevant</u> evidence	

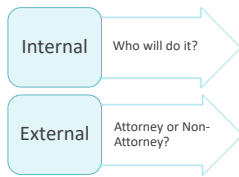
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Best Practices for Internal and Independent Investigations

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Selecting the Investigator



- Recommendation is to hire external investigator through legal counsel to maintain the privilege.
- May be expensive (rough ballpark, \$15,000 - \$25,000 depending on length and complexity).
- Attorney investigator even more expensive but is recommended for legally/factually complex investigations.



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10 Steps for Effective Investigations

1. Receive and Assess the Complaint
2. Urgent Measures
3. Send Notice of the Investigation
4. Frame the Scope
5. Gather, Review, and Preserve Evidence
6. Draft a List of Witnesses
7. Draft Interview Questions and Apply a Trauma-Informed Approach
8. Conduct Interviews
9. Prepare and Report the Findings
10. Corrective Action and Tying Up Loose Ends



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1. Receiving a Complaint

TYPES OF COMPLAINANTS

- Student
- Parent
- Employee
- Member of Public
- Anonymous Person

TYPES OF COMPLAINTS

- Verbal
- Written
- No Complaint (Rumor or Observation)



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Discuss the Complaint with the Complainant

- Ask open-ended questions.
- Get complaint in writing or confirm allegations in writing if not already received.
- Review policy against retaliation.
- Do not promise confidentiality.
- Determine whether matter can be resolved informally.
- Listen and "hear" the concern.



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2. Urgent Measures

- Supportive & Interim Measures
- Student Suspension
- Paid Administrative Leave
- Mandated Reporting
- Criminal Acts
- Complainant's Request



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3. Send Notice of the Investigation

For formal investigations, work with HR to send "notice" letters to both the complainant and the respondent.



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4. Frame the Scope of the Investigation

What are the allegations?

- Prepare clear and concise “yes or no” questions that the investigation will answer.
- Avoid ambiguous and subjective words such as “inappropriate” and “unfair.”
- Make sure all relevant claims are included in the allegations. (Or, if you excluded something, be prepared to explain why.)

Practice Tip: Have someone else review your allegations before proceeding. This will save you time in the long run.



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Factual Findings v. Legal Conclusions



- Don’t focus your investigation on whether an employee committed, for example, “sexual harassment” or violated some other law; instead, focus on what you determined the employee did or did not do.
- Also, consider if the conduct was inappropriate, unprofessional, and/or in violation of District policies or standards.
- Legal standard: Preponderance of the Evidence



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5. Gather, Review, and Preserve Evidence

Documentation & Evidence

- | | |
|-------------------------------------|---------------------------------------|
| ■ Emails | ■ Internet usage and websites visited |
| ■ Phone records | ■ Voicemail messages |
| ■ Attendance records | ■ Pictures |
| ■ Travel logs | ■ Audio/Video |
| ■ Security records | ■ Credit Card Receipts |
| ■ Computer records/files | ■ Observing Locations |
| ■ Complaint | ■ Collective Bargaining Agreement |
| ■ Files of Complainant & Respondent | ■ Policies/Handbooks |
| | ■ Documents provided by witnesses |



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6. Draft a Witness List

- Start with the Complaint and Complainant – Who is listed as a witness?
- Ask each person who the other witnesses are
- Ask each person for documents/evidence
- Review documents to identify additional witnesses

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7. Draft Interview Questions and Apply a Trauma-Informed Approach

- Start with an outline of questions. Use the outline as more of a roadmap for issues you need to touch on with each witness.
- If there are a series of incidents, consider a linear roadmap
- Be curious!
- Start broad and then ask for specificity
 - What is “a long time?”
 - What does “frequently” or “all the time” mean?
 - Ask to demonstrate loudness of voice or how hard someone hit a desk.

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Trauma-Informed Approach

Schedule interview at convenient time and place

Listen attentively and actively without interrupting

Exhaust open-ended questions first and save technical ones for later

Display compassion and sincerity

Interview without judgment or skepticism

Use of trauma-informed techniques during the complainant's interview can facilitate rapport building, cooperation and complainant's emotional recovery.

Do NOT Victim-Blame

Permit student/employee to control information flow

Suggest breaks as needed

Explain the need/context when asking sensitive questions

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8. Conduct Interviews

Common Questions and Issues Prior to the Interview

- What if the witness is underage?
- What if the witness is biased or lies?
- Do all witnesses get a union representative or support person? Attorney?
- What if the witness refuses to be interviewed or wants their identity to remain confidential?

Considerations during the Interview

- Be flexible!
- At the end of the interview: ask if there is anything else?
- Who else would have information?
- Keep in mind big picture goals.
- Don't rush. A moment of silence is okay.



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Recording the Interview

Take detailed notes or have a second administrator or confidential employee involved to take notes

Audio recordings: Pros and Cons

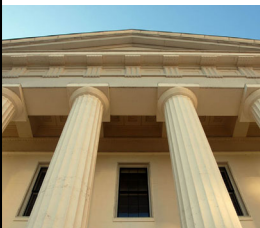
Witness statement summaries



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Admonitions



- Fifth Amendment Protection Against Self-Incrimination
- Spielbauer/Lybarger Warning – Public employees may be compelled to answer potentially incriminating questions about their job performance as long as they are not required to waive their constitutional protections.
- Banner
- Confidentiality
- Retaliation



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Confidentiality & Preserving the Integrity of the Investigation

- Confidentiality cannot be promised to a witness. Reassure witnesses that you will maintain confidentiality to the extent possible.
- Witnesses themselves should maintain confidentiality to the extent necessary to protect the integrity of the investigation (excluding discussions with their union representative or lawyer).
- Explain that the integrity of the investigation requires witnesses to maintain confidentiality.
- It is important to consider who may have access to investigative notes, statements and reports.



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9. Prepare and Report the Findings

- Basics: dates, titles and relationships
- Role: finder of fact
- Deliberative Issues: “Preliminary Draft” and “For Legal Counsel” Labels
- Provide written overview of process
- Make findings by answering the allegation question and explain the conclusion
- Optional: Prepare Executive Summary



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Investigation Findings

Documenting Findings with Complainant and Respondent

- Best practice is to document the outcome of the investigation in separate complaint findings letters to the complainant and the respondent.
- Content of the complaint findings letters will depend on which Board Policy you are processing the complaint under.



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10. Corrective Action and Tying Up Loose Ends

OPTIONS

- Staff/student discipline (various forms)
- Ensuring no retaliation
- Additional support for victims or witnesses
- Generalized training for staff/students in class, school, or district-wide
- Generalized notification of policies/ rules
- Increased monitoring and check-ins
- Changes to District practice



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Complete the Investigation File

Maintain the investigation file in HR or Student Services

The investigation file should include:

- Complaint
- Complaint Procedures Letters
- Report with Evidence/Exhibits
- Findings Letters (may also be placed in personnel file)



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Investigating
Discrimination,
Harassment, and
Abusive Conduct

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Discrimination Law

Sexual harassment is a type of sex discrimination

Federal

- Title VII: 1964 Civil Rights Act. Prohibits discrimination based on specified categories, including sex, in the employment context.

State

- California Fair Employment and Housing Act: Essentially the same but broader; includes sexual orientation.



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Discrimination Law

The definition of sexual harassment is essentially the same under both state and federal law:

- Unwanted and unwelcome
- Sexual in nature, and
- Detrimental effect on working conditions

Does not need to be motivated by a "sexual desire." (*added by SB 292*)



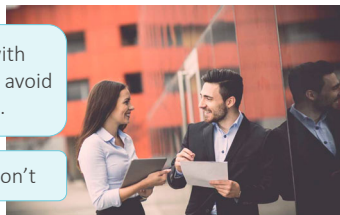
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The Power Dynamic

A subordinate may go along with harassing behavior in order to avoid negative job consequences . . .

. . . until they don't



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Liability for Sexual Harassment

Why must we address sexual harassment?

- State and federal law prohibit it
- Liability for the Employer – the Employer may be liable for sexual harassment of its employees
- Personal liability – you may be liable for your own harassing behavior or if you aid or abet someone else



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Employer Liability

Quid Pro Quo Harassment by Supervisor:

- Employer is strictly liable for harassment by supervisors
- No defense
- Employer's ignorance and supervisor's good intentions are irrelevant

Harassment by Co-Workers or 3rd Parties:

- Employer can be held liable if:
 - Knew or should have known of harassment; and
 - Failure to take prompt remedial action



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Employer Liability

Hostile Work Environment Harassment by Supervisor:


- Employer is strictly liable
- "Avoidable consequences" only mitigates damages, doesn't eliminate liability:
 - Employer took reasonable efforts to prevent and correct workplace harassment
 - Employee unreasonably failed to use preventative and corrective measures provided
 - Reasonable use by employee of measures could have prevented some of the harm



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Employee Liability



An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

(Government Code Section 12940(j)(3))

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Abusive Conduct Defined

Abusive Conduct is:

- Conduct of an employer or employee
- In the workplace
- With malice
- That a reasonable person would find:
 - Hostile
 - Offensive, and
 - Unrelated to an employer's legitimate business interests.

Abusive conduct may include:

- Repeated infliction of verbal abuse
 - Derogatory remarks
 - Insults
 - Epithets
- Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating
- Gratuitous sabotage or undermining of a person's work performance

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Abusive Conduct & Protected Classes

Bullying motivated by discrimination because of a protected class **violates state and federal laws.**

Title VII of the Civil Rights Act of 1964 (Federal)

Fair Employment and Housing Act (California)



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Two Types of Sexual Harassment

Quid Pro Quo

Hostile Work Environment



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Quid Pro Quo Sexual Harassment

*"You do something for me
and
I'll do something for you."*

Common Situations:

- Person of authority either **explicitly or implicitly** conditions tangible benefits, such as raises or promotions, on sexual favors
- Person of authority **withholds tangible benefits as retaliation** for rejection of sexual advances



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Hostile Work Environment

Unwelcome comments or actions, usually directed at the victim, that are:

- Sexual in nature, or
- Hostile to a protected class based on gender or gender stereotype

Does not necessarily result in the loss of tangible job benefits

Harasser need not hold a position of authority

Three types of Harassment: Verbal, Visual, and Physical



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Hostile Work Environment

Conduct must be “**severe** or **pervasive**”

- How frequent is the conduct?
- What about the “stray remark”?
- How severe is the conduct?
- Does it unreasonably interfere with an employee’s work performance?

Courts judge these factors under the reasonable person standard



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Investigation Reports

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Content of Investigation Report

The investigator is the finder of fact and must make factual findings based upon the credibility of witnesses and the quality of other types of evidence.



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Standard of Review

Preponderance of the Evidence

- Standard: Evidence supports that the allegation more likely than not to have occurred.
- If an allegation is found to be more likely than not to have occurred, it will be sustained.
- If an allegation is not found to be more likely than not to have occurred, it will not be sustained.

Clear and Convincing Evidence

- Standard: Evidence supports that the allegation is highly and substantially more probable to be true than not true.
- More rigorous and higher standard than "Preponderance of the Evidence."



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The Findings: Make a Determination of What Occurred



Preponderance of the Evidence/Determine what more than likely occurred



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How to Analyze the Evidence

- Review evidence
- Apply the facts to the law/policy/allegation
- Weigh the evidence
- Consider own bias
- Make credibility determinations



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Credibility Factors

Credibility

Implicit Bias

Confirmation Bias

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Writing the Analysis

Topic sentence

Summarize Complainant's version of events (address credibility)

Summarize Respondent's version of events (address credibility)

Summarize independent evidence (witness statements, documents, etc.) and explain how it corroborates or contradicts the parties' version of events.

Factual Finding (i.e., sustained, not sustained, partially sustained.)


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Confidentiality of Investigation Report

It is important to consider who may have access to investigative notes, statements and reports.



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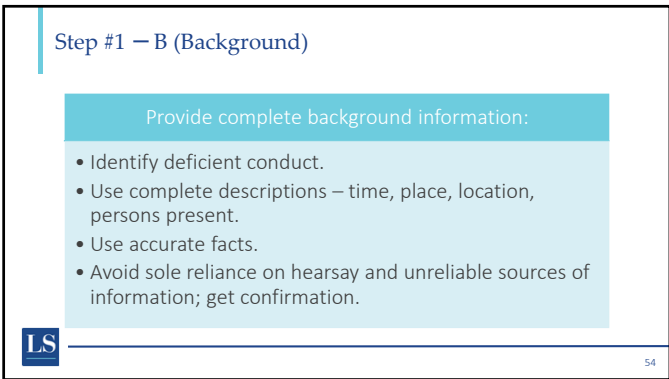
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Step #2 – R (Rule, Expectation or Principle Violated)

Rules violated may include:

- Board Policy
- Education Code or other law
- Job description or requirements
- Supervisor’s directives and Remediation Plans
- Collective Bargaining Agreement
- Standards of Performance

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Step #3 – I (Importance of the Matter to the District)

Consider:

- What’s the Big Deal?
- Why is it important to:
 - Students
 - Co-workers, supervisors
 - Parents
- District resources (e.g.: Time, Money, Facilities, Equipment, and Technology)
- College/District’s image as a public entity

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Step #4 – C (Corrective Action Required/ Commendations)

Options:

- Suggest specific corrections
- Reiterate the expected standard
- Directives
- Remediation Plan
- Commendations

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Step #5 – S (Statement of Rights)

Explain employee rights:


- The right to a hearing or conference
- The right to representation
- List consequences of continued misconduct
- Right to prepare a written response
- Other legal rights

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What the Documents in an Employee's File Say *and Do* Not Say Matters... A Lot.



- An employee's whole file will (should) be reviewed in detail before making an employment decision such as discipline, probationary release, dismissal, suspension.
- We will look to make sure that there is documentation supporting the employment decision, preferably contemporaneous documentation and progressive discipline.
- Make sure that there is nothing in the file (or not in the file) that may be concerning (*i.e.*, that may impact the ability to move forward with action or create liability).

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What and How You Communicate to Your Employees Matters... A lot.

- Properly documenting performance issues, both the good and the bad, helps avoid an employee feeling surprised when they receive a "needs improvement" mark on their evaluation.
- Properly document and communicating specific feedback, both good and bad, gives employees the tools that they need to improve and, hopefully, succeed.
- Providing clear and unequivocal evaluations and communicating well with your employees builds relationships and helps things go right instead of correcting when things go wrong.

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Document, Document, Document...

- When an employer has a consistent practice of documenting employment issues as they arise, it plays a big role in preventing and (if you cannot prevent them) defending claims.
- Lack of documentation has a significant effect on ability to move forward with discipline, probationary release, etc.
- Lack of documentation impacts the employer's ability to defend a civil lawsuit after discipline is imposed.
- Lack of documentation impacts the likelihood that the discipline is upheld if an administrative writ is filed.

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Takeaways

- Assess whether to involve Title IX Coordinator or Law Enforcement
- Determine what policy or process you are working under
- Consider the context when selecting an investigator and preparing questions
- Take notes at every interview and maintain them
- Know if you need a report or findings letter and what it should include
- Provide determinations to Complainants and/or Respondents in every case and maintain documentation
- Clearly document any employee misconduct

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Questions



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