

Conducting Effective Internal Investigations



Module One: Planning the Investigation

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Overview of Course

- Purpose: providing guidance for best practices in conducting internal investigations. **Any** type of internal investigation.



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Overview of Course

- Series of modules on the following topics:
 - Module One: Planning the Investigation
 - Module Two: Conducting the Investigation, Interviewing, and Information Gathering
 - Module Three: Reaching a Conclusion and Credibility Determinations
 - Module Four: Writing the Report and Post-Investigation Considerations



Module Overview

Types of Investigations

Value of Good Investigative Practices

Pre-investigation Considerations

Choosing an Investigator

Confidentiality v. Transparency

Receiving and Evaluating the Complaint

Notice

Interim Measures

Developing an Investigative Strategy or Plan

Public Relations Considerations

Types of Investigations

- Employee Discrimination
- Academic Integrity
- Research Misconduct
- Athletics Compliance
- Tenured Faculty Discipline
- Financial or Time Fraud
- Student Conduct



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Types of Investigations

- What is the subject matter?
- Who is the respondent, if any?
- What is the process?
 - Institutional policies and procedures
 - Regulatory or statutory process
 - Legal requirements

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Types of Investigations

What is the purpose of the investigation?

- Neutral?
- Privileged?



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Types of Investigations

What is the role of the investigator?

- Fact-gathering?
- Proposed findings?
- Making a decision?
- Recommended action?



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Why Good Investigations Are Important

- It's about fair process for all institutions
- Procedural due process for public institutions
 - Property interest: notice and opportunity to be heard
 - Liberty interest: name-clearing hearing
 - Policy determines how much process is due



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Why Good Investigations Are Important

Substantive due process: decision-making is not arbitrary or capricious

Judicial deference for internal administrative investigations

Good management



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Pre-Investigation Considerations

- Interim safety/preservation measures
 - Interim leave/suspension
 - Document retention
 - Sequestration of evidence



Pre-Investigation Considerations

- Concurrent investigations
 - Police involvement
 - Government investigator
 - Required notifications

Choosing An Investigator

- What type of case is it?
- Consider actual or apparent conflicts of interest
- Internal or external investigator?



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Choosing An Investigator

Are there “political” issues to consider?

- Who are the parties?
- What are the issues?
- Review investigator’s background and training
- Investigator’s credibility and the process is at stake



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Confidentiality vs. Transparency

- Tension between maintaining privacy and assuring fair process
- Limits on absolute confidentiality



Confidentiality vs. Transparency

- Applicable policy and law
- FERPA
- Research misconduct
- Employee discipline

Confidentiality vs. Transparency

- Privilege/work product protections
 - Scope may be limited
 - Waiver possible
- Public records
 - State-specific



Investigative Steps

1. Receive/Evaluate Complaint
2. Initiate Investigation/Notification Letters
3. Develop Investigation Strategy
4. Conduct Interviews
5. Gather other Information
6. Write Investigation Report

Receive/Evaluate/Document Complaint

Written complaint vs. in person?

Determine what laws, policies, procedures/practices apply

Evaluate to determine if should be accepted

Evaluate/Document Complaint

- Harmani Case Study Issues:
 - Layoff
 - Harassment

Notice: Notify Respondent/Parties of Complaint

- Method of notification
 - Verbally?
 - In writing?
 - Letter or email?



Notice: Notify Respondent/Parties of Complaint

- Information to include:
 - What to expect during the process.
 - Any available resources, e.g., counseling, health/mental health services, representation
 - Prohibition against retaliation
- Timing – what rights are triggered once notification provided?
- Any required disclosures?

Interim Measures

- Purpose?
- Who has authority to impose?
- Types of circumstances that might warrant an interim employment/academic suspension?
- For employment, with/without pay?
- Process for implementing interim suspension? Due process considerations?

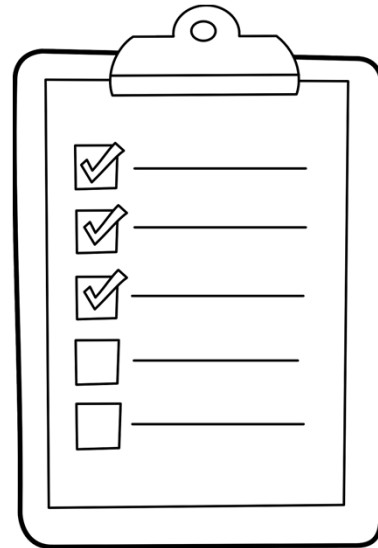
Investigative Plan

Benefits of written plan:

- Keep facts straight
- Keep investigation on course
- Fill in to become investigative report
- Particularly helpful with complicated cases

Develop Investigative Plan

- Frame allegations – identify definitions and standards of proof.
- What evidence do you need and how will you get it?
- Scope of investigation.



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Determine scope of investigation.

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Develop key questions based on scope of investigation.

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Identify possible witnesses and other sources of information.

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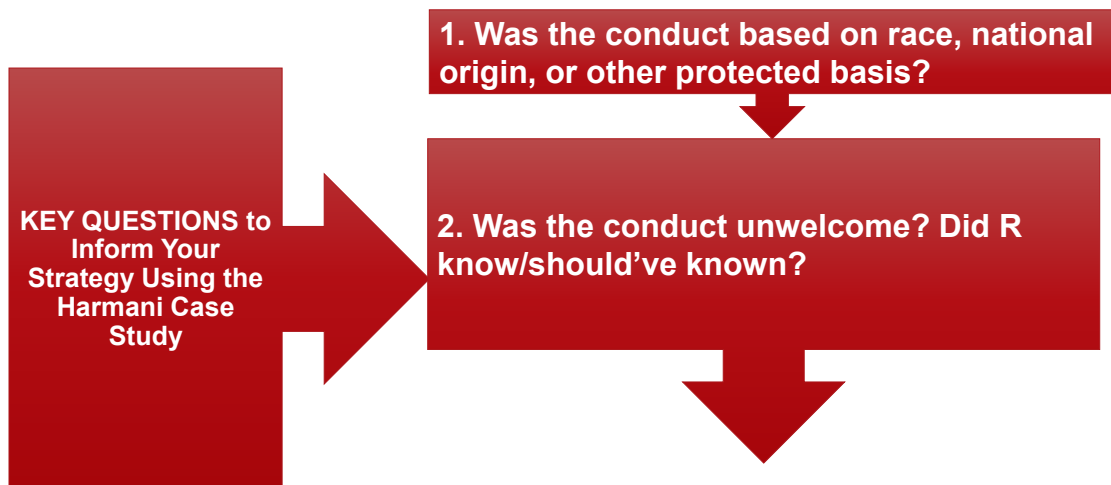
Determine order of interviews

Public Relations Considerations

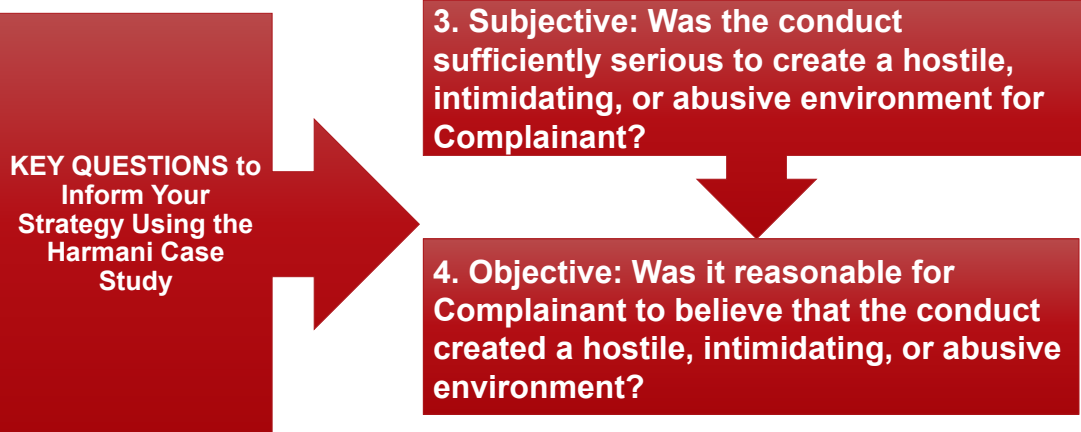
- Likelihood of publicity – Harmani has hinted about talking with the press
- Designated spokesperson?
- Limitations on information that can be disclosed



Investigation Plan – Key Questions



Investigation Plan – Key Questions



Investigative Plan - Standards

What is the burden of proof?

- Preponderance?
- Clear and convincing?

Who bears the burden of proof?

- On institution?
- On parties?

Investigative Plan – Harmani – Layoff – Discrimination

Guiding document: East Coast University Policy on Discrimination and Harassment

- Basis for the alleged policy violation?
- Elements of the definition?
- *Prima facie* case – member of protected group, adverse action, others treated better?
- Legitimate, nondiscriminatory reason?
- Pretext?

Investigative Plan – Harmani – Layoff – Retaliation

Guiding documents: East Coast University Policy on Discrimination and Harassment, FMLA Policy, any relevant policies re whistleblowing

Elements:

- Protected activity
- Adverse action
- Causal connection
- Legitimate nonretaliatory reason
- Pretext

Investigative Plan – Harmani – Harassment

Guiding document: East Coast University Policy on Discrimination and Harassment

- Unwelcome conduct
- Based on (religion/sex?)
- Severe, persistent, and/or pervasive
 - Subjective/objective



Questions

Note

- This training does not cover investigations conducted under the 2020 Title IX Regulations. Other NACUA courses cover those types of investigations.
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