

NTI  
C Group  
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## HARASSMENT AND DISCRIMINATION ISSUES AND INVESTIGATIONS

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## EEO LAWS AND APPRENTICESHIP PROGRAMS

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## Which Applicants for Apprenticeship are Protected from Discrimination?

- White male age 50?
- Male age 20 pre-operative Transgender?
- Female veteran amputee?
- HIV Positive Haitian?
- 25 year old Pregnant female?
- 19 year old Black male?
- White male age 22?
- Iranian born Muslim male age 24?
- Evangelical Christian female age 25?

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### Who is on the Hook?

- *Carrie is called before the Committee after being terminated for insubordination. She explains that she told off her foreman after being subjected to repeated sexual remarks and some physical touching. One trustee remarks that she needs to get tougher if she wants to work in the industry; another says she should stop flirting on the job. Carrie goes to the bottom of the list and is out of work for several weeks. A few months later, Carrie is let go from another job for substandard performance. She again complains of gender discrimination. The Committee terminates her from the program.*

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### Who is on the Hook?

- **Questions**
  - Is the JATC potentially liable for its actions at the first meeting? For the termination?
  - If this were an AJATC Sub-Committee, would the AJATC be liable?
  - Are any of the individual Trustees potentially liable?
  - When would Trust funds need to be used to pay?

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### Title VII of The Civil Rights Act of 1964 and other EEO Laws

- Prohibits discrimination based on race, color, religion, sex or national origin
- Prohibits sexual harassment as a form of sex discrimination
- Prohibits pregnancy discrimination
- New EEOC interpretations say Title VII prohibits gender identity and sexual orientation discrimination State/Local laws may protect other categories, e.g. sexual orientation, marital status

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### Other Federal EEO Laws

- Age Discrimination in Employment Act (ADEA) prohibits discrimination against individuals age 40 or over
- Americans with Disabilities Act (ADA) prohibits discrimination against individuals with disabilities and requires reasonable accommodation of employees
- GINA prohibits use of genetic information

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### What Activities or Programs are Potentially Covered?

- Potentially all of them
- Apprentice selection, training, etc. (in class and OTJ)
- Employment of staff (possibly even if fewer than 15 employees)
- Other programs, including pre-apprenticeship programs, Construction Wiremen (CW), training for journey workers, etc.

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### 4 Basic Concepts In Discrimination Laws

1. *Disparate Treatment Liability* — outright, intentional discrimination
2. *Disparate Impact Liability* — used to challenge qualification standards that tend to screen out individuals based on protected classes, either in initial selection or in promotions
3. *Retaliation* — unfavorable treatment of an employee because of prior complaints about discrimination

AND...

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### Four Basic Concepts

- 4. *Reasonable Accommodation* — if requested, employers/JATCs must make reasonable modifications that do not pose an undue hardship. Applies to *disability* and *religion*

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### Process and Procedure

- Sometimes a lawyer's demand letter
- Usually starts with a Charge to the EEOC or a state or local agency (either FEP or apprenticeship)
- Some form of investigation (often just written submissions)
- Next step depends on the agency and the apprentice—either an administrative hearing or a notice of right to sue

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### Process and Procedure

- If the apprentice proceeds to court, procedures vary, but the timeframe is typically between 6-18 months
- Remedies vary between statutes, but include the plaintiff's attorney's fees; programs can recover their fees in only rare cases
- Some form of back pay and compensatory damages are usually available

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### Proving and Defending EEO Claims

- The apprentice will have to make an initial showing (a *prima facie* case)
  - The apprentice was a member of a protected class or engaged in protected activity
  - The apprentice was qualified or meeting program requirements
  - The apprentice was subjected to an adverse action
  - Some other circumstantial evidence that suggests disparate treatment, e.g., that others in a different protected category were treated better

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### Proving and Defending EEO Claims

- The Program must then explain the non-discriminatory reason for its actions
- The apprentice has the ultimate burden of proving that the real reason was discrimination, and the reason given by the Committee was a “pretext”

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### Proving and Defending EEO Claims

- As a practical matter, juries expect Committees (or employers) to persuade them that
  - The action was taken with “good cause”
  - The rules were enforced consistently
  - The sanctions were fair, compared to others

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### Non-discrimination

- Equal application of the rules, policies and procedures
- Applies to:
  - Grading and requirements at school
  - Equal opportunities for OTJ training, supervision, rotation
  - Discipline and termination
- In class and on the job

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### The Business Agent's Son

- *Jeremy is a Sixth Period apprentice who has been missing classes and has been fired from two jobs for excessive absenteeism. You speak to Jeremy's dad, who admits that Jeremy has some substance abuse issues, but Jeremy is in denial. Jeremy's dad wants the Committee to read him the riot act, but not kick him out of the program. The last time you had a similar situation was two years ago when the Committee expelled a Second Period apprentice. William had excellent skills and reviews, but was missing too much time from work because of problems at home and with his kids. The Committee was reluctant to expel a qualified minority apprentice, but felt it had no choice.*

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### The Business Agent's Son

- **Questions:**
  - What are the possible legal issues here?
  - What would you do with Jeremy?

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## Harassment

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## What Is Harassment?

- Words, conduct or action, especially repeated or persistent, that is directed at a specific person, annoys, alarms or causes substantial emotional distress in that person, and serves no legitimate purpose.

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## Types Of "Harassment"

- Conduct that is *discriminatory*, because is based on protected characteristics or conduct
- Conduct that is just *bullying*

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### The Abused Vet

- *Nicole is a Third Period apprentice who is African-American. She was brought in after she was honorably discharged from the Army. After working for several months at one site, she was terminated for insubordination. When called before the Committee she starts talking about constant, daily harassment by the journeymen, a foreman, and another apprentice. Most of it was sexual jokes and comments, but some were racial slurs. Nicole says she is used to dealing with sexual jokes, but got fed up over racial slurs and constant minor hazing (removing the gas cap on her truck) and guys grabbing her butt. When she finally complained to the foreman, he laughed. Nicole cussed him out, and was fired.*

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### The Abused Vet

- **Questions:**
  - Is the Committee responsible for this conduct?
  - How should the Committee respond?

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### Harassment As One Type Of Discrimination

Harassment based on any of these categories when it rises to a "hostile work environment":

- Gender
- Race
- National origin
- Citizenship
- Sexual orientation
  - Marital status and other protected classes under some state or local laws
- Religion
- Age (usually over 40)
- Disability
- Military status

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### When is it a Hostile Environment?

- **Repeated unwanted** behavior or conduct based upon a person's protected characteristics or conduct
- That has the effect of unreasonably interfering with an individual's work performance or creating an offensive work environment.
- Does not need to involve- loss of economic benefits.

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### Liability Of A JATC/AJATC For Acts Of Its Employees

- If an apprentice suffers an adverse "tangible employment action" by an instructor or a Committee employee, then the Committee is liable
- In other situations, the JATC/AJATC is liable for the acts of supervisors *unless* it
  - Had a written harassment policy and
  - The apprentice did not use it *or*
  - The apprentice complained and the Committee took prompt remedial action.

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### Liability For The Acts Of Co-Workers, Classmates Or Third Parties

- A JATC/AJATC is liable for unlawful harassment of apprentices by others *if it knew or should have known the alleged harassment, and the Committee failed to take immediate and appropriate corrective action*
- This includes conduct by co-workers, fellow apprentices, customers, or employees of other companies

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### Overlap with Contractor Duties

- Contractors have the primary EEO duties for their employees, including apprentices.
- The JATC/AJATC has the duty to ensure that their apprentices are not subjected to discrimination and harassment on the job.

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### The Abused Vet (pt. 2)

- *During your investigation you interview the other apprentice, John, who denies all allegations. A journeyman who is interviewed says John was involved. John admits he lied, and said he was involved in some hazing and pranks (the gas cap), but not any slurs or sexual conduct.*
- **Questions**
  - Has John violated any of your rules? If so, what is the appropriate discipline?
  - Does it make any difference if the contractor chose not to discipline the journeymen and supervisors who were involved?

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### Discrimination/Harassment By Words

- Offensive or derogatory slurs or names.
- Racial, ethnic, religious jokes.
- Offensive or demeaning comments.
- Abusive or offensive language or tone directed at a person because of their race, gender, religion, etc.

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### Discrimination/Harassment By Conduct

- Favoritism to others because of their race, national origin, etc.
- Disparate treatment in work assignments, scheduling, assistance, reviews.
- Teasing and tricks.

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### Examples Of Age-Based Harassment

- Unwanted questioning about age and retirement
- Negative or stereotype comments about older workers
- Remarks favoring younger, stronger employees
- Even if the comments are innocent between two parties, others can and will use these statements against you.

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### Examples Of Age-Based Harassment

- Racial or ethnic epithets and slurs are never acceptable
  - Not even between members of the same group
- Use of code words and stereotypes
- Treating members of one group worse than others

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### Examples of Ethnic/National Origin Harassment

- Comments about Country of Origin, Ethnic Heritage, Stereotypes or Epithets
- Jokes/comments about language or accent
- Imposing higher language requirements on some groups

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### Gender Harassment and Sexual Harassment

- Gender-based Harassment
  - Negative gender comments or stereotypes
  - Negative treatment based upon on pregnancy, child care obligations
  - Negative treatment based upon failure to meet other gender roles (men and women)

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### Sexual Harassment

- A sub-set of gender harassment that often overlaps—but involves *conduct of a sexual nature*
  - *verbal, physical, visual*
- Both men and women can be victims
- The rules cover same-sex sexual harassment (men to men; women to women)

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### Quid Pro Quo Sexual Harassment

- Requiring or threatening to require sexual conduct or a dating relationship as a condition of
  - Hiring/indenture
  - Promotion, raise, easier work assignments
  - Keeping a job or staying in the program
- Adverse action in retaliation for an applicant or apprentice refusing to have a sexual or dating relationship.

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### When Is It Sexual Harassment?

When it:

- Is *unwelcome and* repeated, persistent or severe
- Interferes with a person's ability to perform or disrupts the workplace
- Creates an atmosphere in which others are uncomfortable with the harasser

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### The Randy Foreman

- *Randy is a foreman in his forties who is always telling lewd jokes, surfing porn on his phone, calling women "honey" or "babe." He will often comment on a woman's body or make joking propositions. Randy has been married for twenty-five years and everyone who knows him knows that he is just kidding around. When someone new complains, they say with a laugh, "that's just Randy being randy. He's harmless." A few years ago, there was one apprentice, Lisa, who complained to the JATC. The former Training Director made arrangements so that Lisa would not be assigned to that shop.*

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### The Randy Foreman

- Last month Julie, a third year apprentice, was referred to this shop. She put up with Randy's comments for a week, repeatedly asking him several times a day to stop, before she complained to one of the owners. The owner said that if she did not like it, she should not come back. Julie stormed off the jobsite.
- **Questions:**
  - If Julie files a lawsuit against the contractor, what are the possible risks and what is likely to happen?
  - What should the JATC do?

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### The Wolf at the Bar

- You receive a complaint from Susie, a first year apprentice that she was sexually assaulted after work by Charlie, a third year apprentice. Charlie was flirting with Susie the last time they were at the training center. The two were recently assigned to the same job site. After work, they went with several journeymen to a bar. Susie admits she had a little too much to drink. Charlie started kissing her; she pushed him away with a laugh. Susie says Charlie followed her to her car, where he started fondling her and trying to take her clothes off. Susie put her knee in his groin and ran back to the bar. Others reported that Susie was upset. Charlie Henry tells the same story, except that he says Susie consented.

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### The Wolf at the Bar

- **Questions:**
  - Would this alleged conduct by Charlie violate any policy of your Committee?
  - Do you think this is enough evidence on which to take disciplinary action?
  - If so, what sanction or discipline is appropriate?
  - Would it make any difference if one of the people out drinking had been a member of the Committee? Or the Training Director?

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### Christi

- *Chris comes to meet with the Training Director, says his gender identity is female, and he is going to start living as Christi. Surgery will be some time away, but he may need some time off the job. Chris/Christi wants the JATC's support during this transition.*

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### Christi

- Is Chris/Christi protected under federal or state laws? Which ones?
- What are the potential implications in class? On the job?
- Are any accommodations necessary?
- Are the issues with a transgender apprentice any different than an openly gay or lesbian apprentice?

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### Religious Discrimination, Harassment and Accommodation

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### Reasonable Accommodations of Religious Practices and Beliefs

- Must accommodate religious practices and beliefs in class and on-the-job, if not an undue hardship.
- Examples:
  - Permitting religious dress/appearance, if not a safety hazard
  - Allowing prayers, if other breaks are allowed
  - Days off for religious holidays, if others are allowed off for other reasons
- Balancing of the rights of one with the rights of others to be left alone

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### The Apprentice with the New Found Faith

- *Jason, a Third Year apprentice, informs you that following the recent birth of his son, he has decided to join his wife's denomination (Seventh Day Adventist). He explains that while the Sabbath does not begin until sundown, he needs to get home to prepare, so will generally need to be off Friday afternoons. The supervisor told him he might be able to let him off early some Fridays, but not always. If he leaves work early without permission, he will be fired.*
- *Jason comes to you for help. He also says he cannot work or attend classes on Saturdays.*

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### The Apprentice with the New Found Faith

- **Questions:**
  - How would/should you respond to this situation, and why?
  - Is the Committee required to ensure that John is only referred to contractors that can meet his requests?
  - Your Committee has some mandatory classes on Saturdays, and limited make-up classes. John wants to be able to do make-ups on any other day, including Sundays. None of your instructors want to work Sundays because they are in Church. How do you handle Jason's issue?
  - Would you answer by any different if Jason was Jewish?

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### Religious Discrimination Theories

- *Non-discrimination* (applying the rules equally)
- *Harassment* (not harassing apprentices because of their religious beliefs or practices)
- *Reasonable Accommodation* of religious beliefs and practices
- No *retaliation* for making requests or asserting rights

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### Examples of Religious Discrimination and Harassment

- Any adverse action because of religious beliefs or request for accommodations
- Negative comments about an apprentice's religion or religious practices
- Trying to impose one's own faith or beliefs on others
- Tolerating harassment by others
- Refusal to consider requests for accommodations, or to grant requests that are not an undue hardship

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### Examples of Reasonable Accommodations

- Permitting religious dress/appearance, if not a safety hazard
- Allowing breaks for prayers, if breaks for other reasons are allowed
- Time off for religious holidays or obligations, if others are allowed off for other reasons

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### Process for Considering Reasonable Accommodations

- Do not question the sincerity of the apprentice's religious beliefs.
- Give careful consideration to every request for an accommodation.
- Consider what is done in other circumstances.
- Consult with contractors and the union when needed

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### Undue Hardship

- An employer/JATC is not required to grant a religious accommodation that would violate a union contract
- An employer/JATC *is* required to grant a request for accommodation that would only cause a small burden
- An employer/JATC is *not* required *or permitted* to favor one religion over another

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### Balancing Obligations

- Free expression of one person's beliefs with the right of others to be left alone
- Providing accommodations without favoring one religion over another

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### Ali's Complaint

- *Ali is a first year apprentice. His family fled Iran five years ago. Ali calls to report that he is being harassed by his co-workers and two apprentices, Joe and John. He has overheard them joke that U.S. should turn Iran into one big parking lot, and refer to "rag heads" and "camel jockeys". Ali is insulted when Joe refers to him as an "Arab," and several, including Joe, call him "Ali Baba." Another apprentice, John, has told Ali he should stop reading the Koran, and have offered to take Ali and his family to Joe's church. The foreman has ignored his complaints. Ali says he is thinking about calling a lawyer.*

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### Ali's Complaint

- **Questions:**
  - Is the Committee liable or potentially liable for any of this conduct?
  - Have Joe or John violated any of your policies?
  - What steps should be taken next?

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### Conducting EEO, Harassment and Other Investigations

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### Triggers for Internal Investigations

- Risk management/proactive policy review
- Employee complaints
- Suspicious or potentially illegal conduct
- Government inquiry, charge, or subpoena

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### The Twelve Steps of an Effective Investigation

#### 1. Choose the right investigator

- Appropriate to the type of case
- Sufficient training in investigative skills
- Considerations in hiring outside counsel:
  - Cost
  - Independence & credibility
  - Privilege issues

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### The Twelve Steps of an Effective Investigation

#### 2. Plan the investigation

- Address attorney/client privilege issues
- Learn the relevant law
- Obtain and review relevant documents
  - Include email or other relevant communications
- Review internal procedures
- Choose the order of interviews, locations and format
- If basic allegations are known, consider obtaining background on the complainant and respondent from supervisors or others
- Prepare interview outline(s)

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### Upjohn Warnings

- From *Upjohn Co. v. United States*, 449 U.S. 383 (1981)
- When attorneys for the Committee are investigating acts of employees (including instructors), it is important to explain up front that the attorney represents the Committee, not the employee or individual; and the purpose of the investigation is to provide legal advice to the corporation
- Committee may decide to waive the privilege and decide to disclose information provided by an individual or employee during the course of the investigation and interviewee has no control over this
- If a Training Director or other employee is doing the interviews, a similar statement is appropriate.
- Do not promise confidentiality

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### Interviewing Tips and Techniques

- Friendly, comfortable, non-judgmental
- Fact-finding
- Open-ended, non-accusatory
- Related to topics of investigation
- Related to documents reviewed
- Do not interrogate or prejudge the interviewees

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### Interviewing Tips and Techniques

- Explain the scope of the investigation and the time table
- Explain to each witness that they are expected to cooperate in the investigation
- Stress the need for confidentiality
- Start by having the witness provide a full story or statement

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### Interviewing Tips and Techniques

- Start with open-ended questions and get more specific as the interview goes on
- Try to go through matters in chronological order
- Start with the journalist's "Five W's and an H"

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### Interviewing Tips and Techniques

- Examine the context and motivation
  - Could the incident have been perceived or intended as a joke? Why not?
  - Was there an innocent interpretation that could be given?
  - Pay particular attention to possible cultural differences or to differences associated with age or social background

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### Interviewing Tips and Techniques

- Identify all possible relevant documents
- Identify witnesses
- Identify any individuals that may be able to verify the witnesses' story
- Identify witnesses who may have been subjected to the same type of discrimination in the past
- Ask the witness whether there are other questions that you should have asked

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### Other Issues to Explore with Complainants

- Any time lag in filing complaints and the reason for that delay
- The individual's claimed damages
- What action the complainant wants the company to take and why

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### The Twelve Steps of an Effective Investigation

#### 3. Interview or re-interview the complainant

- Conduct a complete review of all allegations
- Identify witnesses and documents
- Determine what the complainant wants
- Draft and have the complainant sign a summary of the allegations

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### The Twelve Steps of an Effective Investigation

#### 4. Interview the respondent(s)

- Conduct a complete review of all allegations
- Identify witnesses and documents
- Permit a written response

#### 5. Assess options for conciliation or resolution without formal findings or investigation

- Option for face-to-face mediation
- Option for corrective action or transfers without finding of wrongdoing

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### After the Interview of the Complainant and the Respondent

- Decide whether the matter can be concluded
  - In many cases, all necessary facts can be determined from the first interviews
    - It is not sufficient in a "he said, she said" case to conclude that there is no way to tell who is lying, and therefore do nothing
  - If you don't make a determination, a jury will do it for you

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### After the Interview of the Complainant and the Respondent

- Decide what to do next
  - The scope of further investigation is whatever is necessary to determine what happened and make a credibility determination
- Determine, in consultation with legal counsel if necessary, the significance of the facts found

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### The Twelve Steps of an Effective Investigation

6. Interview supervisor(s)(if relevant)
7. Interview other witnesses or complainants (if any)
8. Review and analyze the facts and re-interview if necessary
  - Identify inconsistencies in the facts
  - Further probe motives if not previously clear
  - Give the complainant and respondent opportunity to rebut new allegations or address inconsistencies or omissions

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## The Twelve Steps of an Effective Investigation

### 9. Summarize factual findings and make credibility determinations

- Why to prepare a written report
  - Easier to analyze/appreciate risks
  - Reference for follow-up & future investigation
- Why to NOT prepare a written report
  - Future production
  - Privilege waivers

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## What should a report look like?

- Statement of privilege (if done by or being communicated to counsel)
- Full and accurate description of findings
- Remember: once a report is written, it's written forever

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## The Twelve Steps of an Effective Investigation

### 10. Consult with key decision makers and make decisions

- Consult with legal counsel on the significance and impact of the facts
- Consult with those who would be involved in implementing corrective action
- Decide whether policies, rules and procedures have been violated
- Make a recommendation for or determine appropriate action if necessary

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### What to do with the Results

- Determine the level of sanctions
- Consider Non-Disciplinary Options:
  - Counseling (i.e., referral of respondent to counseling; pay for complainant's counseling)
  - Mediation
  - Additional training of respondent(s)
  - Additional training of others

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### The Twelve Steps of an Effective Investigation

#### 11. Communicate results

- Discuss findings with the complainant and respondent
- Describe any appeal rights

#### 12. Preserve a record of the investigation

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### Privacy and Other Legal Risks in Investigations

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## Common Law Privacy

- Do employees or apprentices have a right of privacy?
  - Primary determination: whether the expectation of privacy is objectively and subjectively *reasonable*
  - Calculation of reasonableness changes depending on the form of technology and existing or past policies or practices

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## Legal Background: Statutes

- Stored Communications Act
  - Prohibits unauthorized access to stored communications, such as emails and Internet accounts
- Electronic Communications Privacy Act
  - Prohibits intentional interception of electronic communications or wires
  - Amended the Federal Wiretap Act of 1968
- State Wiretapping Statutes and Privacy Laws

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## Computer & Internet Monitoring

- Employers can monitor work computers
  - Low expectation of privacy on work-issued computers. *Liebeskind v. Rutgers University* (NJ, 2015)

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## Telephone Monitoring

- Federal law permits unannounced monitoring for business-related calls. Electronic Communications Privacy Act, 19 U.S.C. § 2510
- Employers can also generally access or monitor employer-provided mobile phones.

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## Audio and Video Surveillance

- Employers may use video surveillance in the workplace
  - Common method of deterring theft, maintaining security, and monitoring employees.
- Common law privacy rights provides limitations
  - Surveillance will not likely be permitted where overly intrusive, such as bathrooms, where there is a heightened expectation of privacy
- Audio surveillance is subject to Federal and State wiretapping statutes.

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## Social Media Monitoring

- Stored Communications Act prohibits unauthorized access to stored communications such as emails and Internet accounts.
- However, the Supreme Court has observed that technology and cultural habits, and therefore expectations of privacy, are evolving. *City of Ontario v. Quon*

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## Questions?



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