



TRAINING ON TITLE IX REGULATIONS (AND CLERY)

PART ONE

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Before we begin

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Day One

- Brief introduction to Title IX and the Clery Act
- Understanding the institution's mandatory response:
Scope, jurisdiction, and important definitions
- Roles in the process, and how to serve impartially, without bias,
and without conflicts of interest
- Informal resolution
- How to conduct an investigation
- Relevance and special categories of evidence

Title IX of the 1972 Education Amendments

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

**Violence Against Women Act
2013 Amendments**

to the

**Jeanne Clery Disclosure of
Campus Security Policy and
Campus Crime Statistics Act**

Addresses prevention programs, reporting and publishing obligations, and procedural requirements for handling allegations of dating, domestic violence, and sexual assault

Also adds training requirements

What are we talking about when we say Title IX?

- Federal court cases interpreting civil rights statutes
- Federal guidance documents
 - *Department of Education’s Office of Civil Rights (“OCR”) Sexual Harassment Guidance (2001)*
 - *OCR Title IX Resource Guide (2015)*
 - *OCR Q and A (2017)*
- Individual resolution agreements between federal government and institutions
- **Regulations**



SCOPE, JURISDICTION, AND IMPORTANT DEFINITIONS

Mandatory jurisdiction to respond

- Actual knowledge
- Sexual harassment
- Education program or activity
- Person in the United States



Respond promptly in a manner that is not deliberately indifferent

- Promptly contact complainant to discuss availability of supportive measures regardless of whether complaint is filed and explain process for filing complaint
- What are supportive measures?
- Supportive measures for respondents

Mandatory jurisdiction to investigate Formal complaint filed by a complainant

- What is a formal complaint?
- How to file it/where is it?
- What does it need to say?



Mandatory jurisdiction to investigate Formal complaint filed by Title IX coordinator

When might a Title IX coordinator
file a complaint?



Definition of Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- 1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;**
- 2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- 3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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(the offense formerly known as hostile environment sexual harassment)

- 1) Unwelcome conduct
- 2) Determined by a reasonable person to be so
 - a) SevereAND
 - a) PervasiveAND
 - a) Objectively offensive
- 3) Effectively denies a person equal access to the institution's education program or activity





BREAK



Clery Act regulations definitions and issues related to this conduct

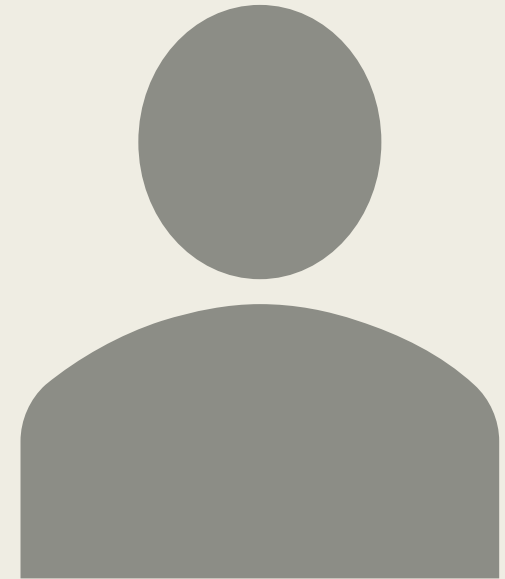
- **Dating violence.** Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- **Domestic violence.** (i) A felony or misdemeanor crime of violence committed
 - *By a current or former spouse or intimate partner of the victim;*
 - *By a person with whom the victim shares a child in common;*
 - *By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;*
 - *By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred, or*
 - *By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.*
- **Sexual assault.** An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's UCR program
- **Stalking.** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to
 - *Fear for the person's safety or the safety of others; or*
 - *Suffer substantial emotional distress.*



ROLES IN THE PROCESS, AND HOW TO SERVE IMPARTIALLY,
WITHOUT BIAS, AND WITHOUT CONFLICTS OF INTEREST

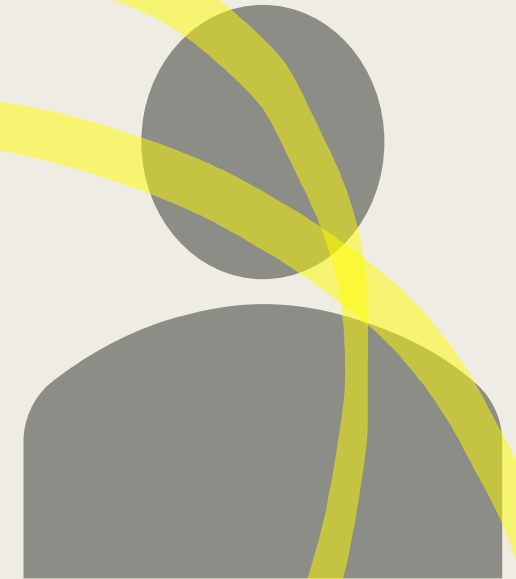
- Title IX Coordinator
- Investigator
- Decisionmaker
- Appeals officer
- Facilitator of informal resolution
- Party advisor

Title IX Roles



Title IX Roles

- Title IX Coordinator
- Investigator
- Decisionmaker
- Appeals officer
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Title IX Roles

- Title IX Coordinator
- Investigator
- Decisionmaker
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- Facilitator of informal resolution



And what about your sanctioner?



How to serve impartially

- Avoid pre-judgment of the facts
- Bias
- Conflict of interest



COMMENCEMENT OF FORMAL RESOLUTION PROCESS

Formal complaint is filed ... what now?

- Grievance process
- Allegations, including sufficient details
- Statement of presumption of non-responsibility
- Right to an advisor/attorney
- Right to inspect evidence
- Any provision in code that prohibits making false statements during process



Dismissing complaints

MANDATORY

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info

Bad behavior that must be dismissed pursuant to regulations

- Why might we want to address this conduct?
- Are we prohibited from addressing it?
- If not prohibited, how can we address it?





LUNCH BREAK
ONE HOUR

Informal resolution

- Can only be offered after formal complaint has been filed
- May include arbitration, mediation, or restorative justice
- Facilitators must be trained in informal resolution



HOW TO CONDUCT INVESTIGATIONS

Steps of investigation

Trained investigator collects information

Investigator shares evidence “directly related” to allegations with parties

Parties have 10 days to respond

Investigator creates summary of “relevant” evidence and shares with parties

Parties have 10 days to respond

Goal of the investigation:

Collect as much reliable and relevant evidence as possible



Interviewing the parties

- Let the person know what is happening, before you meet and when you meet
- Have a standard way that you explain:
 - *Recording of interviews*
 - *Your neutrality*
 - *Investigative process*
 - *Resources and support*
 - *Confidentiality, privacy, and disclosure issues related to their statement*
- Make a note of and ask for every written/electronic item they mention





Interviewing techniques

- Learning from different systems:
 - *Child forensic interview*
 - *Trauma-informed interview*
 - *Forensic experiential trauma interview*

- If asking a sensitive question, explain why

- Handling challenging interviews

Interviewing the parties



- Ask for (and discuss) list of witnesses
- Last question before closing meeting should be open-ended invitation for them to add anything
- At end of meeting:
 - *Explain next steps*
 - *Close with comfortable conversation*
- Be mindful:
 - *Problematic promises and representations*
 - *Interactions with advisors/attorneys*
 - *Kind interviewing techniques*
 - *You must ask the difficult questions. Know how to do so.*

Issues unique to respondent interviews



- Be prepared for a demand to know the allegations– and tell them what the allegations are
- Give respondent opportunity to respond to every claim
- Explore all reasons why complainant might have raised the concerns: “Do you have any idea why the complainant would make these allegations?”

Asking Questions

Help me understand . .	Tell me all about . . .
What were your thoughts and feelings at that time?	What were you hearing when this was happening?
You said X. I want to make sure I understand what you mean by X.	I don't want to make any assumptions, so can you explain what you mean by X?
I am going to ask some questions about X, because it is important that I understand X.	I am going to shift gears and ask about X.
What part of their body touched your body?	How did you know the other person wanted to do X?

Witnesses

- Advise witnesses of neutrality, lack of confidentiality and retaliation
- Ask about relationship to parties/conversations about interview
- Give the witness very little specific information about the allegations
- Last question before closing meeting should be open-ended invitation for them to add anything



Investigator's burden to collect information



- Texts/emails/voicemails
- Employment records
- Social media posts
- Police reports
- Photos
- Phone records





The information we collect: Where does it go?

- Summarized in investigation report
- Information that each party responds to
- Basis for decision-maker
- Basis for appellate entity



BREAK



Reminder:

Steps of investigation

Trained investigator collects information

Investigator shares evidence “directly related” to allegations with parties

Parties have 10 days to respond

Investigator creates summary of “relevant” evidence and shares with parties

Parties have 10 days to respond

Sharing evidence “directly related” to the allegations

- Sensitive information
 - *Consider restrictions on use and non-disclosure agreements*
- Truly irrelevant information
 - *Consider redactions and privilege log*

Next step in the investigation:
Parties' review of evidence
and written response

- Review
 - *Develop document-sharing protocol*
- Tips for keeping timeframes “prompt”



Creating investigative report summarizing “relevant evidence”

- Construct a chronological narrative out of the information collected.
- Use “direct quotes” for important language.
- Sometimes, when appropriate note the person’s demeanor/interviewing style.
- If person said they didn’t know or didn’t remember, include that in statement.
- Address feedback on the evidence appropriately.
- Paste items of evidence into the summary for ease of reference.
- Think about the critical claim and make sure the summary provides sufficient detail around it.

What is “relevant evidence?”

- Use logic and common sense
- Toss out old rules/practices regarding categories of information permitted (except for three situations)

Irrelevant

Irrelevant

Relevant

Irrelevant

Irrelevant



Special categories of evidence that are off-limits

- **IRRELEVANT:** Complainant's prior sexual predisposition or prior sexual history (with two exceptions)
- **IRRELEVANT:** Information protected under a legally-recognized privilege
- **CAN'T USE:** Medical, psychological and similar records without written consent of party

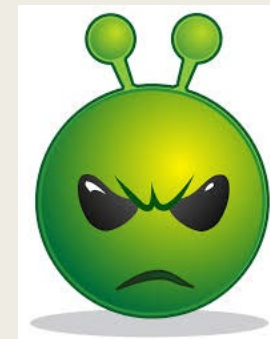
Relevance IS

- Logical connection between the evidence and facts at issue
- Tends to make a material fact more or less probable than it would be without that evidence
- Assists in coming to the conclusion – it is “of consequence”



Relevance IS NOT

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial v. direct
- Based on complicated rules of court





TRAINING ON TITLE IX REGULATIONS (AND CLERY)

PART TWO

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Day Two

- How to convene a hearing
- Evaluating evidence and making the determination
- Workshop: Applying the concept of relevance to the hearing process
- How to handle appeals



HOW TO CONVENE A HEARING

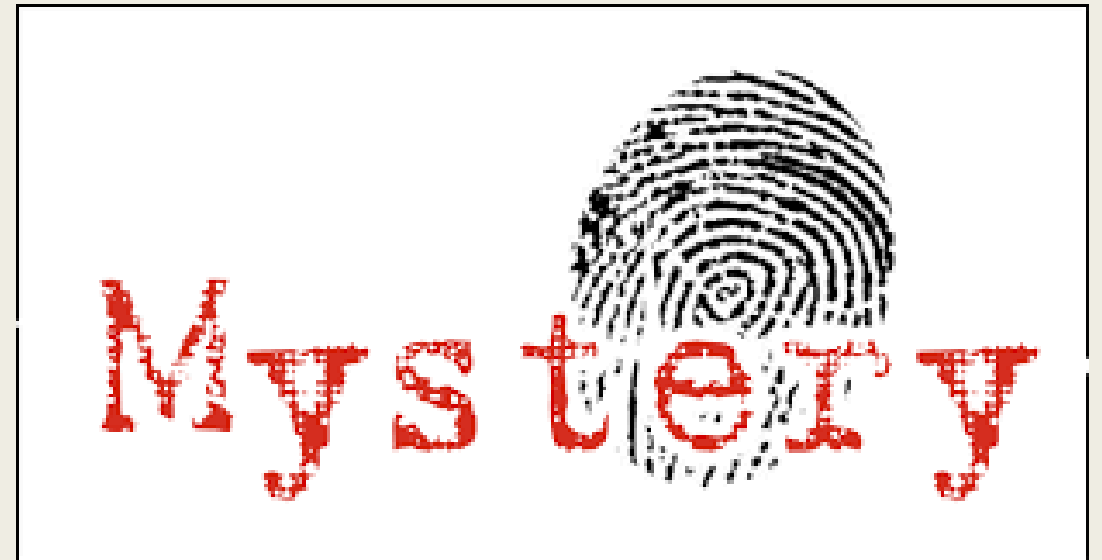


- Confirm advisors for each party; appoint if necessary; consider having back-ups available
- Figure out who will be requested to attend
- Explain to the parties what to expect
- Establish and explain ground rules and structure of hearing
- Make logistical and technology decisions (and give them a trial run)

Before the hearing, convene a **pre-hearing conference** to:

“Submitting to cross examination”

- What this means
- What does NOT submitting to cross examination look like?
- Consequences of NOT submitting to cross examination



Managing the questioning process

- Order of questioning
- Making thoughtful rulings on relevance
- Brainstorm and prepare for hearing scenarios



Remember special categories of evidence that are off-limits

- IRRELEVANT: Complainant's prior sexual predisposition or prior sexual history (with two exceptions)
- IRRELEVANT: Information protected under a legally-recognized privilege
- CAN'T USE: Medical, psychological and similar records without written consent of party



BREAK





EVALUATING EVIDENCE AND MAKING A FINDING





The process as a whole: Weighing the evidence and making a determination

- 1. Making the factual determination of what happened*
- 2. Analyzing whether the conduct that happened constitutes a violation of your institution's policies*

Concepts we use to evaluate evidence

Relevance

- Tends to make a fact more or less probable than it would be without that evidence
- Assists in coming to the conclusion – it is “of consequence”

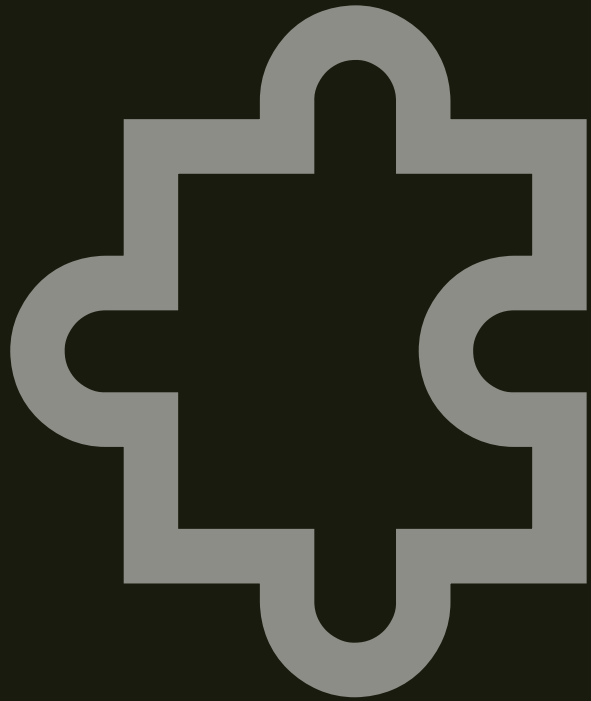
Reliability

- Accurate
- Trustworthy

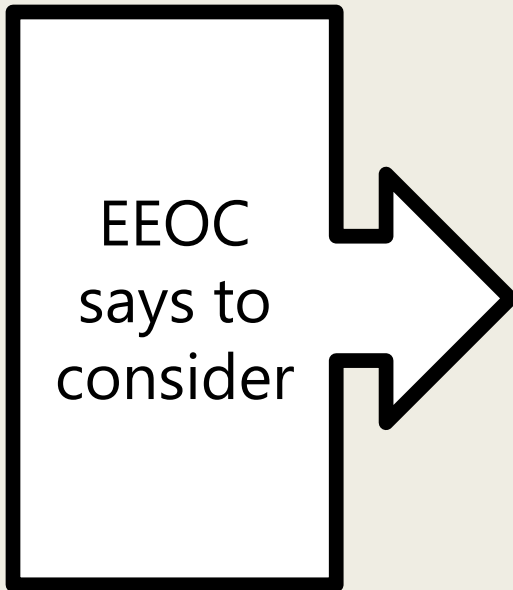
Weight

- The value you assign to the piece of evidence

**IF YOU NEED TO
DETERMINE
CREDIBILITY**

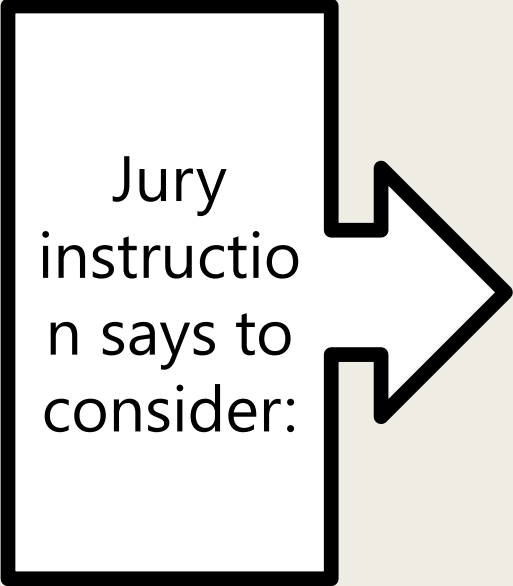


How to determine if a person is credible?



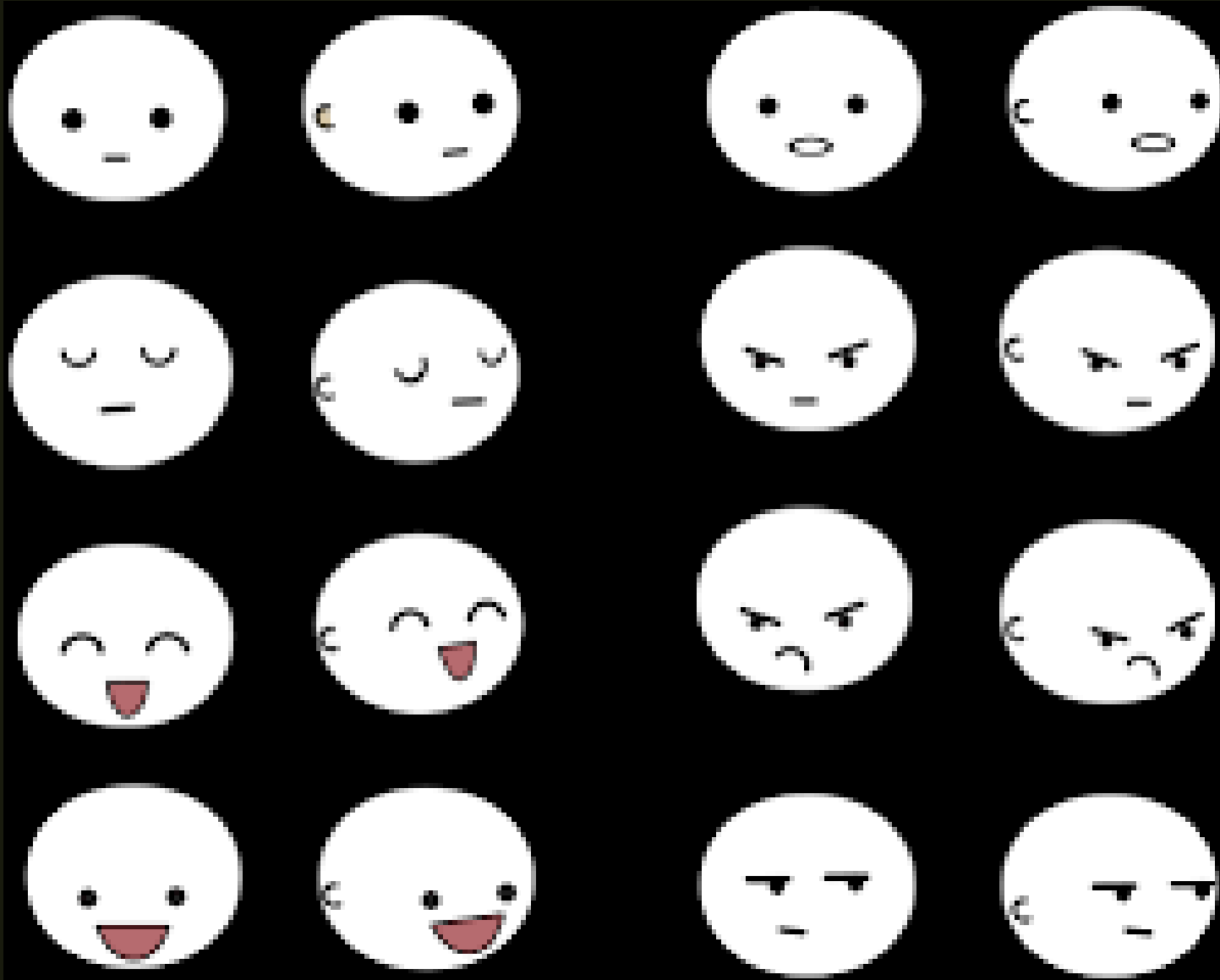
- Inherent plausibility: Is the testimony believable on its face? Does it make sense?
- Demeanor: Did the person seem to be telling the truth or lying?
- Motive to falsify: Did the person have a reason to lie?
- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- Past record: Did the alleged harasser have a history of similar behavior in the past?

How to determine if a person is credible?



Jury instruction says to consider:

- Relationship to the Plaintiff or to the Defendant
- Interest, if any, in the outcome of the case-- Anything to gain or lose from the case
- Manner of testifying – did they appear to be lying? Appear to be telling the truth?
- Opportunity to observe or acquire knowledge concerning the facts about which the witness testified
- Candor, fairness and intelligence
- The extent to which testimony has been supported or contradicted by other credible evidence
- Any bias or prejudice?
- Inconsistency within testimony? Reasonable/minor or significant?
- Use your common sense and your everyday experience in dealing with other people.



CAUTION
RE:
DEMEANOR
EVIDENCE



USE DISCIPLINED, UNBIASED
EVALUATION OF RELEVANT
EVIDENCE:

THINGS NOT TO CONSIDER

Preponderance of the evidence

IS

- Starting from the presumption of non-responsibility, is the complainant's account is supported by the majority of the evidence?
- Starting from the presumption of non-responsibility, does the evidence establish that the complainant's account is most likely to have occurred?

IS NOT

- I think the information shows the respondent most likely to have engaged in the conduct, but I am not convinced beyond a reasonable doubt
- I think the information shows the respondent most likely to have engaged in the conduct, but I am not firmly convinced
- Since the prosecutor declined to file charges, I don't think we should hold the respondent responsible either

Your reasoning should NOT sound like this:

- I don't think the evidence is sufficient to support a finding of responsibility, but I don't want to cause a problem for WSU because this is a high-profile matter.
- I think the respondent did it, but I don't like the complainant and think the complainant filed this claim just to hurt the respondent.
- Yes this is a technical violation of the policy, but I disagree with the policy's definition of consent.
- I don't really think the respondent did it, but I feel really bad for the complainant who is clearly traumatized.
- I think the respondent did it, but I don't want to ruin the respondent's life.

Once factual findings are made, analyze under WSU policy definition

Sexual Harassment: Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity

- 1) Unwelcome conduct
- 2) Reasonably viewed as
 - 1) *Severe and*
 - 2) *Pervasive and*
 - 3) *Objectively offensive*
- 3) Effective denial of equal access to education program or activity



LUNCH BREAK
ONE HOUR



WORKSHOP



WHAT
QUESTIONS DO
YOU HAVE FOR
THE
COMPLAINANT?

Type them into the chat feature.



WHAT
QUESTIONS DO
YOU HAVE FOR
THE
RESPONDENT?

Type them into the chat feature.



WHAT
QUESTIONS DO
YOU HAVE FOR
ANY WITNESS?

Type them into the chat feature.



MY QUESTIONS FOR YOU



BREAK





Required elements in written determination

- Description of procedural steps from complaint through determination
- Findings of fact
- Conclusions regarding application of policy to facts
- Rationale for each result of each allegations
- Sanctions/remedies
- Appeal options (must permit appeal)

Grounds for appeals

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- Title IX coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
- Any other grounds, as long as offered equally to both parties

QUESTIONS?

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