



Harvard University
Office For Dispute Resolution

MCAD TRAINING



TRAINING AGENDA

November 30, 2023- *Preventing and Addressing Discrimination In The Workplace*

December 5, 2023- *Conducting Effective Internal Workplace Investigations: Part 1*

December 7, 2023- *Conducting Effective Internal Workplace Investigations: Part 2*



PREVENTING AND ADDRESSING DISCRIMINATION IN THE WORKPLACE

*Please ensure your camera is on, and your full name is displayed
to receive credit for attending*

Edit your name:

- On a computer, click “...” in the upper right corner of your picture
 - On a phone or tablet, tap “participants” then your name.



GETTING TO KNOW ZOOM

- Mute and camera buttons in lower left corner (your camera must be on so I know you're there/paying attention)
- You can hold the space bar to temporarily unmute yourself
- You can edit your name:
 - On a computer, by clicking "... " in the upper right corner of your picture
 - On a phone or tablet, by tapping "participants" then your name.
- You can change how many people you see by clicking the boxes in the upper left corner above your picture
- You can adjust your view more by resizing the presentation

GETTING TO KNOW YOU

- Name
- Title
- Whether you have attended an antidiscrimination or harassment training in the last 5 years



NORMS

- The MCAD doesn't make the laws, we just enforce them
- Monitor your air time (e.g. is that an individual question or one for the whole group?)
- Keep it general
- We can't provide legal advice 😊
- In order to receive credit for attending the training, all participants must remain on camera
- You're all adults so use the restroom, grab coffee, tend to children, stand up, move around, etc. when needed.
- Ask questions by unmuting yourself at any time, or open the chat box on the bottom of your screen

LEARNING OBJECTIVES

Participants will learn about:

- Massachusetts discrimination law
- Your role in preventing and addressing discrimination in the workplace
- Role of the Massachusetts Commission Against Discrimination (MCAD)



AGENDA

- Protected Categories
- Common Discrimination Claims
 - Disparate Treatment
 - Discriminatory Harassment
 - Sexual Harassment
 - Disability Accommodations
 - Religious Accommodations
 - Pregnant Workers Fairness Act
 - Parental Leave
- Liability
- Role of the MCAD

EMPLOYERS COVERED

- Generally, 6 or more employees for G.L. c. 151B
- As of April 1, 2015, domestic workers are covered, even if there are fewer than 6 employees

THE PROTECTED CATEGORIES

PROTECTED CATEGORIES

- Members of the group (majority and minority groups)
- People perceived as a member of the group
- People associated with members of the group

WORKPLACE DISCRIMINATION: PROTECTED CATEGORIES

- Age (40 years+)
- Criminal records
(inquiries only)
- Disability
- Religion
- Pregnancy
- Sex
- Gender identity/expression
- Sexual orientation
- National origin
- Ancestry
- Race
 - (Including the CROWN Act-
Natural & Protective Hairstyles)
- Color
- Military personnel
- Veteran Status
- Genetic information



CASE SCENARIO 1

Allie says she doesn't get the same training opportunities as the older employees. "Just because I am twenty-two years old, doesn't mean I'm not ready for more responsibilities," Allie says.



CASE SCENARIO 2

Bob's supervisor didn't select him to go to a conference. Bob is very upset that he wasn't selected, especially because he heard the reason he wasn't selected is due to rumors circulating that he is living with HIV.



CASE SCENARIO 3

Carrie admits she feels more comfortable having a male administrative assistant. Recently, she hired her fourth male in a row.



COMMON DISCRIMINATION CLAIMS

COMMON DISCRIMINATION CLAIMS

- Disparate Treatment
- Harassment
 - Sexual or Non-Sexual
- Failure to Accommodate
 - Disability, Religion, or Pregnancy
- Disparate Impact
- Retaliation



GESSY TOUSSAINT ET AL V. BRIGHAM AND WOMEN'S HOSPITAL ET AL. (2018)

1. In 2014, two Haitian-American nurses (Gessy Toussaint and Nirva Berthold) brought a case against Brigham and Women's.
2. Berthold alleged that after applying for a higher paying position as a nurse educator in 2013, the hospital turned her down because she was black. Toussaint claimed that after standing up for Berthold she was retaliated against.
3. The court separated the two claims, and heard Toussaint's claims (Berthold's are scheduled to be held later this year). Toussaint claimed that after standing up for Berthold, the hospital began investigating complaints against Toussaint's work as well as made her take a test for new nurses even though she had been working there since 1999 (among other things).
4. The Suffolk Superior Court jury said that Toussaint could not prove race discrimination – which was also part of her claim - but that she was retaliated against by Brigham.
5. The jury awarded her \$28 million dollars. The award is now on appeal.

DISPARATE TREATMENT

MCAD USE ONLY

WHAT IS THE LINE? *DISPARATE TREATMENT*

<p>Member of Protected Group</p>	<p>Adverse Employment Action</p>	<p>Reason is Pretext; Discriminatory Animus</p>
<p>Not Member of Protected Group</p>	<p>No Adverse Employment Action</p>	<p>Legitimate Business Reason; No Discriminatory Animus</p>

COMMON ADVERSE ACTIONS

- Non-selection / non- promotion
- Lower salary, denial of leave or other benefits
- Denial of training or professional development
- Inequitable discipline or appraisal
- Termination

ELEMENTAL BURDEN SHIFTING

- Step 1: Employee has to PROVE (easy to do):
 - In a protected class
 - Adverse employment action
 - Reason to believe that 1 and 2 are connected
- Step 2: Employer has to show (not prove) legitimate, non-discriminatory, business reason for the adverse employment action
- Step 3: Employee has to PROVE:
 1. The legitimate reason offered by employer is a pretext for discrimination
 2. The employer exhibited discriminatory animus (through intent, motive, or state of mind) and that the animus is causally related to the adverse action.

CASE SCENARIO 4

Doreen, an employee who is Catholic and of Irish descent, was late five times this month, and received no discipline. Essam, who is Muslim and of Egyptian descent, was late five times this month, and was suspended for a day without pay.



HARASSMENT

Words, conduct, or actions that denigrate, show hostility to, or exhibit aversion towards a person or group on the basis of membership in a protected class.

DISCRIMINATORY HARASSMENT

WHAT IS THE LINE?

DISCRIMINATORY HARASSMENT

Unwelcome	Severe or Pervasive	Related to Protected Group
Welcome	Not Severe or Pervasive	Unrelated to Protected Group

DISCRIMINATORY HARASSMENT: HOSTILE WORK ENVIRONMENT

- Verbal or physical conduct that unreasonably interferes with an individual's work performance by creating an intimidating, hostile, or offensive work environment based on their membership in a protected category



SEXUAL HARASSMENT

MCAD USE ONLY

WHAT IS THE LINE?

SEXUAL HARASSMENT

Unwelcome	Severe or Pervasive	Sexual in Nature
Welcome	Not Severe or Pervasive	Not Sexual in Nature

SEXUAL HARASSMENT: QUID PRO QUO

- When a Submission to/ rejection of sexual advances requests for sexual favors or other sexual conduct is explicitly or implicitly a term or condition of employment; and
- Submission to or rejection of sexual conduct is a basis for employment decisions

SEXUAL HARASSMENT: HOSTILE WORK ENVIRONMENT

Sexual advances, requests for sexual favors, or other verbal or physical conduct that unreasonably interferes with an individual's work performance by creating an intimidating, hostile, or sexually offensive work environment.

HOSTILE ENVIRONMENT: SEXUAL HARASSMENT

EXAMPLES OF RISK FACTORS THAT COULD LEAD TO A SEXUAL HARASSMENT CLAIM

- Sexual jokes
- Written or verbal sexual references
- Sexual or suggestive pictures
- Comments about one's body
- Leering, lingering, staring
- Gestures, whistling, or brushing against the body
- Inquiries into or discussions of sexual activities

SEXUAL HARASSMENT:
CAN HAPPEN TO PEOPLE OF ANY GENDER



WORKPLACE RELATIONSHIPS

- Consensual relationships among coworkers are not unlawful, but can cause liability
- Proceed with extreme caution!
- Do you have a workplace relationships policy?



PROMPT, EFFECTIVE ACTION: ALL TYPES OF HARASSMENT

- Meet w/ employee immediately
- Stop conduct
- Swift, neutral, well-documented investigation
- Implement and document appropriate actions, like discipline up to and including termination
- Ensure no retaliation

10 MIN. BREAK!

**WHEN RETURNING, PLEASE MAKE SURE YOUR CAMERA IS
ON, AND YOUR FIRST AND LAST NAMES ARE SHOWN**

AGENDA

- ~~Protected Categories~~
- ~~Common Discrimination Claims~~
 - ~~Disparate Treatment~~
 - ~~Discriminatory Harassment~~
 - ~~Sexual Harassment~~
 - Disability Accommodations
 - Religious Accommodations
 - Pregnant Workers Fairness Act
 - Parental Leave
- Liability
- Role of the MCAD

CASE SCENARIO 5

Grace is Frank's boss. They used to date, but they broke up last year. Now, she wants to get back together, but he is no longer interested. Grace tells Frank that he shouldn't expect any further flexibility in his shifts unless he changes his mind.



CASE SCENARIO 6

Several times, Henry has told his coworker Louise they could be “*really* good together.” He’s trying to be nice to Louise. He thinks she loves the compliments, and she’s never said otherwise.



CASE SCENARIO 7

José's supervisor, Mitchell, constantly yells at all seven of the specialists, criticizing their work in harsh ways. Six of the specialists were born in the United States, and José was born in Brazil.



DISABILITY ACCOMMODATIONS

MCAD USE ONLY

“DISABILITY”

- Has a **physical, mental, or developmental** impairment which **substantially limits** one or more **major life activities**
- Has a **record** of such impairment
- **Perceived** as having an impairment

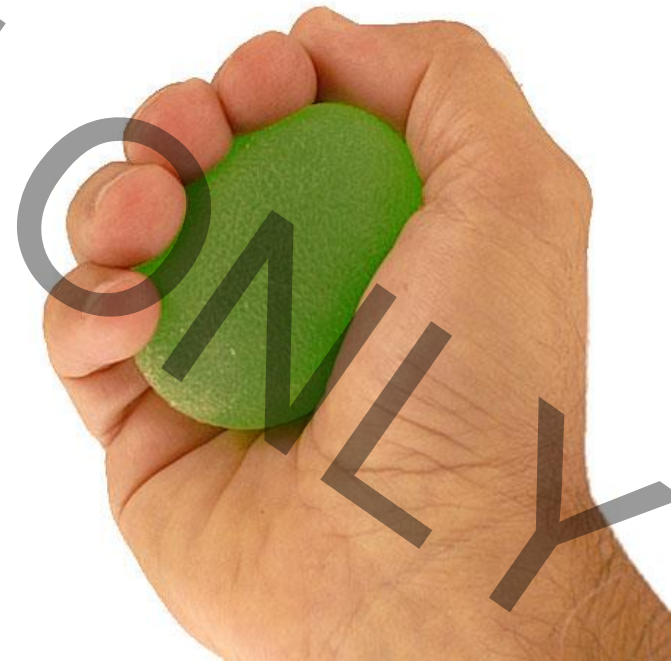


DEFINING “MAJOR LIFE ACTIVITY”

- Caring for one's self
- Walking
- Seeing
- Hearing
- Speaking
- Breathing
- Learning
- Working
- Sitting
- Standing
- Lifting
- Thinking
- Concentrating
- Interacting with others*

“INDIVIDUAL WITH A DISABILITY” EXCLUSIONS

- Personality traits such as “irritability” unless linked to mental or developmental impairment.
- Current use of illegal substances or misuse of legal substances.
- Normal pregnancy.



Employment Discrimination is prohibited against “qualified individuals with a disability”

A person who meets legitimate skill, experience, education, or other requirements of an employment position that they hold or seek, and who can perform the **essential functions** of a position with or without a reasonable accommodation is a “qualified individual with a disability.”



DEFINING “ESSENTIAL FUNCTIONS”

- Must be performed to accomplish job’s principal objectives
- Fundamental to nature of the job
- Not tangential
- Not rarely performed

DEFINING “INTERACTIVE PROCESS”

- Once employer is on notice of need for accommodation, they should initiate an **interactive dialogue**
- Process should identify potential **reasonable** accommodations to overcome employee’s particular limitations.



“REASONABLE ACCOMMODATION”

- Employer **aware** of disability and need for accommodation
- Enables an otherwise **qualified** individual with a disability to perform **essential functions** of his or her position and to enjoy equal terms, conditions, and benefits of employment.



ACCOMMODATION VS. MODIFICATION

- **Accommodation:** Change to policy or practice that is necessary for a person to perform the essential functions of their job.
 - Ex. Exception to a “no pets” policy to allow for an assistance animal, providing reserved parking space
- **Modification:** Structural change to existing premises that is necessary for a person to perform the essential functions of their job.
 - Ex. Building a ramp to allow a wheelchair user to access the dwelling, lowering counters/cabinets, tub cut/curb cut
 - Cannot require fees, insurance, etc.

BARBUTO VS. ADVANTAGE SALES AND MARKETING LLC (2017)

1. Cristina Barbuto was offered an entry level position for Advantage Sales and Marketing; she had to take a drug test prior to the start of her employment.
2. In 2012, medical marijuana had been legalized in Massachusetts and Barbuto was offered the job in 2014 (medical marijuana was legal).
3. Barbuto disclosed to her supervisor that she had a prescription for medical marijuana due to her Crohn's disease; her supervisor said that her medical marijuana shouldn't be a problem and he confirmed with others at ASM.
4. Barbuto took a urine test, worked for two days, and then was informed she was terminated for failing the urine test. The HR rep. from ASM claimed that "we follow federal law not state law" and that they did not care if Barbuto's marijuana was being used for a medical condition because federal law prohibits it.
5. SJC ruled in favor of Barbuto stating that even though federal law prohibits marijuana use, due to the fact that Massachusetts and many other states have legalized medical marijuana, it could be a reasonable accommodation at work (absent undue hardship). They also recognized that federal contractors have contractual or statutory obligations to the federal government thereby jeopardizing their ability to conduct business if they allow employees to use medical marijuana.

EXAMPLES OF REASONABLE ACCOMMODATIONS

- Making facilities readily accessible
- Reallocating or altering nonessential tasks
- Modifying or obtaining equipment
- Modifying work schedule
- Transferring to a vacant position employee is qualified to do
- Allowing employee to work in an alternative location
- Provide Interpreter(s) for some job functions
- Reasonable time off for medical reasons
- Modifying examinations, training, or other programs

REASONABLE ACCOMMODATION GENERALLY DOES NOT REQUIRE...

- Excusing employee from essential job functions
- Giving employee additional paid time off
- Providing an unlimited leave of absence
- Creating an entirely new position
- Hiring two people to do one job

ACCOMMODATION DEFENSES: “UNDUE HARDSHIP” AND DIRECT THREATS

Undue hardships depends on:

- Overall size of employer, including number of employees, facilities, and budget
- Type of operation
- Nature and cost of needed
- Accommodation

Direct threats:

- Reasonable threat of harm to yourself or other people



CHEVRON VS. ECHAZABAL (2002)

1. Echazabal worked for an independent contract of Chevron for 24 years. He applied to work for Chevron three times and each time Chevron offered him a job assuming he could pass a pre-employment physical.
2. During each of the pre-employment physicals it showed he had a heightened risk of liver damage from the chemicals at the plant at which he worked as an independent contractor.
3. After the employment physicals, Chevron not only revoked Echazabal's conditional offer but also terminated him due to a "threat to self" safety risk.
4. Echazabal claimed that Chevron discriminated against him because of his disability when they refused to hire him.
5. The U.S. Supreme Court ended up ruling in favor of Chevron, stating that they did have a right to invoke the "threat to self" defense.

WHAT IS THE LINE?

DISABILITY ACCOMMODATION

<p>Substantial Impairment to Major Life Functions</p>	<p>Can Perform Essential Functions With/out Accommodation</p>	<p>No Undue Hardship/ No Direct Threat</p>
<p>No Substantial Impairment</p>	<p>Can't Perform Essential Functions</p>	<p>Undue Hardship/ Direct Threat</p>

WHICH TRIGGERS THE DUTY TO ENGAGE IN AN INTERACTIVE PROCESS?

- A rumor is circulating that an employee just got diagnosed with lupus
- The new Administrative Assistant appears to walk with a limp.
- A Manager says she has been depressed since a death in her family, and asks for flex time to get therapy
- The coordinator begins missing work a few days per week because of his daughter's illness

SERVICE AND ASSISTANCE ANIMALS

Service Animals: Typically a well trained dog or miniature horse that does work or performs a task for a person with a disability (e.g. seeing eye dogs)

Includes psychiatric support but is distinct from an emotional support animal.

Assistance Animals: All other types of animals including emotional support and comfort animals.

Service and Assistance Animal Requests should be treated like any other accommodation request and follow the Interactive Process.



SERVICE AND ASSISTANCE ANIMALS FAQ

- Service/Assistance Animals do not require special certification or insurance *for the animal itself*.
- If a disability is not readily apparent employers may ask for a note from a medical professional, and the following:
 - Is the animal a service animal required because of a disability?
 - What task or service is the animal trained to perform?
- For Assistance Animals, employers may consider other accommodations through the interactive process:
 - E.g. providing additional breaks for an employee with an anxiety disorder
- Valid Undue Hardship and Threat to Safety concerns are still considered unreasonable accommodations.

CLARK VS. NEW BEDFORD HOUSING AUTHORITY (2013)

1. Melinda Clark was a resident of public housing, run by the New Bedford Housing Authority, in New Bedford.
2. Asked the housing authority to make an exception to their pets policy in order to keep a 4.5 foot long ball python as a pet.
3. Clark began keeping the snake without permission in her apartment, after notice from the New Bedford Housing Authority eventually her daughter removed the snake.
4. Clark claimed she developed depression after the snake was removed from her apartment. After removal of the snake, she took six muscle relaxant pills and was transported to the hospital for treatment. She also began being treated by a psychiatrist for depression and anxiety.
5. Clark did not always keep the snake caged and often let it move about the apartment. According to Complainant, the snake “tightens the back of [my] neck with his body and it teaches me to relax.” Snakes, as well as the dead rats Clark fed the snake, can transmit salmonella along with other diseases and there were children in the building.
6. The psychiatrist stated at public hearing that removal of the pet snake exacerbated Clark’s depression and that having a snake could help Clark’s disability.
7. Ultimately, the hearing officer ruled that although the snake was helpful, there was reasonable threat to safety because the snake was not kept the cage, could transmit salmonella, the dead rats could transmit other diseases.

RELIGIOUS ACCOMMODATIONS

RELIGIOUS ACCOMMODATION

- Sincerely-held religious belief
- Required where an individual's religious beliefs or practices conflict with legitimate work requirements
- 10 days advanced notice of need for absence (or what is reasonable)



MARQUEZ VS. MBTA (2008)

1. Applicant applied for a position as a part-time bus operator with the MBTA.
2. Part time bus operators are required to work Monday-Friday for a morning and evening rush hour shift each day.
3. Marquez identified as 7th Day Adventist. Due to his belief system, he could not work from Friday at sundown to sundown on Saturday. This meant that he could not work the Friday evening shift.
4. The MBTA said they could not hire Marquez because he could not work the Friday evening shift and they never engaged in the interactive dialogue.
5. The MBTA had a policy where drivers could swap shifts among other possible accommodations.
6. The MCAD found that the MBTA had not even attempted to engage in the interactive process or explore any number of possible accommodations and ordered ~\$100,000 in emotional distress and attorneys fees.
7. The MBTA appealed all the way to the Mass Supreme Judicial Court and they affirmed the MCAD (amongst a larger discussion)

CLOUTIER VS. COSTCO (2004)

1. Kimberly Cloutier was hired at Costco in Springfield, MA in 1997. At the time, she had eleven piercings and four tattoos.
2. In 2001, Cloutier joined the Church of Body Modification – a faith that believes body manipulation strengthens the bond between the body and soul.
3. In 2001, Costco also changed its dress code policy to prohibit any facial tattoos or piercings so that all employees maintained a “professional appearance.”
4. One day Cloutier and a co-worker were both wearing eyebrow rings and they were told by a manager they would have to remove them. They informed the manager that they belong to The CBM. The two co-workers ended up not returning to work the next day and Cloutier filed a case with the EEOC.
5. Ultimately, the case ended up in 1st Circuit Court of Appeals and the court ruled in favor of Cost-Co because Cost-Co ended up attempting to offer two reasonable accommodations to Cloutier but Cloutier insisted that she be exempt from the dress code. Cloutier did not meet her obligation to participate in the interactive process and Title VII of the Civil Rights Act of 1964 does not require accommodations to dress codes when other accommodations can be provided. **Please keep in mind that the appeals court discussed federal law and not state law but an interesting case nonetheless because it discusses the importance of engaging in the interactive process.**

PREGNANT WORKERS FAIRNESS ACT

PURPOSE OF THE ACT

Ensure that pregnant **job applicants** and **employees**:

- Can **participate fully** in the workplace
- Meet their medical needs **while pregnant**
- Meet their medical needs **post-pregnancy** such as expressing breast milk and recovering from childbirth.



REASONABLE ACCOMMODATIONS

Employer must engage in timely, good faith, **interactive process** once employee requests accommodation.



ACCOMMODATIONS MAY INCLUDE...

- More frequent/longer paid/unpaid breaks
- Time off for a pregnancy complication or recovery from childbirth
- Acquisition/modification of equipment/seating
- Job restructuring
- Light duty
- Assistance with manual labor
- Modified work schedule
- Temporary transfer to less hazardous/strenuous position



EMPLOYERS CANNOT...

- Deny a reasonable accommodation for pregnancy or a pregnancy-related condition.
- Take adverse action against individuals who request/use a reasonable accommodation.
- Require an employee to take a leave if another reasonable accommodation can be provided.
- Refuse to hire a pregnant person because of pregnancy or pregnancy-related condition.
- Require an employee who is pregnant or has a pregnancy-related condition to accept an accommodation if the accommodation is unnecessary to enable the employee to perform the essential functions of the job.

UNDUE HARDSHIP DEPENDS ON...

- Employer's overall financial resources
- Overall size of business
- Effect of accommodation on the employer's business
- Nature/cost of accommodation

MEDICAL DOCUMENTATION

Employer **can** require medical documentation for:

- Most accommodations
- An accommodation extension



Employer **cannot** ask for medical documentation for:

- More frequent restroom/food/water breaks
- Seating
- Limits on lifting more than 20 pounds
- Private, (locked) non-bathroom space to express breast milk (absent undue hardship)

UNITED AUTO WORKERS V. JOHNSON CONTROLS (1991)

1. Johnson Controls manufactures batteries that have an assembly process that contains high levels of lead.
2. Eight female employees became pregnant and had blood lead levels in excess of those thought safe by the Occupational Safety and Health Administration (OSHA).
3. Johnson barred all female employees – except those with medically documented infertility from engaging in tasks that exposed them to high levels of lead. This “fetal protection policy” was to protect unborn children and pregnant women from unsafe lead levels.
4. The U.S. Supreme Court ruled that gender based “fetal protection policies” are illegal under Title VII of the Civil Rights Act of 1964 since it denied a choice given to fertile men (unsafe lead levels can also impact men) as to whether they wanted to risk their reproductive health for a job.
5. The Supreme Court also stated that the safety concerns did not relate to essential functions of the job because, in this case, fertility or potential pregnancy does not impact a woman’s ability to perform their job. In addition, “[t]he unconceived fetuses of Johnson Controls’ female employees . . . are neither customers nor third parties whose safety is essential to the business of battery manufacturing.”
6. Finally they also ruled that the incremental cost of hiring women cannot justify discriminating against them.

MCAD USE ONLY

PARENTAL LEAVE

MASS. PARENTAL LEAVE ACT

- Employers must grant at least 8 weeks of unpaid leave for birth or adoption
- Must restore to same or similar position
- Must be full-time and post-probation
- Two weeks notice
- No requirement for pay or benefits
- Pregnancy may result in short-term disability
- Paid leave: new paid leave requirement is enforced by The Department of Family and Medical Leave



CASE SCENARIO 8

At a recent department meeting, Kendra commented that she thought the company had a “glass ceiling,” and that women just don’t make it into the upper ranks. Since making the comment, her supervisor and other coworkers have given her “the cold shoulder”.



CASE SCENARIO 9

Mark worked for the company for five years. He recently developed glaucoma and is legally blind. Because his position involved a great deal of computer work he could no longer do, Mark was terminated.



CASE SCENARIO 10

A delivery person named Linda visits weekly to deliver supplies. While she is on site, she frequently comments on David's body. David has complained to his boss, but his boss said they can't do anything about someone who doesn't work for the company.



MCAD

LIABILITY

USE ONLY

WHO IS COVERED?

- Employees protected from all forms of discrimination by anyone who enters the workplace.
- Vendors and the public are also protected.
- Off-site, off-hours conduct may also be covered



SEX BUYING IS ILLEGAL AND EXPLOITATIVE

Under Massachusetts law, it is illegal to buy sex. The demand for paid sex, created by sex buyers, fuels human trafficking. Research shows that employer time and resources (like computers and phones) are being used to buy sex.

Employers can take action against this type of illegal activity by:

- Adopting a policy prohibiting sex buying by employees
- Educating employees about the harms created by commercial sex buying
- Spreading awareness within the business community about the harms of sex buying

A message from:



Employers Against Sex Trafficking



INDIVIDUAL LIABILITY FOR DISCRIMINATION

Individuals may be liable for:

- Their own discriminatory behavior
- Failing to act when they know or should have known about discrimination as a supervisor



EMPLOYER LIABILITY : CO-WORKER HARASSMENT

Employer is liable if knows or should have known of harassment, and fails to take prompt effective remedial action



STRICT LIABILITY: HARASSMENT INVOLVING SUPERVISOR

If a supervisor is involved in harassment, the employer may be liable even if:

- Employee does not complain
- Prompt, effective action is taken



ALL EMPLOYEES' RESPONSIBILITIES

- **Monitor** their own behavior
- **Communicate** concerns to supervisor and/or HR
- **Cooperate** with any investigation
 - Including keeping investigations confidential, and not participating in retaliation



SUPERVISORS' RESPONSIBILITIES

- Monitor your own behavior
- Monitor the environment and counsel anyone who behaves inappropriately
- Report potential policy violations or accommodation needs immediately
- Prevent retaliation
- Recognize a possible need for an accommodation
- Know when to get assistance with an interactive process
- Implement agreed-upon accommodations



DUTY TO REACT/REPORT WHEN...

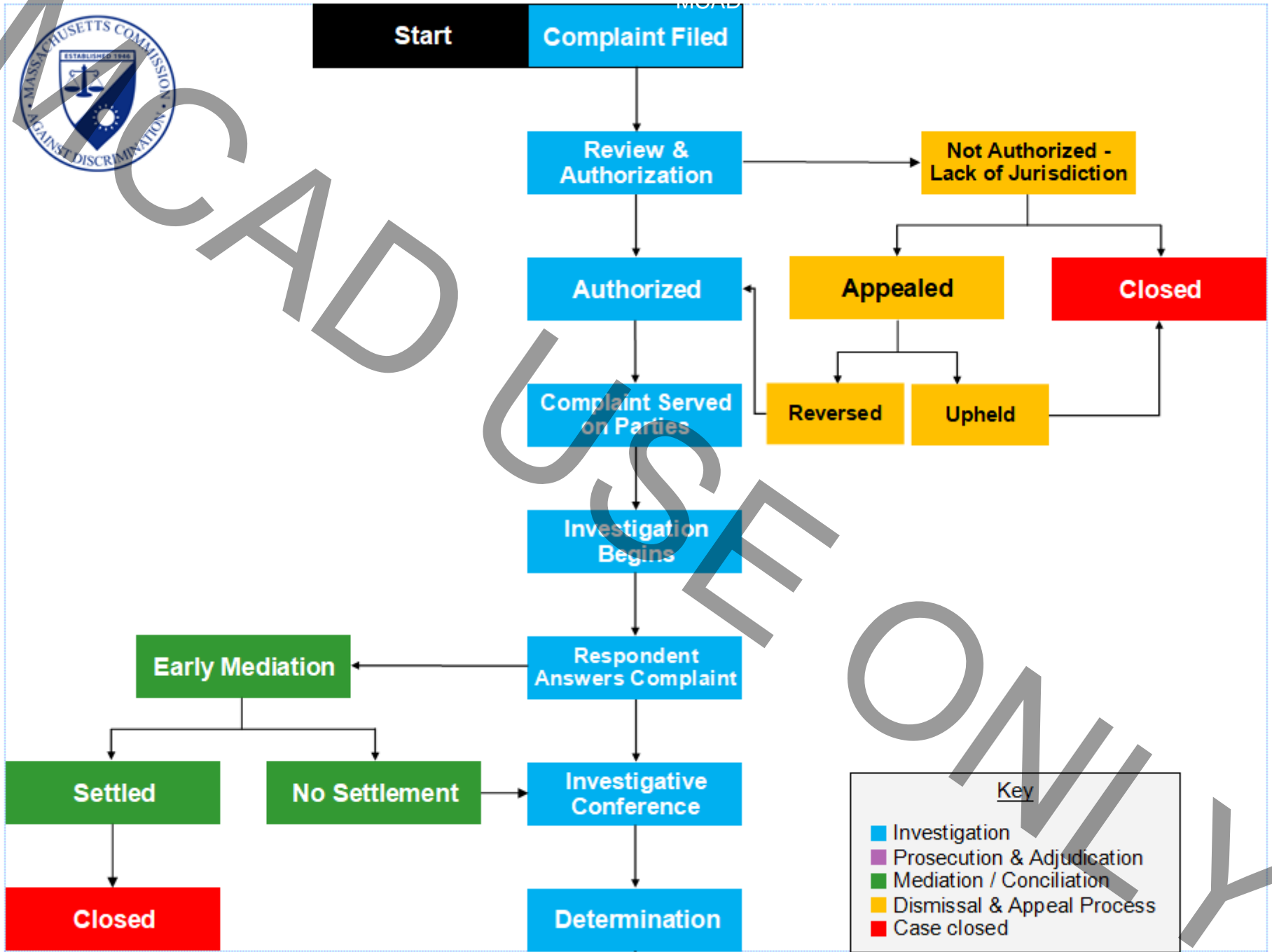
- A report or complaint is made
 - ✓ Even if the reporter is reluctant
 - ✓ If the complaint is verbal
 - ✓ Even if it appears trivial or false
 - ✓ Even if remedial action is immediately taken
 - ✓ Even if the reporter was not offended or targeted
- A report or complaint is not made BUT
 - ✓ Someone in a position of authority knows about it
 - ✓ The conduct is so pervasive that any person in authority has constructive knowledge (“should know”)

ROLE OF THE MCAD

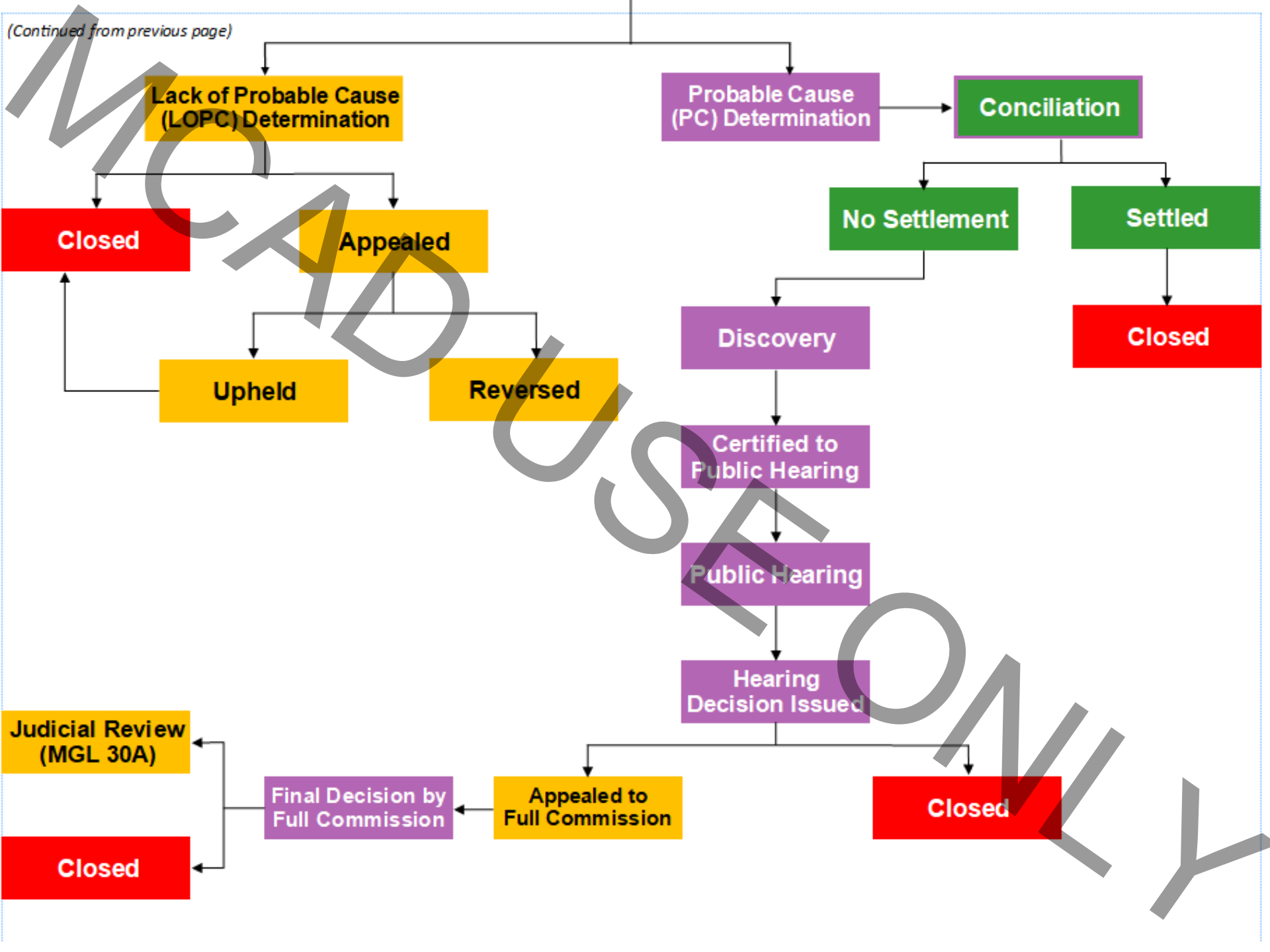
- Receives complaints from employees and others who feel they have experienced discrimination
- Intake through public hearing
- 3,000 to 4,000 cases each year
- 300 days statute of limitations for employment, housing, public places, and mortgage and lending
- 6 month statute of limitations for education



MCAD Complaint Process Flowchart



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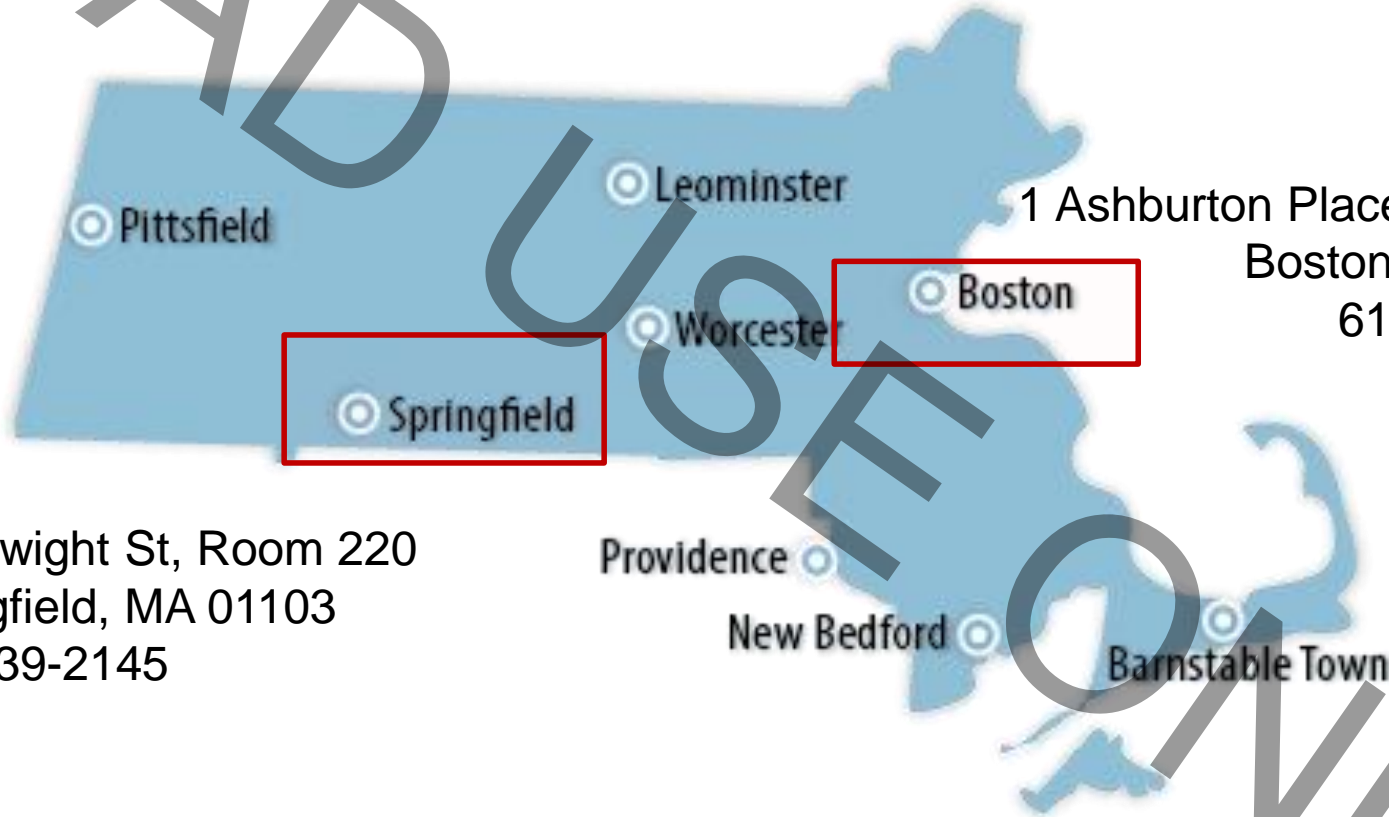


REMEDIES

- Emotional Distress
- Compensative relief
 - Front pay, back pay
- Affirmative relief
 - Position reinstatement, training
- Out of pocket expenses
- Attorney's fees
- 12% Interest since date of filing



MCAD OFFICES



1 Ashburton Place, Suite 601
Boston, MA 02108
617-991-6000

436 Dwight St, Room 220
Springfield, MA 01103
431-739-2145

WEB RESOURCES

- MCAD: <http://www.mass.gov/mcad>
- Mass. Attorney General: <http://www.ago.state.ma.us/>
- EEOC: <https://www.eeoc.gov/>
- Department of Family and Medical Leave: <https://www.mass.gov/paid-family-and-medical-leave-information-for-massachusetts-employers>



Harvard University
Office For Dispute Resolution

MCAD TRAINING

Conducting Effective Internal Workplace Investigations
December 5, 2023 & December 7, 2023



MCAD USE ONLY

Introduction –
Please put in
the chat:

- What is one skill you bring to doing internal investigations?

Objectives

- Learn steps for an effective internal investigation (MCAD)
- Enhance consistency of investigation practices
- Develop skills for each step of the investigation

Policy vs Law – Quick Quiz!

When looking into possible harassment based on sexual conduct, an internal investigator should determine whether there was a “sexually hostile work environment” using the legal standard according to:

- a) The Massachusetts Commission Against Discrimination
- b) The Equal Employment Opportunity Commission
- c) Neither

Know your EEO laws and policy

- Not all workplace allegations have EEO implications
- EEO investigations have unique requirements
 - Investigation must begin promptly and be concluded in a reasonable amount of time
 - Investigator should be perceived as “impartial”
 - Role
 - Relationships
 - Investigator should be skilled not only in investigations, but understand the underlying legal and policy issues

Investigation Checklist: Harassment – Hostile Work Environment

- Was there conduct in the workplace or a work-related venue that was:
 - Sexual; or
 - Stereotyping, demeaning or derogatory to a protected characteristic
 - Microbehaviors or implicit bias may not rise to the level of unlawful, but are the type of conduct that could escalate and can be addressed at the internal level
- Who engaged in the conduct?
- Who was aware of the conduct and what, if anything did they do?

MCAD MODEL POLICY LANGUAGE

Please note that while this policy sets forth our goals of promoting a workplace that is free of . . . harassment, **the policy is not designed or intended to limit our authority to discipline or take remedial action for workplace conduct which we deem unacceptable, regardless of whether that conduct satisfies the definition of sexual harassment.**

Investigation Checklist: Discrimination – Disparate Treatment

- What employment decision affected the employee reporting the issue?
- What information is there to support the manager's reasons for the decision?
- What information is there to support the employee's perception of possible discrimination?

Investigation Checklist: Retaliation

- Did the employee engage in protected activity? If so, when?
- Did the individual(s) accused of retaliation know (or should have known) that the employee engaged in this conduct?
- What conduct or employment decision was potentially retaliatory?
 - If conduct – is there any information to suggest that this conduct would not have occurred if the employee had not engaged in the protected activity?
 - If employment decision – is there any information to suggest that this same decision would have been made without the protected activity?

REPORT OF POSSIBLE DISCRIMINATION OR HARASSMENT COMES IN

1. Why are we calling it a “report?”
2. What do you do FIRST?

REPORT COMES IN – NOW WHAT?

- Interim?
- Privilege?
- Union
 - Representation rights
 - Notify?
- Scope
- Who to Notify
- Prior issues?
- Documents
- People
- Organize information
- Anything else your organization or CBA requires

A note on privilege . . . without legal advice!

- True or false?
 - A communication copied to an attorney is always protected by attorney-client privilege
 - A communication labeled “attorney-client privileged” is always protected by attorney-client privilege
 - Many people think that anything copied to an attorney or labeled “attorney-client privileged” is always protected by attorney-client privilege

A note on privilege . . . without legal advice!

- Attorney-client privilege and work product doctrine generally prevent 3rd parties from seeing things like:
 - Information obtained from or provided to an attorney for purposes of giving or getting legal advice
 - Mental thoughts and impressions of attorney or designee
 - Legal advice
- Organizations should work with legal counsel to determine whether to have privilege in some or all of investigation (e.g., strategy)
- MCAD and most courts will not allow employer to use effective investigation as a defense without sharing the investigation report and possibly the underlying documents (notes, etc.)

Planning the
Investigation

Handout: Sample Investigation Plan



Determine Scope of Investigation



For each hypothetical situation, discuss in your breakout rooms what you need to determine to conduct a full investigation of the allegation(s).



Situation	Policy & Scope of Investigation?
<p>1. Jason's coworkers tease him about his clothing, which he wears due to his religious observance.</p>	<p>Policy: Harvard University Non-Discrimination Policy-Discriminatory Harassment section; Protected category covered under the policy-Religion</p> <p>Scope: What conducted occurred that was derogatory to Jason's religious observance? Who engaged in the conduct? Was a supervisor aware of it?</p>
<p>2. Caleb reports that a coworker points out their perception of every employee's sexual orientation and gender identity.</p>	
<p>3. Elaine says her supervisor gave her an unfair, poor performance review after the employee reported she was pregnant.</p>	

Situation

Policy & Scope of Investigation?

4. Evan was denied a leave of absence when he and his husband adopted a child. He believes it was because he is gay.

5. Kramer alleges that their coworker says mean things about another employee's obvious developmental disability.

Documents Activity:

What documents would you want to review to investigate these issues?

1. Allegation of poor performance appraisal due to age
2. Allegation that a coworker made sexual comments at a meeting
3. Allegation of termination due to retaliation for reporting possible harassing conduct

Interviews



Establishing Rapport

- Initial Impressions Matter
- Setting the tone in the introduction
- Rapport building impacts the interview and is influenced by comfort level of both the investigator and interviewee

Interview versus

Interview	Interrogation

Interview

Testimony (deposition, hearing, trial)

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Before we draft opening script:

POLICIES



What Are My Rights?



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What are the obligations and legitimate rights of the REPORTER

Legitimate Rights

Obligations

What are the obligations and legitimate rights of the WITNESSES

Legitimate Rights

Obligations

What are the obligations and legitimate rights of the SUBJECT (Respondent)

Legitimate Rights

Obligations

What are the obligations and legitimate rights of the EMPLOYER (Harvard University)

Legitimate Rights

Obligations

Welcome Back!

- Any lingering questions from the other day?
- Case Study
- Interview Questions
- Credibility Assessment
- Report Writing

Investigative Planning Map

- Define Scope of Allegations and Policies
- Identify Parties, Witnesses, and Key Stakeholders
- Gather Background Information on parties, location, department
- Who to Interview and Order of Interviews
- Scheduling Interviews
- Prepare Interview Questions
- Identify Additional Evidence to Gather

CASE STUDY (Use Investigation Plan – Handout) :

- On November 30, 2023, Professor Chris filed a formal complaint alleging Professor Pat engages in frequent banter with other professors, including sexual innuendo and overtones, as well as comments based on gender stereotypes. This usually takes place before department meetings while everyone is walking in and getting their coffee, and in the faculty lounge with two other professors Pat eats with every day who laugh at the comments.
- Chris told department head, Tracy, about it a few weeks ago. Chris asked Tracy not to do anything about it, Chris just came to Tracy as a friend to vent.
- Pat is a long-term professor who is among the “best of the best,” always getting amazing feedback from students and parents. Pat’s teaching is innovative, and Pat implements every new technique and teaching suggestion from the administration.

Order of Interviews

Involved Party Type (Claimant, Witness, Respondent)	Name	Job Title	Interviewer	Interview Date & Time
1.				
2.				
3.				
4.				
5.				

Planning the Interviews

- Opening Script

- ✓
- ✓
- ✓
- ✓

- Topics to cover

- ✓
- ✓
- ✓
- ✓
- ✓

- Conclusion/next steps

Complainant: _____

Opening Script

Topics to address

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Respondent: _____

Opening Script

Topics to address

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Witness: _____

Opening Script

Topics to address

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Witness: _____

Opening Script

Topics to address

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INTERVIEW QUESTIONS

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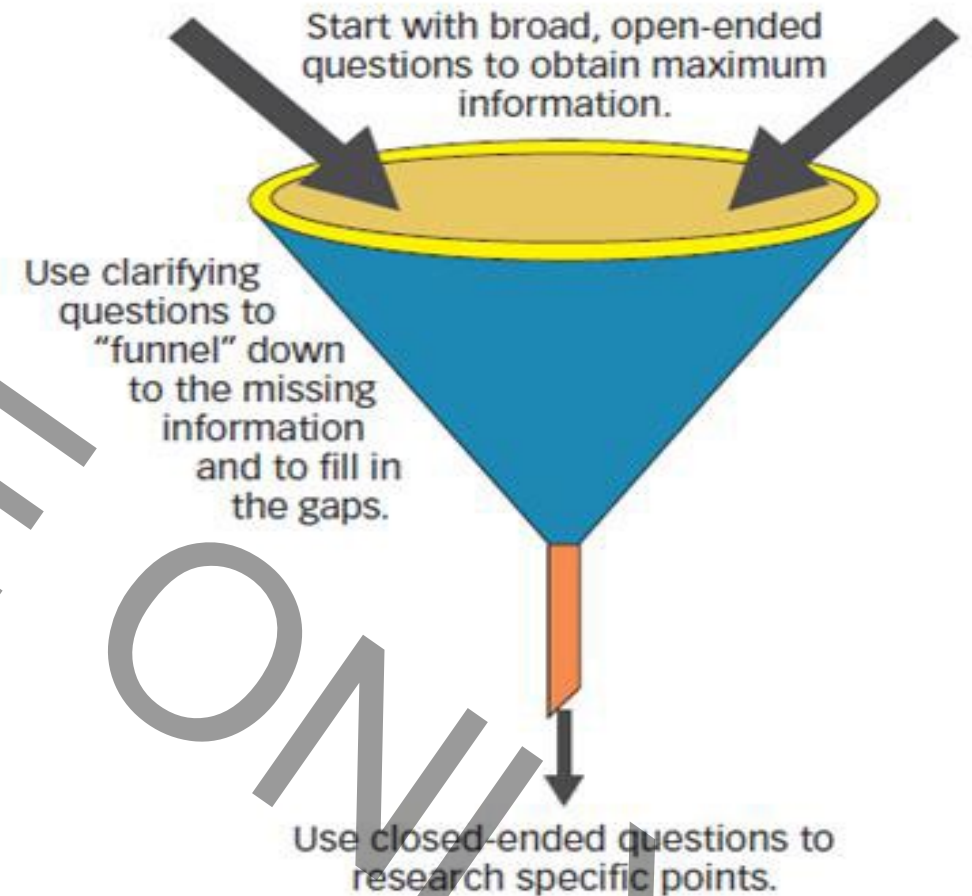
Interviewing-Funnel Approach

Start broad and keep narrowing

Circle back for details

Review for consistencies and contradictions

Funnel approach / FIGURE 1



Please return at 11:31

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Improving our interviewing Questions

Instead of:

Q: Isn't it true that Elaine started to act differently toward her male direct reports after her break-up with Jerry?

How would you improve the question?

Describe any change in Elaine's behavior you noticed?

Improving our interviewing Questions

Instead of:

Q: Did you ever hear a colleague comment about “getting lucky” intended in a sexual way?

A: no.

Q: Is that the type of thing that anyone in your group might say?

How would you improve the questions?

Improving our interviewing Questions

Instead of:

Q: Thinking about that meeting we talked about, did you hear any comments that were inappropriate?

A: what do you mean by inappropriate?

Q: Anything that offended you?

How would you change the questions?

Improving our interviewing Questions

Instead of:

Q: At the happy hour, you heard Dwight making jokes about him and Michael visiting a strip club on a business trip, didn't you?

How would you improve the questions?

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During the interview



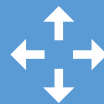
Ask critical questions more than once in different words to assess consistency.
Quantify things and Request Specifics.



Actively listen so the witness knows you are paying attention and taking accurate notes.



Be flexible - adjust "planned" questions to follow where witnesses lead, come back as needed.



Make note of any issues raised that are "out of scope" to discuss after the interview.

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NOTE TAKING STRATEGIES & TIPS

ONLY

Notetaking

- Practice
- Review ASAP to make sure all words readable/spelled out
- If you add or clarify any notes, date and initial the change (if it's a major change, consider explaining why)
- Follow your organization's requirements regarding recording notes

What will I say if . . .



What if the witness says .

1. “You can’t possibly understand what it’s like to be _____.”
2. “You’re also _____, you must know exactly what it’s like here for me.”
3. “Do I have to talk to you?”
4. “I am not going to say anything that would get ___ in trouble, they’re my friend.”

- Any others?

Assessing Credibility: How do you do it?

- Remember, you are assessing the credibility of the ***statement(s)***, NOT necessarily the ***person***
 - If you do believe someone lied, that may be a separate investigation into the witness's conduct
- Someone's perception is ***their*** truth; it is the investigator's job to determine what led to the perception, not to validate or invalidate the perception

Assessing Credibility

- What affects the credibility of a witness' statement?

Finishing

- **Assess the Facts**

- Documents
- Undisputed Facts
- Disputed facts:
 - Credibility
 - Logic
 - Corroboration
 - Need more information?

- **Decide what happened**

- “more likely than not” vs. “certainty”

- **Organize your findings of fact**

- Chronologically
- By issue
- By person if > 1



Writing a report – possible sections

- Scope/issue investigated
- Summary of report/allegations
- Witnesses interviewed (dates, length, location, anyone else present)
- Documents and materials reviewed or relevant
- Findings of Fact (chronological, by issue, by person, whatever is most logical)
- Conclusions of Fact (e.g., are allegations true, is a policy violated)

Remember to distinguish between Findings and Conclusions

Findings of Fact Might Say:

Supervisor terminated employee primarily for the following two reasons:

1. an increase in the number and seriousness of client complaints regarding employee's work; and
2. employee's recent report to HR that her supervisor was not approving payment of hours employee worked from home.

I find also that supervisor was aware of employee's report to HR, and supervisor had to attend time processing training as result of an HR investigation.

One other employee who reports to Supervisor had client complaints similar in nature and frequency to employee's; Supervisor never addressed those complaints with employee. Supervisor was not aware of that employee making any reports to HR.

This is a conclusion of fact:

I conclude that it is more likely than not that Supervisor violated the Company's policy, which prohibits treating employees differently because they reported an issue to HR, in this case a wage and hour issue.

Things to think about:

- Avoid including your opinion unless it's directly related to credibility
- Avoid words of extremity unless specifically warranted (“very,” “completely,” “totally,” “extremely,” “never,” “slightly”)
- Specify when you are stating *your* findings (as Investigator) or a witness’ statement
 - The Investigator finds/ Or The Investigation finds.....
 - Witness X stated
 - According to several witnesses

Hypothetical

You have concluded an investigation of alleged harassment and determined that an employee engaged in pervasive, harassing conduct that created a hostile work environment. Do you include this in your report?

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