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OEI, LR and OGC Divisions

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# Analyzing the Investigative Report

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# ***What is a Decisionmaker deciding?***

## **The two broad categories of decisions :**

- **Was there a violation of the 1B.1 policy?**
  - Protected class harassment/discrimination (including sexual harassment)
  - Retaliation
- **Was there a violation of the 1B.3 policy?**
  - Sexual violence (sexual assault, non-forcible sex acts, stalking, relationship violence)
  - Attempted acts of sexual violence
  - Aiding acts of sexual violence

# *Analyzing a 1B.1 Investigation Report*

## **First -- What is alleged?**

- Discrimination**
- Harassment**
- Retaliation**

# ***Analyzing a 1B.1 Investigation Report: Protected classes***

## **SECOND – WHAT IS THE BASIS FOR THE ALLEGATION(S)?**

- Race
- Color
- Religion
- National Origin
- Marital Status
- Gender Identity
- Gender Expression
- Status with regard to Public Assistance
- Membership or activity in a local commission
- Sex
- Creed
- Age
- Disability
- Sexual Orientation
- Familial Status

# Analyzing the Report

- NOTE: An investigation may concern more than one allegation. Each allegation may have more than one basis.

# ***What is discrimination?***

Note: Familiarize yourself with the elements of discrimination before you read the facts/analysis.

The elements of discrimination:

- Someone was treated **differently**;
- The different treatment was **based on** the individual's protected status; **and**
- **Interfered** with or limited the ability of that person to participate in, or benefit from, the services, activities or privileges at the college/university **or**
- Otherwise **adversely affected** that person's employment or educational experience of the college/university

# *What is harassment (hostile environment)?*

Note: Familiarize yourself with the elements of harassment (hostile environment) before you read the facts/analysis.

- Unwelcome verbal or physical conduct directed at another;
- Because of that individual's protected class status;
- That unreasonably interferes with the individual's work or educational environment;
- The conduct is sufficiently severe, pervasive or persistent; and
- The conduct has the purpose or effect of creating a hostile work/educational environment

# What is sexual harassment (quid pro quo)?

Note: Familiarize yourself with the elements of sexual harassment (quid pro quo) before you read the facts/analysis.

- **Unwelcome** sexual advances, requests for sexual favors, sexually motivated physical conduct, and other verbal or physical conduct of a sexual nature **when**;
- **Submission to** such conduct is made either explicitly or implicitly **a term or condition** of an individual's employment or education, evaluation of a student's academic performance, or term or condition of participation in student activities or in other events or activities sanctioned by the college or university.



# *What is retaliation?*

Note: Familiarize yourself with the elements of retaliation before you read the facts/analysis.

- It includes, but is not limited to, intentionally engaging in any form of intimidation, reprisal or harassment against an individual because he/she/they:
  - Made a complaint under 1B.1 or 1B.3;
  - Assisted or participated in an investigation or process under these policies (or other applicable laws and policies); **or**
  - Associated with a person or group of persons who are disabled or are of a different race, color, creed, religion, sexual orientation, gender identity, gender expression, or national origin
- There does not need to be a finding of violation of policy in the original case for retaliation to exist.
- Retaliation can occur regardless of any power or authority differential between the parties involved.

# ***Key elements of Discrimination***

- Is there evidence that the behavior was based on a protected class? (*i.e.*, race, gender, religion, age, etc.)
- How were other similarly-situated individuals treated?
- Was there a legitimate, non-discriminatory reason for the action or behavior?

## ***Key elements of Harassment (hostile environment)***

- The complainant must establish that he/she/they is a member of a protected class
- That he/she/they has been subject to **unwelcome** conduct That the harassment was directed to Complainant **because of his/her protected status**
- That the behavior results in an **adverse affect** or terms and condition or privilege of employment or education
- That the behavior is **severe and pervasive**

## ***Factors to consider to determine if conduct is severe, pervasive or persistent?***

- Whether the conduct was verbal or physical or both
- How frequently it was repeated
- Whether the conduct was hostile and patently offensive
- Whether the alleged harasser was a fellow student, a faculty member, a co-worker or supervisor
- Whether others joined in perpetrating the harassment
- Whether the harassment was directed at more than one individual

## *Key elements of Sexual Harassment (quid pro quo)*

- The complainant must be a member or a protected class
- He/she was subject to **unwelcome** harassment in the form of sexual advances or requests for sexual favors
- Submission to unwelcome sexual advances was an express or implied **condition** for receiving job benefits or his/her refusal resulted in a tangible job detriment.

# *Definitions*

- Unwelcome Conduct
  - The complaining student or employee did not request or invite conduct
  - The complainant student or employee regarded the conduct as undesirable or offensive

# Consensual Relationships

- A Minnesota State Colleges and Universities employee **shall not** enter into a consensual relationship with a student or employee over whom that employee exercises direct or otherwise significant academic, administrative, supervisory, evaluative, counseling or extracurricular authority or influence.

# *Key topics for sexual assault*

- What happened? (Actual, attempted or threatened)
- Did Complainant give affirmative consent (for each sexual act)?
  - Was the Complainant able to consent?
    - Intoxication versus Incapacitation
    - Other forms of Incapacitation
    - Minor (If a minor, the consent inquiry ends here)
  - What did the consent look like?
  - Was it verbal or non-verbal?
- Was there force or threat of force used? Note: This is not a required element, but may be important when considering possible sanctions.
- Also includes “offensive sexual behavior” that is directed at another such as indecent exposure or voyeurism (this may also fall under non-forcible sex acts)



# Affirmative Consent

# Affirmative Consent – 1B.3 Policy Language

## What is Affirmative Consent?

- Consent is **informed, freely given, and mutually understood** willingness to participate in sexual activity that is expressed by **clear, unambiguous, and affirmative words or actions**.
- A lack of protest, absence of resistance, or silence alone does not constitute consent, and past consent to sexual activities does not imply ongoing future consent. The existence of a dating relationship between the people involved or the existence of a past sexual relationship does not prove the presence of, or otherwise provide the basis for, an assumption of consent. Whether the respondent has taken advantage of a position of influence over the complainant may be a factor in determining consent.

# Affirmative Consent Questions Answered

- Who has the responsibility to obtain affirmative consent?
- Can affirmative consent be revoked?
- Who can give affirmative consent?

# Intoxication versus Incapacitation

# Incapacitation is ...

- A state where a person cannot make an informed and rational decision to engage in sexual activity.
- A person who was incapacitated due to the influence of drugs, alcohol, and/or medication and could not understand the fact, nature or extent of the sexual activity.

# What is the investigator evaluating?

- Whether the complainant was incapacitated and, therefore, unable to give consent to sexual activity.

# Assessment of Knowledge

- If the investigator finds complainant was incapacitated, investigator must evaluate respondent's level of knowledge of the level of incapacitation.
- Assess whether the respondent knew or reasonably should have known that the complainant was unable to consent to the sexual activity.

--Keith Rohman, 2017

# Assessment of Knowledge, continued

- Respondent observed Complainant asleep or unconscious
- Respondent observed Complainant unable to communicate due to physical or mental condition
- Respondent observed Complainant ingest alcohol and/or drugs, rate of ingestion, time of consumption
- Respondent observed Complainant's physical and verbal behaviors
- Respondent was told about the amount of alcohol and/or drugs Complainant ingested
- Respondent's actions like assisting Complainant after Complainant threw up
- Respondent's comments to others about Complainant's state

--Keith Rohman, 2017



# Analysis

- 1. What is the evidence that the complainant was under the influence of alcohol and/or drugs?
- 2. Did the alcohol and/or drugs cause the complainant to be incapacitated?
- 3. What did the respondent know, or what should the respondent have known, about the complainant's level of intoxication and/or incapacitation?

# Other Types of Sexual Violence Under the 1B.3 Policy



# Stalking

- Conduct directed at a specific person that is **unwanted, unwelcome, or unreciprocated;**  
**and**
- that would cause **a reasonable person** to fear for their safety or the safety of others or to suffer substantial emotional distress.

# Stalking, examples

- Unwanted Phone Calls
- Unwanted Voicemails
- Unwanted Text Messages
- Spying
- Sending unwanted gifts
- Letters
- E-mails
- Social media use
- Showing up at a location

# Dating/Relationship Violence

- Physical harm or abuse (or threats of physical harm or abuse);
- Arising out of a personal intimate relationship.

Note: While this is called dating/relationship violence, this category includes more casual intimate relationships.

# Non-forcible Sex Acts

- Statutory Rape
- Invasions of sexual privacy
  - Shower/bathroom peeping (technology assisted or otherwise)
  - Distribution/posting of sexual images (may be sexual harassment)
- Catch all

# Neurobiological Responses to Trauma

# Why is this Important?

- Recognize what a victim/survivor goes through (physically and mentally) during an assault
- Understand how a victim/survivor's brain may process information during an assault
- Identify the effects trauma has on memory and a victim/survivor's ability to recall details of an assault (especially the way in which they are asked to do so)
- Identify reasons for varying behaviors and emotions in victim/survivors following assault



# The Eight General Dimensions of Trauma

1. Threat to life or limb;
2. Severe physical harm or injury (including sexual assault);
3. Receipt of intentional injury or harm;
4. Exposure to the grotesque;
5. Violent, sudden loss of a loved one;
6. Witnessing or learning of violence to a loved one;
7. Learning of exposure to a noxious agent; and
8. Causing death or severe harm to another.

--Wilson & Sigman, 2000

# Types of Trauma

- \*Physical trauma;
- \*Medical trauma;
- \*Psychological trauma;
- \*Social or Collective trauma;
- \*Historical or Intergenerational trauma;
- \*Immigration trauma;
- \*Developmental trauma;
- \*Ongoing, Chronic, and Enduring trauma; and
- \*Vicarious or Secondary Trauma (“Compassion fatigue”)

--Brenda Ingram, 2017

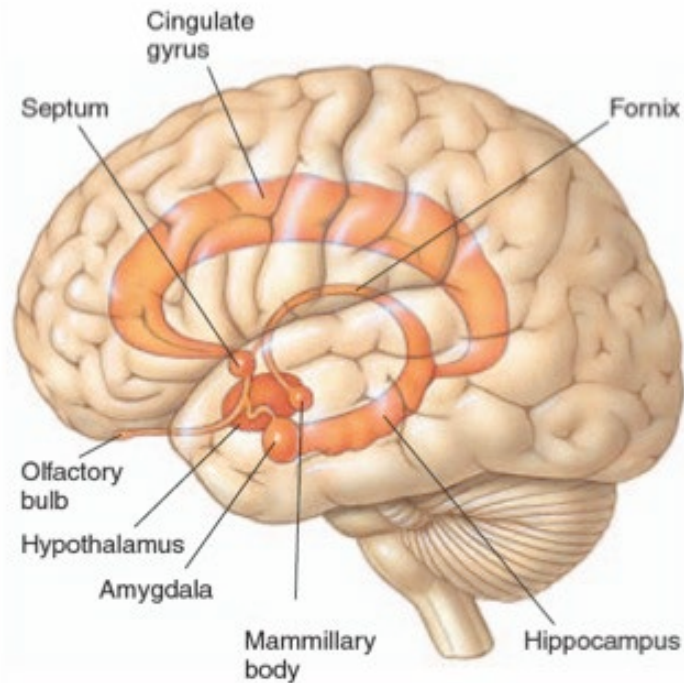
# Examples of Traumatic Events

- Car accidents
- Surgery
- Child abuse
- Divorce for young children
- Community violence
- Sexual abuse and assault
- Domestic Violence
- Diagnosis of a terminal illness
- Suicide or murder of a loved one
- Earthquakes, tornadoes, natural disasters
- War
- Violent Crime

--Brenda Ingram, 2017

# Neuroscience – The Limbic System

1. Emotion
2. Memory encoding – data points
3. Defense circuitry



# Prefrontal Cortex

Plays a role in:

1. Logical thinking and planning and rational decision-making
2. Integrating Memories into “Stories”
3. Controlling Attention

# Amygdala

- The brain constantly scans the environment to ensure we remain safe, identify potential threats and take steps to protect ourselves.
- The amygdala is like a smoke alarm – alerting the brain to danger before you are even consciously aware of it
- It triggers chemicals to be released into your brain and body in order to prepare you to react to the threat

*--Understanding the Neurobiology of Trauma and Implications for Interviewing Victims, Wilson, Lonsway, Archambault, Hopper, 2016*

# Hippocampus

- Once a threat is identified by the Amygdala, we scan the environment to allow the Hippocampus to help us compare what in the environment with what we know are indicators of either safety or danger
- The hippocampus, in effect, gives us maps of safety and danger that we can use to assess the threat
- --*Understanding the Neurobiology of Trauma and Implications for Interviewing Victims*, Wilson, Lonsway, Archambault, Hopper, 2016

# Responses of the Brain & Body During Trauma

- NOTE: Many responses to trauma are often automatic

## Defense cascade

- Perceived threat? (Amygdala) Freeze and scan. (Hippocampus)
  - Assess situation, avoid (more) attack – Prefrontal cortex may not be engaged until threat has passed
- Flight and Fight survival reflexes
- Three other survival reflexes (if Hippocampus scan consistent with danger):
  - **Dissociation**
    - Protect from overwhelming sensations & emotions
  - **Tonic Immobility**
    - Last ditch effort to avoid (more) attack or at least survive
  - **Collapsed Immobility**
    - Sometimes likened to “Playing Possum” – but it is not a conscious choice, it is a reflexive response



# Why not fight back or flee?

- Unique circumstances of many sexual assaults and dating/relationship violence
- Known offender:  
Attachment circuitry = creates confusion in the brain + suppresses defense circuitry
- Neurobiological conflict – same person who activated the attachment circuitry is now also activating defense circuitry
- Confusion + fear can trigger powerful feeling of mental defeat and the perception of inescapability

*--Understanding the Neurobiology of Trauma and Implications for Interviewing Victims, Wilson, Lonsway, Archambault, Hopper, 2016*

# Dissociation

- Defense mechanism (of the brain) to protect against overwhelming sensations & emotions
  - Occurs automatically, without trying
  - A way of disconnecting from the experience
- Examples (during & immediately following a trauma):
  - “Blacked out” or “spaced out” – in some way felt that I was not part of what was going on
  - What was happening seemed unreal to me – like I was in a dream or watching a movie or a play
  - Felt “disconnected” from my body

-Wilson, Lonsway, Archambault, Hopper, 2016

# Tonic Immobility

- Uncontrollable response
- Mentally know what's happening but physically unable to move or talk (like being awake during surgery)
- Involves a “waxy mobility” in the limbs – rigid/stiff, but still positionable
- Rate of occurrence
  - 12 – 52% victim/survivors of rape experience tonic immobility during assault (most studies are closer to 50%)
  - It is more common in victim/survivors with prior history of sexual assault
    - Result of activation of memories of old assault plus stress hormones response activation related to new assault

-Wilson, Lonsway, Archambault, Hopper, 2016

# Tonic Immobility (continued)

- Caused by:
  - Fear
  - Physical contact with the person causing the harm
  - Physical restriction
  - “Perceived” inability to escape
- Initially elevated heart rate, high blood pressure, progressively declines
- Occurs suddenly
  - Usually after a failed struggle (escape response)
- Often ends suddenly
- Can last from seconds to hours

-Wilson, Lonsway, Archambault, Hopper, 2016

# Collapsed Immobility

- While some victim/survivors may remain still as a strategy to avoid the assault or the severity of the assault, collapsed immobility is a reflexive response
- A victim/survivor becomes immobilized and their body goes limp—general loss of muscle tone; usually cannot speak or move; heart rate and blood pressure decrease—can cause faintness or passing out—may be described as “blacking out”
- Like tonic immobility, the onset is sudden, but in collapsed immobility, the offset is gradual
- The same four conditions that can trigger tonic immobility may also trigger collapsed immobility
  - Extreme fear
  - Physical contact with the person causing the harm
  - Physical restraint
  - The perception of inescapability

-Wilson, Lonsway, Archambault, Hopper,

2016

# Bottom-up vs. Top-down Processing

- Defense circuitry affects the focus of our attention
- If prefrontal cortex is fully functioning, we usually have conscious control of our attention (top-down processing)
- If threat present, chemicals released to deal with threat, impair prefrontal cortex, ability to choose where to focus your attention impacted (bottom-up processing) – central details are the focus – “important” details may be missing from account
- Central details: (1) things that will allow us to survive the threat; (2) things that will help us cope with the threat
  - Weapon
  - Sexual Assault w/o weapon
- Peripheral details – everything else

-Wilson, Lonsway, Archambault, Hopper,

2016

# Memory

- It starts with attention.
- What we don't pay attention to, we don't remember.

# Hippocampus and Memory

- The hippocampus goes through two distinct stages during a traumatic event:
  - 1. Flashbulb Memories
    - When the defense circuitry first kicks in, hippocampus goes into overdrive encoding as much data into memory as it can
    - Consolidates and stores away the information encoded into short-term memory before the fear kicked in (memory buffer of about 30 seconds)
    - Flashbulb memory explains why the initial moments of a traumatic events are often encoded—evolutionary, help us predict and avoid in future attacks (what happened just before and at beginning)
  - 2. Fragmented Memories
    - After a few seconds to minutes, hippocampus shifts into fragmented or refractory mode – focuses on consolidated everything absorbed during flashbulb, so it has fewer resources available to encode new information—especially more complex information associated with context and time sequence—but often include sounds, smells, bodily sensations, and emotions.

-Wilson, Lonsway, Archambault, Hopper,

2016



# Memory Fragmentation

- Victim/survivors often want to be able to “help”
  - Fill in gaps
  - Strain to recall
- Memory recall can be very slow and difficult (or not possible)
  - Memories are “fragmented” – they come only in bits and pieces (often do not follow a timeline)
  - Process can be very frazzling and frustrating for victims

# Traumatic responses can alter...

- Physiology
  - Heart rate, respirations, dilated pupils, dry mouth, knot in the stomach
- Affective (mood and emotion) responses
  - Fear, helplessness, horror
- Cognitive (thought) processing
  - Memory – fragmented, out of sequence
  - Time distortion
  - Increased confabulation
  - Trauma memory and recall

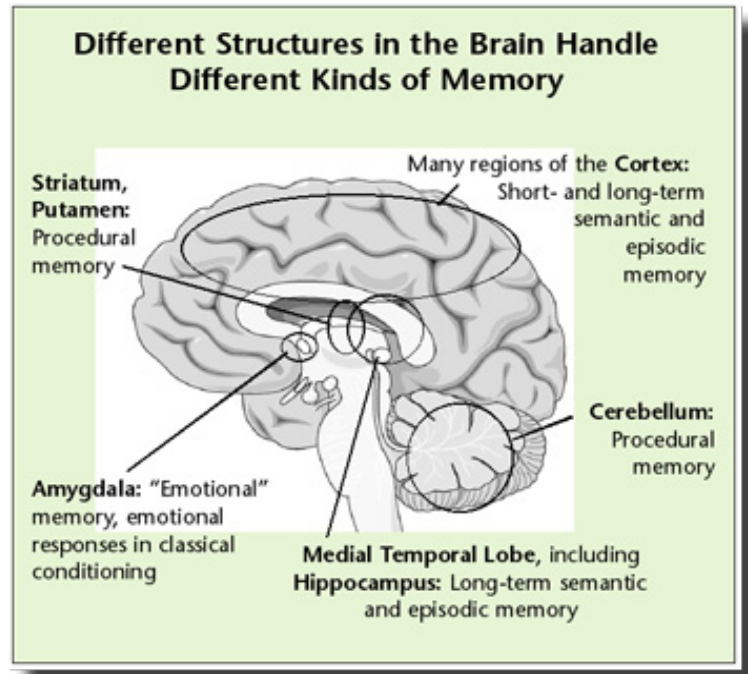
# Trauma and Memory

- The body and brain react to and record trauma in a different way than we believed traditionally
- Many professionals were trained to believe that even when a person experiences a traumatic event, the pre-frontal cortex records the vast majority of the event including: Who, What, When, Where, Why, and How

[The Forensic Experiential Trauma Interview](#), Strand & Heitman

# Trauma and Memory

## diagram of brain

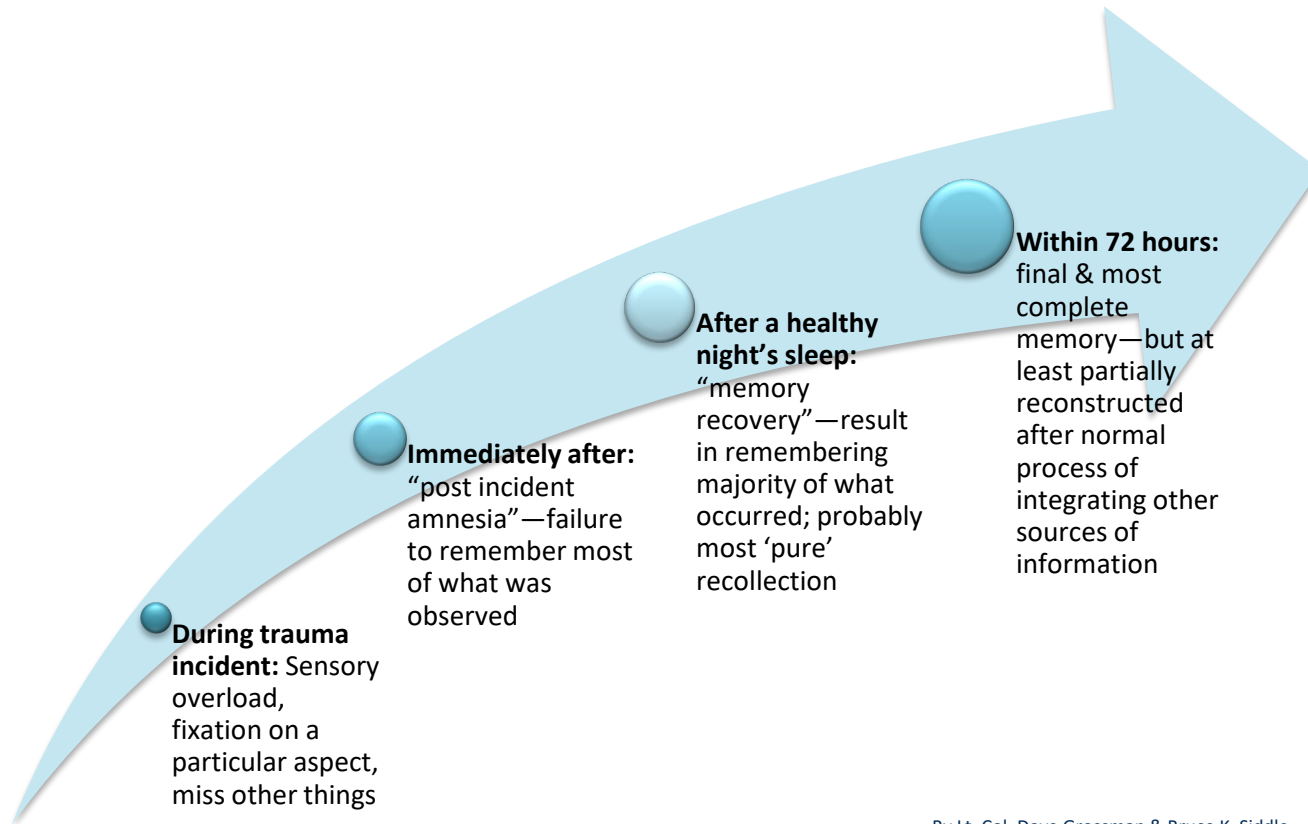


# Trauma and Memory, considerations

- Most trauma victims are not able to accurately provide detailed information, but when asked to do so often inadvertently provide inaccurate information and details which frequently causes the fact finder to become suspicious of the information provided
- Inconsistent statements are often thought of as red flags – especially in the criminal justice system—however, research shows this is not a reliable assumption when stress and trauma impact memory

--Strand, 2013

# Memory phenomenon in traumatic situations



By Lt. Col. Dave Grossman & Bruce K. Siddle  
*The Firearms Instructor: The Official Journal of the International Association of Law Enforcement Firearms Instructors*  
Issue 31 / Aug 2001

## Common Victim/Survivor Behaviors to Consider

- May be trying to protect others – physically, psychologically
- May feel pressure from the person causing harm or others
- May actually feel safer maintaining the relationship
- May have some emotional/physical attachment with the person causing harm
- May still be under the influence or manipulation and control of the person causing harm
- May be worried about collateral misconduct – perceived or real

## Trauma and Memory, closer look

- One of the mantras within the criminal justice system is “inconsistent statements equal a lie.”
- Nothing could be further from the truth when stress and trauma impact memory, research shows.
- In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma.

--Strand, 2013



# The Impact of Trauma on Victim/Survivor Behavior

- The effects of trauma can influence behavior of a victim/survivor during an interview
- People are often reluctant to recall experiences that evoke negative feelings and emotions such as anger, fear, humiliation, or sadness

--Strand, 2013

# The Impact of Trauma on Victim/Survivor Behavior, continued

- Interviewers should be familiar with the signs of trauma and not assume the victim/survivor is evading the truth.
- Memory loss, lack of focus, emotional reactivity, and multiple versions of a story can all be signs of trauma exhibited during interviews.
- For example, lack of linear memory is often a sign of trauma, so it may be helpful during initial interviews to ask, “What else happened?” instead of “What happened next?”

--Strand, 2013

# The impact of Trauma on Victim/Survivor Behavior, further considerations

- Environmental barriers such as the layout of the room, the length of the interview, and the comfort of the interview room are also factors to consider.
- Privacy and security may be a large concern for people who have just experienced something traumatic; therefore, the interview room should be a quiet area.

--Strand, 2013

# The Impact of Trauma on Victim/Survivor Behavior, further considerations continued

- Cultural and language needs must be ascertained and reasonably accommodated to avoid shutdown due to culturally offensive or inappropriate approaches.
- Be aware of cultural considerations of gender, subject matter, and narrative style.
- Some cultures reveal a story in a circular rather than linear manner.

--Strand, 2013

# Assessing Credibility



# What is CREDIBILITY?

- Credibility is about the believability of a party or witness (sometimes about a piece of evidence)
- It is an assessment of the evidence/facts using a set of factors as tools
- **Caution:** We are investigating on a preponderance of the evidence standard. It is important to acknowledge how this is different from determining the truth or who is lying. Even a criminal standard—beyond a reasonable doubt, which is much higher does not purport to determine the truth. Including the words truth, lie, or variations, is a misnomer and clouds the standard we are applying.

# Things to Consider

- Corroboration/Lack of Corroboration
- Consistency/Lack of Consistency
- Actual Knowledge
- Inherent Plausibility
- Motive to Falsify
- Material Omission
- Past Record

## ***Information that may be helpful in decisionmaking***

- Evidence about the credibility of the alleged victim and harasser
- Evidence that the alleged harasser has been found to have harassed others
- Evidence that the victim has made false allegations against others
- Evidence of the victim's reaction or behavior after the harassment
- Evidence about whether the victim filed a complaint, told others, or wrote about the conduct soon after it occurred



# Check Your Bias as a Decisionmaker



# Types of Bias

- Protected Category Biases (non-exhaustive list)
  - Race
  - Gender
  - Sexual Orientation
  - Gender Identity
  - Religion
  - Class
  - Age
  - National Origin
  - Disability
- Investigator-Specific Biases
- Title IX-Specific Biases

# Implicit Bias

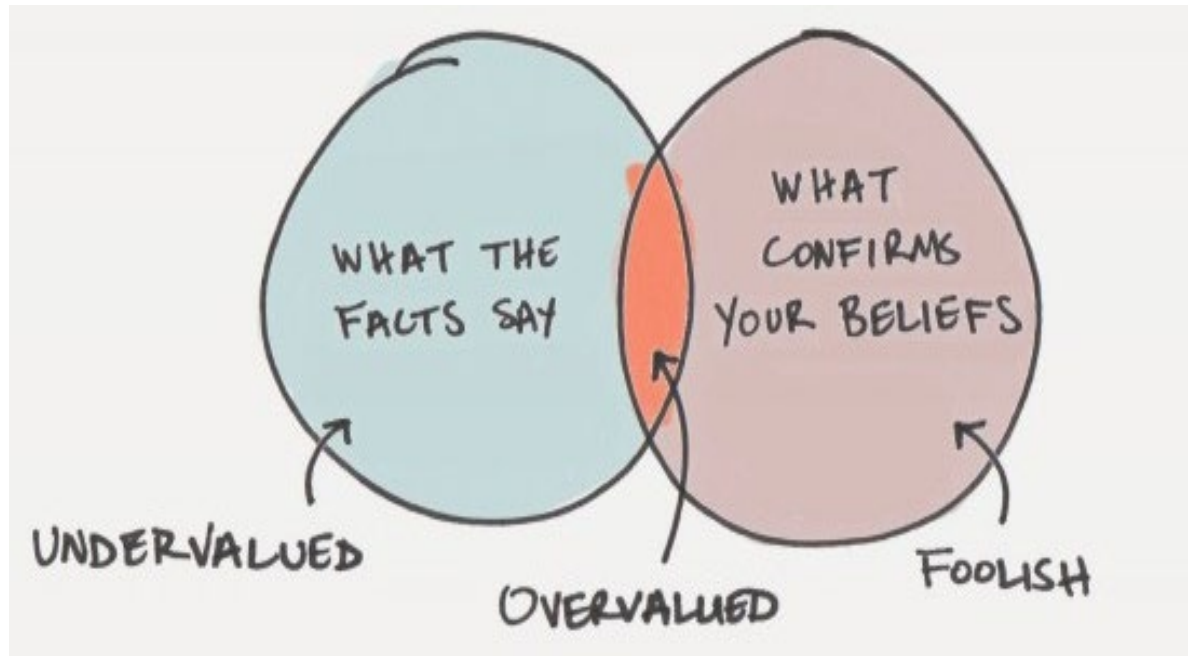
- What is it?
  - Attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner
- Who has it?
  - Implicit biases are pervasive. Everyone possess them
  - The implicit associations a person has do not necessarily align with their declared beliefs or even reflect stances they would explicitly endorse
  - A person generally tends to hold implicit biases that favor their own “in” group (although research shows that people can hold biases against their own “in” group too)

Kirwan Institute for the Study of Race and Ethnicity

# Implicit Bias, considerations

- What can we do to counteract it?
  - Implicit biases are malleable and can be unlearned
  - Be conscious of the reality of implicit bias
  - Be aware of our own implicit bias
    - Educate yourself – Consider taking the Implicit Association Test (IAT) at [implicit.harvard.edu](http://implicit.harvard.edu)
  - Check ourselves in our work – Be accountable
    - When confronted with bias, take the time to examine your action or beliefs. Think of how you would explicitly justify them to other people.

# Confirmation Bias, diagram



--JamesClear.com

# Sexual Violence Case Specific Biases

- The subject matter of these cases is often personal and very intimate
- Most of us hold our own conscious beliefs and practices when it comes to this content area and it is important not to intentionally or unintentionally cast your lens on the matters you investigate
  - Your own sexual experiences
  - Moral or religious views about sex
  - Comfort level in using terms – subject matter

# Alcohol and Drug Use Biases

- You may have your own views on and experiences with:
  - Alcohol use
  - Drug use
- These things may have impacted your life

# Final Report Structure

- Disclosure Notice
- Investigation report cover page
  - Date, Report for, Report by, Nature of investigation, Complainant(s), Respondent(s)
- Table of Contents (If lengthy report or many exhibits)
- Rationale or basis for investigation
- Methodology for the investigation
- Summary of complainant(s) allegation(s)
- Summary of witness statement(s)
- Summary of respondent(s) statement(s)
- Assessments of credibility
- Findings of fact
- Investigative analysis
- Conclusion





# *Discipline*

- Prompt
- Equitable
- Stop (as well as prevent and remedy – might be more global and less-case specific pieces for the college or university to consider)



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# Implementing the 1B.1 Decision

Jim Jorstad  
Labor Relations

# Decision-maker's Responsibilities

- Reviews investigative report
- Decides if misconduct occurred
- Determines appropriate action
- Implements appropriate action
- Participates in appeal and/or grievance process

# Who Makes the Disciplinary Decision?

Someone who:

- Accepts the responsibility
- Lacks bias or ill-will
- Has the authority (direct or delegated)
- Will be able to testify and is a good witness

# Analyzing the Investigation Report

- Read the allegation or complaint to see what the report should cover
- Review the elements of the offense
- Read the report 3 or 4 times
- Do the facts in the report completely support each element of the offense? (if not, send it back)
- Are there inappropriate conclusions in the report? (if yes, send it back)

# Analyzing the Investigation Report, considerations

- Are the witnesses, complainant and the accused credible? Is there corroborating evidence for their accounts?
- How did they react or behave after the incident?
- Did they talk to others or write about the conduct soon after it occurred?
- Has the accused been found to have engaged in similar behavior?

# Reviewing the Investigative Report

Determine if additional steps should be taken before making a decision

- Additional investigative measures
- Request additional information, e.g., written response from complainant and or respondent
- Meeting complainant, respondent or other involved individuals

# Meeting Complainant, Respondent or Others

- Tennessen Notice
- Non-Bargaining Unit Employee Representation Rights
  - May be accompanied by a support person
- Bargaining Unit Employee Representation Rights (AKA Weingarten Rights)
  - Per Collective Bargaining Agreement (CBA)



# Meeting Complainant, Respondent or Others, continued

## Weingarten Rights

- Is the bargaining unit employee being questioned in connection with an investigation which could lead to discipline of that employee?
- If so, the employee has a right to union representation
- Check CBA representation rights provisions

# Deciding if Misconduct Occurred

- Did discrimination or harassment occur in violation of Policy 1B.1?
- Did other misconduct occur?

# Deciding if Misconduct Occurred, standard

## Burden of Proof

- 99% Beyond a reasonable doubt (criminal court matters)
- 75% Clear and convincing evidence (civil court matters)
- 51% Preponderance of evidence; e.g., more likely than not (most public institutions)
- <51% Good faith in investigation/reasonable conclusion (most private employers)

\* Check the relevant CBA

## Deciding if Misconduct Occurred, assessing

Gather all information and highlight the important points

What do the important points show or prove?

- If not relevant, put it aside.
- If relevant, is it credible?

# Determine Appropriate Action

- Take corrective action for 1B.1. violations
- Refer non-1B.1 work problems or student misconduct to appropriate resource
- Complainant's preference is informative but not controlling

# Determining Appropriate Action, factors

- Action must be sufficient to:
  - Ensure harassment will stop and not recur
  - Send clear messages that policy is meaningful and applies to everyone
- Factors
  - Severity of conduct
  - Degree of harm to complainant and others
  - Has the conduct potentially created a class of complainants?
  - Has offender a history of alleged behavior?

## Determine Appropriate Action, CBA

- Progressive (or corrective) discipline is designed to correct an employee's behavior so that the misconduct does not occur or is not repeated
- For egregious acts of misconduct, progressive discipline need not be strictly followed
- Review CBA disciplinary provisions

# Determine Appropriate Action: Just Cause

## Just Cause

- Did employee know and understand the consequences of violating the rule or standard?
- Was the violated rule or standard reasonable?
- Was the pre-disciplinary investigation fair and objective?
- Did the investigation result in proof of violation of the rule or standard?
- Was employee treated consistently with similarly situated employees?
- Was the penalty appropriate for the offense?



# Determine Appropriate Action, context

## Penalty Assessment Factors

- Aggravating Circumstances
- Mitigating Circumstances

# Risk Assessment Prior to Taking Disciplinary Action

- Has the employee engaged in protected or concerted activity?
- Is the employee on or recently taken a job protected leave?
- Is the employee alleging about illegal conduct?
- Has the decision maker made inappropriate statements about the employee?

# Determine Appropriate Action

## Employee

### Non-disciplinary options

- Informal process (supervisory coaching, training, letter of expectation, alternative dispute resolution)
- Reassignment or administrative leave

### Types of progressive discipline\*

- Oral reprimand
- Written reprimand
- Suspension (with or without pay)
- Vacation reduction per CBA (e.g., MAPE, MMA, MSUAASF)
- Demotion
- Discharge

\*Check the relevant CBA

# Determine Appropriate Action

## Student Conduct Sanctions

- All possible conduct code sanctions available (Dean of Student can be a resource). For example:
- Warning.
- Probation.
- Loss of Privileges (for example, removal from residence life; restriction from campus other than for class, etc.).
- Required training.
- No contact.
- Suspension.
- Expulsion.

More than one sanction available if any scenario (for example, probation and required training).

# Implement Appropriate Action

## Components of Disciplinary Letter

- Level of discipline
- Reason(s) for discipline
- Past warnings and/or discipline the employee has received
- Opportunity for Loudermill meeting, when appropriate

# Implement Appropriate Action, letter

## Components of Disciplinary Letter – cont'd.

- Corrective action required of employee
- Referral to EAP, if your practice
- Consequences of failure to measurably improve
- Employee's appeal rights

# Implement Appropriate Action, discipline

## Distribution of disciplinary letter

- Employee
- Personnel file
- Union? Check CBA

## Service of disciplinary letter in person or via mail

- Check CBA if certified mail required
- Move It Securely with the delivery receipt box checked

# Implement Appropriate Action, supervisor role

Follow up to Discipline (by supervisor)

- Work with employee to correct deficiencies
- Give employee a written plan of correction? It should be specific and include a timetable for improvement.
- Monitor employee's progress
- Document changes or continued problems
- Follow up with EAP referral, if your practice



# Available Appeal Processes

Procedure 1B.1.1 part 8

and/or

Collective Bargaining Agreement

and/or

Veteran's Preference Hearing (classified discharge  
and demotion only)



Office Of General Counsel

# Decision-Making in Student Respondent Cases

Scott Goings  
Assistant General Counsel

# Duty

- If a school knows or reasonably should know about student-on-student discrimination or harassment that creates a hostile environment, the school must take action to eliminate the discrimination or harassment, prevent its recurrence, and address its effects.

# Board Policy 1B.1 and System Procedure 1B.1.1

- One system-wide Policy and Procedure.
  - Students and employees.
- Investigator/Decision-Maker Model.
  - Investigator.
  - Decision-Maker.
  - Appeal.
  - Ch. 14 or CBA.



# Thoughts for Decision-Makers

- Analytical Order.
  1. Policy Violation.
  2. If yes to 1, then sanction.
- Look for corroborating information.
- Articulate a succinct statement of the facts supporting the decision and the rationale for the sanction.

# Sanctions

- Remember Basic Duty.
  - Eliminate discrimination/harassment, prevent its recurrence, and address its effects.
- All possible conduct code sanctions available (Dean of Students can be a resource).
- Factors
  - Seriousness of Behavior.
  - Previous Disciplinary History.
  - On-going threat?
  - Remorse.
  - Similarity to past discipline.
  - Other factors?

# Examples of Typical Student Conduct Sanctions (see your conduct policy; Dean of Students)

- Warning.
- Probation.
- Loss of Privileges (for example, removal from residence life; restriction from campus other than for class).
- Required training.
- No contact.
- Suspension.
- Expulsion.

More than one sanction available if any scenario (for example, probation and required training).

# Decision Letters

- Process map at your campus.
  - Each letter sets up the next letter (i.e., decision letter sets up internal appeal; appeal decision sets up Ch. 14 if applicable).
- Some rationale for:
  - Finding on policy violation.
  - Sanction.
- No retaliation; appeal.
- Refer to services available to parties?



# Board Policy 1B.3 and System Procedure 1B.3.1

- One system-wide Policy and Procedure.
  - Students and employees.
- Previously the same as 1B.1.1 but now modified because of new Title IX regulations.
- Modified Investigator/Decision-Maker Model.
  - Investigator.
  - Ch. 14 Hearing and then report and recommendation to Decision-Maker.
  - Decision-Maker.
  - Appeal or CBA.

# 1B.3.1 Decision-Maker Responsibilities

- See System Procedure 1B.3.1, Part 7, Subpart D, 3.
- Receive and review ALJ report and recommendation.
- Consult with assigned AAG or OCR representative.
- Issue written determination with 6 required elements.
  - Identify allegations potentially violating the policy.
  - Description of procedural steps.
  - Findings of fact.
  - Conclusions regarding application of the policy to the facts.
  - Results as to each allegation (responsible; not responsible, and sanctions if responsible).
  - Procedures and bases for appeal.
- KEY – Written determination may satisfy these elements by **ADOPTING** the report and recommendation.

# Final Thoughts

- Think about how your campus can support decision-makers especially on sanctions.
- Student complainants with a complaint that involves a grade or academic issue (typically this is a 1B.1).
  - Coordinate with grade appeal or other academic process.
- OGC Assistance.
  - Student Respondent – Scott Goings.
  - Employee Respondent – Gary Cunningham.

## MINNESOTA STATE CONTACT INFORMATION

Office of Equity and Inclusion (OEI)

<http://www.minnstate.edu/system/equity/>

*Labor Relations (LR)*

<https://www.minnstate.edu/system/hr/index.html>

Office of General Counsel (OGC)

<http://www.minnstate.edu/system/ogc/>

