



CONSOLIDATION & NOTICES OF INVESTIGATION

Ruth Jones
University Counsel

Laura Anson

Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services

10:00 a.m – 11:00 a.m.

Consolidation and Notice Issues

Presented by:

Ruth Jones

University Counsel, Civil Rights
CSU Office of General Counsel



Laura Anson

Sr. Systemwide Director for
DHR/Whistleblower/Equal
Opportunity Compliance Services





Potential Consolidation Situations

- One (1) Complainant vs. Multiple Respondents
- Multiple Complainants vs. One (1) Respondent
- Cross-Complaints against the Parties

Policy Language



General Principles

Where Parties assert Complaints against each other, and they arise out of the same events or circumstances, the Title IX Coordinator/DHR Administrator may consolidate the Complaints into one.

CSU Nondiscrimination Policy Article VII. A. ix.

Policy Language



Track 2

Where there is more than one Respondent or Complainant in connection with a single occurrence or related multiple occurrences, the hearing officer and the Parties may agree to a single hearing. A Party may request consolidation with other cases, or the Title IX Coordinator may initiate the consolidation. (Subject to FERPA and other applicable privacy laws)

CSU Nondiscrimination Policy Article VIII. B. 2.

Consolidation

When might the issue of consolidation arise:

- Notice of allegation
- Preliminary Investigation Report
- Final Investigation Report
- Hearing



What are the Interests at Stake When Considering Consolidation?

- Efficiency
- Undue Prejudice
- The Facts of the Specific Case



Efficiency

Streamlining the process to avoid required participation by witnesses and parties in multiple investigations.



Possible Undue Prejudice

- Protecting the privacy interests of the Parties.
- Ensuring that there is an assessment of individual culpability.



Analyzing Consolidation

Factors to be considered:

- Are the factual allegations closely related?
- Would a combined investigation involve most or many of the same witnesses and/or parties?
- Would a combined investigation include many or most of the same factual allegations, the same instances, or alleged conduct?



Analyzing Consolidation

cont.

- Might consolidation unnecessarily share information beyond those who “need to know”?
- Would a combined investigation result in parties learning substantial information about another party that is unrelated to their investigation?
- Would consolidation make assessment of individual culpability more challenging?



Alternatives to Consolidation of the Entire Process

- One investigation with multiple reports.
- One report with redactions?

Hypothetical: Consolidation

Tom, Dick and Harry are students in Professor Smith's math class. Professor Smith likes to go off on tangents during his lectures and talk about non-math related subjects. In particular, Professor Smith enjoys talking about the history of race and U.S. slavery. During one such off-topic lecture, Professor Smith used the N-word several times. Tom, Dick and Harry were offended and filed a complaint against Professor Smith with the DHR Administrator. A couple of days after Tom, Dick and Harry filed their complaint, another student, Sue, filed a complaint against Professor Smith after he allegedly used a racial epithet toward her during his office hours.

Can all of these complaints be consolidated? Discuss.

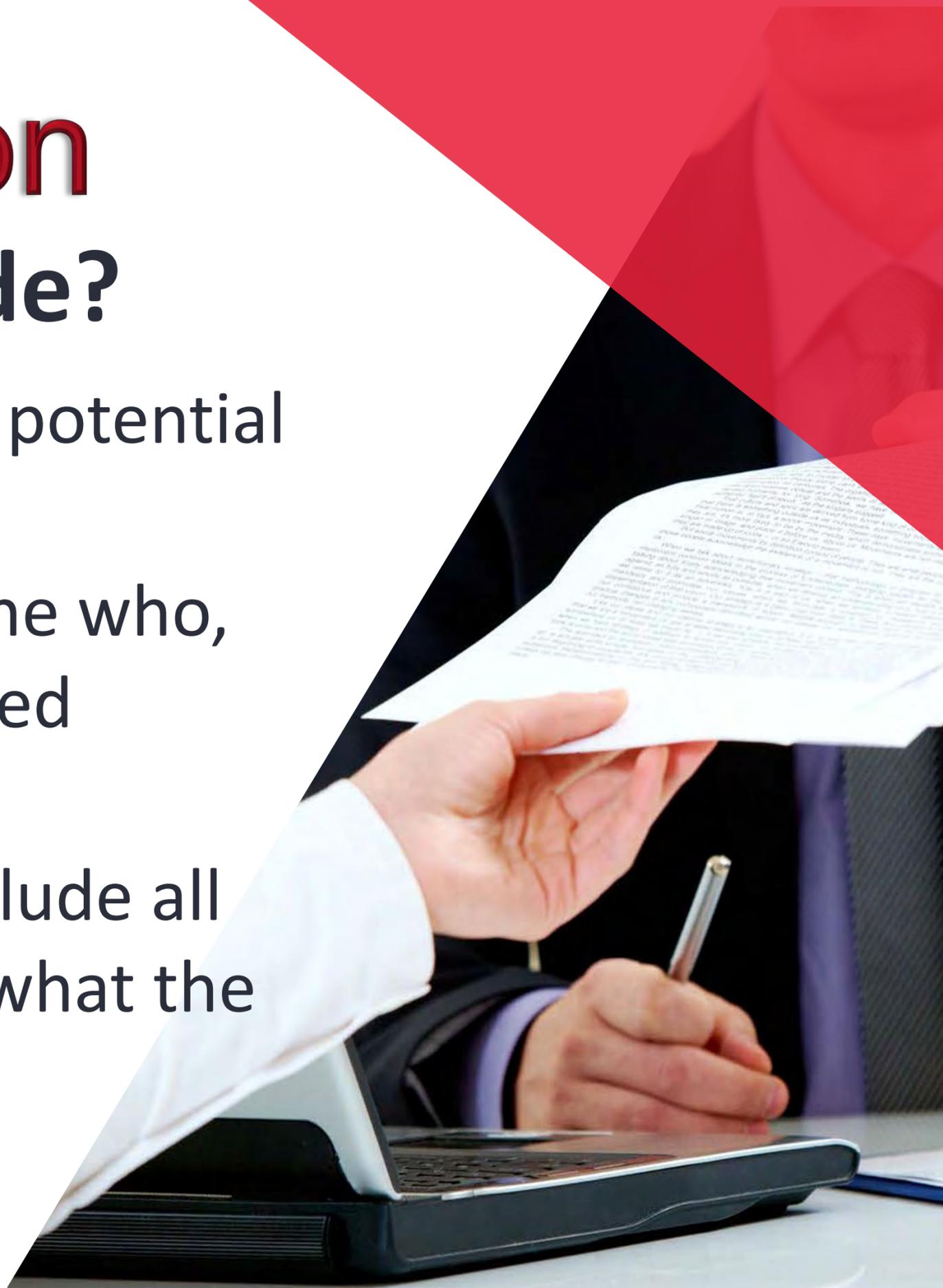
Notices of Investigation



Notice of Investigation

What should the notice include?

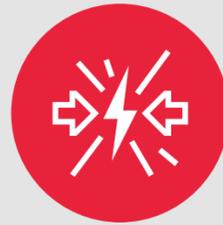
- Includes the factual allegations and potential policy violations.
- Factual allegations should include the who, what, where, and when of the alleged conduct.
- Possible policy violations should include all possible policy violations - not just what the Complainant might identify.



Special Notice Issues



Including Both Track 1,
Track 2/Track 3 Prohibited
Conduct



Retaliation

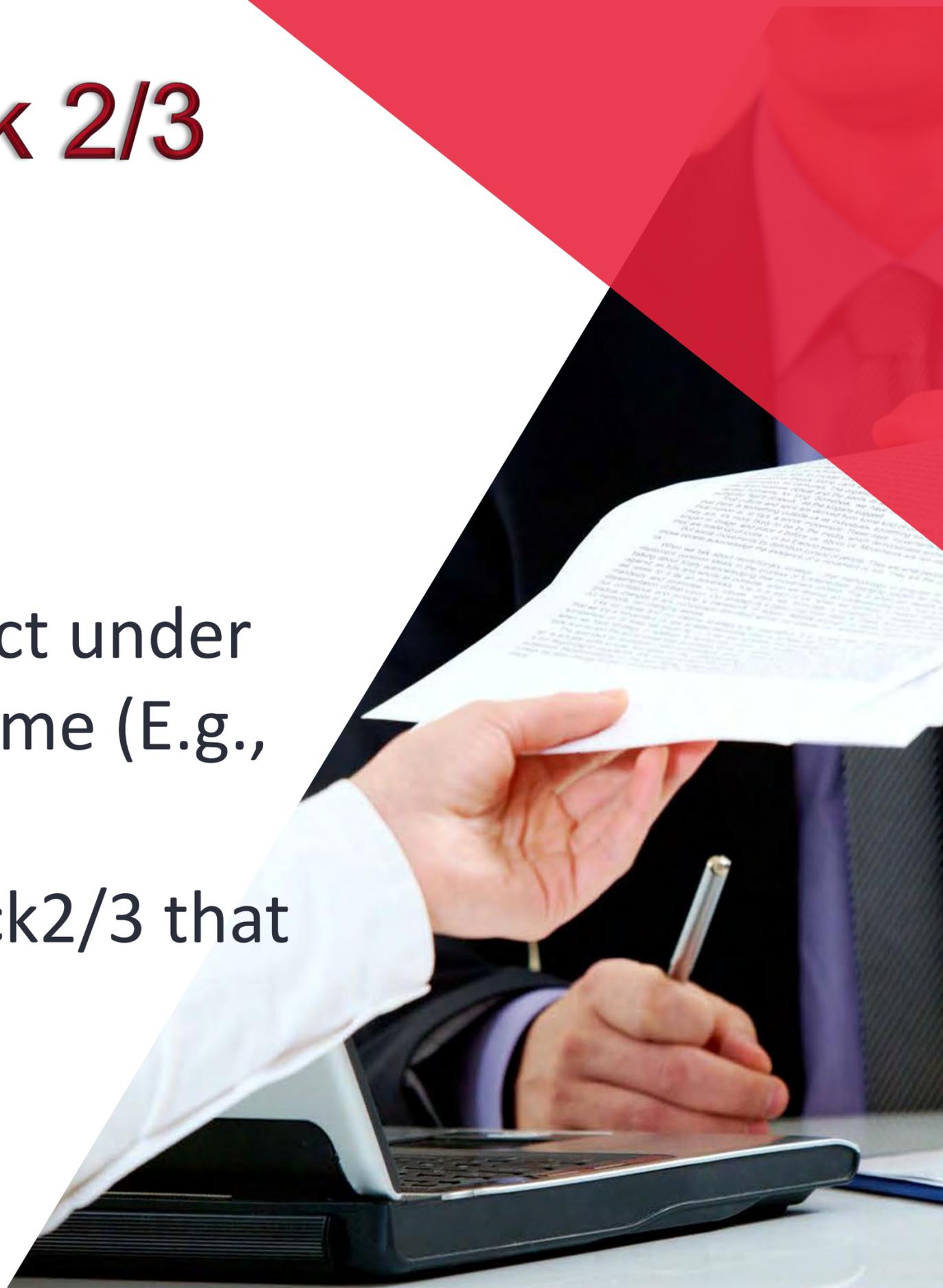


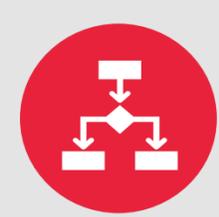
Including Other
Information

Including Track 1 and Track 2/3

Definitions

- CSU policy implements both federal regulations and state law.
- The definitions of prohibited conduct under Track 1 and Track 2/3 are not the same (E.g., sexual harassment).
- There are some offenses under Track 2/3 that are not offenses under Track 1.





Sexual Harassment Definitions (Hostile Environment)

Track 1

- Unwelcome conduct determined based on the reasonable person standard to be so severe, pervasive, **AND** objectively offensive that it effectively denies a person of equal access to an Education Program or Activity.

Track 2/3

- The conduct is sufficiently severe, persistent, **or** pervasive that its effect, whether or not intended, could be considered by a reasonable person in the shoes of Complainant, and is in fact considered by Complainant, as creating an intimidating, hostile, or offensive environment.



Which Conduct Definitions Should be Included in the Notice of Investigations?

- Does the complaint meet the elements of Track 1? Formal complaint with allegations of Track 1 prohibited conduct.
- Are there potential Track 2/Track 3 policy violations? a colorable claim of Sexual Harassment under Track 1, the Notice of Investigation should include the definition of Sexual Harassment under Tracks 1, 2 and 3.
- Are there factual findings relevant to other policy violations? (E.g., professional misconduct)

Notice of Investigation: Retaliation

- Retaliation complaints pertain to Protected Activity and not Protected Statuses
- Notices should specifically refer to protected activity. Protected activity means that Complainant did one or more of the following:
 - a. Exercised their rights under the Nondiscrimination Policy.
 - b. Reported or opposed conducted reasonably believed to violate the Nondiscrimination Policy.
 - c. Assisted or participated in a proceeding/investigation under the Nondiscrimination Policy.
 - d. Assisted someone in reporting or opposing a violation of the Nondiscrimination Policy.





Retaliation

Example:

An NOI in a Retaliation case should **NOT** say: Complaint alleges that Respondent retaliated against him **based on his race** by failing to promote him.

- This allegation focuses on a Protected Status and not a Protected Activity.



Including Other Information

Background or other information to put the allegations in context:

- Relationship between the parties e.g., student-teacher, supervisor, faculty member-department chair.
- On-campus or off-campus.
- Relevant location or work unit (e.g., lab, the dorm).

Hypothetical: Retaliation^t

Sam is an African American accountant in the Finance & Administration Department on his campus. His boss, Jack, has used offensive racial epithets towards him and other African American employees in the department. One day, after Jack made a multitude of racial slurs, Sam was fed up and couldn't take it anymore, and filed a complaint with the campus DHR Administrator. When Jack was notified that he was a Respondent in a DHR investigation, his attitude toward Sam changed, and not for the better. Jack started giving Sam less desirable work assignments, a negative performance evaluation, and told Sam he was not selected for a promotion he had applied for. Sam talked to the DHR Administrator and decided to add a Retaliation allegation to his complaint.

If you were the DHR Administrator, how would you draft the Notice of Investigation pertaining to the retaliation allegation?

QUESTIONS?





EMPOWERING MANAGERS TO BOOST STAFF MORALE

Cindy Sayani

Associate Marriage and Family Therapist | LifeMatters

1:00 p.m – 2:00 p.m.

15 TIPS TO BOOST MORALE

Presented by:

LifeMatters[®]

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TODAY

- Signs, costs and causes of low morale
- Tips for improving morale
- Action plan

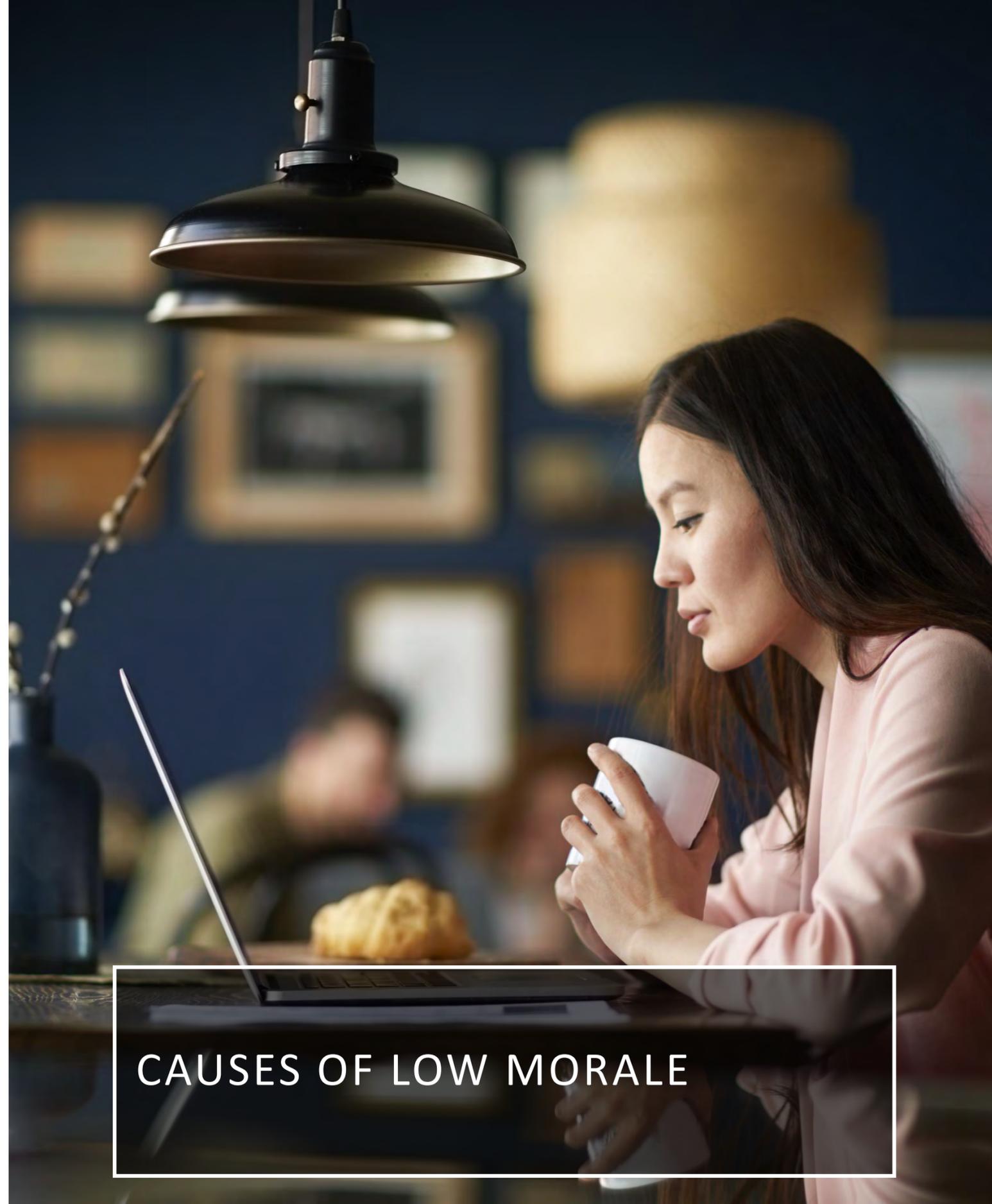


THE COST OF LOW MORALE

- Decreased productivity
- Unresolved conflict
- Employee turnover
- Tainted reputation
- Unpleasant environment

SIGNS OF LOW MORALE

- Tardiness
- Absenteeism
- Apathy
- Moping
- Backstabbing
- Increased turnover
- Decreased quality
- Decreased productivity
- Increased accidents/injuries



CAUSES OF LOW MORALE

- Think about a time when you've experienced low morale.
- What were the conditions that contributed to it?

CAUSES OF LOW MORALE

Excessive workload

Concerns regarding leadership

Anxiety about the future

Lack of challenge in work

Insufficient recognition

- Source: Towers Perrin and researchers Gang & Gang

“Lightening Round”

- Break into small groups
- Quickly generate/record ideas
- When time is called, move to next station

A large teal circle with a white border, containing the text 'TIPS FOR IMPROVING MORALE'.

TIPS FOR
IMPROVING
MORALE



TIP #1

Manage your own morale first

- Take responsibility for your happiness
- Look for the best in people and life
- Take on an attitude of self-confidence
- Treat everyone like a VIP

TIP #2

Talk and listen to employees

- Ask what is causing poor morale
- Ask for ideas to improve morale
- Really listen to responses
- Implement viable ideas

TIP #3

Express appreciation

- **Timely**
- **Specific**
- **Sincere**

Expect good things

- The “self-fulfilling prophecy”
- People and teams do as well as you think they will



TIP #4



TIP #5

Brag about employees

- Newsletters
- Trade magazines
- Local press
- Bulletin board
- Meetings
- E-mail

TIP #6

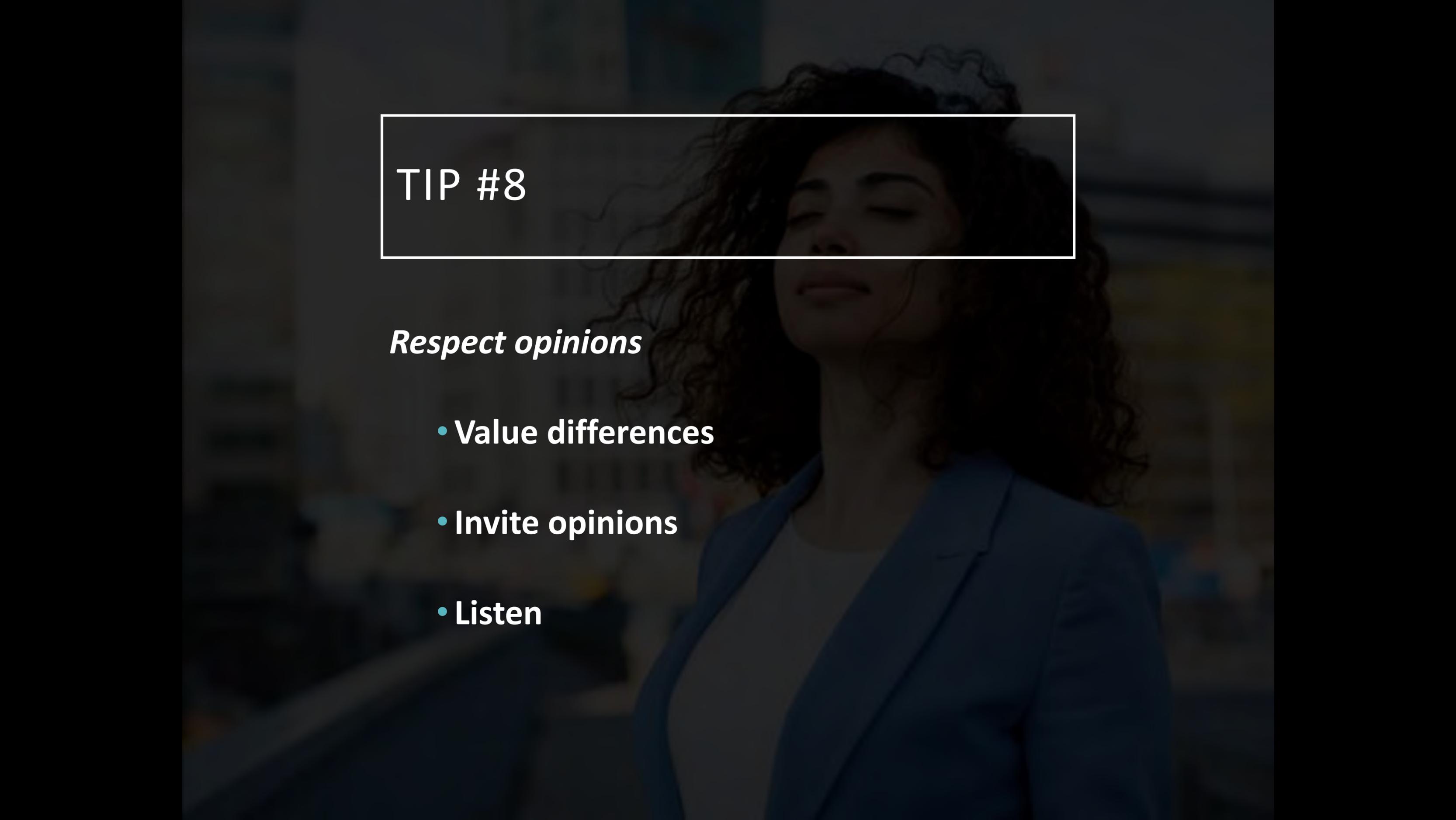
Create goals

- What skills do I need?
- What info do I need?
- What help do I need?
- What resources do I need?
- What barriers do I need to overcome?
- Is there a better way of doing things?

TIP #7

Encourage involvement

- Setting goals
- Create team tasks
- Stay open to opportunities



TIP #8

Respect opinions

- Value differences
- Invite opinions
- Listen

TIP #9

Celebrate success

- Take time before next project
- Include support staff
- Pizza party
- Off-site lunch

TIP #10

Provide feedback

- Be proactive
- Be specific
- Develop a plan
- Link performance to organizational goals



TIP #11

Connect with community

- Get involved in the community
- Make donations to local organizations
- Offer student internships

Be honest

- Notify people of changes
- Talk about how the changes will effect them

TIP #12



TIP #13

Show concern

- Use the person's name
- Be there for your employees
- Offer resources
- Ensure safety
- Supply necessary tools

TIP #14

Evaluate workload

- List work and tasks
- Are there tasks that no longer need to be done?
- Should tasks be delegated?
- Is there a more efficient way to do the task?

Earn trust

- Back them up
- Treat like customers
- Delegate authority
- Understand mistakes happen

TIP #15



TIP #15 (CONTINUED)

Earn trust

- Be fair
- Be respectful
- Communicate openly
- Trust employees



GOING
FORWARD

As a result of today's session, I will do the following to help improve the morale of my workgroup...

FINAL THOUGHT

“When you wholeheartedly adopt a ‘with all your heart’ attitude and go out with the positive principle, you can do incredible things.”

-Norman Vincent Peale, Author

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**CREDIBILITY ANALYSIS
& FACTUAL FINDINGS**

Sue Westover

Asst VC & Chief Counsel - Litigation

11:00 a.m. – 12:00 p.m.



The California State University

OFFICE OF THE CHANCELLOR

Truth, Fiction, or Something Else? Assessing Credibility of Parties/Witnesses and Making Factual Findings

Presented by:

**Susan Westover, Asst. Vice Chancellor & Chief Counsel – Litigation
Office of General Counsel**

Divining the Difference Between Truth, Fiction (Lies), and Mistakes

- **Burdens of Proof**
 - **Preponderance of the Evidence = More Likely Than Not**
 - **Clear and Convincing Evidence = Highly Probable**
 - **Beyond a Reasonable Doubt = *for criminal cases only***
- **Some cases truly are 50/50, where findings cannot be sustained**
- **Both direct and indirect (circumstantial) evidence are probative**
- **Most cases hinge on credibility, and you're the judge and jury – at least in the university setting**

Guiding Principles

- **No magic formula; it's truly a case-by-case analysis**
- **All testimony must be weighed**
 - **Some witnesses tell lies**
 - **Some witnesses tell the truth**
 - **Most witnesses make mistakes – neither absolute truth nor lie – but you must assess their ability to be accurate**
 - **Differences in recall do not necessarily amount to lies**
- **Keep in mind that in most CSU proceedings, witnesses are not placed under oath (so potential perjury charges are not available)**

Factors in Evaluating Credibility

- **Initial level of cooperation or hesitancy**
- **Ability to see or hear the events in question (vs. hearsay)**
- **Capacity to perceive, recollect, retell (including incapacitation)**
- **Motive to lie or existence of bias**
- **Withheld evidence**
- **Plausibility of the story**
- **Admissions of untruthfulness**
- **Consistency vs. inconsistency**
- **Actively omitted, concealed or destroyed evidence**

Factors in Evaluating Credibility (cont.)

- **Demeanor while testifying (baseline vs. the harder questions)**
- **Eye contact**
- **Nonverbal responses**
- **Inadequate verbal responses**
- **Timing of answers**
- **Nonverbal clues to dishonesty (stress reactions)**
- **If someone lies once, chances are it's not just once**

Drafting your Credibility Findings

- **First lay out all the largely undisputed factual findings**
- **Then list all the facts for which you must make credibility determinations**
- **For contested evidence, perform a credibility determination**
- **Do's and Don'ts:**
 - **Don't call someone a liar or dishonest unless it was blatant; instead, write that a person was:**
 - **Less credible**
 - **Less persuasive**
 - **More inconsistent**
 - **Less believable**
 - **Unconvincing**
 - **Contradictory**

Drafting your Credibility Findings (cont.)

- **Explain in detail the specific reasons for your findings:**
 - **In word-versus-word situations, explain why you found one more persuasive**
 - **Verbal or non-verbal clues that you found significant**
 - **Level of accuracy of testimony, compared to others**
 - **Plausibility of their story, in view of the totality of the circumstances**
 - **Capacity to perceive or retell**
 - **Consistencies vs. inconsistencies**
 - **Bias or hostility**
 - **Motive to lie**
 - **Dishonesty, concealment, or destruction of evidence**
- **Example from State Personnel Board case**
 - **Recite the conflict**
 - **Recite the factors to be taken into account (the legal list)**
 - **Describe witness demeanor and other factors that came into play, including plausibility (“Appellant’s explanation made little sense”)**
 - **Decide which testimony to believe**



**WHAT ARE THE ELEMENTS? APPLICATION OF
FACTUAL FINDINGS TO POLICY**

Elisabeth Walter

University Counsel, Sonoma State

Sarah Clegg

Interim Systemwide Title IX Assistant Director

1:00 p.m. – 2:00 p.m.

WHAT ARE THE ELEMENTS?

APPLYING FACTUAL FINDINGS TO POLICY ANALYSIS





SARAH CLEGG

Interim Assistant Director, Systemwide
Title IX Compliance



ELISABETH WALTER

Office of General Counsel
University Counsel,
Sonoma State University

INDEX CARDS

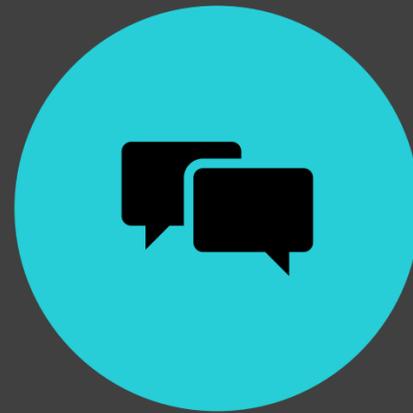
SHARE 1-2 OF YOUR BIGGEST CHALLENGES APPLYING FACTUAL FINDINGS TO POLICY



GOALS FOR TODAY'S PRESENTATION



QUERY – BIGGEST
CHALLENGES?



DEFINING THE
ELEMENTS/PRONGS



DETAILS OF THE
ELEMENTS/PRONGS



IDEAS TO CONSIDER

SCOPE vs **ELEMENTS**

Scope is the universe of the investigation.

Elements/prongs are questions that you need to answer to reach your findings.





WHAT ARE ELEMENTS/PRONGS?

- They are derived from the standards and definitions in the policy.
- They become the headers and questions for your analysis.
- They should be set out in advance.
- Don't analyze prongs in the same order as the policy language.
- A 'yes' or 'no' answer to some of the prongs may end the analysis.

CSU policy:

Discrimination is (an) Adverse Action(s) against a Complainant because of their Protected Status.

- Adverse Action means an action engaged in by the Respondent that has a **substantial and material adverse effect** on the Complainant's ability to participate in a university program, activity, or employment. Minor or trivial actions or conduct not reasonably likely to do more than anger or upset a Complainant does not constitute an Adverse Action.

An adverse employment action is any conduct or employment action that is reasonably likely to impair an employee's job performance or prospects for advancement or promotion.

- If Adverse Action is taken because of a Complainant's Protected Status, that means that the Complainant's Protected Status is a substantial motivating reason (but not necessarily the only reason) for the Adverse Action.

Discrimination based on
Protected Status



For conduct occurring on or
after January 1, 2022

ANALYSIS USING ELEMENTS OF DISCRIMINATION BASED ON PROTECTED STATUS



1. What Adverse Action(s) does Complainant allege by Respondent? (e.g. failure to promote, unfounded criticism, denied opportunity)
2. Was Respondent's conduct minor or trivial in nature such that the conduct was not *reasonably likely* to do more than anger or upset a complainant? (e.g. comments, facial expressions, jokes)
 - If yes: No policy violation. Refer to appropriate department for further action as needed.
 - If no: move to next question.
3. Did Respondent's conduct have a **substantial and*** material adverse effect on the Complainant's ability to participate in a university program, activity, or employment? (e.g. reasonably likely to impair Complainant's job performance or prospects for advancement or promotion.)
 - If no: No policy violation. Refer to appropriate department for further action as needed.
 - If yes: move to next question.

ANALYSIS USING ELEMENTS OF DISCRIMINATION BASED ON PROTECTED STATUS



4. Is Complainant in a qualifying Protected Status?

Age, Disability (physical and mental), Medical Condition, Gender (or sex, including sex stereotyping), Gender Identity (including transgender), Gender Expression, Genetic Information, Marital Status, Nationality, Race or Ethnicity (including color, caste, or ancestry), Religion (or religious creed), Sexual Orientation (a person's identity in relation to the gender or genders to which they are sexually or romantically attracted and includes but is not limited to heterosexuality, gay, lesbian, bisexuality, and queer, Veteran or Military Status.

- If no: No policy violation (unless perceived status is an issue). Move to next question or refer to appropriate department for further action as needed.
- If yes: move to next question.

5. Was a substantial motivating reason (but not necessarily the only reason) Respondent engaged in the conduct based on Complainant's Protected Status? (Consider if Respondent was aware of or indicated any disapproval of Complainant's protected status (or perceived status)).

- If no: A finding of policy violation by Respondent is unlikely.
- If yes: A policy violation finding is reasonable.



Remember, these analysis questions are not absolutes.

They must be tailored to each case.

They are a guide.

Harassment Based on Protected Status:

For conduct occurring on or after January 1, 2022

CSU Policy states:

Harassment means unwelcome verbal, nonverbal or physical conduct engaged in because of an individual Complainant's Protected Status. If a Complainant is harassed because of their Protected Status, that means that the Complainant's Protected Status is a substantial motivating reason (but not necessarily the only reason) for the conduct.

Harassment may occur when: Submitting to, or rejecting, the verbal, nonverbal or physical conduct is explicitly or implicitly a basis for:

Decisions that adversely affect or threaten employment, or which are being presented as a term or condition of the Complainant's employment; or
Decisions that affect or threaten the Complainant's academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university.

OR

The conduct is sufficiently severe or pervasive so that its effect, whether intended or not, could be considered by a reasonable person under similar circumstances and with similar identities, and is in fact considered by the Complainant as creating an intimidating, hostile or offensive work or educational environment that denies or substantially limits an individual's ability to participate in or benefit from employment and/or educational, services, activities, or other privileges provided by the CSU. ...

Single, isolated incidents will typically be insufficient to rise to the level of harassment.

HARASSMENT BASED ON PROTECTED STATUS: ANALYSIS

1. Is Complainant in a qualifying Protected Status?

- If no: A policy violation finding is unlikely (unless perceived status is an issue). Move to the next question.
- If yes: Move to the next question.

2. What misconduct does Complainant allege by Respondent?

(e.g. comments, facial expressions, jokes)

3. Was that conduct taken by Respondent *against* Complainant?

- If no: consider if there is a different complainant and/or whether the environment became hostile for Complainant nonetheless. Move to the next question.
- If yes: Move on to the next question.



4. Was a substantial motivating reason (but not necessarily the only reason) Respondent engaged in the conduct based on Complainant's Protected Status? (Consider if Respondent was aware of or indicated any disapproval of C's protected status.)

- If no: A policy violation finding is less likely, unless the harassment was significant (*next slide).
- If yes: Move to the next question.

5. Was the conduct unwelcome by Complainant?

- If no: A policy violation finding is unlikely unless the harassment later became unwelcome or the harassment was significant (*next slide). Move to the next question.
- If yes: Move to the next question.

6. Was the conduct a single, isolated incident unlikely to adversely affect or threaten Complainant's employment, academic status, progress, or access to benefits and services, honors, programs, or activities available at or through the university?

- If yes: A policy violation finding is less likely, unless the conduct was significant (*next slide).
- If no: Move to the next question.

**HARASSMENT
BASED ON
PROTECTED
STATUS:
ANALYSIS
CONTINUED**



7. a) Did Respondent indicate, explicitly or implicitly, that Complainant's submission to, or rejection of Respondent's conduct would be used as the basis for any decision affecting or threatening a term or condition of the Complainant's employment, academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university? (Quid pro quo/retaliation)

OR

b) Did Respondent's conduct adversely affect or threaten Complainant's employment, academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university?

OR

c) Was Respondent's conduct sufficiently severe or pervasive*: (cont.)

**HARASSMENT
BASED ON
PROTECTED
STATUS:
ANALYSIS,
CONTINUED**



7.c) Was Respondent's conduct sufficiently severe or pervasive:

- Using the lens of a reasonable person under similar circumstances and with similar identities, would the effect of the conduct, (even if unintended by Respondent), create a work or educational environment that is intimidating, hostile or offensive, such that it denies or substantially limits an individual's ability to participate in or benefit from employment and/or educational, services, activities, or other privileges provided by the CSU?

AND

- **If yes to the above**, did Complainant *in fact* consider Respondent's conduct, (even if unintended by Respondent) to create an intimidating, hostile or offensive work or educational environment that denied or substantially limit Complainant's ability to participate in or benefit from employment and/or educational, services, activities, or other privileges provided by the CSU?

**HARASSMENT
BASED ON
PROTECTED
STATUS:
ANALYSIS,
CONTINUED**



If NO to 7 a, b and c:

A policy violation finding is unlikely.

If YES to 7 a, b or c:

A policy violation finding against Respondent is reasonable.

Remember, these analysis questions are not absolutes.

They must be tailored to each case.

They are a guide.

**HARASSMENT
BASED ON
PROTECTED
STATUS:
ANALYSIS,
CONTINUED**



Sexual Harassment

For conduct occurring on or after January 1, 2022

CSU Policy states:

- **Sexual Harassment** means unwelcome verbal, nonverbal or physical conduct of a sexual nature that includes, but is not limited to, sexual advances, requests for sexual favors, offering employment benefits or giving preferential treatment in exchange for sexual favors, or indecent exposure, and any other conduct of a sexual nature where:
 - A. Submission to, or rejection of, the conduct is explicitly or implicitly used as the basis for any decision affecting a Complainant's academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university; or
 - B. Submission to, or rejection of, the conduct by the Complainant is explicitly or implicitly used as the basis for any decision affecting a term or condition of the Complainant's employment, or an employment decision; or
 - C. The conduct is sufficiently severe, persistent, or pervasive that its effect, whether or not intended, could be considered by a reasonable person in the shoes of the Complainant, and is in fact considered by the Complainant, as limiting their ability to participate in or benefit from the services, activities or opportunities offered by the university;
- (e.g. Sexual Harassment could include being forced to engage in unwanted sexual contact as a condition of membership in a student organization or in exchange for a raise or promotion; being subjected to video exploitation or a campaign of sexually explicit graffiti; or frequently being exposed to unwanted images of a sexual nature in a work environment, or in a classroom where the images are unrelated to the coursework.

SEXUAL HARASSMENT: ANALYSIS



1. What verbal, nonverbal or physical misconduct does Complainant allege by Respondent?

2. Is the conduct Complainant is alleging by Respondent sexual in nature? (e.g., sexual advances, requests for sexual favors, offering employment benefits or giving preferential treatment in exchange for sexual favors, or indecent exposure)

- If no: No finding of Sexual Harassment but consider other forms of harassment and/or refer to appropriate department for further action as needed.
- If yes: move to the next question.

3. Did Respondent indicate, explicitly or implicitly, that Complainant's submission to, or rejection of Respondent's conduct would be used as the basis for any decision affecting or threatening a term or condition of the Complainant's employment, academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university? (Quid pro quo/retaliation)

OR

4. Was the conduct sufficiently severe, persistent, or pervasive?

a) Did Respondent's conduct adversely affect or threaten Complainant's employment, academic status or progress, or access to benefits and services, honors, programs, or activities available at or through the university?

OR (cont.)

SEXUAL HARASSMENT: ANALYSIS

(cont.)

OR

b) Using the lens of a *reasonable* person in the shoes of Complainant, could the effect of the conduct, (even if unintended by Respondent), be considered as limiting their ability to participate in or benefit from the services, activities or opportunities offered by the university?

- If no: A policy violation finding is unlikely.
- If yes: move to the next question.

c) Did Complainant *in fact* consider Respondent's conduct, even if unintended by Respondent, as substantially limiting their ability to participate in or benefit from employment and/or educational, services, activities, or other privileges provided by the CSU?

- If no: No policy violation finding.
- If yes to 4a or 4b&c: A policy violation finding against Respondent is reasonable.



Retaliation

For conduct occurring on or after
January 1, 2022

CSU Policy states:

Retaliation means that a substantial motivating reason an Adverse Action was taken was because the person has or is believed to have:

Exercised their rights under this Nondiscrimination Policy,

Reported or opposed conduct which was reasonably and in good faith believed to be in violation of this Policy,

Assisted or participated in an investigation/proceeding under this Policy, regardless of whether the Complaint was substantiated,

Assisted someone in reporting or opposing a violation of this Nondiscrimination Policy or assisted someone in reporting or opposing Retaliation under this Policy.

Adverse Action means an action engaged in by the Respondent that has a **substantial and** material adverse effect on the Complainant's ability to participate in a university program, activity, or employment. Minor or trivial actions or conduct not reasonably likely to do more than anger or upset a Complainant does not constitute an Adverse Action. Retaliation may occur whether or not there is a power or authority differential between the individuals involved.

RETALIATION

1. What misconduct does Complainant allege by Respondent?

(e.g., failure to promote, unfounded criticism, denied opportunity)

2. Was Respondent's conduct taken against Complaint?

- If no: is there is a different complainant and/or refer to appropriate department for action.
- If yes: move to the next question.

3. Was Respondent's conduct minor or trivial in nature such that the conduct was not *reasonably likely* to do more than anger or upset *a complainant*? (e.g. comments, facial expressions, jokes)

- If yes: No policy violation finding. Refer to appropriate department for further action.
- If no: move to the next question.

RETALIATION: ANALYSIS

Retaliation may occur whether or not there is a power or authority differential between the individuals involved.



4. Did Respondent's conduct have a **substantial and** material adverse effect on the Complainant's ability to participate in a university program, activity, or employment? (e.g., reasonably likely to impair Complainant's job performance or prospects for advancement or promotion.)

- If no: No policy violation finding. Refer to appropriate department for further action.
- If yes: move to next question.

5. Was Respondent's adverse action substantially motivated because Complainant has or is believed to have done any of the following:

Exercised their rights under this Nondiscrimination Policy, or Reported or opposed conduct which was reasonably and in good faith believed to be in violation of this Policy or Assisted or participated in an investigation/proceeding under this Policy, regardless of whether the Complaint was substantiated, or Assisted someone in reporting or opposing a violation of this Policy or assisted someone in reporting or opposing Retaliation under this Policy.

If yes, a policy violation finding is likely.

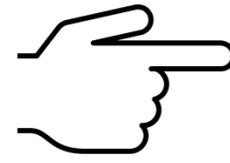
further If no: A policy violation finding is unlikely. Refer to appropriate department for action as needed.

RETALIATION: ANALYSIS

Retaliation may occur whether or not there is a power or authority differential between the individuals involved.

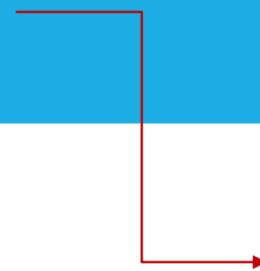


Close Call/tough
Decisions: there isn't
always a *right* answer but
there is always a
reasonable answer based
on the facts available.

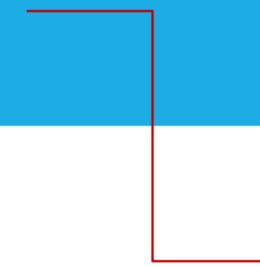


Remember,
preponderance is the
standard, not beyond a
reasonable doubt.

Create a timeline based
on the facts



Brain dump: jot down
every thought you have
and then sort, organize &
find gaps



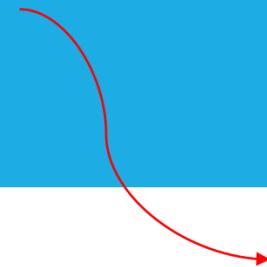
Tie fact findings to
elements (don't restate
facts not needed to
explain your rationale)

Explain your logic/
rationale

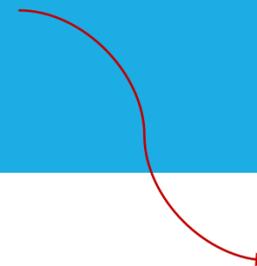


Have a conversation
with yourself on paper

Ping pong between
sides/views/arguments



Explain why a different
conclusion doesn't
make sense



Force yourself to write
about the opposite
perspective on every
element

If credibility is an issue:

- explain why each person is credible AND why they are NOT
- plausibility of the statements, (does it make sense?)
- does their story fit the timeline of events
- corroboration of statement through other statements and/or physical evidence
- motives to falsify or withhold relevant information/motive to lie
- motive to tell the truth
- bias or prejudice
- demeanor of the party/witness * * * * Be careful using demeanor to judge a person's veracity. Unless you know the person well it's hard to gauge their demeanor under stress. We all have quirks, behaviors, mannerisms.



PAY EQUITY & DISCRIMINATION

Marc Mootchnik

Assistant Vice Chancellor & Chief Counsel

Lety Hernandez

Sr. Director Systemwide General Employment Services and Policy Administration

2:15 p.m – 3:15 p.m.

CFPA: In General

- Prohibits paying employees of different gender, race, or ethnicity less for “substantially similar work”
- Prohibits retaliation against employees for complaining or assisting in complaints based on CFPA
- Statute of limitations
 - Two years
 - Three years if willful
 - CFPA Retaliation claims - one year statute of limitations



Nondiscrimination Procedure

- Follow Non-Discrim Policy
 - Intake
 - NOI
- Is claim based on gender vs. race or ethnicity?
 - DHR Administrator or TIX Coordinator responsible for investigation
- Notify campus counsel

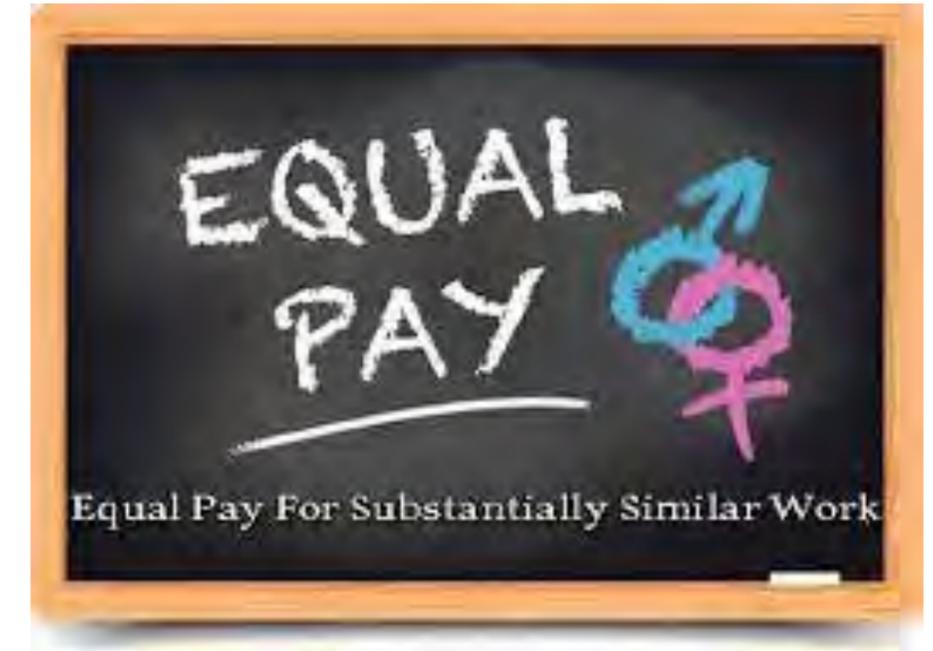


Triggers

- Internal Complaint Under Non-Discrim Policy
- Grievance
- External Complaints
- May be subset of other claims
 - Or may include DHR/TIX allegations beyond comp analysis
- Hiring, IRPs and Other Internal Triggers



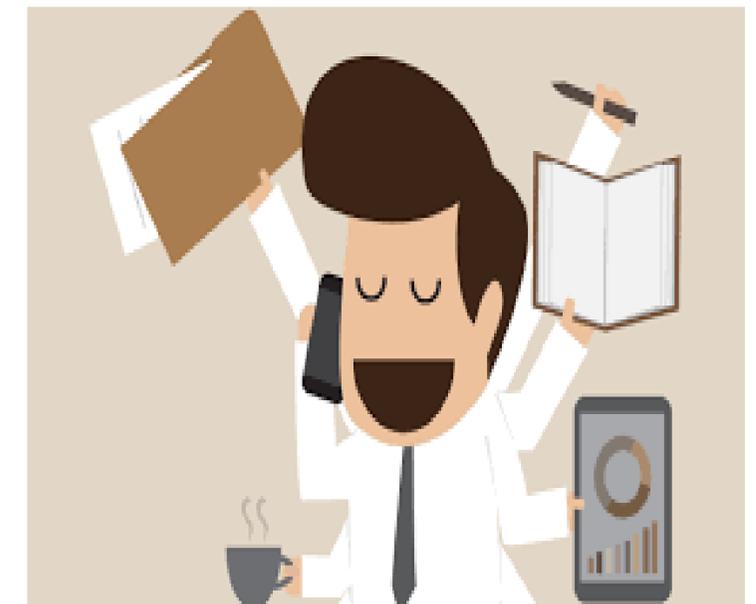
Determine Comparables



- Work performed under similar working conditions
- Substantially comparable taking all necessary skills, effort and responsibilities into account
- Analysis based on *actual* duties and requirements of position

“Substantially Similar Work” Key Concepts

- Skills
 - Includes experience, training, education, ability
 - Must relate to core function of the job
 - Performance
- Effort
 - Physical or mental exertion to perform core functions
- Responsibility
 - Operate independently or under supervision
 - Extent supervises others
 - Impact on operations and mission of CSU
- Working Conditions
 - Amenities, environment, noise level, safety or hazard issues



Other Factors

- Job Descriptions
 - Instructive but not determinative
 - Keep current, descriptive, and accurate
- Titles are important! (Lindsley case)
- Extra assignments
- “Common core of tasks” (Univ. of Oregon case)
- Discuss with manager



Determine Comparable Group

- Complaint
 - Strong consideration to persons ID'd by complainant
- ID persons in substantially similar positions on campus
 - Unit? Department? College? Campus-wide?
 - Broad enough comparable pool?
- Do we need to look systemwide or multi-campus?
 - Requires cooperation and coordination
- Local job market (?)
- Consult with systemwide office
 - Sr. Dir, Systemwide General Employment & Policy Admin
 - Sr. Systemwide Dir, Academic & Staff Human Resources

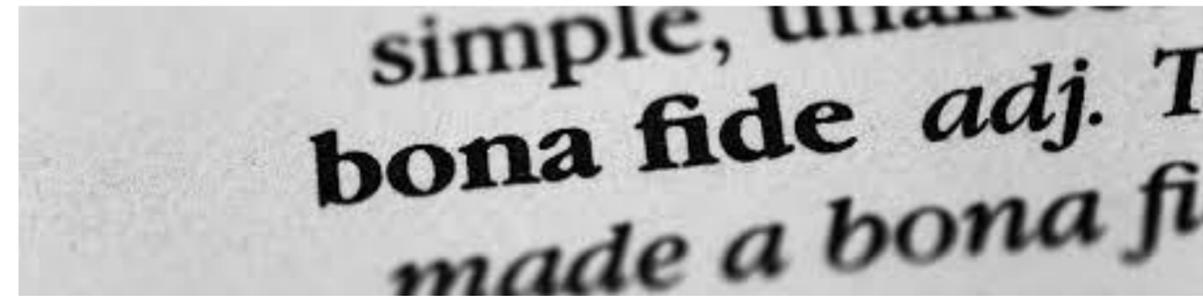
The Comp Analysis

- Involve the Comp Manager
- Snapshot vs. salary history
- But not prior employment history
- Market surveys (?)
- Look at reasons for salary changes



But Disparity Okay If....

- Seniority system
- Merit system
- Quantity or quality of work
- Other “bona fide” factor
 - Examples: education, training or experience
 - Job related
 - Consistent with “business necessity”
 - Includes: cost of living, cost of labor, geographic differences, differences in disciplines or fields of study



Seniority, Merit and Incentive Systems

- Cannot be adopted with discriminatory intent
- Established, Pre-determined criteria
- Communicated to employees



Example: Faculty rank and promotion systems

Additional Considerations

- Justifications must be applied consistently and reasonably
- Justifications must account for entire wage differential
- Considering job market at time of hire carries risks
- Consider all forms of compensation:
 - Overtime, pay differentials, stipends, supplemental pay, allowances, quantifiable benefits

Pay Attention To....

- Supplemental Comp
 - All funding sources
- Retention Raises
- Neutral Comp Practice – Disparate Impact
- Leapfrogging
- Outliers
- Coaches

Some Nuts and Bolts

- Work with comp manager for analysis.
- Document each step of analysis
- Incorporate into Investigation report
 - ID all relevant factors
 - State reasons
- Remedy
- Communication to Management



Prior Salary Cannot Be Considered

- Since 2017, prior salary cannot, by itself, justify any disparity
- Labor Code 432.3
 - Prohibits asking applicants for salary history information
 - Must provide pay scale on reasonable request
 - Can ask for salary expectations
 - Candidate can voluntarily, without prompting, disclose prior salary
 - Statute does not apply to publicly available info
 - Can support a pay equity claim