



Association of
Title IX Administrators

Investigating Sex/Gender Discrimination and Disparate Treatment

An ATIXA Best Practices Workshop

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Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, any applicable state or local laws, and evolving federal guidance.

Workshop Introduction



The primary focus of this workshop is to explore the framework for investigating allegations of discriminatory treatment, often called “disparate treatment,” because of someone’s sex or gender.



Sex discrimination complaints often involve the issues of climate, culture, policies, or practices, which in turn require a specific investigative framework and investigation skills.



Our goal is to provide practitioners with an opportunity to sharpen skills for investigating complaints of sex discrimination through applied learning exercises.

Content Advisory

- The content and discussions in this training will necessarily engage with sex-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses
- ATIXA faculty members may offer examples that emulate the language and vocabulary Title IX Coordinators and Title IX team members encounter in their roles including slang, profanity, and other graphic or offensive language

Title IX, Discrimination, and Disparate Treatment

Title IX and Equity

- Title IX is a gender equity law
- Equity refers to the understanding that not all individuals have access to the same resources and opportunities
 - Equity focuses on providing support and resources to reduce disparities in access to the education program
 - Title IX seeks to remedy the inequities created by sex and gender discrimination
- Title IX imposes a duty to stop, prevent, and remedy sex and gender discrimination

Overview

- Recall that the Title IX statute includes the phrase “on the basis of sex”
- Title IX does not explicitly prohibit discrimination on the basis of gender, sexual orientation (SO), gender identity (GI), or gender expression (GE)
- However, in *Bostock v. Clayton County*, the Supreme Court extended Title VII to SO and GI
 - Other federal courts extended that reasoning to Title IX cases
 - U.S. Dept. of Education interprets Title IX consistent with *Bostock*
- State laws vary significantly
 - Incorporation of SO, GI, and/or GE in state civil rights laws
 - Distinctions based on “biological sex”
 - Prohibitions against training on SO, GI, and GE

Bostock v. Clayton County, 590 U.S. ____ (2020)

Overview

- Title IX requires sex discrimination complaints be subject to a prompt and equitable resolution
- Parallels in Title VII, including, but not limited to, sex and gender

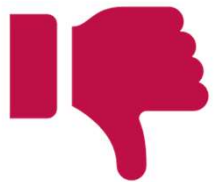


Current Title IX Interpretation

- OCR interprets “sex discrimination” as:
 - Inequitable treatment based on sex or gender
 - Sex characteristics
 - Sex stereotypes
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity
 - Exclusion from participating on the basis of sex or gender identity
- **Notice of Interpretation (2021)**
- **Pending NPRMs**



Distinguishing Types of Discrimination



Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliated with or perception of affiliation to protected class



Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups



Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating/Domestic Violence
- Stalking



Retaliation

- Suffered adverse academic or employment action based on participation in a protected activity

Examples of Disparate Treatment

Employees

- Hiring
- Promotion/Performance reviews
- Pay
- Responsibilities/Job assignments
- Shifts
- Access to resources

Students

- Athletics
- Grading
- Program access
- Student conduct outcomes
- Housing access
- Guest visitation policies

Adverse Action Examples

- Not hiring/demotion/termination
- Promotion/Tenure denial
- Poor performance reviews
- Less desirable work assignments
- Work-related threats
- Supervisory responsibility removal
- Abusive verbal or physical behavior
- Discipline
- Student leadership opportunity denial
- Unfair grading
- Pay and compensation disparity
- Resource inaccessibility
- Remedy inaccessibility
- Opportunity denial

Disparate Impact

- Stems from “neutral” policies and practices applied evenhandedly, but are alleged to have a discriminatory impact
- Complex investigations
 - Often examines culture/climate
- High level statistical analysis
 - Validity studies
 - Programmatic necessity
- Examples: effect of hiring, admissions, or disciplinary processes, even when conducted in a facially neutral way
- Focuses on remedies, not sanctions



Disparate Treatment Construct

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Disparate Treatment Construct

Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?

Step 2: Does the Respondent offer a non-discriminatory reason for the adverse action?

Step 3: Is there evidence that the offered reason is pretext for discrimination?

Step One: Complaint

Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?



1(a)

Does the complaint implicate a protected characteristic?



1(b)

Does the complaint identify an adverse action?



1(c)

Does the complaint assert that the protected characteristic status caused the adverse action?

Step One: Initial Allegation Assessment

- When receiving a report or complaint of disparate treatment:
 - Determine whether the allegations, if proven, have all three elements
 - If not, conduct a preliminary inquiry or “small i” investigation
- Cannot disregard because the Complainant’s initial report does not “check all the boxes”
- Examples:
 - Meet with the Complainant to learn additional information
 - Consult with human resources or a department chair (if appropriate)
 - Perform a preliminary employment data review

Step One: Examples

“The College of Engineering hates women!”

- No specific discriminatory treatment alleged
- Meet with the Complainant to get additional information; may not ultimately result in a formal investigation

“I’m not getting paid enough because the College of Engineering hates women!”

- Discriminatory treatment alleged, but need additional information
- Meet with the Complainant, possibly request human resources records about relevant salaries to get started

Step One: Examples

The College of Engineering denied my tenure application because I am a woman. All male candidates who applied, even those who had less experience and had worse evaluations, were promoted. All the female candidates were denied tenure.

- Complaint identifies a protected characteristic, an adverse action, and points to comparators to connect the tenure decisions to the alleged disparate treatment
- Establishes all three required elements of disparate treatment for Step One

Step One: Initial Allegation Assessment

Some evidence must connect the adverse action to the protected characteristic

- Examples:
 - “Similarly situated individuals” outside the protected characteristic group treated differently
 - Any individual is “**similarly situated**” if it is reasonable to expect that they would receive the same treatment within the context
 - Fact-specific analysis
 - Direct evidence of a connection
 - Documents or witnesses who have evidence of discriminatory intent/animus
 - Can also be circumstantial or indirect evidence
 - Satisfactory job performance data or academic performance data

Gathering Evidence

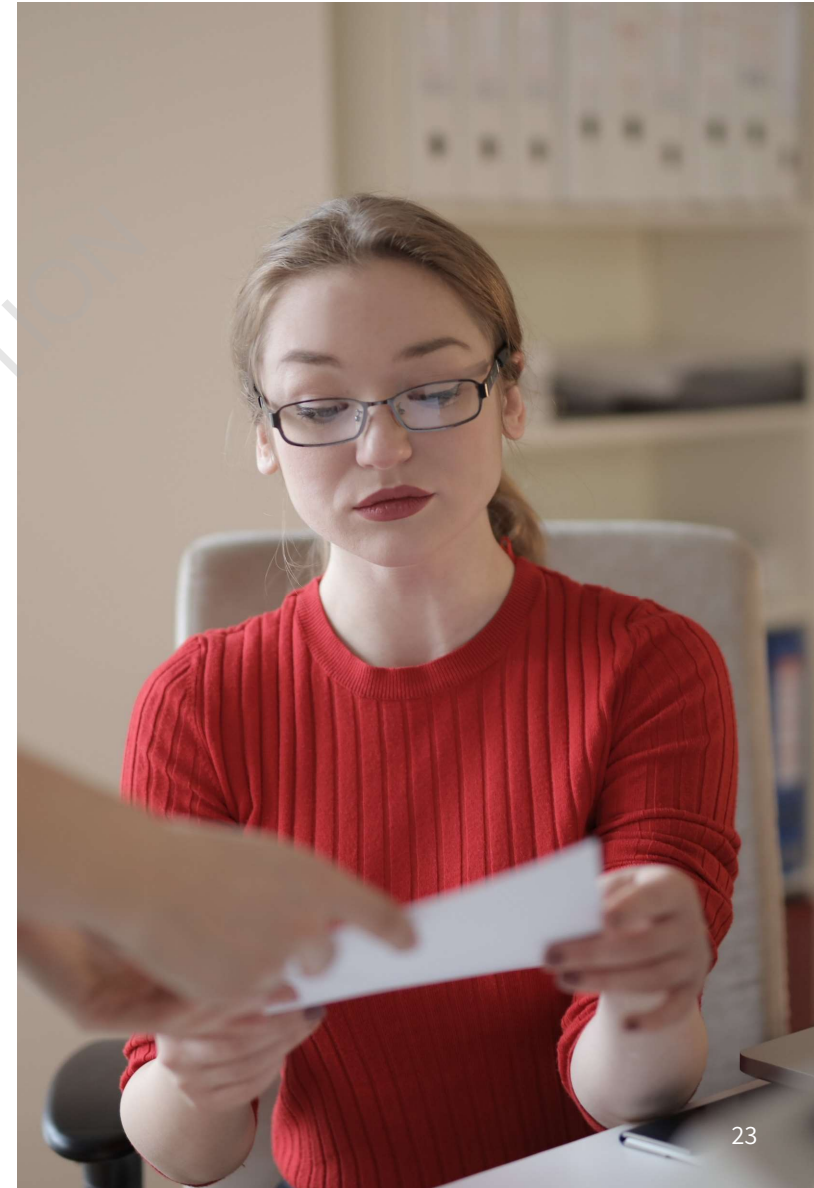
- Similarly situated does not mean identically situated
 - **Most relevant** comparisons based on the available evidence
 - Evidence of differential treatment of similarly situated individuals creates an inference of the presence of a discriminatory motive
- It is the responsibility of the institution/school/district to gather relevant evidence once an initial showing of disparate treatment has been made



Statistical Evidence

Statistical evidence could be important for an alleged pattern or practice of discrimination

- Example: A professor alleges his department chair implemented a hiring process that is biased against males
 - Consider the identities of the department chair's hires against the overall applicant pools in those hiring cycles
 - If 75% of applicants are male identifying but comprise only 25% of hires



Step Two: Non-Discriminatory Reason

- If the initial assessment in Step One **does not** establish the required complaint elements, end the inquiry
 - Consider appropriateness for referral to a different process or office
 - No formal dismissal requirement
- If an initial showing of disparate treatment is made, the complaint moves forward
 - Follow your policy to file a complaint and initiate the resolution process
 - Step Two and Step Three roughly correspond to the investigation phase



Step Two: Non-Discriminatory Reason

- Interview the Respondent about the allegations to elicit explanation:
 - Ask about the **why** behind the adverse action or disparate treatment
 - “Why didn’t Sally get tenure?”
 - “Why did John get tenure when Sally didn’t?”
 - Gather any evidence that supports the stated reason(s)
- Investigator should seek corroboration of any offered non-discriminatory reason(s)
 - Analyze the Respondent’s offered reason in light of relevant evidence
 - Statistical evidence may also be used to rebut a discriminatory motive
- A complaint may implicate multiple Respondents, a department, a division, or an entire institution/district

Step Three: Pretext Analysis

- If the Respondent offers a non-discriminatory reason for the adverse action, the Investigator must then seek relevant evidence to determine if that reason is “legitimate”
 - Is the Respondent’s stated reason just pretext for discrimination?
 - **Pretext** occurs when an adverse action occurred for discriminatory reasons but an individual nonetheless asserts that there was a legitimate reason for the action
- Provide the Complainant with an opportunity to respond to the Respondent’s reasoning
 - Follow-up interview to identify any evidence to rebut the Respondent’s reasoning
 - Direct evidence
 - Other witnesses or documents
- Consider other sources to thoroughly investigate whether the reasoning is pretextual

Michelle & Tim

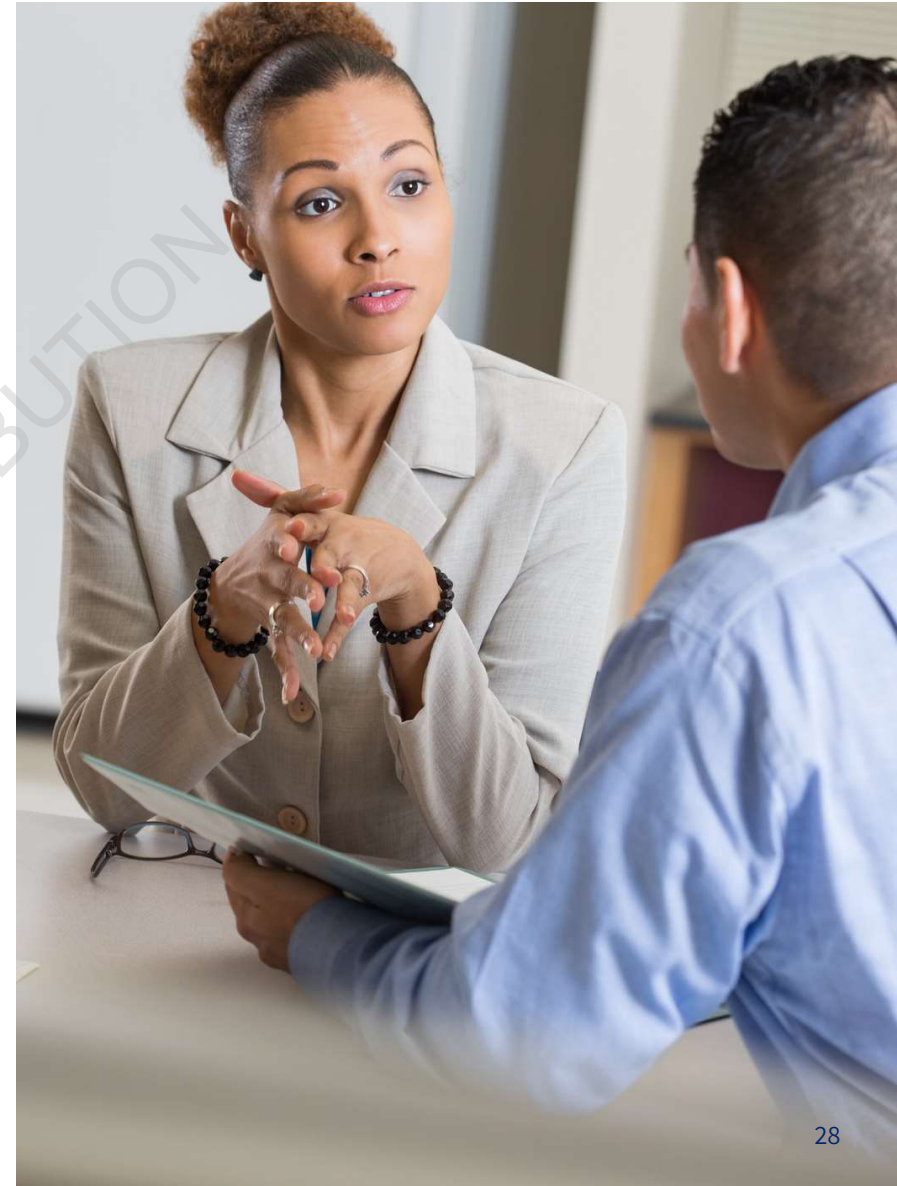
- Michelle, a Black woman currently employed at the high school, applied for the new Chief Information Officer (CIO) role in the school district
- The job posting required experience with specific student information software, as well as a minimum of three years of supervising other IT professionals
 - Michelle met all of the requirements for the position but was not hired
 - The district hired Tim, a Black male
 - Tim previously worked at the district, before Michelle arrived and before leaving for a tech start-up in the finance sector
 - Tim had no experience with the specific student information software and hadn't yet supervised other IT professionals

Did Michelle allege all the elements of a disparate treatment complaint?

Michelle & Tim

- Tyrone, who supervises the CIO role, asserts that he offered Tim the job because they're friends from when Tyrone was the district business director and Tim worked in the IT office
 - Tyrone never worked directly with Michelle and opted to hire his friend

Has Tyrone provided a **non-discriminatory** reason for not hiring Michelle?



Michelle & Tim

- Tyrone claimed his decision was based on favoritism for his friendship with Tim
- Michelle responds that Tyrone's argument is pretext
- Michelle offers two coworkers as witnesses to Tyrone's statements about how he does not trust women in IT roles because his mother is completely inept when it comes to technology
 - Tyrone counters that these comments were made in jest
 - Witnesses provide evidence that Tyrone made such comments more than once

Does the evidence suggest that Tyrone's offered reason was pretext?

Rory

- Rory, a transgender student, has limited housing options because they feel most comfortable living with students of a different gender identity than their own, and the institution's housing policy requires same-gender room assignments
 - Institution has a practice of assigning transgender students to single occupancy rooms that are available in a residence hall at the edge of campus, away from the academic buildings
 - The single occupancy rooms are in older buildings with dated furniture
 - The institution has many residence halls and apartment complexes in locations across campus with varying levels of renovation updates

Has Rory alleged all the elements of a disparate treatment complaint?

Rory

- The Director of Residential Life asserts that the practice is the result of working with transgender students in the past, who often preferred single-occupancy room privacy over other housing considerations
- The institution did not intend to discriminate, but rather to formalize and streamline an ongoing practice

Has the Department provided a non-discriminatory reason for the transgender housing assignment practice?

If not, what may next steps look like?

Making a Determination

- After completing Steps One, Two, and Three, the Investigator/Decision-maker applies the standard of evidence to determine whether a violation occurred
 - May involve credibility analysis
- If a violation occurred, consider appropriate sanctions and/or remedies



Special Considerations in Resolving Disparate Treatment Complaints

Intake

- Disparate treatment complaints require very specific elements
 - May need to tweak intake approach to elicit key information to fill in the blanks
 - Who is alleged to have done what, precisely?
 - Be transparent with the Complainant about the reasons for your questions
 - Intake meeting is usually **not** an interview, but can help to flesh out the Step One allegation elements
 - Intake meeting can also help to set expectations about the investigation
 - Explain the process and the Disparate Treatment Construct

Techniques for Assessing Motive

- Discriminatory motive may be inferred from similarly situated individuals who do not identify with the protected characteristic being treated differently
- Investigator should still look for direct evidence of a motive
 - Respondent statements or statements made on Respondent's behalf indicating bias
 - Can include evidence that Respondent failed to take appropriate corrective actions to resolve known discriminatory practices or policies
 - Documentary evidence
 - Emails, performance reviews, text messages, grading patterns, etc.
 - Testimonial evidence
 - Party statements, witness statements
- Previous satisfactory job performance can also support an inference of discrimination

Similarly Situated Individuals

- **“Similarly situated”** is not precisely defined
 - Individuals may be similarly situated in one context but not another
 - Investigators must determine which individuals, in the same context as the Complainant, should receive the same treatment as the Complainant
 - Consider the scope of the complaint
 - If a student is reporting an individual faculty member, similarly situated students may be the other students in that course and students in the faculty member’s other courses
 - If an employee is reporting a vice president’s bias in hiring/promotion, similarly situated employees may be other employees division wide

Similarly Situated Individuals

- If there are no individuals in the same position as the Complainant, the Investigator should consider other individuals in the most similar situations
 - Make the **most relevant comparisons possible** based on the available evidence
 - Do not force a comparison where there really is no comparator
- Generally, the similarly situated comparison is most useful if the similarly situated individuals **are not** part of the Complainant's protected group



Comparative Evidence

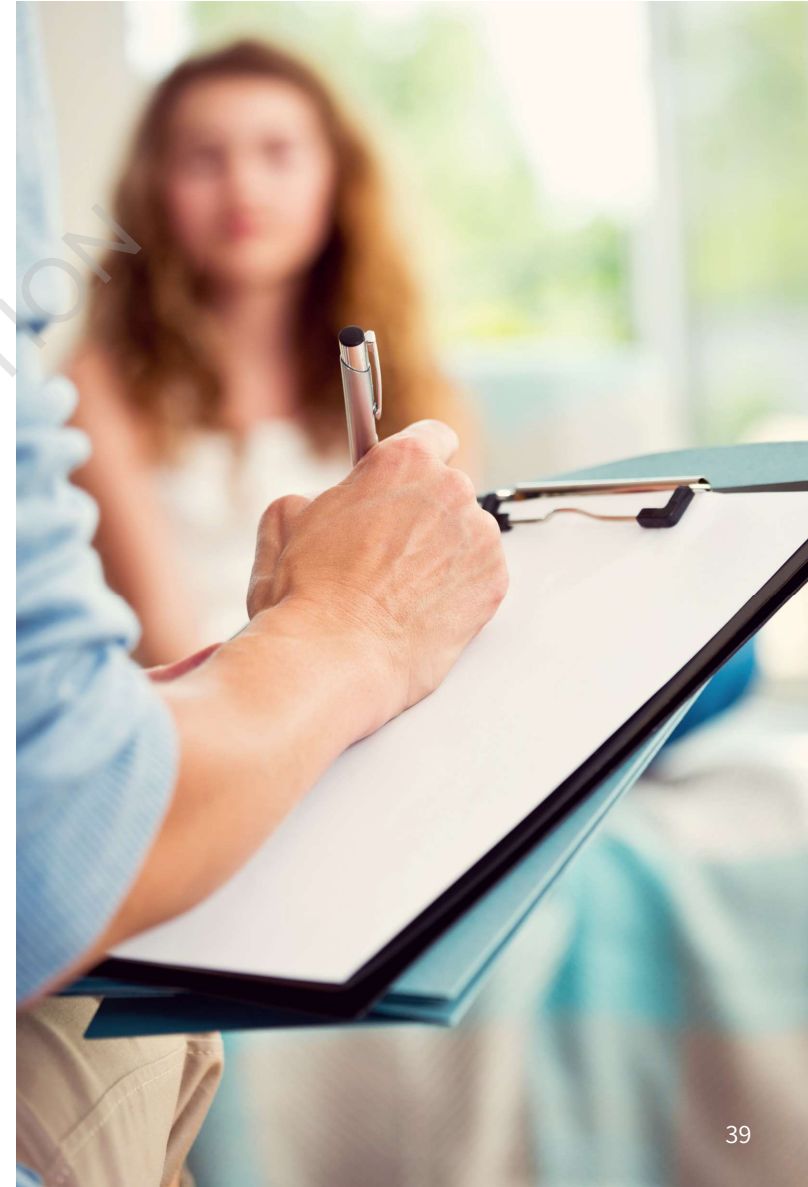
Investigators may use a variety of tools to obtain comparative evidence from similarly situated individuals

- Surveys
- Focus groups
- Policy reviews
- Performance reviews/other evaluations
- Previous complaints
- Grading records/reviews
- Expert witnesses to analyze complex cases such as compensation/experience



Direct Motive Examples

- A student supervisor regularly refers to LGBTQ+ individuals with a slur
- Facilities and Maintenance refuses to hire women because the director does not believe women can perform all aspects of the job
- A Resident Assistant told another student that he likes to file disciplinary reports against transgender residents because they are just looking for attention



Satisfactory Job Performance Example

- Discriminatory intent may also be identified by viewing the adverse action in relation to a person's prior performance
 - This is not fool-proof
 - Past performance does not guarantee future performance, but it's an indicator
- Example:
 - In each of the past three years, the Director has gotten rave reviews during her annual evaluation
 - She has previously been told that she will be up for a promotion during her fourth year and is a “shoe-in”
 - One month before evaluations and promotions occur, the Director shares with her supervisor that she's pregnant
 - After evaluations, the Director was given a Performance Improvement Plan instead of a promotion

Assessing Rationale

- Investigator should ask the Respondent for any rationale for their actions
 - Seek corroborating evidence from other sources
 - Look for evidentiary consistency
 - Consider pre-existing relationships among parties and witnesses
 - Be mindful that decisions may have more than one reason
- Similar to assessing credibility in other contexts



Common Rebuttal Arguments

Respondent may provide evidence that:

- Complainant's allegations are **factually incorrect**
 - Ex: A Complainant's pay disparity allegations are based on inaccurate compensation information
 - Ex: Rory was offered other housing options and chose their room
- Complainant has been **improperly compared** to individuals not similarly situated
 - Ex: A Complainant alleges student conduct outcome disparities, but Complainant had previous violations, while comparators had not
- Complainant was compared to **some**, but not **all**, similarly situated individuals

Common Rebuttal Arguments

Respondent may offer evidence that:

- Actions were based on **favoritism**
 - Investigator should consider if favoritism is **pretext** for discrimination
 - Ex: Consider Michelle's hiring allegations
- Any statistical evidence the Complainant relies upon **does not raise an inference** of disparate treatment
 - Comparison group in the statistical data is not appropriate
 - Disparity is not statistically significant enough to derive conclusions
 - Ex: The hiring pool is 50/50 but successful candidates are 55/45

Common Rebuttal Arguments

Respondent may offer evidence that:

- Not **all** members of a sex or gender group have received disparate treatment
 - This could be a red herring
 - The question is whether the **Complainant** was treated less favorably than similarly situated persons of a different sex or gender group
- Respondent treated Complainant the same as a member of a **different** sex or gender group
 - Unless that other individual is **similarly situated**, this is not a justification

Common Rebuttal Arguments

Respondent may offer evidence that:

- A Complainant was qualified for a position but asserts that another person was selected because that person was **better qualified or a better fit**
 - This type of argument requires close examination
 - Respondents should articulate why the other person was more qualified than the Complainant
 - An expert witness may be helpful in these situations
 - Qualifications can be multifaceted and subjective

Mixed motives for adverse actions are possible

- If any one of the motives is discriminatory, even if other motives are non-discriminatory, a policy violation occurred

Techniques for Assessing Pretext

- Always provide the Complainant with the **opportunity to respond**
 - Complainant may have evidence or be able to suggest evidence to rebut Respondent's position as **pretext**
 - Investigator's responsibility to investigate pretext
- When a conflict between Respondent's position and Complainant's position arises, seek corroborating evidence
 - Coworkers or other students may be able to verify
 - Documents or testimony of senior officials may verify a policy or practice
- Perform a credibility analysis of all parties' positions and their respective arguments concerning the allegations

Questioning Guidelines

- Investigating a disparate treatment complaint is different from investigating a sexual harassment complaint
- Investigators should:
 - Start with broad questions
 - Follow up to explore gaps
 - Use policy definitions to drive questioning
 - Use trauma-informed questioning skills where appropriate
- Investigators should avoid:
 - Accusatory or argumentative questions
 - Confusing questions



Questioning Guidelines

- Investigator may be more direct than in a sexual harassment complaint
 - “Why do you feel like you have been subjected to sex discrimination?”
 - “Could there be any other possible reasons for your treatment?”
 - “If your professor were to provide one of the reasons you described, how would you respond to that?”
 - “Why did you say that in front of the department?”

Questioning Guidelines

- Be transparent when being direct
 - Explain the Disparate Treatment Construct, in comprehensible terms
 - “I need to establish some of these facts before we can move forward”
 - “These types of complaints focus on whether there is a legitimate, non-discriminatory reason for the action, so I am trying to gather insight and facts from all parties in that regard”
- Structure questioning and evidence gathering based on Disparate Treatment Construct

Applied Learning

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Questions?

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