

Sexual Misconduct Case Management Decision-Making Scenarios (Part 2)

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Fall 2021

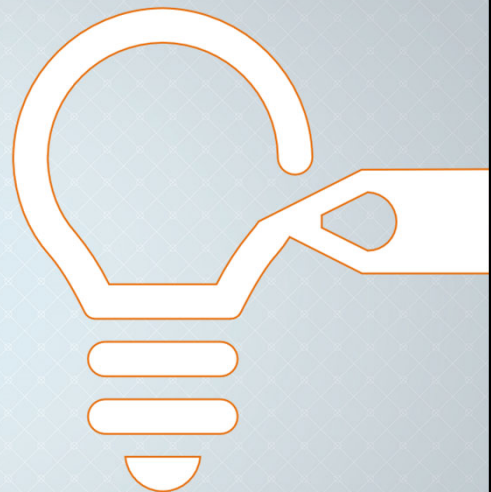


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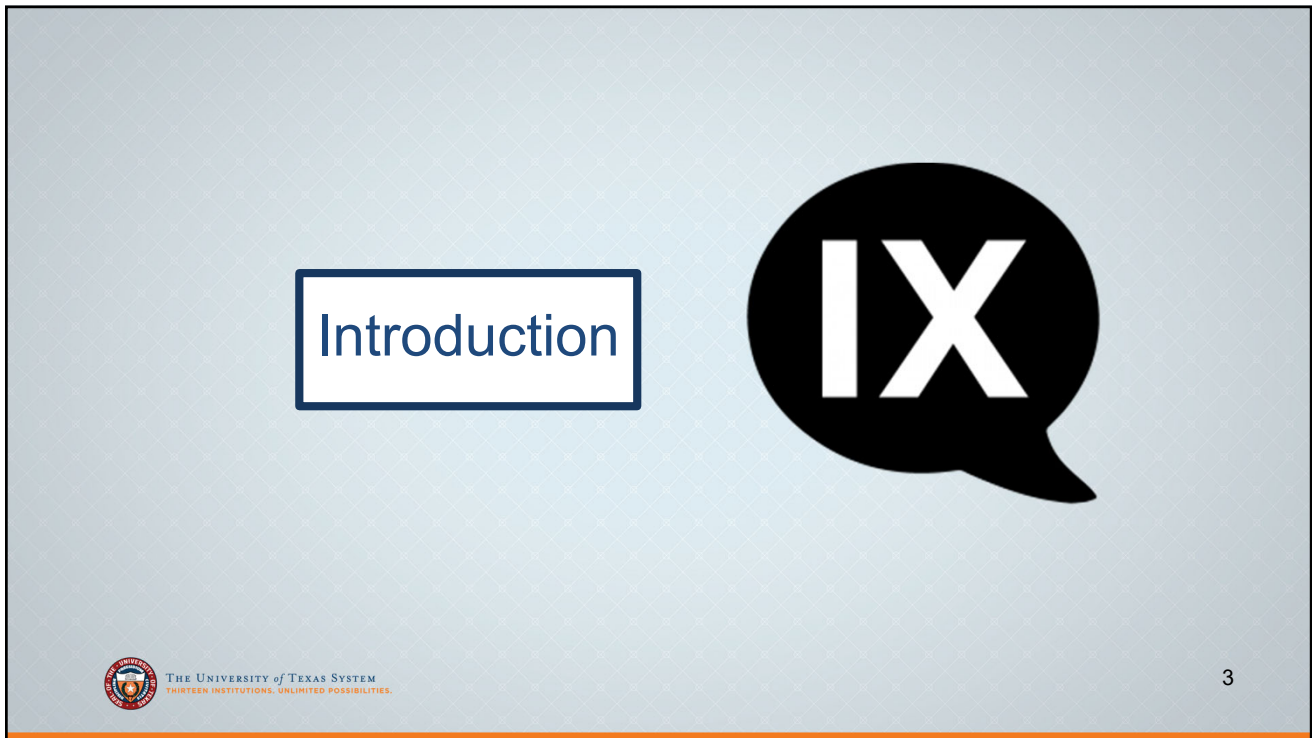
Agenda

1. Title IX Introduction
2. Case Mgt Hypothetical Scenarios
 - General Case Mgt Decision-Points
 - TIXC: When to File a Formal Complaint?
 - Threat Assessment Cases
 - Formal Complaint Dismissals
 - Free Speech & Retaliation Cases
3. Q & A




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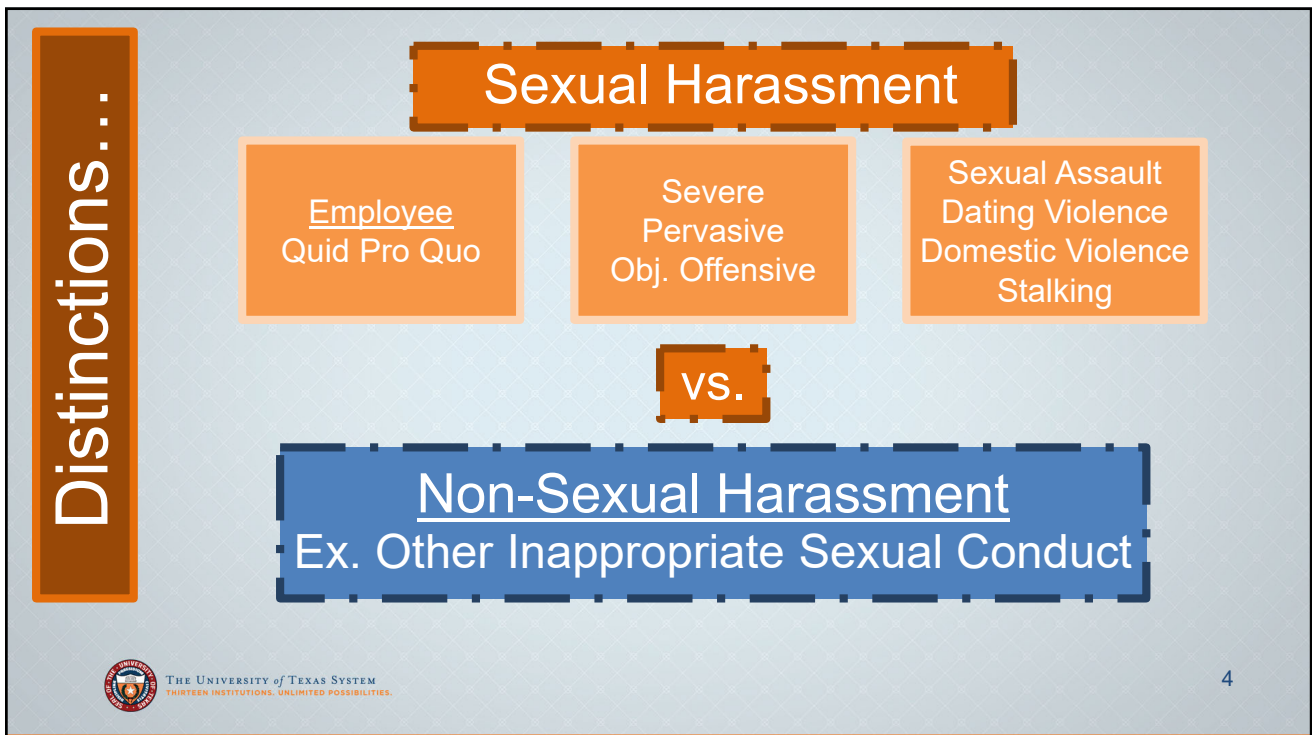
Introduction

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Distinctions...

Sexual Harassment

- Employee Quid Pro Quo
- Severe Pervasive Obj. Offensive
- Sexual Assault
Dating Violence
Domestic Violence
Stalking

VS.

Non-Sexual Harassment
Ex. Other Inappropriate Sexual Conduct

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Definition of “Sexual Harassment” under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the institution’s education program or activity; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



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Source: Title IX Regulations (2020)

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“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



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Source: Title IX Regulations (2020)

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Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is

1. Verbal conduct (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that they created a Hostile Environment, as defined in the Model Policy.
2. Physical conduct...



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Source:

UT System Model Policy for Sexual Misconduct (2021)

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Definition of “Other Inappropriate Sexual Conduct” (Cont.)

Potential Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.




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Source:

UT System Model Policy for Sexual Misconduct (2021)


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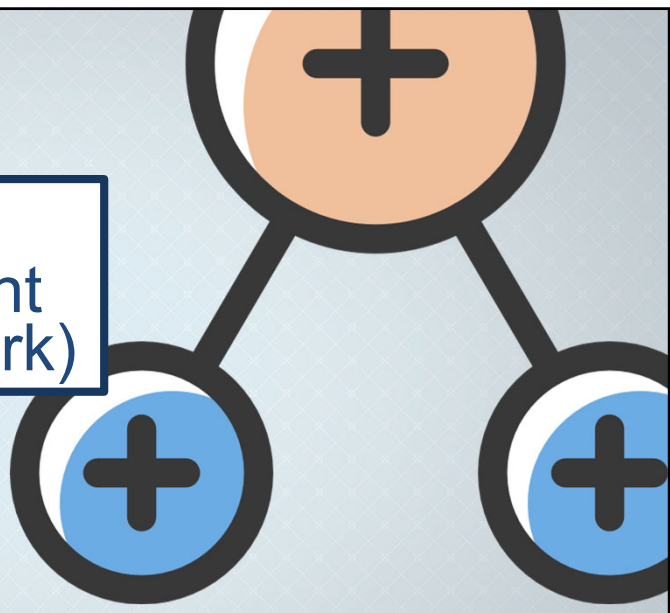
Bottom Line
for Case
Management

- Be **consistent**
- Refer to **case precedent** (e.g. similar facts or elements)
- Follow your **policy** and **process**




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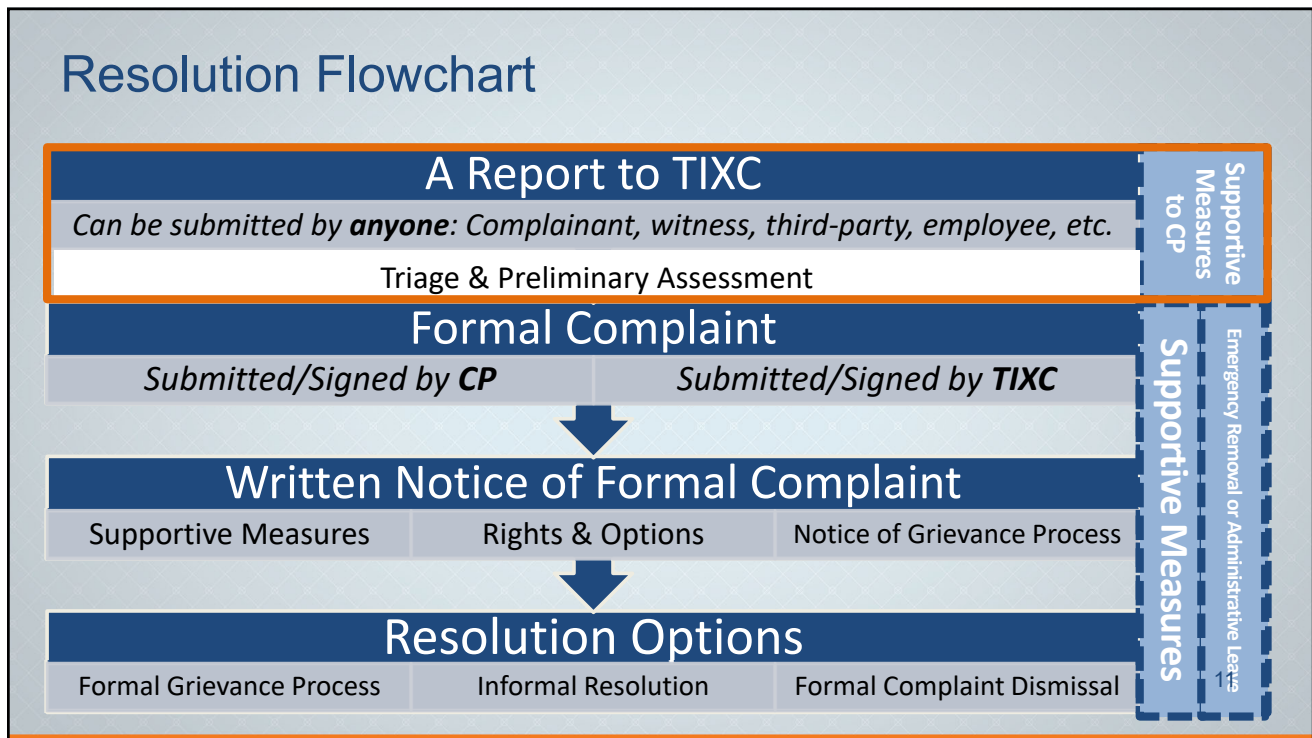
Triage &
Case Management
(General Framework)



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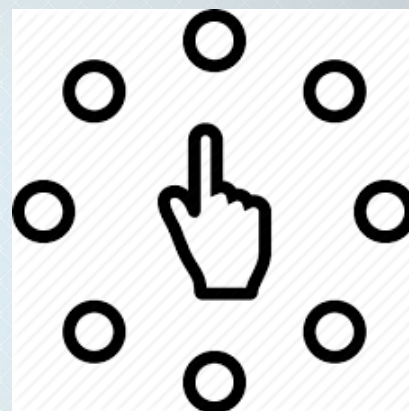
Resolution Flowchart



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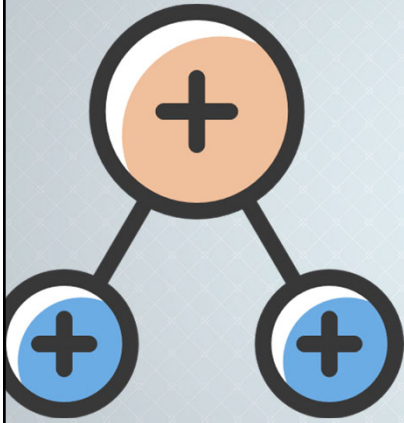
TIXC: Options for Next Steps

- Supportive Measures for the CP
- CP's right to file a formal complaint
- TIXC files a formal complaint, in lieu of a Reluctant Complainant & compelling reasons to investigate further...



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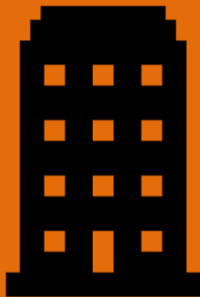
TIXC: File a Formal Complaint?



Consider if there are compelling reasons:

1. The **nature, circumstances, & seriousness** of the alleged conduct;
2. The **safety & risk of harm** to others;
3. Any **pattern evidence**, other similar conduct or allegations of the **RP**;
4. **RP's affiliation** with the institution & **applicable options** for institutional action; and/or
5. Other relevant factors in the specific matter?

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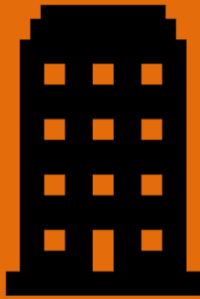


Hypothetical 1

- Responsible employee submits a **report** to the TIXC.
- CP (student) disclosed being a victim of a “sexual assault” by RP (student) at an on-campus residence hall “last semester”

Triage/next steps?

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Hypothetical 1 Follow-up

- Responsible employee submits a **report** to the TIXC.
- CP (student) disclosed being a victim of a “sexual assault” by RP (student) at an off-campus apt “last semester”
- CP expressly wishes “no investigation.”
- Two previous reports of alleged “sexual assault” in the past year against same RP

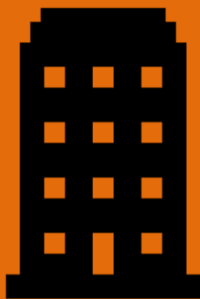
Should the TIXC file a Formal Complaint?



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Hypothetical 1 Considerations

1. Opportunity to revisit with the 3 CP's (independently) & explore options again?
2. Case precedent? Similar cases like this in the past?
3. Specific circumstances of the alleged sexual assaults? Any predatory behaviors alleged?
4. Weigh the safety factors when filing a F.C. without CP's support or cooperation. Impacts or risks?



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Hypothetical 2

- Responsible employee submits a **report** to the TIXC.
- CP (student) disclosed being the victim of “sexual blackmail” by RP (student) via multiple texts and emails: Accused of threatening to post sexually explicit content of the CP “if the CP doesn’t talk to the RP”.
- CP & RP were in a previous romantic/sexual relationship; currently not together.

Triage/next steps?



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Hypothetical 2 Follow-up

- Responsible employee submits a **report** to the TIXC.
- CP (student) disclosed being the victim of “sexual blackmail” by RP (student) via multiple texts and emails: Accused of threatening to post sexually explicit content of the CP “if the CP doesn’t talk to the RP”.
- CP & RP were in a previous romantic/sexual relationship; currently not together.
- CP expressly wishes “no investigation”.
- CP has history of academic probation and withdrawals.

Should the TIXC file a Formal Complaint?



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Hypothetical 2 Considerations

1. Opportunity to revisit with the CP, discuss warning signs of “stalking”, safety tips, supportive measures for academic impacts, & explore options again?
2. Case precedent? Similar cases like this in the past?
3. Specific circumstances of the alleged “sexual harassment” or “stalking”? Any threats of violence, intimidation, or predatory behaviors alleged?
4. Weigh the safety factors when filing a F.C. without CP’s support or cooperation. Impacts or risks?
5. Opportunity for BIT referral for the RP? CP?



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Hypothetical 3

- Responsible employee submits a **report** to the TIXC.
- CP (student) disclosed being a victim of an “abusive relationship” by RP (student). Both CP & RP live “off campus” and are currently in a relationship together.

Triage/next steps?



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Hypothetical 3 Follow-up

- Responsible employee submits a **report** to the TIXC.
- CP (student) disclosed being a victim of an “abusive relationship” by RP (student). Both CP & RP live “off campus” and are currently in a relationship together.
- CP expressly wishes “no investigation”.
- One additional report of alleged “dating violence” in past month against the same RP by the same CP, involving a physical altercation (pushing and restraining arms during an argument).
- CP has described RP as “jealous” toward CP’s interactions with others, and RP “has a temper” and “gets angry easily.”
- RP has threatened “suicide” in the past when CP doesn’t return calls/texts.

Should the TIXC file a Formal Complaint?



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Hypothetical 3 Considerations

1. Opportunity to revisit with the CP, discuss warning signs of “dating violence”, safety tips, supportive measures (e.g. counseling, victim advocacy) & explore options again?
2. Case precedent? Similar cases like this in the past?
3. Specific circumstances of the alleged “dating violence”? Any threats of violence, intimidation, or predatory behaviors alleged? How lethal?
4. Weigh the safety factors when filing a F.C. without CP’s support or cooperation. Impacts or risks?
5. Opportunity for BIT referral for the RP? CP?



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Hypothetical 4

- Responsible employee submits a **report** to the TIXC.
- CP (employee) disclosed witnessing “inappropriate conduct” of a sexual nature in the workplace by RP1 (employee) and RP2 (employee):
 - RP1 uses “vulgar” language & “picks on the women” in the office;
 - RP2 talks about their own “sexual encounters” and how attractive the coworkers are in the office.
 - The supervisor “doesn’t seem to address any of the behavior,” and it’s “interfering with the office morale & work environment.”

Triage/next steps?



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Hypothetical 4 Follow-up

- Responsible employee submits a **report** to the TIXC
- CP (employee) disclosed witnessing “inappropriate conduct” of a sexual nature in the workplace by RP1 (employee) and RP2 (employee):
 - RP1 uses “vulgar” language & “picks on the women” in the office;
 - RP2 talks about their own “sexual encounters” and how attractive the coworkers are in the office.
 - The supervisor “doesn’t seem to address any of the behavior,” and it’s “interfering with the office morale & work environment.”
- CP isn’t sure what to do; and “fears retaliation” from the supervisor and coworkers.
- CP says that other women in the office have expressed “feeling uncomfortable” and have considered quitting.
- CP says the office has been like this “for a long time.”

Should the TIXC file a Formal Complaint?



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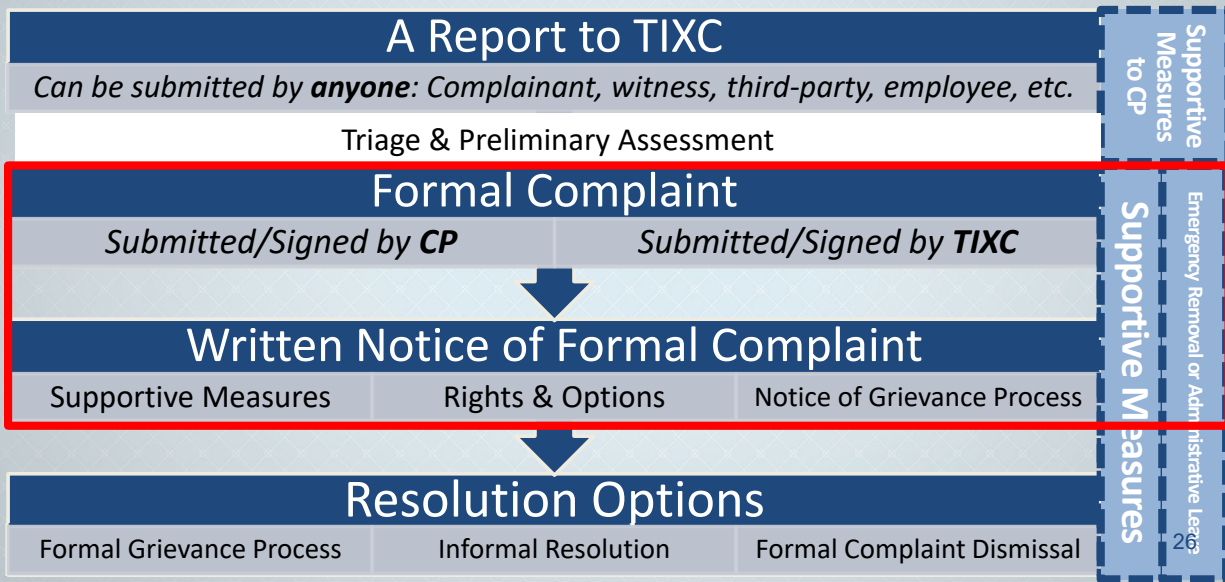
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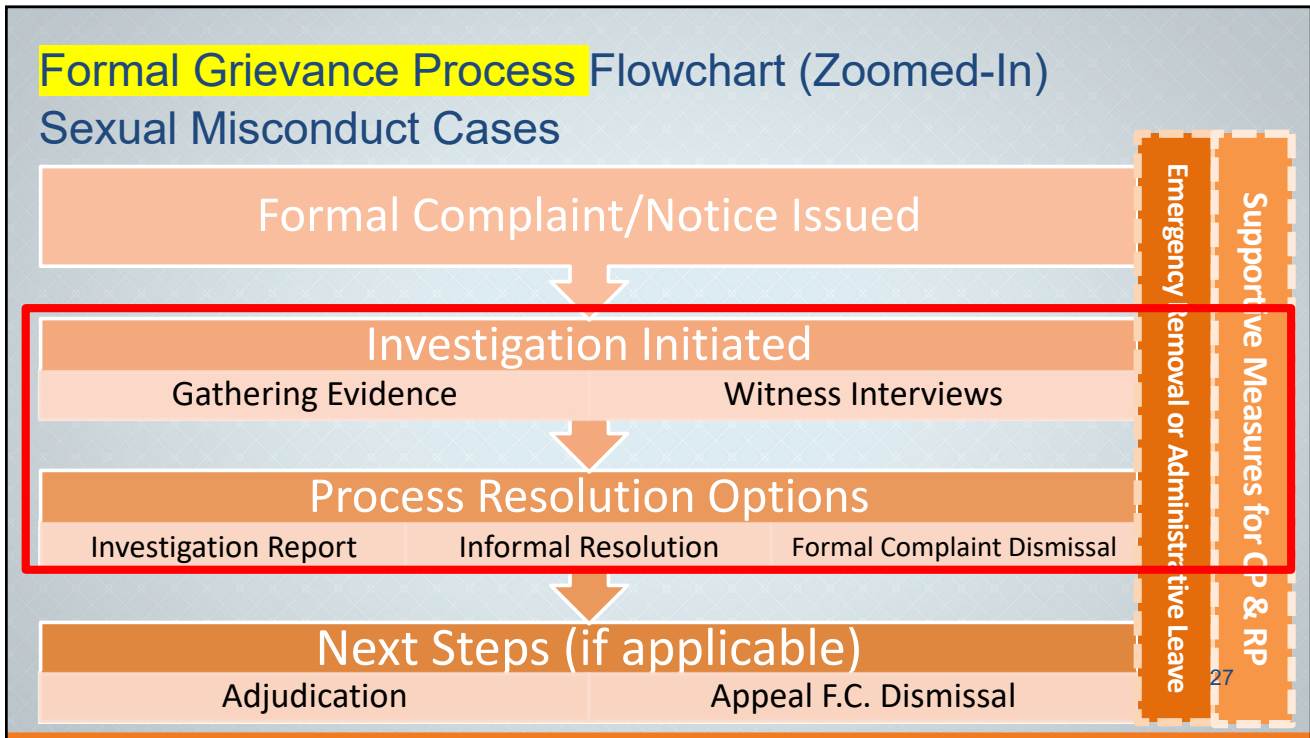


Hypothetical 4 Considerations


1. Opportunity to revisit with the CP, discuss supportive measures & discuss that the TIXC can file a F.C. to address the potential “hostile environment” in the education program or activity (e.g. work environment of the institution).
2. Duty to respond under Title VII?
3. Case precedent? Similar cases like this in the past?
4. Specific circumstances of the alleged “hostile environment”? Any intimidation, manipulation or predatory behaviors alleged? How severe?
5. Weigh the safety factors when filing a F.C. possibly without CP’s support or cooperation. Impacts or risks?

Resolution Flowchart





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Hypothetical 4
Updates/Cont.

TIXC initiates & signs **formal complaints** into:

- a. Allegations of possible “**inappropriate conduct**” of a **sexual nature** & potential “**hostile environment**” in the workplace by RP1 (employee), RP2 (employee); and
- b. Possible “**failure to report**” of a **responsible employee** by RP3 (supervisor). RP3 supervises CP1, along with possible witnesses to the investigations.

- The notice of the formal complaints are issued and an included provision reiterates that retaliation is prohibited.
- CP1 has requested “supportive measures” of (a) being reassigned to a different supervisor, (b) that CP1’s performance appraisal be completed by someone other than RP3, and (c) to be stationed “out of sight” from RP1, RP2, and RP3.
- The office space is relatively small with “no additional workspaces,” according to the Dept’s Director.

Triage/next steps?



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Hypothetical 4 Considerations

1. What are “reasonably available” individualized supportive measures that can be arranged for CP1 in this specific situation?
2. Case precedent? Similar cases like this in the past?
3. Can reasonable alternatives be offered or arranged instead?
4. Other options or issues at play?



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Hypothetical 5

- CP files a **formal complaint** to the TIXC.
- CP (student) alleges being the victim of “sexual harassment” by RP (student): CP feels uncomfortable by the RP; RP gives the CP “strange looks” and describes unwanted verbal contact from the RP.


Triage/next steps?



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Hypothetical 5 Updates

- TIXC triaged further with CP and initially determined the conduct may constitute “sexual harassment” or “other inappropriate sexual conduct” and to investigate further.
- Then, in the course of the investigation, evidence gathered shows that the RP asked the CP to “hangout” and tried to initiate a “study date.”
- The RP had romantic interest in the CP at the time of the attempted forms of contact.
- CP didn’t respond to the RP’s attempts at contact and CP said the RP acts “awkward” and “creepy.”
- RP says that the CP is making a “false complaint.”
- Using a “reasonable person” standard, investigators examine & determine that the alleged conduct doesn’t constitute “sexual harassment,” “other inappropriate sexual conduct” and the conduct doesn’t meet the definitions of any other prohibited conduct under the Sexual Misconduct Policy.


*What are the main issues presented?
Triage/next steps?*



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Hypothetical 5 Main Issues

Main Issues	Possible Options?
1. Decision-point about CP’s Formal Complaint of “sexual harassment” and/or “other inappropriate sexual conduct.”	a. Formal Complaint dismissal? b. Disagree with investigators’ definitional analysis and continue formal investigation?
2. RP’s concern/verbal allegation of “ false compliant ” regarding CP’s Formal Complaint.	a. Definitional analysis and/or compelling rationale for TIXC to file a Formal Complaint? b. Follow-up with RP regarding the concern?



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Hypothetical 5 Considerations



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Issue #1: CP's Formal Complaint:

1. Follow-up with CP & gather any additional information or testimony necessary.
2. If TIXC disagrees with the investigators' definitional analysis, document the additional analysis and continue the investigation.

If the TIXC agrees with the investigators' definitional analysis, and there is no other information that may change the analysis/conclusion then...

3. Issue a Formal Complaint Dismissal to CP & RP regarding the open case, dismissing all of the allegations and therefore closing the case.

Note: Both CP & RP have the option to appeal the F.C. Dismissal.

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Hypothetical 5 Considerations (Cont.)



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Issue #2: RP's concern/verbal allegation of "false complaint" against the CP:

1. Review the definition of "false information & false complaint" in the Sexual Misconduct Policy.
2. Is there any preliminary evidence to any elements of the "false complaint" definition that show this is a reasonable consideration for the TIXC to file a formal complaint against the original CP regarding these allegations?
3. Consult with your Legal Affairs Office regarding any legal implications or concerns.
4. Explain to RP that the Formal Complaint has been dismissed and closed, and the reason(s).
5. Provide the RP with the process for filing formal complaints, as well as providing the definitions of prohibited conduct under the policy (e.g. "false information & false complaints") so that the RP has a description of that type of conduct.

Note: RP has the right to file a formal complaint (e.g. against the CP) regarding any prohibited conduct in the Sexual Misconduct Policy.


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Hypothetical 6

- CP files a **formal complaint** to the TIXC.
- CP (student) alleges being the victim of “sexual harassment” by RP (faculty): CP says that the RP “made inappropriate comments directed specifically toward the CP about the CP’s gender in class” and “made sexually suggestive comments directed toward CP in one-on-one appointments & office hours.”
- RP teaches about gender & sexuality.
- RP has a reputation for provocation & controversial gender-based pedagogical opinions.


Triage/next steps?



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Hypothetical 6 Updates

- RP responds to the allegations, saying that RP’s conduct was in relation to the curriculum, and the RP has “academic freedom” in the course & scope of RP’s faculty role.
- CP is provided an opportunity to respond to the RP’s initial responses to the allegations (noted above) and CP provides investigators with testimony and witnesses from class to help corroborate the “sexual harassment” allegations.
- As the investigation continues, CP posts on social media that CP is the victim of “sexual harassment” and names the RP publicly on Twitter and Instagram.
- Shortly thereafter, the RP files a formal complaint of “retaliation” against the CP, arguing the following:
 - a. RP is protected from retaliation by participating in the investigation, and
 - b. CP’s social media posts are “publicly defaming the RP without a determination of responsibility regarding the allegations” and it’s in retaliation to the RP participating in the grievance process.


*What are the main issues presented?
Triage/next steps?*




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	Main Issues	Possible Options?
 <p data-bbox="219 661 560 766">Hypothetical 6 Main Issues</p>	<p>1. Decision-point about CP’s Formal Complaint of “sexual harassment” and/or “other inappropriate sexual conduct.”</p>	<p>a. Formal Complaint dismissal? b. Continue formal investigation? c. Any academic freedom implications?</p>
	<p>2. Decision-point about RP’s Formal Complaint of “retaliation” against CP.</p>	<p>a. Formal Complaint dismissal outright? b. Issue notice of a new Formal Complaint & initiate formal investigation? c. Any free speech implications?</p>

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 <p data-bbox="219 1533 560 1638">Hypothetical 6 Considerations</p>	<p>Issue #1: Original CP’s Formal Complaint regarding the “<u>sexual harassment</u>” and/or “<u>other inappropriate sexual conduct</u>” allegations against the original RP:</p> <ol style="list-style-type: none"> 1. There could be elements of a legitimate <u>prohibited conduct</u> complaint & an <u>expression of academic freedom</u> (e.g. RP’s defense to the allegations, RP’s course & scope of teaching). 2. Consult with your Legal Affairs Office regarding any legal implications or concerns. 3. Continue to make a good faith effort to investigate further. 4. Administrative Leave for RP?
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Hypothetical 6 Considerations (Cont.)

Issue #1 (Continued)

If there is a valid reason to dismiss the Formal Complaint during the investigation, such as for the “**sexual harassment**” allegation, then...

5. Issue a Formal Complaint Dismissal regarding the “sexual harassment” allegation, dismissing the allegation “under Title IX” but the **investigation is continuing** under the Sexual Misconduct Policy’s grievance process for “**other inappropriate sexual conduct**”.

Note: Both CP & RP have the option to appeal the F.C. Dismissal.



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Hypothetical 6 Considerations (Cont.)

Issue #2: Original RP’s Formal Complaint regarding the “retaliation” allegation against the original CP:

1. The original CP’s conduct can be an expression of free speech, but there should be a thoughtful analysis on alleged adverse action claim toward original RP.
2. Consult with your Legal Affairs Office regarding any legal implications or concerns.
3. Issue notice to CP & RP of the Formal Complaint for “retaliation” against CP.
4. Follow-up with both parties & conduct initial interviews. Make a good faith effort to investigate.
5. Expedite the interviews, due to the escalation of the cases, and the filing of multiple formal complaints against each other.



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Hypothetical 6 Considerations (Cont.)



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Issue #2 (Continued)

If there is a valid reason to dismiss the Formal Complaint during the investigation, then...

6. Issue a Formal Complaint Dismissal to CP & RP regarding the “retaliation” allegation, dismissing the allegation, and therefore **closing the case**.

Note: Both CP & RP have the option to appeal the F.C. Dismissal.

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Hypothetical 6 Considerations (Cont.)



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1. TIXC can revisit with both parties about **supportive measures, expressed wishes, and options**.
2. Investigators can revisit with both parties about **what to expect** of the process, the policy, and **procedures** of the grievance process.
 - Focus on the impartiality & neutrality of your role as a fact-finder.
 - Center on the elements of conduct definitions that constitute a possible policy violation.
 - Be consistent.

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Wrap-Up:
Bottom Line
for Case Mgt

- Focus on the **impartiality & neutrality** of your role
- Use **communication paths** for BIT referrals & “need to know” matters
- Be **consistent** with **case mgt decision-making**
- Refer to **case precedent** (e.g. similar facts or elements)
- Follow your **policy** and **process**



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