



UTSA[®]

The University of Texas at San Antonio[™]

EOS Retreat 2024

Presented by Office of Legal Affairs September 2024

Credibility

- What is credibility?
- Why is it important to make credibility determinations in an investigation?
- What is a credibility determination in an investigation?

Assessing Credibility

First Tier Factors

- Motive to Falsify
- Consistency
- Material Omission
- Corroboration
- Inherent Plausibility

Assessing Credibility Second Tier Factors

- Demeanor
 - body language, facial cues, eye contact, fidgeting
- An Individual's Recollection
 - "I don't remember"

Pitfalls in Assessing Credibility

- Failing to explain your credibility assessments
- Bias
- Failure to properly prepare and gather information, particularly before conducting interviews.

Interview Tips

- Plan questions carefully
- Keep questions simple
- Avoid leading questions
- Ask follow up questions or rephrase their answer for confirmation

Preponderance of the Evidence

The standard for assessing the credibility and weight of the evidence takes the following into account:

- Is there a preponderance of evidence based on corroborating information?
- Did the event in question more than likely occur?
- Does the evidence presented on one side outweigh what's presented on the opposing side?
- Is there a greater than 50% chance that a proposition is true?

Insufficient evidence is often the factor that leads to a conclusion that it's impossible to make a call – the very thing that is most needed.

Compelling Participation

- Formal Title IX v. HOP 9.01/Appendix A
- Employees v. Students
- Garrity Warnings

Federal Title IX (2020)

- 34 CFR 106.71
- UTSA may not "intimidate, threaten, coerce, or discriminate against any individual . . . because the individual has . . . refused to participate in any manner in an investigation, proceeding, or hearing under this part."

The Future of Federal Title IX?

- 34 CFR 106.2 (2024)
- "Retaliation means intimidation, threats, coercion, or discrimination against any person . . . because the person . . . refused to participate in any manner in an investigation, proceeding, or hearing[.]"
- "Nothing in this definition or this part precludes a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service under the recipient's education program or activity to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part."

UTSA Investigations Aren't Optional

- Allowing witnesses/parties to opt out of a HOP 9.01/Appendix A investigation can:
 - Make it difficult to gather sufficient evidence to reach a conclusion
 - Present a "strategic non-participation" problem
 - Prevent UTSA from addressing discrimination, harassment, and sexual misconduct
 - Impair UTSA's ability to defend itself in administrative complaints/litigation
 - Impact employee and student trust in investigation process

Considerations

- What type of case is it?
- Do you have reason to believe the witness can provide relevant testimony or evidence?
- Is there a legitimate reason the witness cannot provide information or testimony?

EOS Witness FAQs

Differentiates between Federal Title IX cases and HOP 9.01/Appendix A

Notes consequences for failure to respond to a request from an investigator

Explains current Title IX policy regarding participation

3. I am a UTSA faculty or staff member or a UTSA student, and I have been identified as a witness in an investigation. Am I required to participate in the investigation?

It depends on the type of investigation. In most situations, UTSA faculty, staff, and students are required to fully participate in investigations and to promptly provide all information in response to a request from an investigator. Failure to do so may constitute insubordination and result in disciplinary action.

However, current policy permits faculty, staff, and students to decline to participate in an investigation of sexual harassment under Title IX. Nevertheless, EOS encourages witnesses to fully participate in any investigation. If witnesses do not participate in the process, it is more difficult for UTSA to combat discrimination, harassment, or sexual misconduct. EOS recognizes that it may be difficult to participate in an investigation and the concerns witnesses may have regarding how their participation may influence or impact their academic and/or professional life, as well as personal and professional relationships. Individuals who have such concerns are strongly encouraged to contact EOS at eos.office@utsa.edu or call 210-458-4120.

EOS Respondent FAQs

Refers to Notification Letter

Differentiates between Federal Title IX cases and HOP 9.01/Appendix A

Notes consequences for failure to respond to a request from an investigator

Explains current Title IX policy regarding participation

3. Am I required to participate in an investigation with the EOS/Title IX Office?

It depends on the type of investigation. You should review your Respondent notification carefully. The notice will state whether EOS is investigating allegations of discrimination under HOP 9.01, allegations sexual harassment and sexual misconduct that fall under Title IX under HOP 9.01, or allegations of other sexual misconduct (non-Title IX) under Appendix A to HOP 9.24.

If EOS is investigating allegations of discrimination under HOP 9.01 or allegations of other sexual misconduct under Appendix A, you will be required to fully participate in the investigation and to promptly provide all information in response to a request from an investigator. Failure to do so may constitute insubordination and result in a referral to the appropriate department for potential disciplinary action.

If EOS is investigation allegations of Title IX sexual misconduct under HOP 9.24, you are not required to participate in the investigation. You may decide at any point whether, or to what extent, you wish to participate. In this type of investigation, Respondents may attend an informational meeting with EOS to learn about the process and ask questions. The meeting is designed to help you make an informed decision regarding whether or how you would like to participate. You will also be asked to participate in an investigative interview with the assigned Investigator of the case, where you may also decide whether or to what extent you wish to participate. A Respondent who wishes to participate in the process may provide their response at the interview or may instead prepare a written response to the allegations. It is important to note that EOS has an obligation to investigate the allegation and will proceed without your perspective, even if you choose not to participate in an interview or provide a written response. Investigators, or in the appropriate case, a hearing officer, can only make a determination regarding alleged policy violations based on the information provided by those who choose to participate in the investigative process and any evidence obtained during the course of the investigation.

Compelling Employee Participation

Requirement to participate flows from:

- State and federal requirements
- Inherent in employer/employee relationship
- Refusal can constitute insubordination

Compelling Employee Participation: Process

If employee does not participate or provide information:

- Request information in writing, provide deadline to respond
- Advise employee in writing of obligation to participate
- Contact employee's supervisor to provide written directive
- People Excellence

Compelling Students

Requirement to participate flows from Student Code of Conduct, Sec. 202(A)(3)

- "Disciplinary proceedings may be initiated against any Student for . . . failing to comply with any order or instruction of an official of the University or the System acting in the course of their authorized duties, or furnishing false or misleading information to or withholding material information from any University staff member acting in the course of their duties[.]"

Compelling Student Participation: Process

If student does not participate or provide information:

- Request information again in writing, provide deadline to respond
- Advise student in writing of obligation to participate
- Student Conduct and Community Standards

Garrity v. New Jersey, U.S. Supreme Court (1967)

- "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

Garrity Basics

- Stems from the 5th Amendment right against self-incrimination
- Applies only to situations where an internal investigation implicates potential criminal liability.
- Does not apply to purely voluntary disclosures.
- In appropriate cases, a Garrity warning advises an employee:
 - They are required to answer questions and provide information;
 - Failure may result in disciplinary action, including termination; and
 - Information provided cannot be used against them in a criminal matter.
- Employees may invoke their own Garrity rights.

Garrity Warning Process

Discuss with Legal Affairs:

- If you believe compelling a party or witness to provide information to EOS may subject the employee to criminal liability, or
- If a party or witness requests a *Garrity* warning.

New Report Template

- Purpose
- Why it is beneficial to the investigator
- When the information used to render a determination will be released.

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