

Morgan Lewis

REPORT OF INVESTIGATION

TO: Fatoumata Ndiaye, Deputy Executive Director (Management), UNICEF
Peter Mason, General Counsel and Senior Adviser to the Executive Director of UNICEF

FROM: Grace E. Speights

DATE: August 8, 2018

SUBJECT: **Sexual Harassment Investigations Conducted by UNICEF OIAI**

In March 2018, Morgan Lewis was retained by the United Nations Children's Fund (UNICEF) to conduct a review of 26 sexual harassment investigations conducted by UNICEF's Office of Internal Audit and Investigations (OIAI) from 2013 to 2017. 24 of the investigations were completed by May 31, 2018 and were reviewed for this report. This report summarizes the scope of our review, our observations based on our review of specific investigation files, and certain recommendations UNICEF should consider in order to fulfill the goals announced by UNICEF Executive Director Henrietta Fore on February 28, 2018¹ and to ensure that UNICEF's sexual harassment investigations comply with best practices.

I. Scope of our Review

From 2013 to 2017, OIAI opened 26 investigations involving an allegation of sexual harassment or other sexual misconduct.² Our team consisted of attorneys with extensive experience conducting internal workplace investigations including investigations of sexual harassment or misconduct. From April 17, 2018 to May 31, 2018, our team reviewed each of the 24 OIAI files relating to investigations that were conducted and concluded³ involving an allegation of sexual

¹ In a Statement to UNICEF staff on March 1, 2018, Fore wrote, in part: "This must be a new era for UNICEF. I want every person who works at — and with — this wonderful organization to feel safe entering UNICEF offices, workplaces or project sites, and remember two words: not here." Fore's Statement further outlined various steps designed to address the culture, including: (1) swiftly addressing new reports and keeping complainants informed during the investigation, and consequences for individuals who fail to live up to UNICEF's values; (2) improving staff vetting and screening for new hires, including through a specialized UN reference-check facility; (3) the use of independent advisors to review harassment practices; (4) launching new measures to report allegations and obtain ethics, legal and medical support, as well as counselling services; (5) expanding online harassment training to include mandatory, in-person training for all staff members; (6) using online tools to solicit staff input on UNICEF's harassment policy; and (7) reminding employees of the prohibition on commercial or other transactional sex and accessing pornographic material on UNICEF computers, and promising discipline for such conduct.

² During the same period, other investigations were opened into allegations of potential abuse of authority and harassment that was not of a sexual nature. We did not review those files for this report.

³ Two sexual harassment investigations were opened in late 2017 and were not yet complete at the time of our review.

harassment or misconduct. Our team also held meetings with UNICEF counsel to review key United Nations and UNICEF policies regarding sexual harassment and with OIAI Director Paul Manning and OIAI Principal Advisor for Investigations Kevin Curtis to discuss investigations generally and certain of the specific cases.

II. Sexual Harassment Investigations Conducted Between 2013 and 2017

Based on our review, we did not detect meaningful trends over time. For example, we did not find that the number of sexual harassment allegations increased or decreased over time, nor did we find that they became any more or less serious depending on date, location, or when the allegations were reported. The files we reviewed did reflect a relatively high number of cases reported in 2015 (9 cases) versus other years (5 cases each in 2013 and 2017, 4 cases in 2016, and only 1 case reported in 2014). We note that while current / open sexual harassment investigations were not part of this review, we understand that OIAI received a large volume of new allegations after the Executive Director's February 28, 2018 statements and that some of the alleged conduct may have occurred several years ago.

Allegations of sexual harassment were reported in locations around the world, with 8 cases reported from Africa, 6 cases each from Asia and the Middle East, 2 from North America, and 1 case each from Europe and South America.

Investigation files we reviewed typically contained a Closure Memo where allegations were not corroborated or an Investigation Report where allegations were corroborated and referred to the Division of Human Resources (DHR) Policy and Administrative Law Section (PALS) for further review. Files also typically contained a document reflecting the original allegations (e.g. an email or a complainant's statement); emails, notes, memoranda, and transcripts reflecting interviews conducted during the investigation or that reflect other investigation activity (e.g. emails about the progress of the investigation); copies of evidence gathered during the investigation; and copies of information provided to or received from the person accused of misconduct (including, for example, emails to or from the individual responding to the allegations).

Five of the 24 closed cases we reviewed were deemed substantiated after investigation by OIAI. In 1 other case, other allegations of general misconduct were substantiated, but the allegations of sexual harassment were not substantiated. In 18 cases, the sexual harassment allegations were not substantiated or the investigation did not make a conclusion about the allegations (e.g., where the complainant decided to remain anonymous and the investigation was stopped).

III. Observations

We had several observations based on our review of the investigation files and UNICEF policy relating to the investigation of allegations of sexual harassment and misconduct. In 5 cases investigated in 2015 and 2016, we found that OIAI conducted an investigation that appeared appropriate for the particular matter and for which we had no observations. We identified one or more observations for each of the remaining 19 investigations.

A. *Investigations Can Help Improve the UNICEF Culture*

The Executive Director's February 28, 2018 statement announced a policy of "no tolerance" for "harassment of any kind . . . [a]nywhere." Her statement further committed that UNICEF would swiftly address all reports of harassment, create a culture in which it is safe to come forward, and impose consequences for those who fail to live up to UNICEF's values. To achieve this goal, investigations play a dual role. They must respond to allegations and get at the veracity of those allegations so that individuals who engage in misconduct can be disciplined, as appropriate. Investigations also must, however, serve broader organizational and cultural goals like fostering a safe culture in which to report allegations and an overall culture in which sexual harassment of any type is simply not tolerated.

Based on our review, OIAI's sexual harassment investigations reflect a strong, but narrow, focus on whether or not specific allegations are substantiated and whether the individual accused of harassing conduct may be subject to discipline. The OIAI Investigation Manual specifies that OIAI's role is to "find and assess the facts pertinent to the allegation(s) of misconduct, whether committed by a UNICEF staff member or non-staff personnel [or others], in order to determine whether the allegations are substantiated."⁴ Where OIAI does not substantiate an allegation of sexual harassment / misconduct, it issues a closure memo. Complainants are notified of the results and no further action to address the allegations are taken.⁵ Where OIAI substantiates an allegation of misconduct involving a UNICEF staff member, OIAI then must provide an investigation report to the accused and permit him / her to provide written comments. Then, if OIAI remains of the opinion that the allegations are substantiated, the investigation report and relevant evidence are forwarded to DHR for further action.⁶

OIAI's remit is similar to the scope assigned to investigations teams in industry guidance,⁷ but with a primary focus on assessing allegations for the purposes of deciding what is (and is not) referred for DHR disciplinary decisions. UNICEF and OIAI, however, are missing an opportunity for investigations to play a broader role in building and sustaining a culture free of harassment. OIAI conducts investigations "after it all happens" and may not view itself as the front line of being able to impact a change in UNICEF's culture. But, guidance from other national agencies suggests that all parts of an organization must be accountable for a harassment-free

⁴ Office of Internal Audit and Investigations (OIAI) Investigation Manual, Dec. 2014 (hereinafter "OIAI Investigation Manual"), at § 3.1 "Role of OIAI – Remit."

⁵ UNICEF CF/EXD/2012-005, Executive Directive: Disciplinary Process and Measures, 30 Nov. 2012 (hereinafter "CF/EXD/2012-005"), at § 3.5.

⁶ CF/EXD/2012-005, at §§ 3.7 - 3.8. We did not review how DHR resolves the investigations referred to it, but we understand that once reports are referred, DHR assesses the matter to determine if it will issue written formal charges; if so, the staff member has another 15 days to respond to the charges and may have counsel represent him / her. DHR may recommend discipline if it concludes misconduct occurred "based on all circumstances, and in consideration of the response and additional evidence provided by the staff member." See CF/EXD/2012-005, at §§ 4.1 - 4.2. In addition to the recommendations set forth below, UNICEF should consider extending this or another review to cover how sexual harassment cases are addressed once the cases are referred to DHR.

⁷ See, e.g., The Conference of International Investigators Uniform Principles and Guidelines for Investigators, General Principles § 2 ("The purpose of an investigation by [an] Investigative Office is to examine and determine the veracity of allegations of . . . Misconduct on the part of the Organization's staff members.")

workplace.⁸ In combination with greater prevention efforts across UNICEF, adopting more flexibility in how investigations are conducted – as outlined in our suggested recommendations below – may enable OIAI to better serve this dual purpose by being positioned to address root cause issues in certain harassment cases even if there is not enough evidence for a disciplinary proceeding against an individual employee.

B. Sexual Harassment Investigations Should Be Completed Where Allegations Are Detailed Enough to Conduct an Investigation

Until February 28, 2018, UNICEF policies prohibited the anonymous reporting of allegations of sexual harassment⁹ and required that allegations be reported within six months from the date of the last alleged incident.¹⁰ Current policy also requires that if, after an initial assessment, OIAI determines that an investigation will be conducted, OIAI must notify the alleged offender and “provide that person with the details of the complaint and the name of the complainant.”¹¹

We understand that, as of March 1, 2018, UNICEF has informally adopted a more flexible policy and that OIAI will now investigate anonymous allegations and allegations relating to older conduct.¹² That was an appropriate policy change because best practices counsel in favor of preserving confidentiality to the extent possible, even where complete anonymity may not be possible.¹³ While the policy is now changed, our review identified several older investigations of sexual harassment that appear to have been curtailed based on the complainant’s desire to remain anonymous in the investigation. In our review, we identified four cases closed because the complainant wanted to remain anonymous. In those cases, individuals reported that they wanted to remain anonymous because of fears that, if identified as a complainant, they may lose a job, or suffer social stigmas or other consequences. Where the goal is ensuring a harassment-free culture, more must be done to investigate allegations where they are detailed enough to permit an investigation – even if and where the complainant is afraid and declines to be identified to the alleged harasser.

UNICEF also should consider updating its policy that requires OIAI to notify the accused of sexual harassment allegations and the name of the complainant. While it may be impossible to always preserve the anonymity or confidentiality of the name of a complainant,¹⁴ UNICEF’s

⁸ See, e.g., Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, June 2016 (hereinafter “EEOC Select Task Force Study”), at v. (“Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. . . . [E]ffective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company [and] . . . at all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation.”)

⁹ See, e.g., UNICEF CF/EXD/2012-007, Executive Directive: Prohibition of discrimination, harassment, sexual harassment and abuse of authority, 30 Nov. 2012 (hereinafter “CF/EXD/2012-007”), at § 5.10. The original policy did include some flexibility for OIAI to initiate investigations into sexual harassment without a written and signed complaint. CF/EXD/2012-007 at § 6.2.

¹⁰ UNICEF, *Dealing with Harassment, A Complainant’s Guide*, 2010, at § 4.2 (p. 18).

¹¹ CF/EXD/2012-007 at § 5.15.

¹² We understand the policy documents are not yet formally revised but that, as a practical matter, OIAI has implemented these change as of March 1, 2018.

¹³ See, e.g., EEOC Select Task Force Study, at 43 and 68.

¹⁴ See, e.g., EEOC guidance on Confidentiality at <https://www.eeoc.gov/employees/confidentiality.cfm>.

existing policy virtually guarantees that there will be no opportunity to even try to do so. Such an approach may be incompatible with developing a culture in which employees feel it is safe to report allegations. As an alternative, UNICEF could consider sharing the details of the allegations of sexual harassment with the accused harassers but only share the name of the complainant depending on the specific circumstances.

C. Sexual Harassment Investigators Must Carefully Assess the Credibility of Complaints and Those Accused of Harassment

As is common in sexual harassment investigations, allegations in several cases involved conduct in which only two people were present: the complainant and the alleged harasser. In several of the UNICEF matters we reviewed, the investigation record indicated that the allegations could not be substantiated because the allegations involved he-said / she-said conduct. Because harassment often occurs behind closed doors, the complainant's allegations cannot be disregarded by the mere fact that there were no eye-witnesses to the alleged harassment.¹⁵ The credibility of the complainant can be assessed to determine whether – absent independent evidence of the alleged harassment – the allegations should be substantiated or not. Moreover, the same standards to assess credibility should be applied to the alleged harasser, and the investigator should evaluate any denials or explanations using the same factors, rather than just accepting a harasser's explanation on its face.

U.S. Equal Employment Opportunity Commission (EEOC) agency guidance recognizes a variety of factors that can be considered where there are conflicting versions of relevant events. Factors to consider to assess the credibility of information where individuals report different versions of events include:

- *Inherent plausibility*: Is the testimony believable on its face? Does it make sense?
- *Demeanor*: Did the person seem to be telling the truth or lying?
- *Motive to falsify*: Did the person have a reason to lie?
- *Corroboration*: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- *Past record*: Did the alleged harasser have a history of similar behavior in the past?¹⁶

1. Credibility Assessments Regarding Complainants Did Not Appear to Credit Reports of Harassment without Independent Evidence of the Alleged Conduct

Based on the review we conducted, OIAI did not appear to uniformly assess the credibility of conflicting information using a holistic framework. Instead, information that complainant's report tended to be viewed as having no weight unless independent evidence (documentary or

¹⁵ See, e.g., EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, at <https://www.eeoc.gov/policy/docs/harassment.html>.

¹⁶ See, e.g., EEOC *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*.

other independent witnesses) existed to confirm what the complainant reported. For example, we noted two cases in which the accused generally acknowledged the conduct but the cases were closed as unsubstantiated because there were no witnesses. In another case, an investigation was closed because the allegations were not submitted in a way that complied with the expected process for submitting allegations. And, in two other cases, the investigation files contained notes that “verbal allegations without witnesses or supporting documents cannot be conclusive” and that “we have little information without people being able to back up” the allegations which suggests strongly that the complainant’s allegations were not viewed as credible without others reporting the same facts.

Where complainants’ allegations carry no evidentiary weight or where they are not investigated because of failing to conform to some process requirement, it is difficult to create a culture in which it is safe to come forward and in which individuals believe that there are consequences for those who fail to live up to UNICEF’s values. While we are not recommending a system in which all allegations of harassment are deemed substantiated based on allegations alone, for complaints to be taken seriously, the investigation framework must be flexible enough to permit credibility assessments regarding allegations without requiring independent proof from other sources (e.g. documents or other witnesses). It is a best practice to assess credibility of information that complainants provide using a more flexible framework and UNICEF should consider updating its policies and practices to adopt a standard practice for assessing credibility in harassment investigations. While independent evidence of misconduct may be ideal, the current framework may be ignoring or, at a minimum under-weighting, other evidence that exists from credible verbal statements.

2. Credibility Assessments Regarding the Accused May Credit Denials and Subjective Intent without Independent Evidence of Either

By contrast, in other cases, OIAI appeared to view information provided by the accused as credible without requiring independent evidence of what the accused stated. Where UNICEF’s goal is to ensure a harassment-free environment, UNICEF should consider whether its policies should include more specific guidance regarding assessments based on the intent of an individual accused of harassment. UNICEF’s Complainant’s Guide for Dealing with Harassment recognizes that the intent of an alleged harasser may be relevant to a complainant’s decision about whether to informally confront that person, but the OIAI Investigation Manual does not explain what role, if any, the subjective intent of the alleged harasser should play as part of an overall credibility assessment about the veracity of the allegations.

D. Evaluating Complainants’ Responses to Harassment

Several investigations involved subjective assessments regarding the complainant’s response to the alleged harasser’s conduct. In some matters, the fact that a complainant continued to do her job professionally was assessed as evidence that the allegations of harassment were unsubstantiated. In these cases, accused harassers pointed to the complainants’ continued professionalism as evidence that allegations were false or as a sign that the complained-about behavior, which they often admitted, was welcome.

In our experience, the victims of harassment often under-report harassment that they experience and a complainant’s failure to confront an accused or to act unprofessionally does not necessarily indicate that the harassment did not occur. It is not uncommon, for example,

for those experiencing harassment to avoid the harasser; deny or downplay the gravity of the situation; and attempt to ignore, forget or endure the behavior. The least common approach to harassment tends to be taking a formal step to report it to an employer or take legal action.¹⁷ Many people who do not report a formal complaint do so out of fear that no one will believe them, that no one will help, that they will be blamed for causing the conduct, and/or that they will suffer socially and professionally.¹⁸ Further, not all individuals respond to harassment in the same way. Some (e.g., younger employees) may lack the self-confidence to resist unwelcome overtures or challenge conduct that leaves them uncomfortable and some may tolerate behavior out of fear for losing future opportunities.¹⁹

In our review, the complainant's continued professionalism towards the accused harasser was, in some cases, a factor that led to the allegations being unsubstantiated. This typically followed OIAI's interview of the alleged harasser, who would suggest factors to support their position that their conduct was welcomed or justified and not misconduct. For example, we identified three cases in which the complainant's friendly or professional conduct towards the alleged harasser was factored into a finding that the allegations of harassment were unsubstantiated.

Based on the above, UNICEF should consider updating its approach in this area by considering policy updates or training for staff involved in responding to harassment on best practices for evaluating a potential victim's responses to harassment.

E. Investigations May Require Additional Resources

Given UNICEF's global footprint, OIAI must have the resources and tools needed to conduct effective sexual harassment investigations. In some matters involving serious allegations of potential sexual abuse, OIAI was able to conduct in-person interviews and engage in an extensive effort to gather evidence. By contrast, the majority of sexual harassment investigations we reviewed were conducted using e-mail questions and, only in some more recent cases, through telephone and video interviews. Conducting sexual harassment investigations by e-mail is not a best practice. While certain details can be gathered and, where resources are constrained, investigations may involve telephone or video call interviews – "interviews" conducted by e-mail are ineffective when investigating allegations of workplace misconduct like sexual harassment that involve credibility assessments, attention to culture and workplace dynamics, and other issues not readily ascertainable in an e-mail only review.

Our discussions with OIAI suggest they rely on e-mail interviews because they do not have sufficient resources (personnel and budget) to conduct sexual harassment investigations in person (ideally) or by phone / video calls. OIAI also asks questions carefully to "avoid putting words in the mouths" of individuals who are contacted but, in some investigations, questions were too general. Additional resources may be required to ensure that investigators have enough resources to conduct harassment investigations in person or, at a minimum, using phone and/or skype video calls. Then, when conducting those investigations, OIAI must ask potential witnesses about the conduct that has been reported to determine whether individuals have potentially relevant information.

¹⁷ See, e.g., EEOC Select Task Force Study, at 16.

¹⁸ See, e.g., EEOC Select Task Force Study, at 16.

¹⁹ See, e.g., EEOC Select Task Force Study, at 85-86.

F. Investigation Files Should Reflect all Key OIAI Activities and Findings

Finally, in several matters, OIAI was involved in investigations involving individuals outside of UNICEF. Two of the matters involved conduct that was being investigated by other authorities and, as a result, the files do not follow the format of other files and may not contain a full picture of OIAI's purpose for the investigation, its role in the matter, and/or the support for any conclusions reached by the investigation team about the conduct under review. In one other matter, the file does not reflect that the investigation findings were shared with the partner agency at the end of the investigation even though we confirmed through an interview that those details were shared. Maintaining complete investigation files that track the purpose of the investigation, key investigation activities, findings and outcomes is important during and after investigations.

IV. Recommendations

Based on what we observed in our review, we believe there is room for improvement in how UNICEF conducts sexual harassment investigations. While UNICEF has begun to adopt certain policy changes regarding the timing and anonymous reporting of sexual harassment allegations, additional changes should be considered.

First, and most importantly, OIAI must have the flexibility and ability to play a greater role in addressing the root cause of harassment. OIAI currently appears to have a narrow (though important) focus on preparing cases for potential disciplinary review by PALS. While prevention efforts are paramount to establishing a harassment-free culture, investigations can also play an important role in improving culture. For example, how OIAI responds to complainant allegations plays an important part in whether individuals feel safe to come forward. Additionally, OIAI could be asked to report the results of all sexual harassment investigations to a UNICEF sexual harassment response committee and to provide any recommendations that go beyond whether a case should or should not be referred to PALS. Recommendations could relate to steps UNICEF could take to improve UNICEF's culture and reduce the potential for sexual harassment through, for example, training, staff counseling, policy changes, and/or potential greater HR / management oversight of individuals.

Second, UNICEF should consider revising the policy that currently requires OIAI to notify all sexual harassment investigation subjects with the name(s) of the complainant(s) and details of the sexual harassment allegations. While it may not always be possible to preserve the anonymity of a complainant, a policy that requires OIAI to disclose a complainant's name at the outset of a formal investigation is likely incompatible with a culture in which employees feel it is safe to report allegations.

Third, UNICEF should consider developing or updating investigation policy and practices such that uniform standards for evaluating the credibility of information are used across investigations. The current approach in cases we reviewed appears to require proof of harassment that is independent of whatever the complainant reported. Although independent evidence is ideal, such evidence may not always exist in a sexual harassment investigation. For that reason, there are best practices for assessing the credibility of information, including the probative value of a complainant's allegations. The same credibility factors should be used to evaluate whatever information the accused provides in a given investigation. OIAI should be

consulted to help develop these factors and then, once a new policy or process is implemented, OIAI investigators should receive training on them.

Fourth, OIAI must have enough resources to conduct effective investigations in a global organization. Due to resource limitations, OIAI has conducted sexual harassment investigations using e-mail as the primary (or only) method of communicating with complainants, the accused, and witnesses. OIAI also takes a cautious approach to questioning in emails to “avoid putting words in the mouths” of individuals who are contacted but, in some investigations, questions were too general. Additional resources may be required to ensure that OIAI has enough resources to conduct harassment investigations in person or, at a minimum, by using phone and/or skype video calls. UNICEF should consider whether using third party investigators around the world would allow for more witness interviews to be conducted in person.

Fifth, UNICEF should consider updating or replacing *A Complainant's Guide to Dealing with Harassment*. The Guide should be updated to reflect current best practices with particular attention to providing careful guidance about steps individuals should take or consider before turning to official channels for help if they feel they are experiencing sexual harassment.

Sixth, all investigation files should completely track the purpose of the investigation, key investigation activities, findings and outcomes is important during and after investigations. While most investigation files appeared complete, this remains a best practice for all investigation files.

Finally, once UNICEF has implemented the above recommendations, a discrete number of investigations should be assessed to determine whether the case should be re-opened.