
Avoiding #MeToo and Sexual Harassment in the Workplace

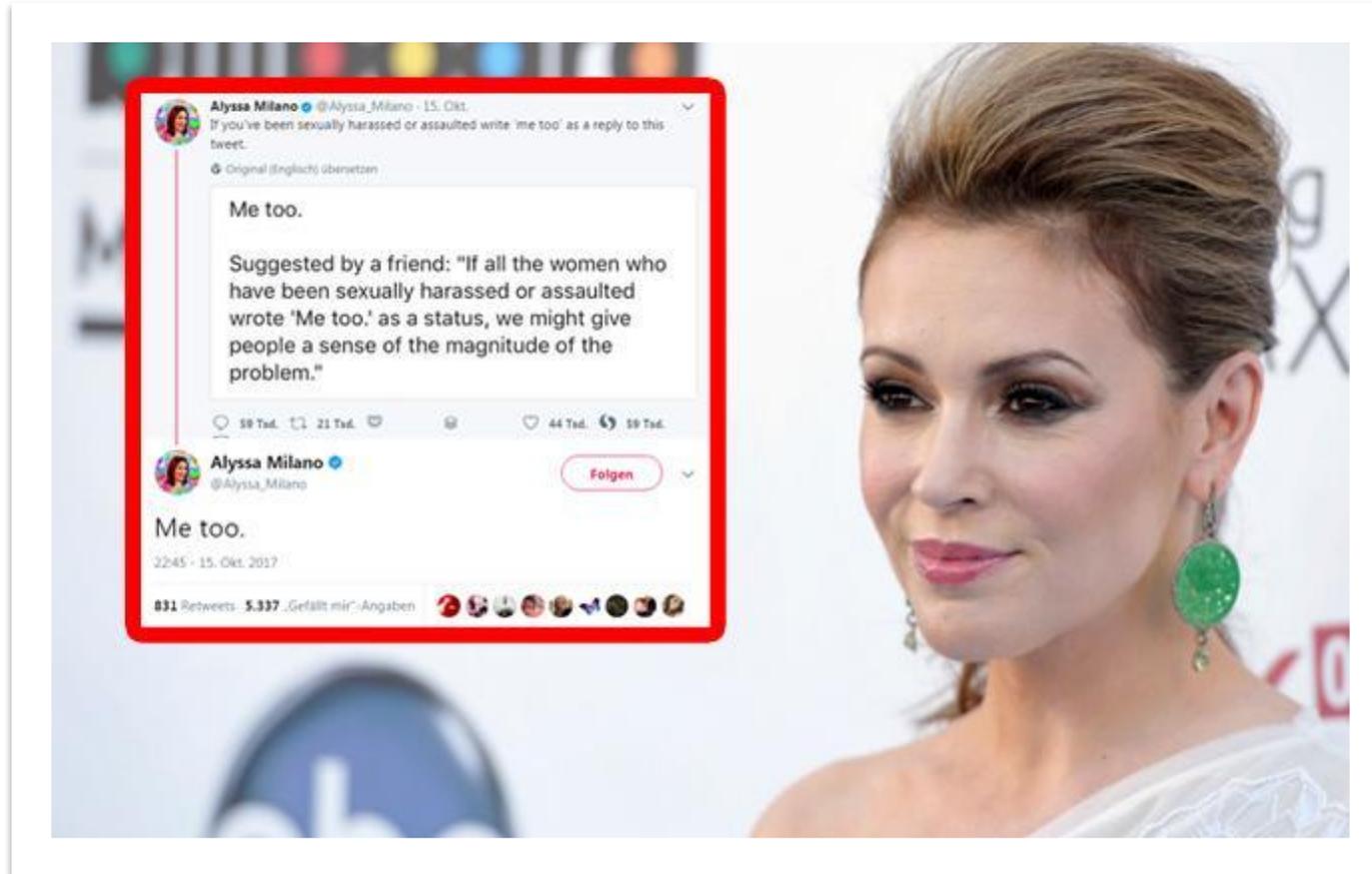
Presenter:

Jacki Thompson, Counsel – Washington, DC

The History of #MeToo



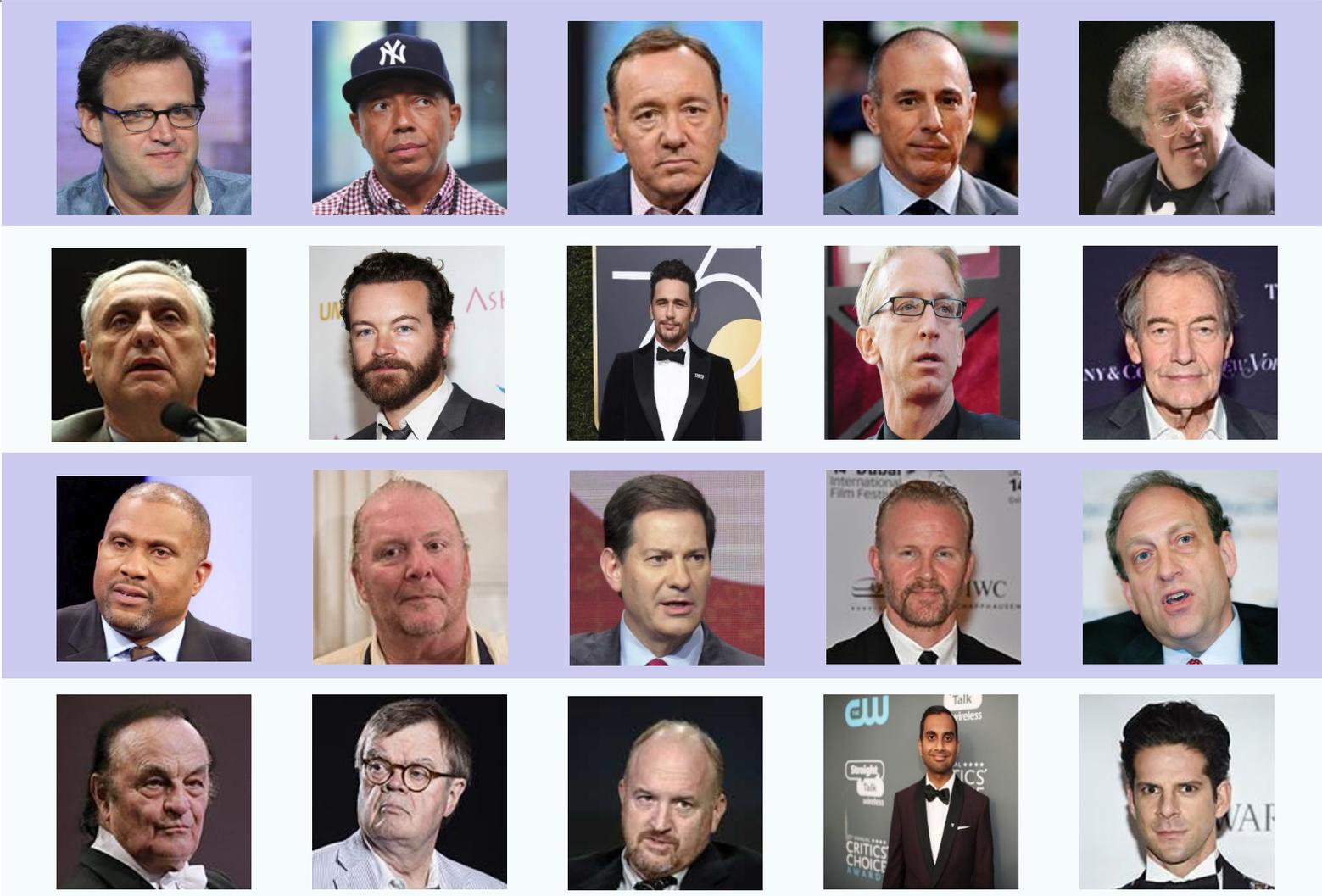
The History of #MeToo



The History of #MeToo



- According to CBS reports:
 - On **Twitter**, over 1.7 million tweets have included #MeToo.
 - On **Facebook**, there were more than 12 million posts regarding #MeToo in less than 24 hours by 4.7 million users worldwide.



“A powerful person has been accused of misconduct at a rate of nearly once every 20 hours since Weinstein.”
(LA Times)

The Stats

- As many as **85% of women** report having experienced sexual harassment in the workplace
- While there are fewer surveys of men, **15% of male federal employees** surveyed experienced unwanted sexual attention and sexual coercion at work

(Report of EEOC Select Task Force on the Study of Harassment in the Workplace, June 2016)

Male Accusers

Christina Garcia

- California Assemblywoman and Democratic head of the state's Legislative Women's Caucus
- Vocal supporter of #MeToo movement
- Accused by two separate men of “inappropriate behavior”
- “...voluntarily taking an immediate unpaid leave...” of absence, a day after allegations of sexual misconduct surfaced



Accusers

James Levine

- Conductor and pianist, former teacher at the Cleveland Institute of Music (CIM) between 1965 and 1972
- Suspended by New York's Metropolitan Opera (the "Met") on December 3
- Accused by multiple men of sexual misconduct
- Denied allegations, saying "...as understandably troubling as the accusations noted in recent press accounts are, they are unfounded. As anyone who truly knows me will attest, I have not lived my life as an oppressor or an aggressor."



The Stats

- “**Unwanted compliments about your appearance**” –38% of adults said this amounted to sexual harassment, while 47% said it did not.
- 41% of adults said they thought it was sexual harassment when someone told you “**dirty jokes**” but 44% said it was not.
- 44% of adults said that “**nonconsensual hugging**” was sexual harassment, while 40% said it was not.

(Reuters/Ipsos National Opinion Poll Dec 2017)

The Stats

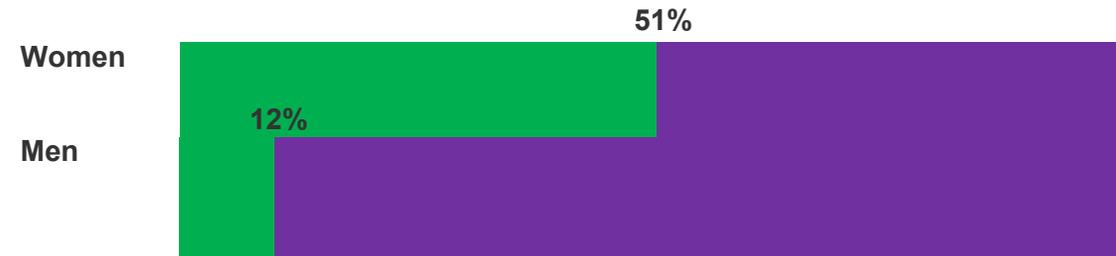
- FY17 – EEOC received approximately **27,000 charges** alleging harassment
- About **45%** of those were sexual harassment charges
- Males filed 16.5% of those EEOC lawsuits involving harassment
- **\$164.5 million** secured for employees alleging harassment (\$46.3 million for sexual harassment at charge state)

(Report of EEOC Select Task Force on the Study of Harassment in the Workplace, June 2016)

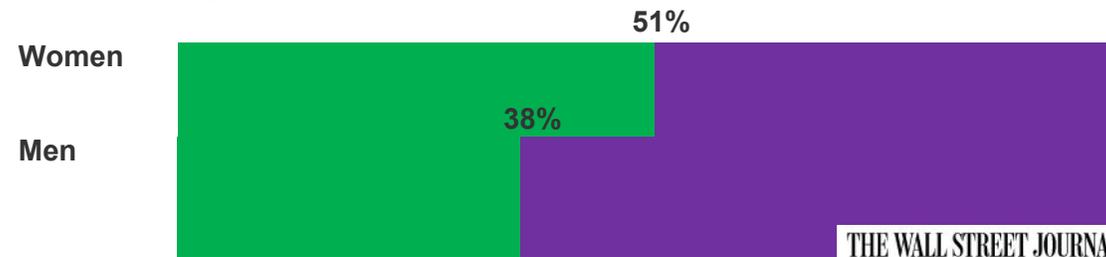
Facing Harassment

Workplace sexual harassment is highly prevalent...

People who say they've been the direct victim of sexual harassment at work:



People who say they've witnessed sexual harassment in the workplace:



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Reporting is the least likely response to harassment

- Only about **30%** of individuals who experience harassment in the workplace will report it to their supervisor
- Only **6% to 13%** file formal complaints
- Unwanted physical touching is only reported **8%** of the time

(Report of EEOC Select Task Force on the Study of Harassment in the Workplace, June 2016)

Fixing Harassment

For women who don't report sexual harassment, the reasons vary*...

I didn't want to create a fuss, look like a trouble-maker or get a bad reputation



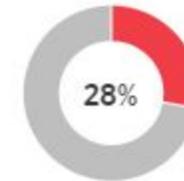
Feelings of shame or shared blame



Reporting it doesn't result in any action



Fear of retribution



*Women could respond with more than one answer on this question.

...and a sizable number of women aren't hopeful that press coverage will change things.

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Person of the Year



The Price of Misconduct

- *Herring v. SCI at Sherwood Funeral Home* (2018)
\$300,000 in compensatory damages
\$1,750,000 for punitive damages
- *Chopourian v. Catholic Healthcare West* (2012)
A federal jury in California awarded Chopourian \$168 million, potentially the largest judgment in U.S. history for a single victim of workplace sexual harassment. Judge later vacated the award because attorneys reached a negotiated settlement.
- *Carlson v. Twenty-First Century Fox*, the parent company of Fox News Channel. Reported settlement of \$20,000,000.

The Price of Misconduct

- *City of Monroe Employees' Retirement System v. Murdoch et al* (2017)
Settlement of shareholder claims arising from the sexual harassment scandal at Fox News Channel. Reported settlement of \$90,000,000
- *MacCluskey v. University of Connecticut Health Center* (2017)
Plaintiff awarded \$125,000
- *Bianco v. Flushing Hospital Medical Center* (2009)
Awarded \$15 million after reporting unwanted touching

The Price of Misconduct

- In November 2016, a SkyWest FA claims a pilot drugged and raped her during a layover in Edmonton, Alberta, before a return flight to Seattle.
- Contended SkyWest is negligent for pilot's actions and for failing to properly address her complaints after she reported the alleged assault.
- The airline is liable, the civil suit contends, the pilot's position of authority on the flight and within the company.”
- It also claims SkyWest has unfairly retaliated against her with hostility and by reprimanding her for missing work — days she says she took off as a result of emotional trauma she suffered as a result of the alleged attack.

The Price of Misconduct

- At least 417 high-profile executives and employees across fields and industries have been outed by the #MeToo Movement in 18 months, according to data collected by a New York-based crisis consulting firm.
- EEOC announced it is actively pursuing sexual harassment claims.
 - Filed 7 lawsuits earlier this month.
- On June 11, 2018, the EEOC Select Task Force on the Study of Harassment in the Workplace heard testimony on “Trans-forming #MeToo Into Harassment-Free Workplaces.”

The Price of Misconduct

- Bayou LaBatre, Alabama-based Master Marine Inc., a shipbuilder, allegedly sexually and racially harassed a male Asian-American welder at its headquarters.
- Santa Barbara, California-based Real Time Staffing Services Inc. was sued in Albuquerque for allegedly allowing a group of female employees to be subjected to sexual harassment while they were working at the Public Records Act unit of the Albuquerque Police Department.
- Georgetown, South Carolina-based G2 Corp. allegedly subjected a female worker at its warehouse in Corsicana, Texas to unwelcome physical and verbal sexual harassment by a production manager and another high-level corporate office.

The Price of Misconduct

- Springfield, Missouri-based new Prime Trucking Inc. allegedly failed to take adequate steps to prevent the sexual harassment of a female truck driver.
- Paramount, California-based Sierra Creative Systems Inc. allegedly failed to prevent and correct ongoing sexual harassment, sex-based harassment and retaliation against female employees.
- South El Monte, California-based Tapioca Express, a milk tea franchise, and two of its franchisees were charged with allegedly subjecting female employees to sexual harassment.
- Cincinnati-based Total Maintenance Solutions Inc., a commercial cleaning and construction clean-up company, allegedly subjected an employee to a sexually hostile work environment.

“Soft” Costs of Harassment

- Turnover – loss of valued employees
- Decreased productivity
- Reputational injury
- Ability to attract new talent
- Increased sick leave
- Expensive and disruptive litigation

What is Sexual Harassment?

Unwelcome Conduct

- What Makes Conduct “Unwelcome”?
 - Reasonable person standard (... meaning it is not always clear if unwelcome)



Who?

Who can be a harasser?

Anyone and Everyone/Everyone and Anyone

- » Supervisor
- » Co-Worker
- » Supplier
- » Visitor (Family Member)
- » Third Party Provider



Who?

Who can be a victim?

- » Female
- » Male
- » Same sex
- » Co-workers (favoritism)



When and Where

- At Work
- Conferences, Seminars
- Off Work (Work-related functions, events)
- Anytime, day or night

Liability

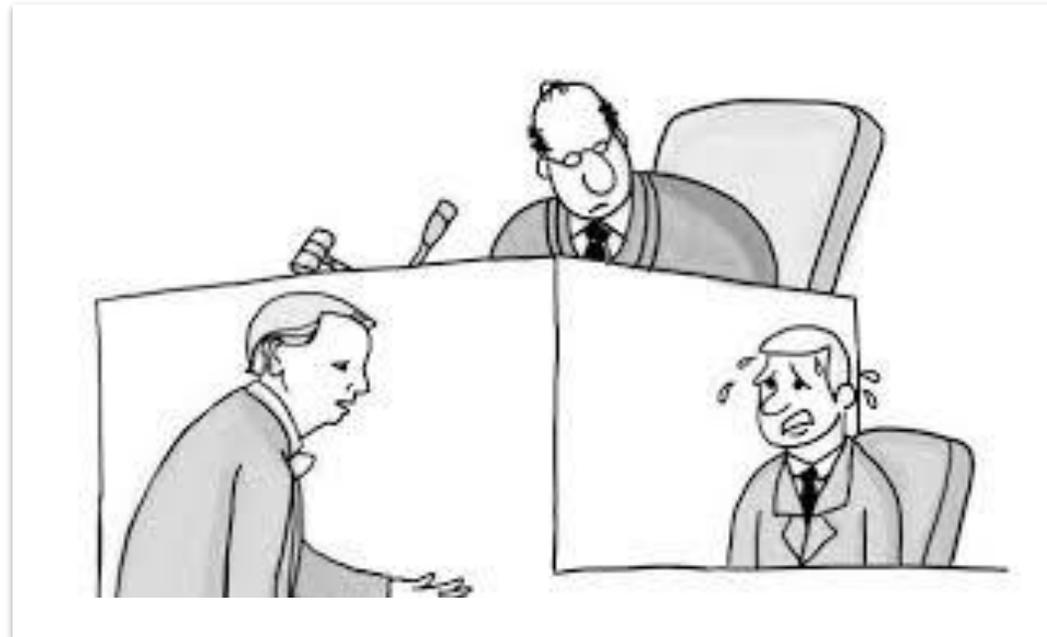
Vicarious Liability

Employers may be held liable not only for harassment by supervisors, but also by coworkers or non-employees.

Individual Liability

- State law torts:
 - » assault
 - » battery
 - » defamation
 - » false imprisonment
 - » negligent hiring
 - » suspension
 - » retaliation

To Defend or Not to Defend the Individual



Thinking Outside the Box: Breach of Fiduciary Duty

Claims against companies, officers and directors...

BUSINESS NEWS | NOVEMBER 20, 2017 / 6:02 PM / 3 MONTHS AGO

21st Century Fox in \$90 million settlement tied to sexual harassment scandal

Thinking Outside the Box: Breach of Fiduciary Duty

On November 20, 2017, senior officers of Twenty-First Century Fox Inc. agreed to a \$90 million settlement of allegations that management permitted a culture of harassment to permeate the company resulting in financial and reputational harm to the company. (Included issues involving Fox CEO Roger Ailes and Bill O'Reilly).

So What Do We Do?

CORPORATE CULTURE



Tip 1: Create a Culture Against Harassment

- This starts at the top and must have buy-in at every level. There must be a culture of respect for women. Set clear expectations.
- A written policy must be reinforced by daily behavior.
- Hold managers accountable for their behavior and what happens in their area of responsibility.

Create a Culture Against Harassment

- Even the best written harassment policy can be undermined by:
 - Offensive comments about women in general
 - Stereotyping women's capabilities, work ethic, etc.
 - Sexual jokes in the workplace
 - Allowing pornography to be viewed in the workplace
 - Allowing female employees or customers to be "rated" by male employees or physicians

Tip 2: Establish / Audit Policies and Procedures



Establish / Audit your policies and procedures

- Does it clearly define sexual harassment and include specific examples of prohibited behavior?
- Is it user-friendly? Easy to understand?
 - Do you need your policy to be in more than one language?
- Compliant with state/local law?
 - Does it address same-sex sexual harassment?
- No retaliation

Establish / Audit your policies and procedures

- Confidentiality statement
- Complaint process
 - Is your complaint process effective?
 - Is it discouraging reporting?
- Prompt, thorough, and impartial investigation
- Assurances of prompt and appropriate remedial action

Policy Distribution

- How is it distributed?
- Who should the policy come from?
- Frequency of distribution
 - All new hires
 - Periodically to existing employees?
- Acknowledgement from employees

Tip 3: Training



Training

- Who does your training?
 - Computer based or in person?
- Not just new hires – existing employees too
- Make sure management, especially upper-level management, gets training.
- Be sure to check state law (California requires employers with 50 or more employees to provide 2 hours of sexual harassment training to each supervisory employee every 2 years).

Tip 4: The Investigation



The Sexual Harassment Investigation – Planning the Investigation

- Who should conduct the investigation?
- Do your homework
 - Review employment histories/personnel files of parties involved
 - Have there been other complaints?
 - Do you have the documents you need? Do you have an idea of what to request?
 - Consider forensics?
- Who is going to be interviewed?
 - Complaining employee
 - Every employee complainant identifies as possible witness
 - Alleged harasser
 - Employees your investigation revealed may have knowledge
 - Those identified by those you've already interviewed
 - Those who likely may have knowledge (regardless of whether they've been identified)

Timeliness of Investigation

- Investigation needs to be completed in a prompt manner but it also needs to be thorough.
- If your investigation is taking longer than a week, advise employee of status
- Always respond to employee's request for a status update (don't ignore)

Concluding Investigation

- What level of disciplinary action is appropriate, if any
 - Punishment should fit crime (and multiple offenders punished as such).
- Once you've decided to take disciplinary action, take it. (But you are under no obligation to tell complaining party what it is)
- Even if you don't find a violation, have alleged harasser sign copy of policy.

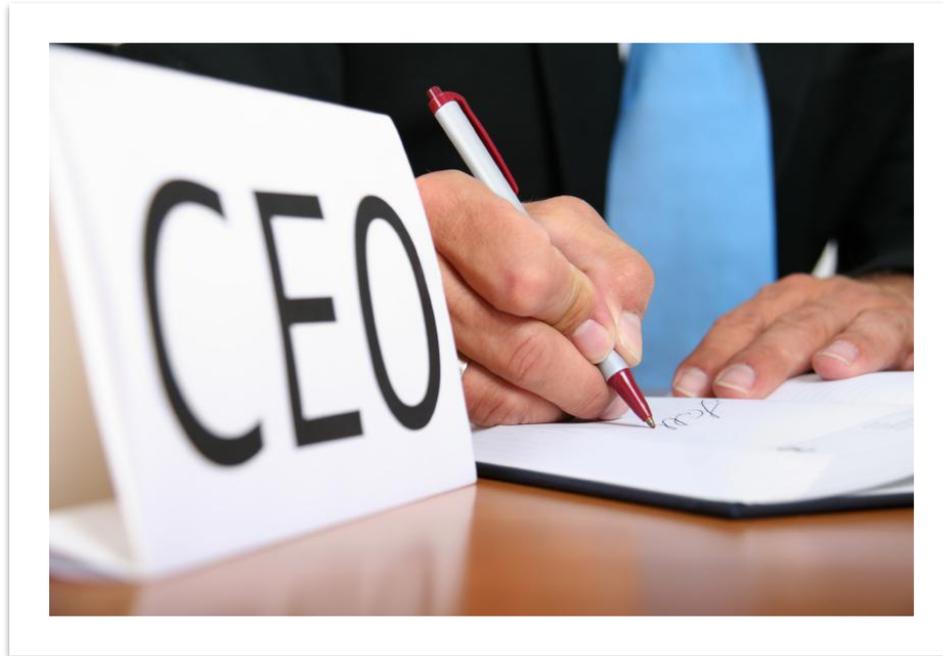
Communicating Results of Investigation to Complaining Party

- Thank employee for bringing issue to your attention.
- Sometimes it's not what you say but how you say it.
- Document conversation.
- No retaliation.
- **FOLLOW UP!**

Communicating Results of Investigation to Alleged Harasser

- Discuss discipline issued and why.
- If there was no discipline issued, explain how could avoid situation in the future.
 - Is it a personality conflict?
 - Communication issue?
 - Could additional training help?
- Stress retaliation is prohibited.
- Discuss how to move forward from here.

Tip 5: Handling Complaints Externally



Handling Complaints Externally

- Is there insurance to cover a legal claim?
- Depending on the level of the alleged harasser, does the Board of Directors need to be notified?
- Is a crisis management team needed?
- Does a potential statement to the media need to be drafted?
- Particularly if a high level alleged harasser is involved does a public relations firm need to be retained?
- Have a thorough investigation, follow your policy and take prompt and appropriate remedial action.

Handling Complaints Externally

- Consistency
- Has the employee alleging harassment signed an arbitration agreement?
- As part of any settlement, consider requiring a confidentiality agreement.
- The December 2017 tax reform law eliminates a possible tax reduction for sexual harassment settlements when the settlement is part of a nondisclosure agreement.

A bill has been introduced in Congress (itself under a microscope) to ban employers from forcing workers to arbitrate sexual harassment or gender bias claims.

The Reality

- The Weinstein Company recently attempted a sale of the company to a buyer for \$500,000,000. On February 11, 2018, the attorney general of New York filed for civil penalties against the Company on behalf of the accusers. The purchase offer has since been withdrawn.
- CBS Fires Charlie Rose, PBS Halts His Show Following Allegations
 - PBS cancelled distribution of his programs
- Wynn's Tarnished Name and Now a Tainted Brand
 - Wynn resigned as the head of his hotel and casino empire after allegations of sexual misconduct
 - Alignment between brand and personality presents a problem
- American Apparel Lawsuit results in Chapter 11 bankruptcy filing

The Reality Test

- How would you feel if someone said or did this to your spouse or child?
- Would you say or do it if your quote or picture was going to appear on the front page of the newspaper?



Thank you!

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