

# Addressing #MeToo Claims

**You have a claim. Now what?**

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# Reinforcing a Respectful Culture

- ➔ Must be reflected in not only your strategic training, but also the way you handle issues that arise
  - ➔ Where the rubber meets the road
- ➔ Need to meet some general standards of "fairness" and "impartiality"
  - ➔ Not only a legal need, but a cultural one
- ➔ Remember – not all issues that arise need to result in someone getting fired

## Even before a "complaint" . . .

- ➔ Important to have a reasonable policy/rule related to harassment (or respectful conduct) in the workplace
- ➔ Policy should be known and understood by employees
- ➔ Helps avoid claims of unfairness or lack of knowledge

# Getting Warmed Up

Two days after she resigns, Nancy is upset about disrespectful treatment by her former boss (Tracy). Victim takes to Facebook and writes the following on her Facebook page:

**Good-bye Company No-Good. You don't deserve to have any employees while Tracy remains working there grabbing every woman's butt that walks by.**

Post is visible to “friends” which included some coworkers

Now what?



Like



Love



Haha



Wow



Sad



Angry

# Complaint? What Complaint?

- "Formal" complaint
  - Using the internal process
  - Direct to a supervisor
  - Direct to HR
- Written complaint requirement?
- Anonymous complaint?
- By-stander/witness report

# Social Media?

- ➔ Facebook
- ➔ Instagram
- ➔ Twitter
- ➔ Glassdoor
- ➔ Newspaper
- ➔ Shouting from the rooftops



Do these 'count' as complaints?

# Take Every Complaint Seriously!

- ➔ Just joking? Workplace “drama”? Unsubstantiated gossip? Simple whining? Outside of workplace?
- ➔ Legal and morale issues may be lurking in what seem to be minor complaints of unfair treatment
- ➔ Training of supervisors vital

# Take Every Complaint Seriously!

- ➔ Take third-party reports just as seriously as complaints by victims
- ➔ Why?
  - ➔ The employer is on notice the same as with a complaint



# A Note about Confidentiality

- ➔ Obligation
  - ➔ To the extent possible
- ➔ Sharing with other management

**CONFIDENTIAL**

# Before the Investigation

- ➔ Steps to prevent additional harm
  - ➔ Separate individuals?
  - ➔ "Investigatory leave"?
  - ➔ Leave for person reporting?

# Why Is a Fair Investigation Important?

- ➔ Process matters
  - ➔ Builds accountability
  - ➔ Builds respectful culture
- ➔ Consistency is the cornerstone
- ➔ Not just to protect company

# Preventing Victim Status Builds a Positive Culture

- ➔ Requires that employees feel empowered to discuss/report
- ➔ What do people get out of having a victim's mentality in the workplace?
  - ➔ Avoid responsibility and accountability
  - ➔ It is personally affirming, even if delusional
  - ➔ Receipt of attention/drama, even if negative or dysfunctional
- ➔ Accountability culture can be uncomfortable
  - ➔ Requires some direct communication
  - ➔ Requires some vulnerability

# What is needed for a fair investigation?

1. Timely
2. By someone seen as "neutral"
3. Fair and Thorough
4. Reasonable Conclusion supported by evidence
5. Appropriate Action/Discipline
6. Closing the Loop

# Timely Investigation

- ➔ Prompt upon receipt/learning of complaint
  - ➔ 1-2 days = prompt
  - ➔ 2 months ≠ prompt
  - ➔ In between - depends
- ➔ Your investigation must take place before a disciplinary decision is made.



# Control of Reporting Person on Investigation

- ➔ What if the person who was allegedly harassed won't cooperate?
  - ➔ Investigate anyway
  - ➔ Interview the person alleged of misconduct and any witnesses
  - ➔ Take action if you find the report substantiated
- ➔ What if the report is not prompt?
- ➔ What if the report was not made to you/the company?

# WHO should Investigate?

- ➔ Choose an investigator who is neutral, disinterested and discreet
  - ➔ Considerations:
    - ➔ Reporting structure between accuser and accused
    - ➔ Level of responsibility of the accused or accuser
    - ➔ Reporting structure of investigator
    - ➔ Other potential biases
- ➔ Outside investigator?



# Fair and Thorough Investigation

- ➔ You are judge, jury and executioner, so you have to show fairness and be fair. How do you do that?
- ➔ Document, document, document
- ➔ High level official and HR reviews all evidence



# Sufficient Investigation?

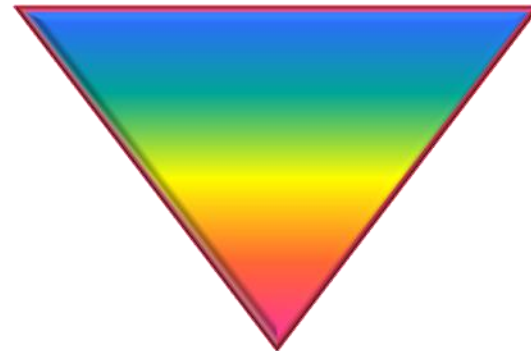
- ➔ Brittney, a construction worker, repeatedly complains to the superintendent that she is being sexually harassed by Phil, the foreman in charge of Brittney's crew. After about two weeks, the superintendent asks a friend of his to conduct an investigation. The friend is not familiar with EEO law or the harassment policy and has no experience conducting harassment investigations. Another week later, the investigator contacts Brittney and Phil and meets with them individually for about 10 minutes each. During the meeting with Brittney, the investigator never asks her any follow-up questions and does not take any notes. Without consulting with the company's HR office, the investigator issues a single-page memorandum concluding that there is no basis for finding that Brittney was sexually harassed, but does not provide any explanation.

# Interview/Investigation Tips

- ➔ Prepare
  - ➔ Outline, not script
  - ➔ Review files/other records (videos)
- ➔ Determine who will interview and order
  - ➔ The Rule of 3: Accuser, accused, any other witness.
- ➔ Explain what you are doing and why
- ➔ Become a reporter
  - ➔ Who, what, when, where, why, how
  - ➔ Non-judgmental
  - ➔ Calm, but not cold

# Interview/Investigation Tips (cont'd)

- ➔ Pay close attention
- ➔ Ask follow-up questions
  - ➔ Press gently
- ➔ Funnel – general to specific
- ➔ Watch body language/physical cues
- ➔ Always ask: Who do you think I need to talk with?
- ➔ Non-retaliation statement
- ➔ Confidentiality?



# Interview/Investigation Tips (cont'd)

- ➔ Update the individual who reported on the status from time to time
- ➔ Keep any commitments you make (back to accountability)

# Document, Document, Document

- ➔ Make notes of all interviews
  - ➔ Email
  - ➔ Hand-written notes
    - ➔ On paper
    - ➔ On a napkin
- ➔ Take notes during and immediately after conducting an interview
- ➔ What was said and person's demeanor/body language
- ➔ Include interviewer's name and date

**I didn't do it.  
Nobody saw me do it.  
You can't prove anything.**

~ Bart Simpson



# Shades of Gray

- ➔ What if there is no "smoking gun" evidence?
- ➔ No "witness"?
- ➔ Now what?!?!





ALWAYS COME TO  
A CONCLUSION

# Conclusions Your Lawyer Never Wants to See

- ➔ Based on my investigation, the conduct was not legal harassment
- ➔ Because she would not prepare a written statement, I could not investigate or make a determination
- ➔ He took two months to report it, so I cannot do anything
- ➔ She denied doing it, so I could not determine if it happened
- ➔ This is the way they talk out there/this is how he is – we are all used to it, so no action is needed.
- ➔ He is our best sales person so we are just going to give a warning
- ➔ She wears tight fitting clothes, so she welcomes/invites those kind of comments

# Appropriate Action/Discipline

- ➔ Be consistent in how YOU enforce these rules in your culture.
- ➔ Hold yourself to an accountability standard.

# Consistency is the Key

- ➔ Inconsistency – where two employees commit the same infraction but the same supervisor treats one more leniently
- ➔ Why does it matter?
- ➔ If a meaningful difference exists justifying harsher treatment, be sure included in report/disciplinary action



# Think about . . .

- ➔ Position/Responsibilities
- ➔ Length of employment
- ➔ Past issues
  - ➔ Other types of performance issues
  - ➔ Similar conduct
- ➔ Nature/Context of conduct
- ➔ When last trained
- ➔ What does the person who reported want???
- ➔ Employee/public relations considerations

# Appropriate Discipline

- ➔ Is the discipline reasonably related to the seriousness of the conduct that you concluded occurred?
- ➔ Is this a minor offense that has happened before?
- ➔ Use reasonable judgment
- ➔ Difference between union/non-union?

# Document, Document, Document

- ➔ Final report of investigation and conclusion – details increase credibility
  - ➔ Nature of reported conduct
  - ➔ Steps taken to investigate
  - ➔ Summary of interviews and other evidence
  - ➔ Findings/credibility determinations (and reasons)
  - ➔ Final conclusion
  - ➔ What could not resolve
  - ➔ Who made decision and with what information
  - ➔ Action taken

# Closing the Loop

- ➔ Important to circle back with person who reported/complained
  - ➔ Not necessarily full disclosure
  - ➔ Enough to support that
    - ➔ You took seriously
    - ➔ You were fair and thorough
- ➔ Reinforce non-retaliation



# Document, Document, Document

## WHY DOES IT MATTER?

- ➔ Helps prove the legitimacy of this or a subsequent action
- ➔ Helps ensure consistent handling of similar conduct
- ➔ Storage/retention



# Your Not Finished . . .

- ➔ Monitor
- ➔ Follow-up
- ➔ Retrain?
- ➔ Reinforce
- ➔ Helping the person who was hurt

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