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Texas Chapter | Public Risk Management Association

# Texas PRIMA 2018 Conference

Investigating Discrimination and  
Harassment Allegations in the Workplace

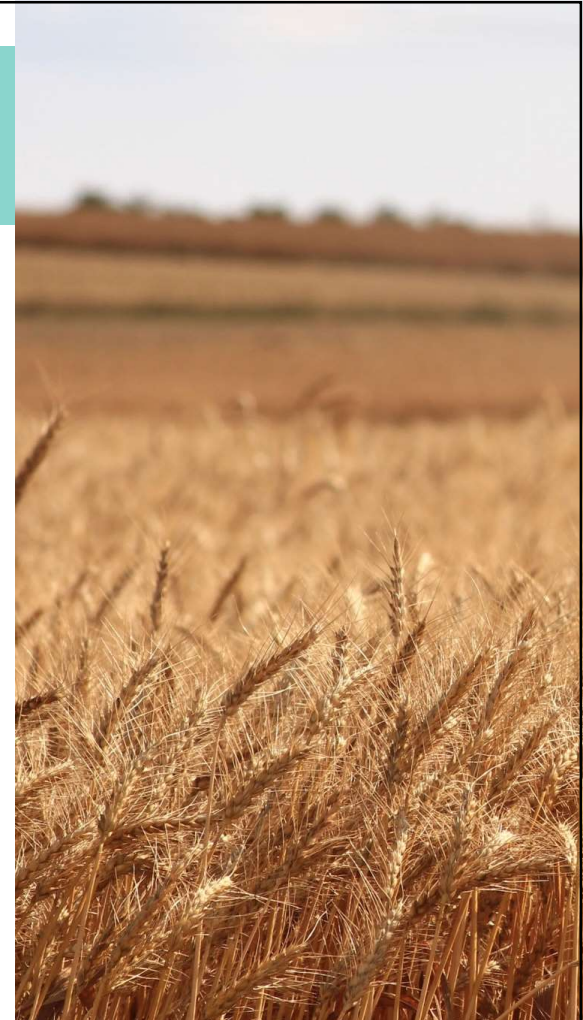
Mark Preiss, Esq.

## Disclaimer

The material presented in this presentation represents the views of the speaker and is not intended to provide legal or tax advice as to any of the subjects mentioned, but rather is presented for general information only. You should not rely on this general information to address specific circumstances. You should consult knowledgeable legal counsel or other knowledgeable experts as to any legal or tax questions you may have.

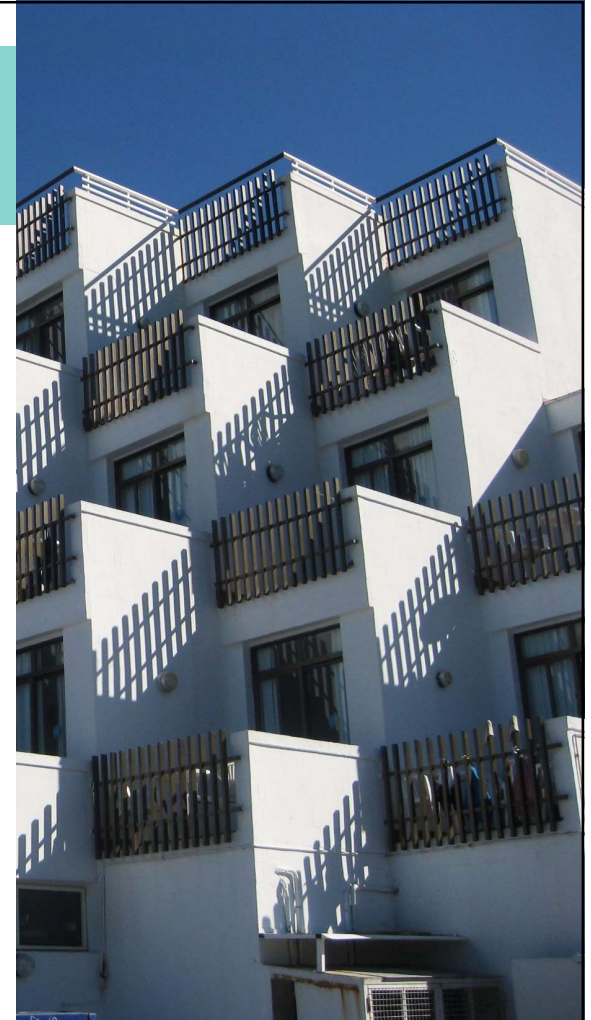
## Investigating Discrimination and Harassment Allegations in the Workplace

- ❑ Reduce risk through identifying and preventing sources of discrimination and harassment in the workplace.
- ❑ Conducting and documenting an investigation into allegations of harassment and discrimination.
- ❑ Outline a clear policy for workplaces targeted at facilitating prompt reporting of claims, the investigation steps to be taken, and the best practices for preventing retaliation.



## Investigating Discrimination and Harassment Allegations in the Workplace

- ❑ Why have a formal policy?
  - ❑ Employee Morale.
  - ❑ Low Productivity/disruptive impact to workplace.
  - ❑ Loss of employees.
  - ❑ Lawsuits.
- ❑ Not all offending conduct may be obvious.
- ❑ Uniform and consistent response.



## Investigating Discrimination and Harassment Allegations in the Workplace

- ❑ Over \$17M jury verdict awarded to multiple plaintiffs who were subjected to egregious sexually harassing conduct in the workplace. (Florida).
- ❑ \$450K EEOC settlement for group of women subject to groping, sexual comments and gestures, and retaliation by male supervisors.
- ❑ \$1.5M verdict for three female employees and one male employee who supported his female co-workers in rebuffing sexual advances in the workplace. (Tennessee).



## How do I know what IS and IS NOT Harassment or Discrimination?

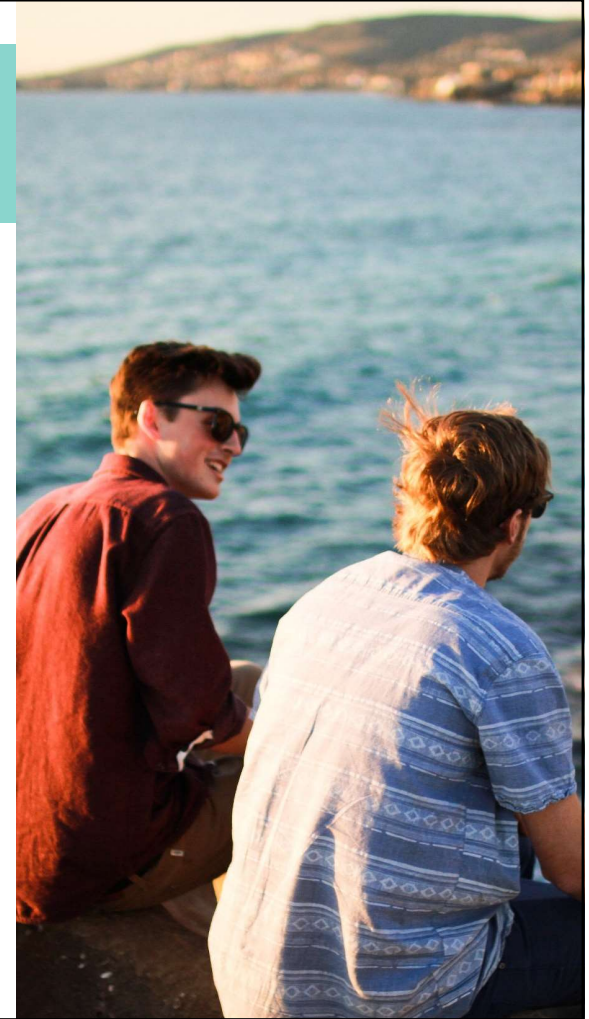
- ❑ Harassment – Title VII of the Civil Rights Act:

“Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

...unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive....

...Offensive conduct may include...offensive jokes, slurs, epithets or name calling....”

- ❑ See: <https://www.eeoc.gov/laws/types/harassment.cfm> and <http://www.eeoc.gov/policy/docs/harassment-facts.html>





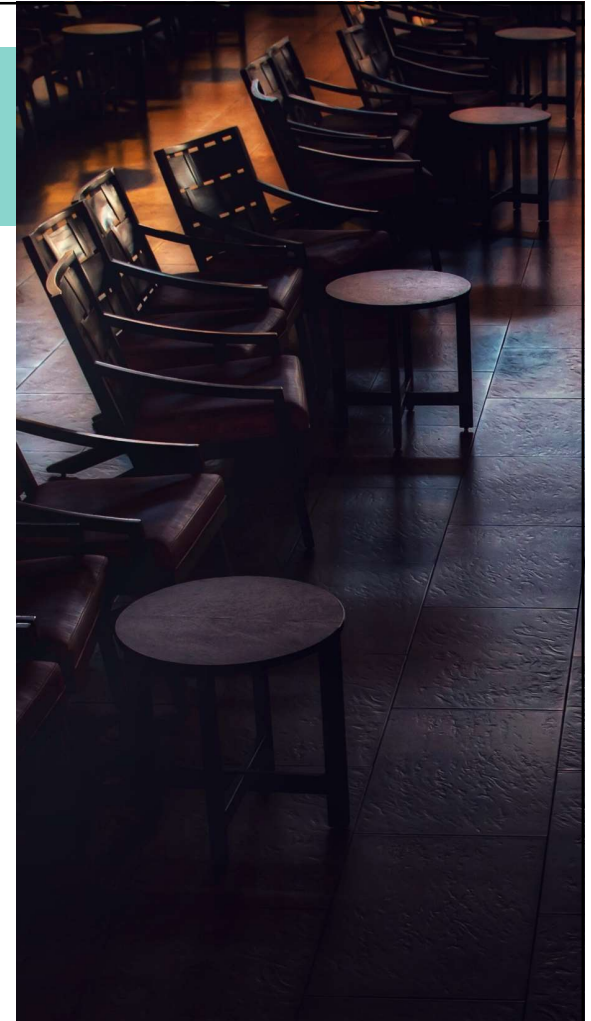
## How do I know what IS and IS NOT Harassment or Discrimination?

### ❑ Discrimination:

“...it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.”

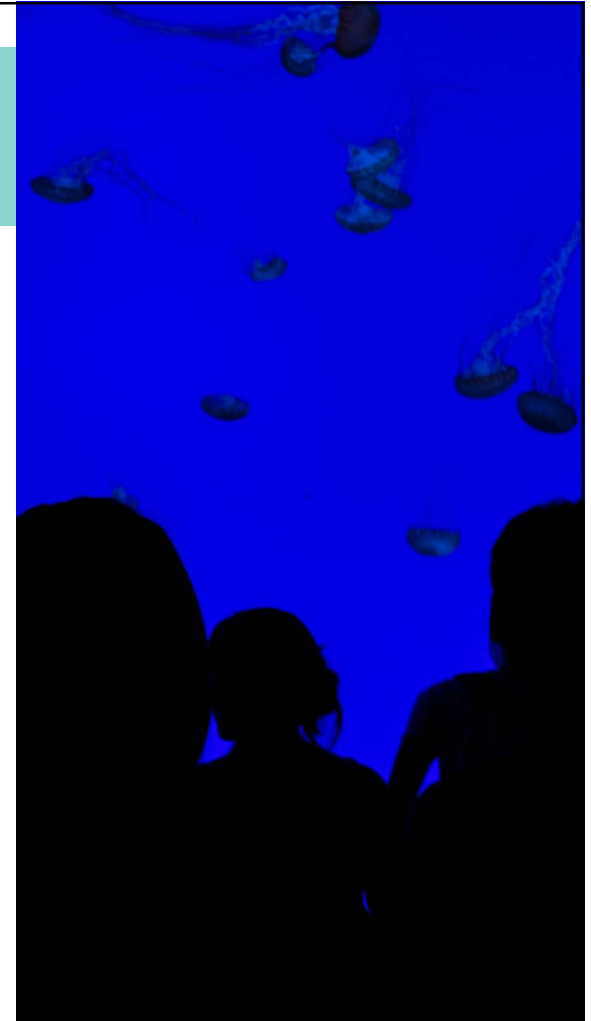
❑ See: <https://www.eeoc.gov/laws/practices/index.cfm>



## How do I know what IS and IS NOT Harassment or Discrimination?

Protected Classes – Texas Labor Code, Chapter 21:

- ❑ “race, color, disability, religion, sex, national origin, or age....”
- ❑ Retaliation:
  - (1) opposes a discriminatory practice;
  - (2) makes or files a charge;
  - (3) files a complaint; or
  - (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.
- ❑ See: [https://twc.texas.gov/news/efte/thresholds\\_for\\_coverage.html](https://twc.texas.gov/news/efte/thresholds_for_coverage.html)





# Sexual Harassment

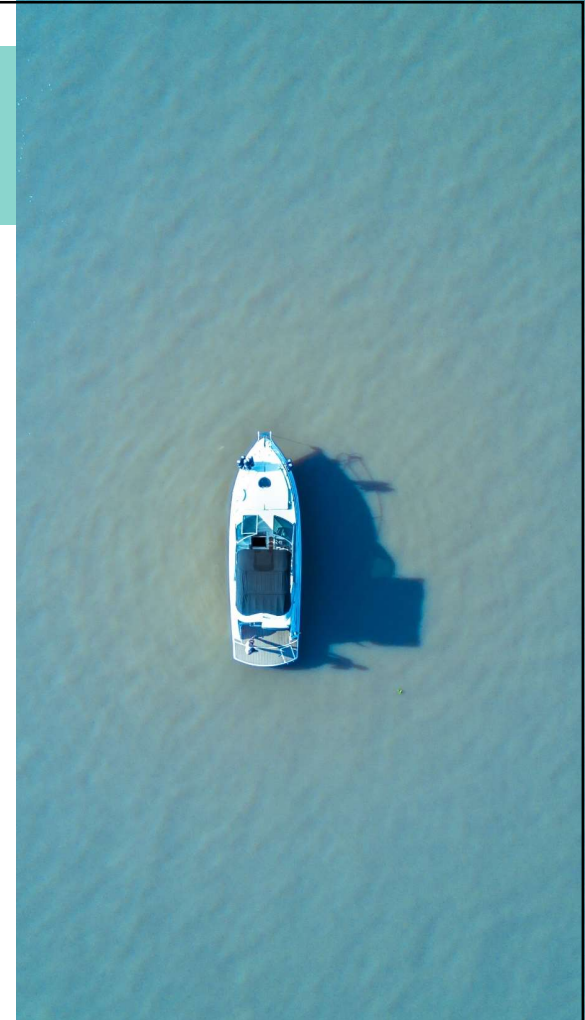
- ❑ Sexual Harassment
  - ❑ “...the unlawful act of harassing a person (an applicant or employee) because of that person’s sex.” (U.S. Equal Employment Opportunity Commission).
- ❑ Harassment can include “sexual harassment” or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- ❑ See also :  
[https://twc.texas.gov/news/efte/harassment\\_minimizing\\_liability.html](https://twc.texas.gov/news/efte/harassment_minimizing_liability.html)



# Sexual Harassment

Two forms of sexual harassment:

- ☐ Quid Pro Quo
  - ☐ Offering certain perks (or denying them) based on whether an employee succumbs to a supervisor's or manager's sexual advances.
  - ☐ More common with manager/subordinates.
- ☐ Hostile Work Environment
  - ☐ Behavior that creates an intimidating, hostile, or offensive working environment or similar behavior that makes it impossible for one to perform his or her job.
  - ☐ In order to rise to the level of a hostile working environment, the offending conduct must be either (1) severe or (2) pervasive enough to alter the terms and conditions of employment.



# Sexual Harassment

Hostile Work Environment - Dual Standard:

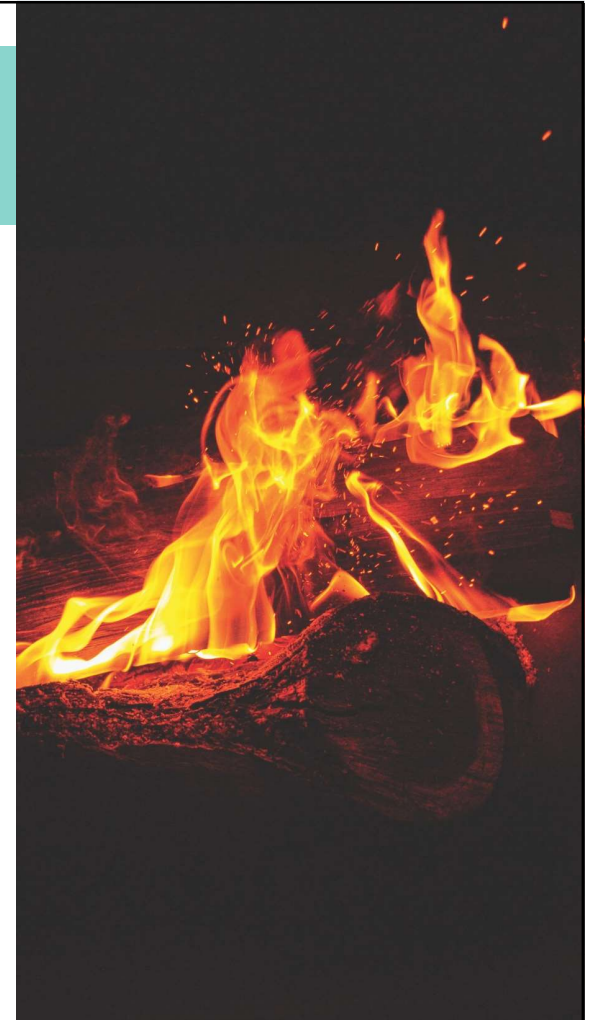
- ❑ Objective – a reasonable person must perceive the workplace as hostile or abusive, and
- ❑ Subjective - the alleged victim must actually and reasonably regard the workplace as hostile or abusive.



## Sexual Harassment

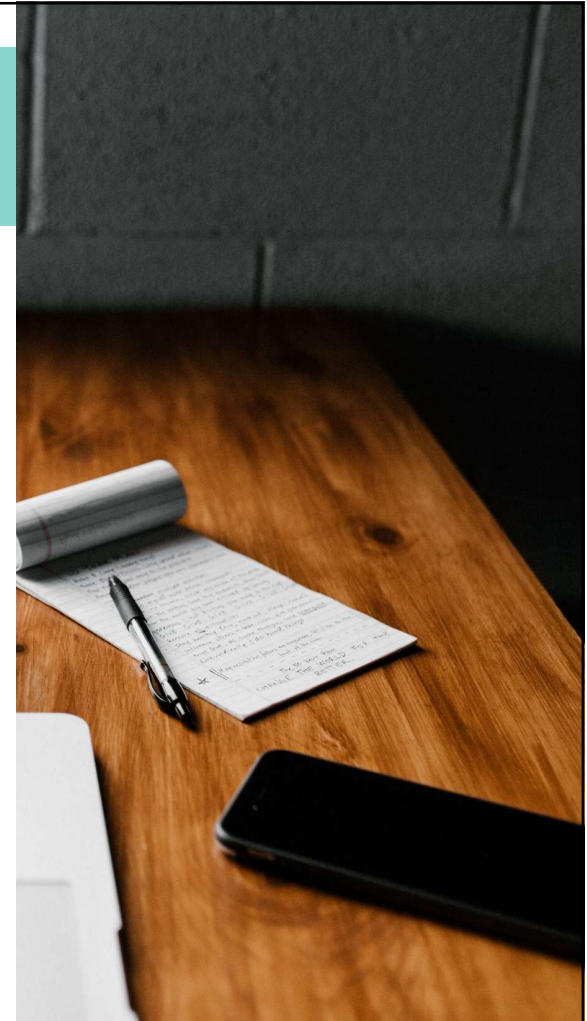
Any conduct of a sexual nature that makes an employee uncomfortable has the potential to be sexual harassment.

- ☐ A supervisor implies to an employee that the employee must sleep with him to keep a job.
- ☐ A sales clerk makes demeaning comments about female customers to his coworkers.
- ☐ Lawyers who regularly tell sexually explicit jokes make an office manager in a law firm uncomfortable.
- ☐ A cashier at a store pinches and fondles a co-worker against the co-worker's will.
- ☐ A secretary's co-workers belittle her and refer to her by sexist or demeaning terms.
- ☐ Several employees post sexually explicit jokes on an office intranet bulletin board.
- ☐ An employee sends emails to co-workers that contain sexually explicit language and jokes.



## What would trigger an employer to need to conduct such an investigation?

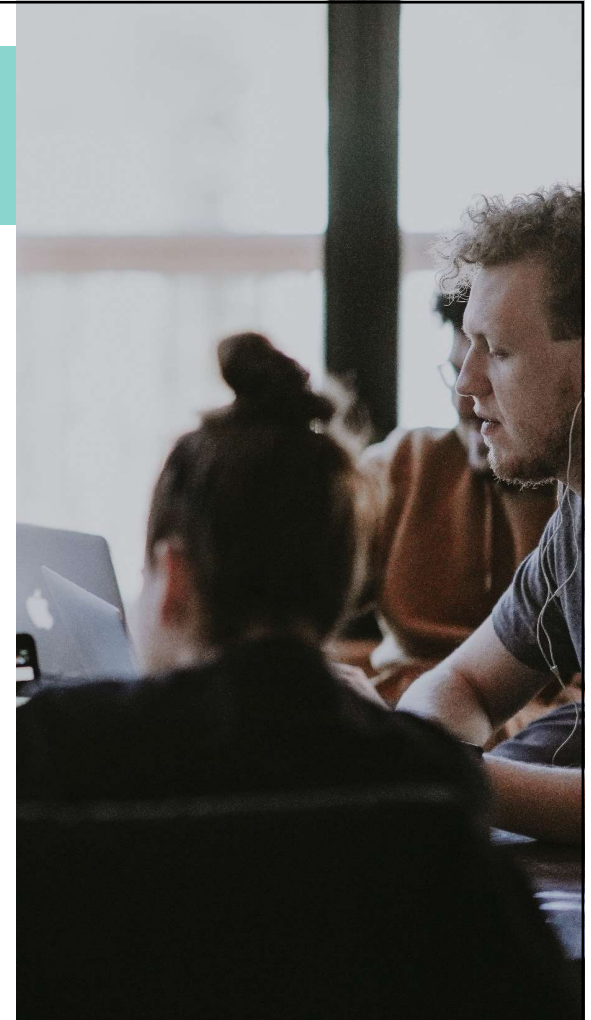
- ❑ Employers should begin an investigation even if a formal complaint has not been filed. If employers “knew or should have known” that a situation was occurring they need to investigate.
  - ❑ Conduct reported by the accuser
  - ❑ Employer-observed conduct
  - ❑ Reports from a co-worker
  - ❑ Sexual harassment knows no gender
  - ❑ People of the same sex can sexually harass each other





## Sources of Possible Harassment

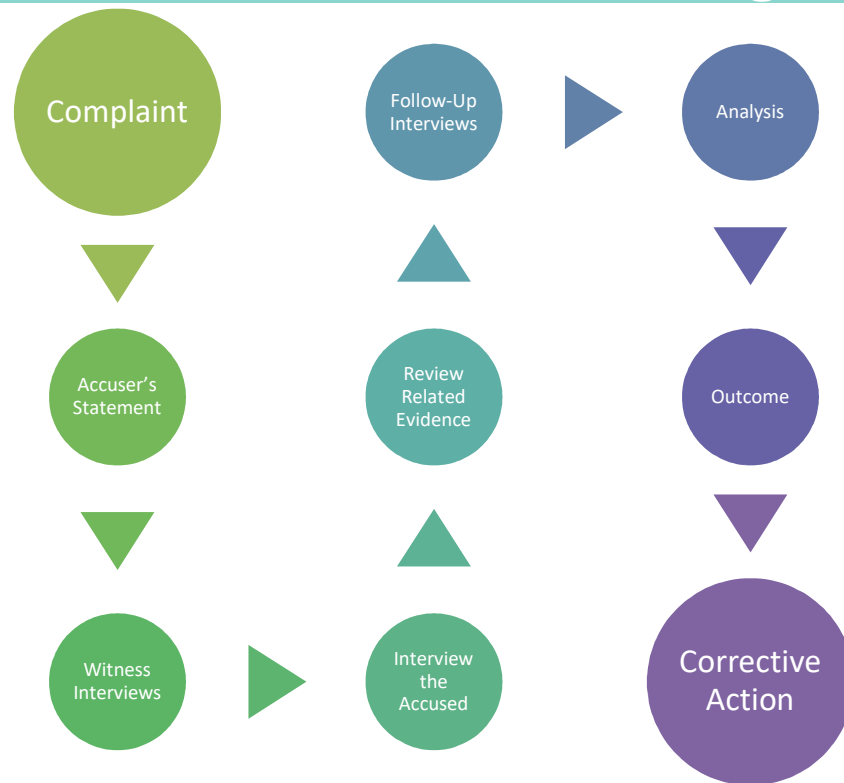
- ❑ Who may be harassing employees?
  - ❑ Victim's supervisor, manager or co-worker.
  - ❑ A non-employee, if the person is on the premises with permission.
    - ❑ Customer or a vendor.
  - ❑ Employer has the same duty to investigate and remediate harm.



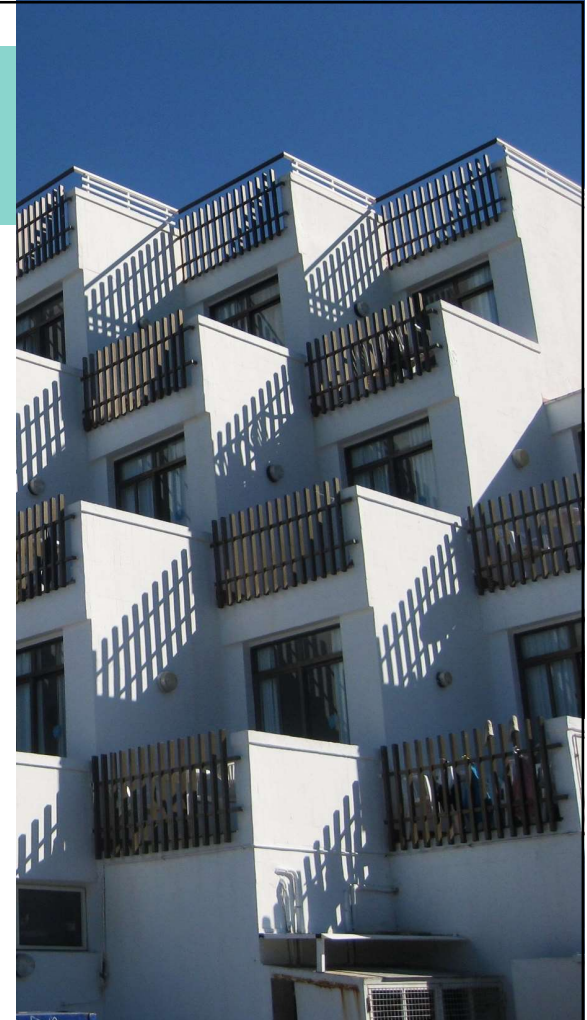


# Organizing and Executing an Investigation

## Framework of a Workplace Harassment/Discrimination Investigation

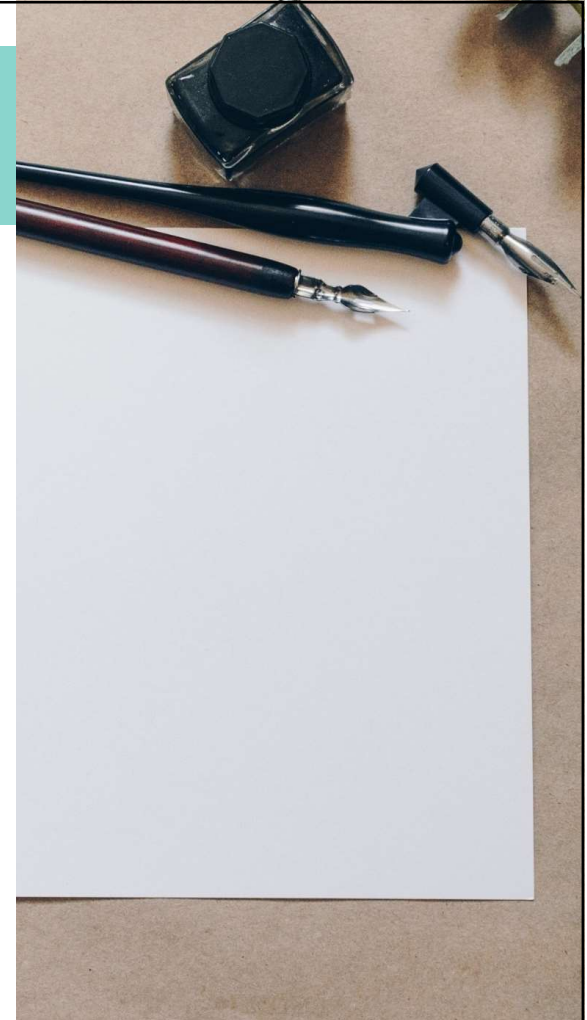


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## Starting the Interview

- ❑ Be prepared to explain:
  - ❑ What you are investigating,
  - ❑ Why the interviewee is being interviewed, and
  - ❑ How the information obtained will be used.
- ❑ Assure each interviewee that confidentiality will be maintained as far as possible.
- ❑ Assure each interviewee of the employer's policy against retaliation and whom to contact if he/she believes that retaliation is occurring.



## Questions for the Accuser

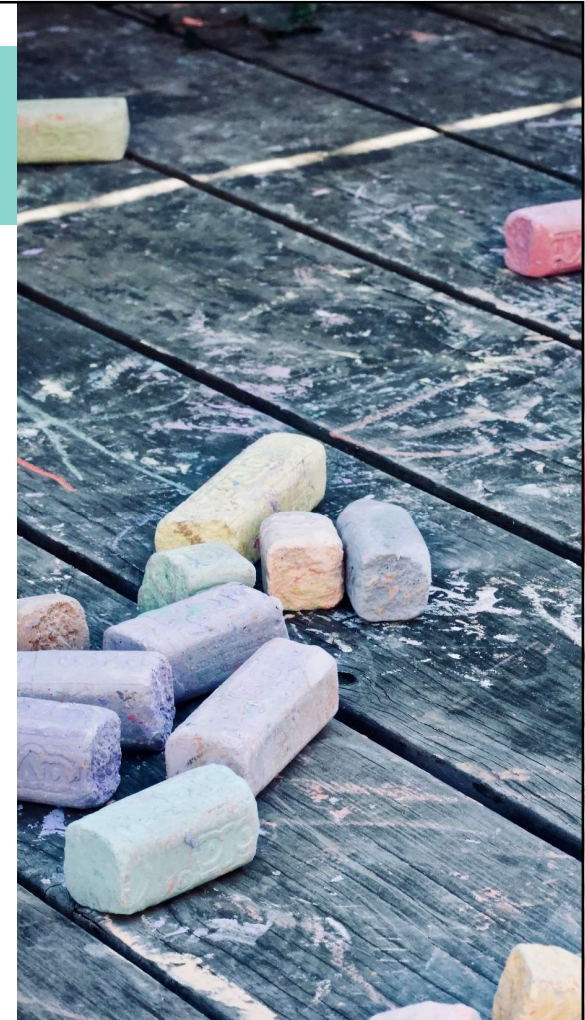
Take All Complaints  
Seriously

Factual Basis for Complaint

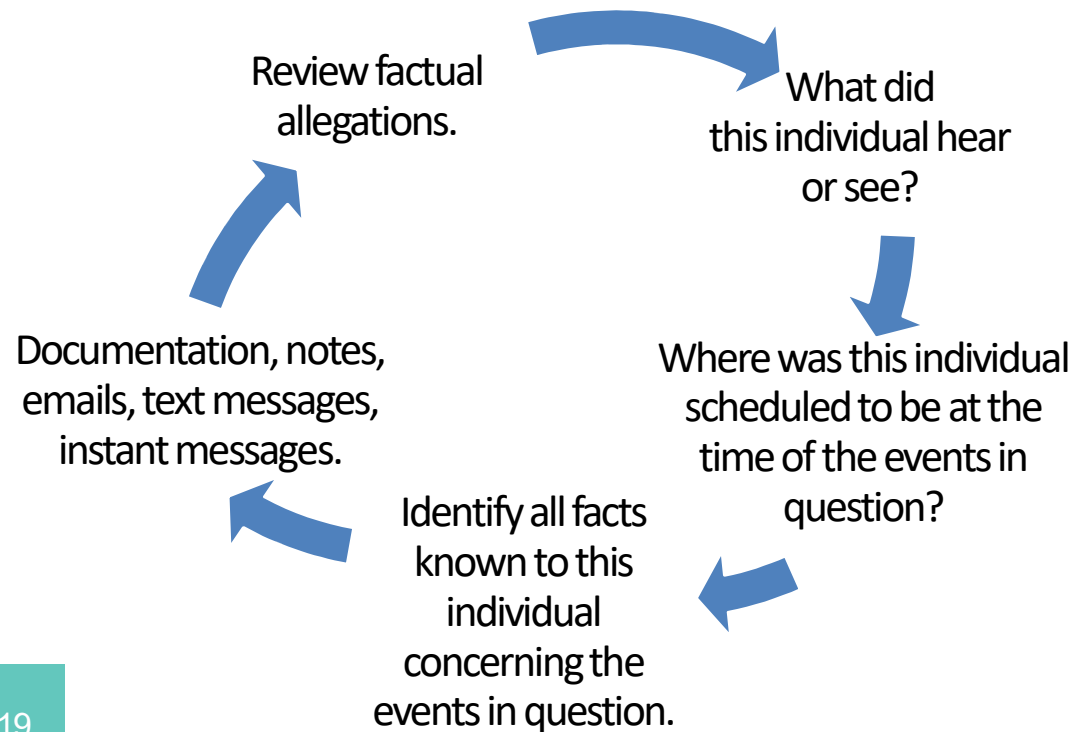
Road Map for Investigation

Written Statement or  
Employee's Notes

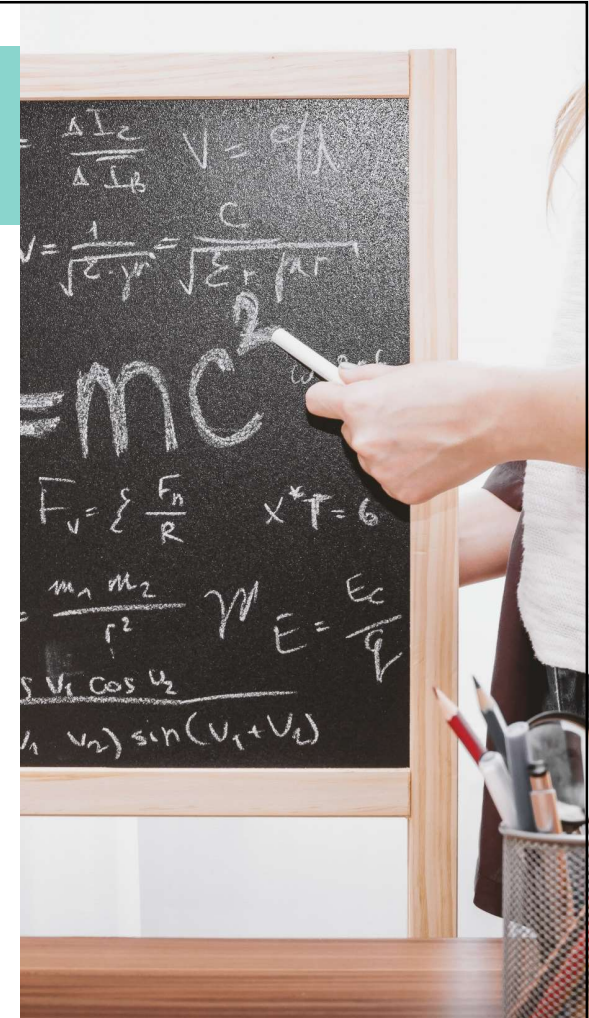
Docs, Emails, Notes,  
Text/Instant Messages



## Questions for Witnesses



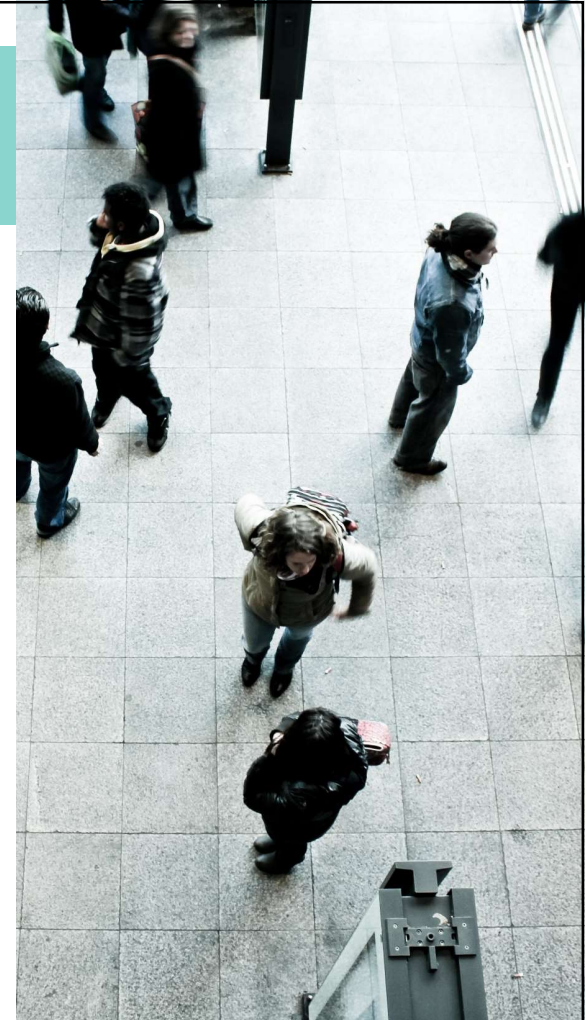
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## Questions for Accused

- ☐ Review the accuser's statement and factual basis for their beliefs.
- ☐ Review the statements of any known witnesses regarding the facts known to them.
- ☐ The accused employee's 'side of the story.'
- ☐ Identify any new witnesses?
- ☐ Documentation, notes, emails, text messages, instant messages.
- ☐ No retaliation.





## Succeeding in Your Interview

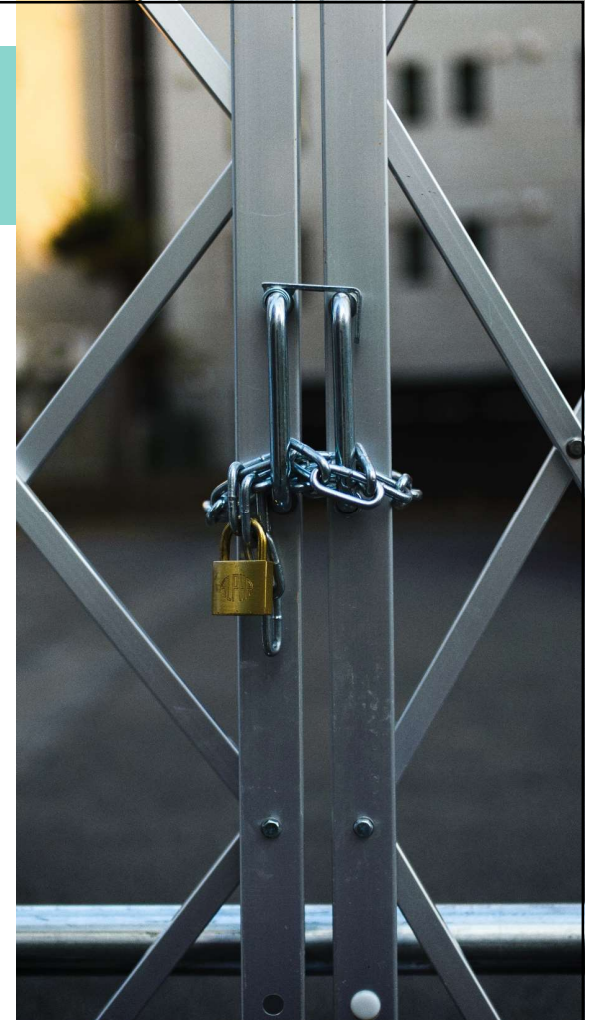
- ❑ Control the pace of the meeting and questions.
- ❑ One question at a time.
- ❑ Ensure your question was answered.
- ❑ Outline questions.
- ❑ Key bullet points.
- ❑ Review your notes/key bullets.
- ❑ Chronological presentation of facts.



## Scope of Questioning

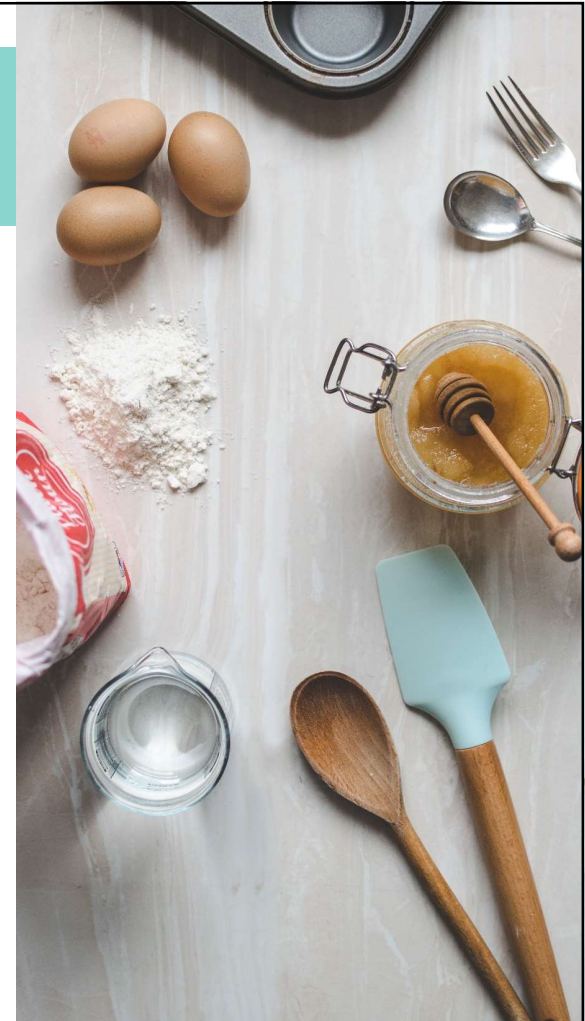
- ☐ Equal Employment Opportunity Commission (EEOC):
- ☐ Accuser:
  - ☐ When did it occur and is it still ongoing? How often did it occur? How did you react? Did the person who harassed you harass anyone else?
- ☐ Witness:
  - ☐ What did you see or hear? What did the complainant tell you? When did s/he tell you this? Are there other persons who have relevant information?
- ☐ Accused:
  - ☐ What is your response to the allegations? If the harasser claims that the allegations are false, ask why the complainant might lie.

Source: <https://www.eeoc.gov/policy/docs/harassment.html>



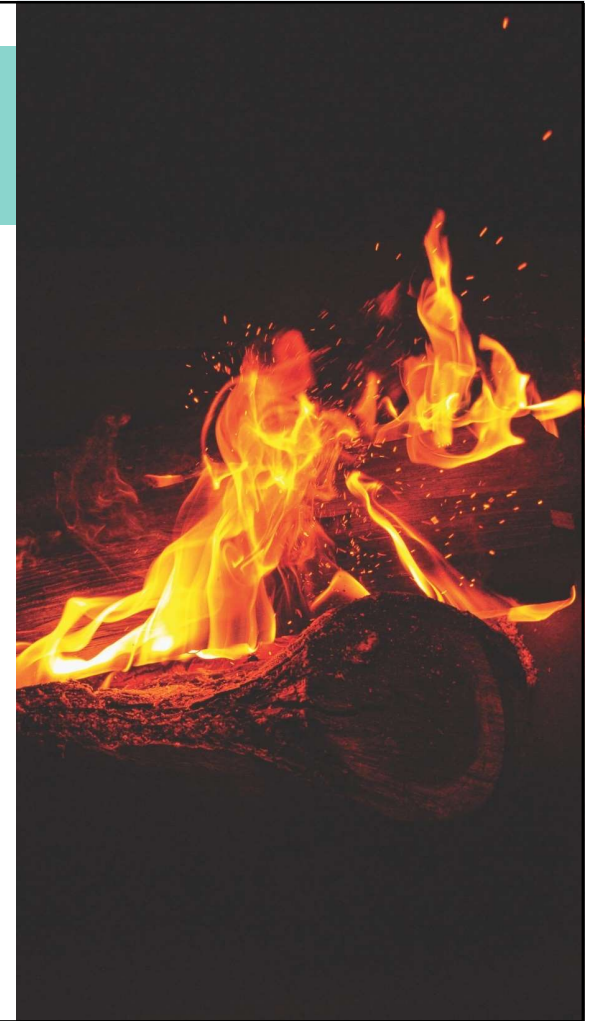
## Evaluating Statements and Information Learned

- ❑ Assessing the credibility of a witness/accuser/accused
  - ❑ Motive to make/refute statement (bias, conflict of interest).
  - ❑ Consistency of statements.
  - ❑ Behavior (hesitations, demeanor).
  - ❑ Do other witnesses, documents or evidence back up what is being said?
  - ❑ Where was the witness/party scheduled or expected to be at the time of the events they saw/experienced?
  - ❑ Does a witness or party have a habit, pattern or practice of engaging in conduct regularly?



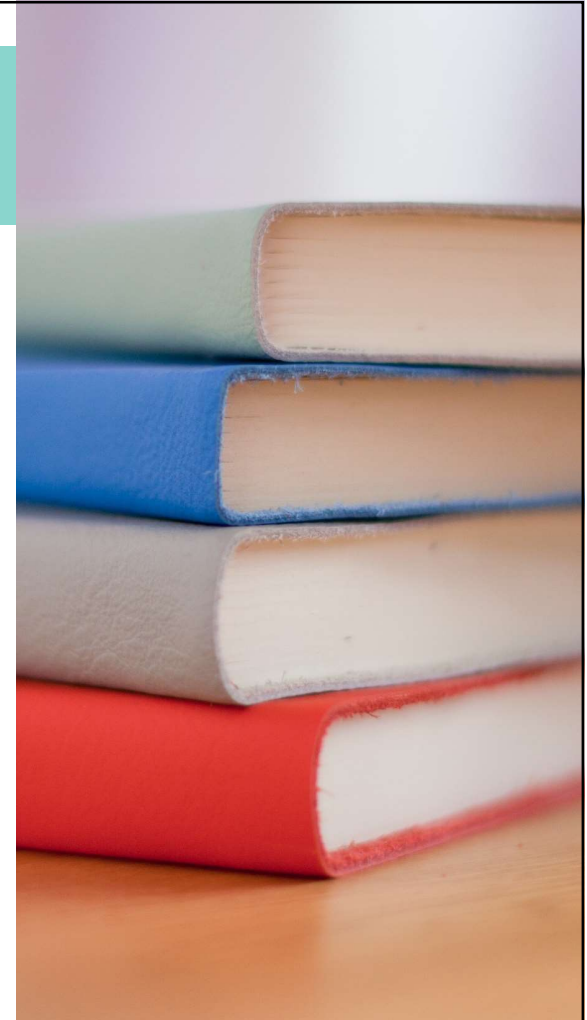
## Evaluating Statements and Information Learned

- ❑ “He said/she said”
  - ❑ Credibility of the party/witnesses involved.
- ❑ Re-interview based on areas in question.
- ❑ Inconclusive outcomes.
- ❑ Unlawful conduct vs policy violations.



## What if offending conduct is found?

- ☐ Burden of proof – preponderance of the evidence.
- ☐ Promptly Remediate:
  - ☐ Discipline up to and including termination;
  - ☐ Progressive disciplinary processes.
- ☐ Do not resolve by transferring the accuser.





## Retaliation

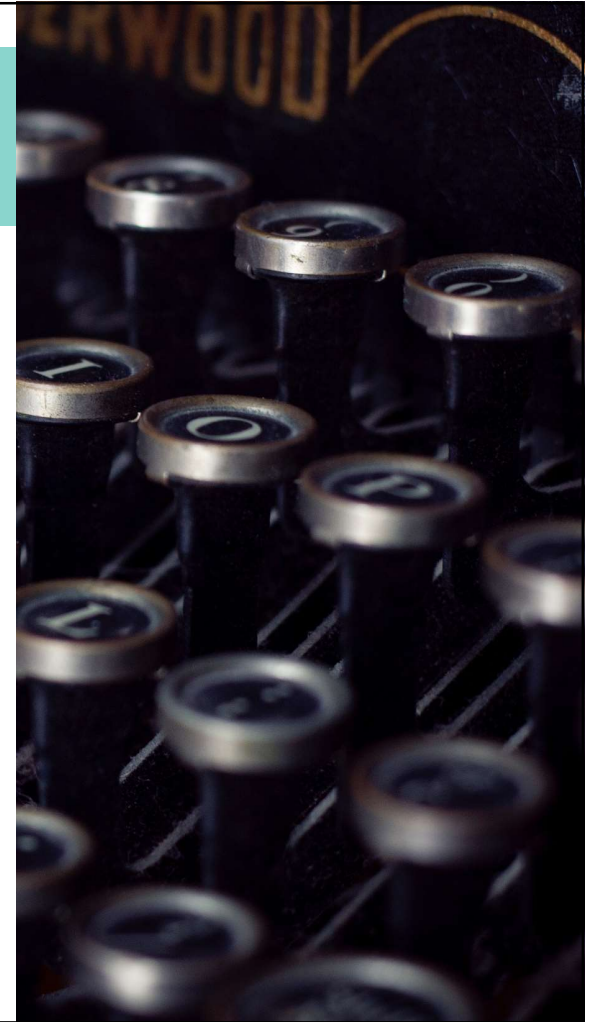
- ☐ Assess:
  - ☐ An employee engages in protected activity;
  - ☐ The employer is aware of the activity;
  - ☐ The employer takes an adverse employment action against the employee; and
  - ☐ A causal connection exists between the adverse employment action and the protected activity.
- ☐ Advise accuser they will not be retaliated against.
  - ☐ Notify employer promptly if it occurs.
- ☐ Advise accused not to retaliate.





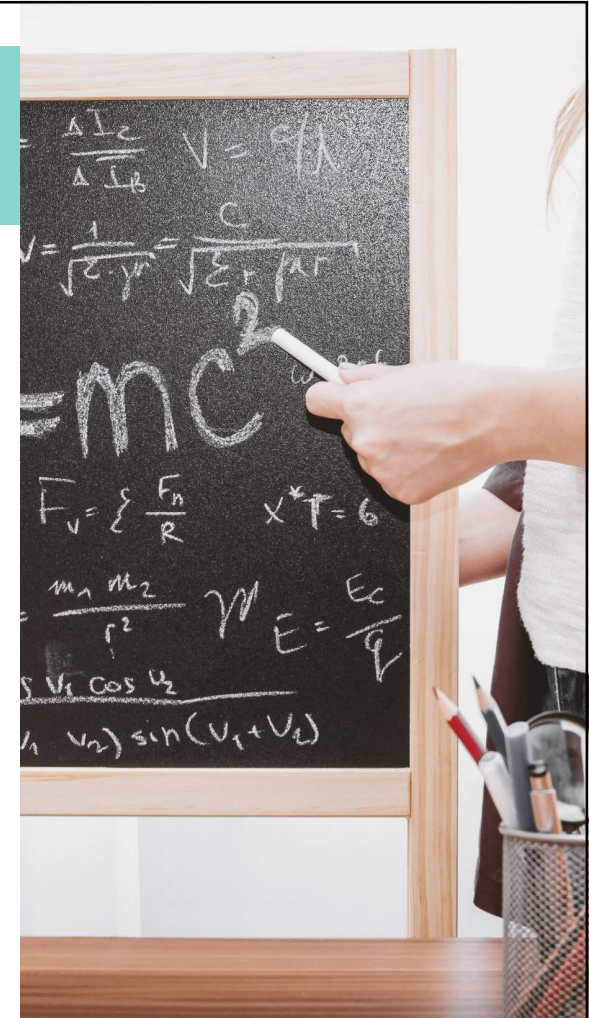
## Retaliation

- ❑ Examples of Protected activity:
  - ❑ Emailing a complaint to HR about harassing and discriminatory workplace behavior;
  - ❑ Making a verbal complaint to a manager about a co-worker's inappropriate conduct;
  - ❑ Participating in an internal sexual harassment investigation;
  - ❑ Refusing to carry out management's orders based on an employee's protected class membership.
- ❑ What constitutes an adverse employment action?



## Strategies to Prevent Harassment and Discrimination

- ☐ Adopt a clear anti-harassment/discrimination policy.
- ☐ Train employees.
- ☐ Train supervisors and managers.
- ☐ Monitor the workplace.
- ☐ Take all complaints seriously.



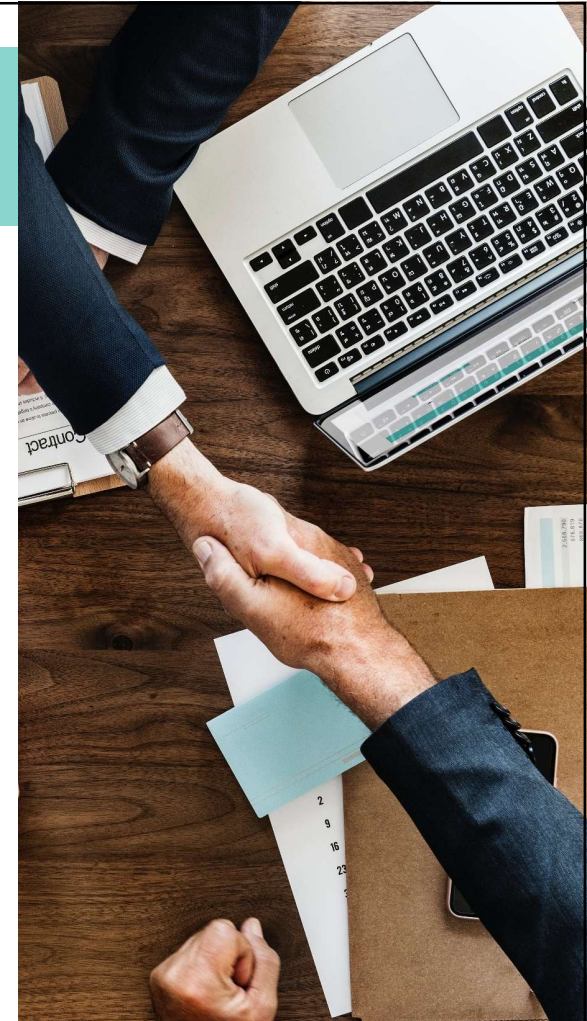
## Anti-Harassment/Discrimination Policies

- ❑ Make clear the employer does not tolerate harassment or discrimination in any form.
- ❑ Explain such conduct may come in the form of verbal comments, non-verbal conduct, and physical conduct.
- ❑ Include examples of prohibited conduct
  - ❑ i.e., slurs, lewd images, inappropriate jokes, derogatory or demeaning comments, etc., relating to protected class membership.
- ❑ Include direction as to prohibitions against sexual harassment.
- ❑ Violations may include discipline up to and including termination.



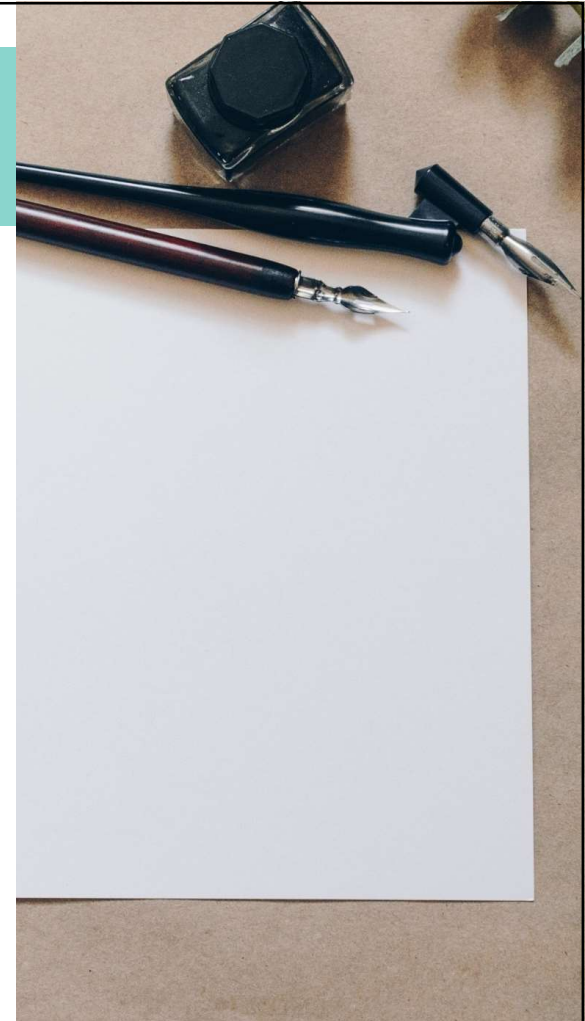
# Anti-Harassment/Discrimination Policies

- ❑ Reporting process
  - ❑ All employees responsible for reporting conduct that may violate policies.
  - ❑ Identify the individual to be contacted for making a report.
  - ❑ Victim should not need to report to their aggressor; upper management must be designated for receiving such reports when needed.
- ❑ Retaliation
  - ❑ Specific direction that retaliation will not be tolerated.
  - ❑ Include examples of such conduct.



## Anti-Harassment/Discrimination Policies

- ☐ Employee acknowledgment form (whether on paper or on-line).
  - ☐ Received the employee handbook (whether the handbook is provided in hard copy or electronic format);
  - ☐ Reviewed it;
  - ☐ Agree to ask any questions about it as they may have; and,
  - ☐ Agree to comply with its terms.
  - ☐ The same goes for any updates to the handbook as may later be instituted.
- ☐ Forms should be filed in each employee's personnel file or stored securely electronically so that they can be produced and printed if necessary.





An aerial photograph of a beach scene, overlaid with a semi-transparent teal filter. The image shows a wide beach with many people, colorful umbrellas, and lounge chairs. A line of palm trees separates the beach from a road with several cars. The ocean is visible at the bottom of the frame.

# Questions & Answers

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Questions become answers.®