



Sexual Harassment in the Workplace in a 'Me Too' World

Presented by:
Valerie Faeth
Cohen & Grigsby
412-297-4951

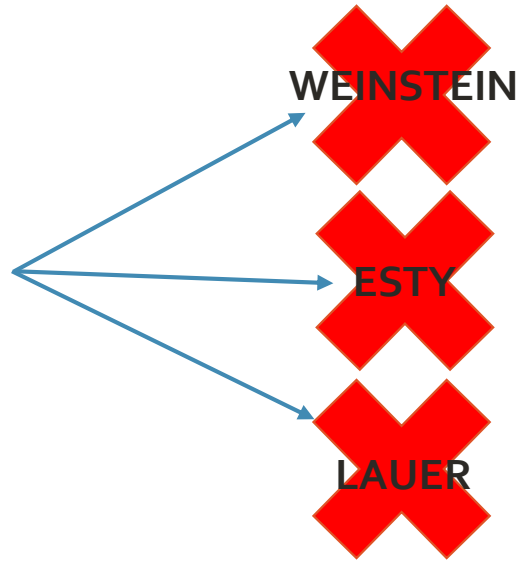
Me Too Movement



- Hashtag #METOO went viral in 2017
- Has encouraged thousands of women and some men to share their personal stories

Me Too Movement

Since Movement went viral, accounts of sexual harassment and assault have destroyed careers, reputations etc... of both men and women.



Me Too Movement

Accounts of sexual harassment and assault also result in negative publicity and damage to organizations

```
graph LR; A[Accounts of sexual harassment and assault also result in negative publicity and damage to organizations] --> B[Second Mile]; A --> C[Aspira]; A --> D[CBS]; A --> E[Fox News]; A --> F[Impacts fundraising, recruitment and retention];
```

- Second Mile
- Aspira
- CBS
- Fox News

Impacts fundraising, recruitment and retention

Sexual Harassment Statistics

In recent poll: **54%** of women reported being sexually harassed in workplace

Only **1** in **4** women report harassment

Number of sexual harassment Charges filed with EEOC has not increased since October 15, 2017 but threat/demand letters have

Me Too Movement

With increased scrutiny, it's important to

Update
harassment
policies

Conduct
meaningful
training

Conduct
prompt
investigation



Sexual Harassment – Unlawful Hostile Work Environment

Definition:

Unwelcome sexual advances that have the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile or offensive work environment

Affirmative Defense To Hostile Work Environment Sexual Harassment

Employer exercised care to prevent and promptly correct any harassing behavior

Employee failed to take advantage of corrective opportunities



Non Profit Sexual Harassment Investigation Protocols

Define clear path to follow in investigating allegations:

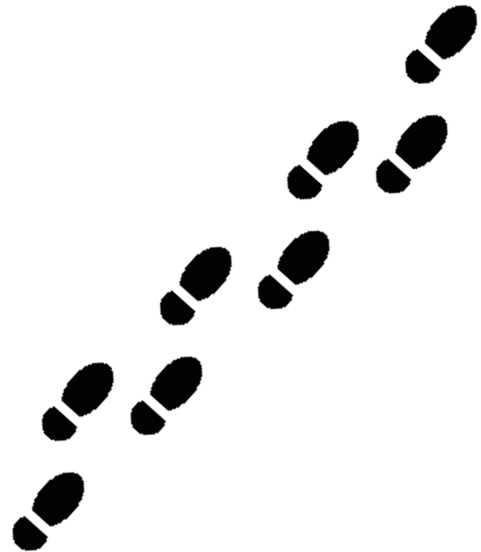
- Review harassment policy & procedures

- Determine internal reporting chain and at what point (if any) Board should be notified

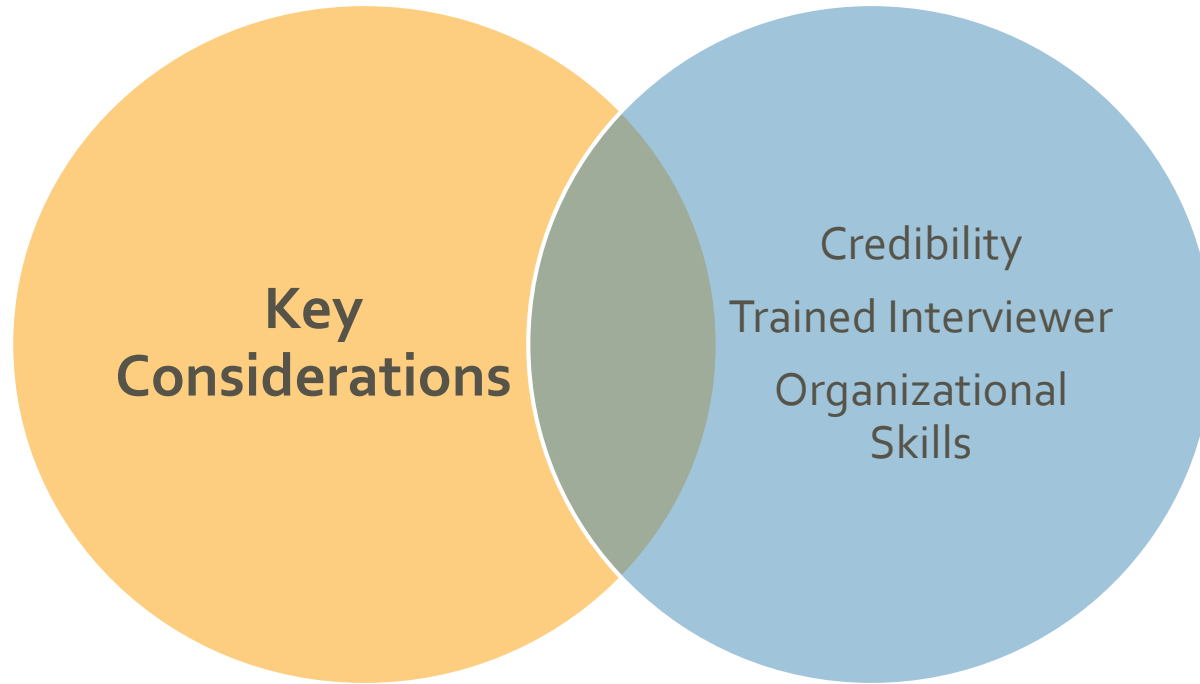
- Determine if entire Board or only committee of Board should be notified

 - Notify entire Board about complaints about CEO and other executive management

- Consider plan for handling media and other inquiries



Selecting the Investigator



Appropriate Investigators

In-house human
resources
professionals

In-house counsel

Outside counsel

Outside HR
consultant or
investigator



Investigations Involving Executives

Should normally be conducted by outside investigators

Avoid appearance of undue influence or impropriety

Eliminates awkwardness if executive keeps job



Investigations Conducted by Outside Counsel



Considerations

Can't be witness and also represent in same matter

- Rules of Professional Responsibility 3.7

Could also appear to be biased if routinely performs legal work for company

Investigation Preparation Recommendations

Make certain that you
or investigator:

Review applicable policies, rules,
personnel records, etc. and
understand purpose

Determine who will be
interviewed and in what order

Generally want to interview
complainant before accused

Interviews of Complainant and Witnesses

Prepare outline of questions

Ask open-ended questions

Don't suggest answers

Ask for supportive evidence, texts, emails, etc.

Ask about other witnesses or knowledgeable persons

Upjohn warning



Explain that identity of complainant must be disclosed to wrongdoer

Interviews of Complainant and Witnesses



EEOC has published guidance about questions to be asked during interviews

EEOC Guidance on Vicarious Liability
Employer Liability for Unlawful
Harassment by Supervisors, June 18,
1999

New EEOC guidance will be issued soon

Conducting Harassment Claim Interviews

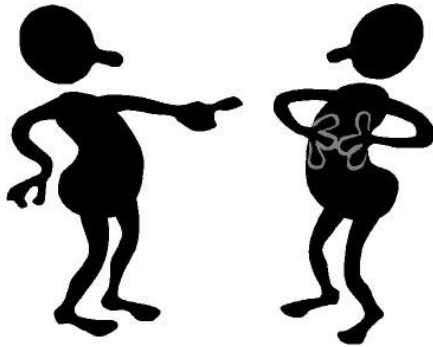
Conduct in private office (certain circumstances may require off-site)

Date and sign all documents

Read notes back to witness and ask to initial to verify accuracy

Record impressions on separate document

Interviews of Accused



Identify any motives for complainant to fabricate allegations

What is relationship between two

Get names of other witnesses

Ask for any documentation to disprove allegations

Read back notes and ask to initial to verify accuracy

Advise that retaliation will not be tolerated

Finalizing the Investigation

Review all of the information and evidence

Determine if follow-up interviews necessary

Make credibility determinations

Consider if pattern of questionable behavior

Preponderance of the evidence standard not “beyond a reasonable doubt” standard

Determining the Response

Have policies and practices have been violated

How have similar situations have been addressed in the past.

What corrective action would be effective

What is complainant's desired outcome

Consider preventative recommendations, if any



The Investigation Report

Describe issue prompting investigation

Summarize relevant policies

Identify witnesses interviewed and summarize information provided

Identify and summarize evidence reviewed

Describe any evidence not reviewed and why not reviewed

Summarize conclusions and recommendations



Presentation of the Report

Typically addressed to the individual(s) responsible for overseeing the investigation

In person presentation is typically the best approach

If CEO or executive management is the accused, the report may need to be provided to the Company's Board of Directors or designated committee

If prepared by attorney, maximize the privileged nature of the report



Communicating the Outcome

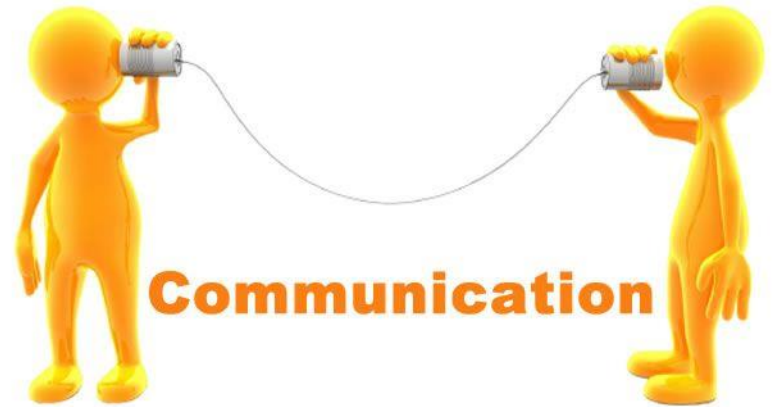
Communicate the outcome to complaining party

If allegations are disproven, ask why the employee came forward

Communicate the outcome to the accused

Issue discipline if warranted

Reiterate that retaliation is not tolerated and will result in discipline



Always document what is communicated to the complainant & the accused

Post Investigation Follow-Up

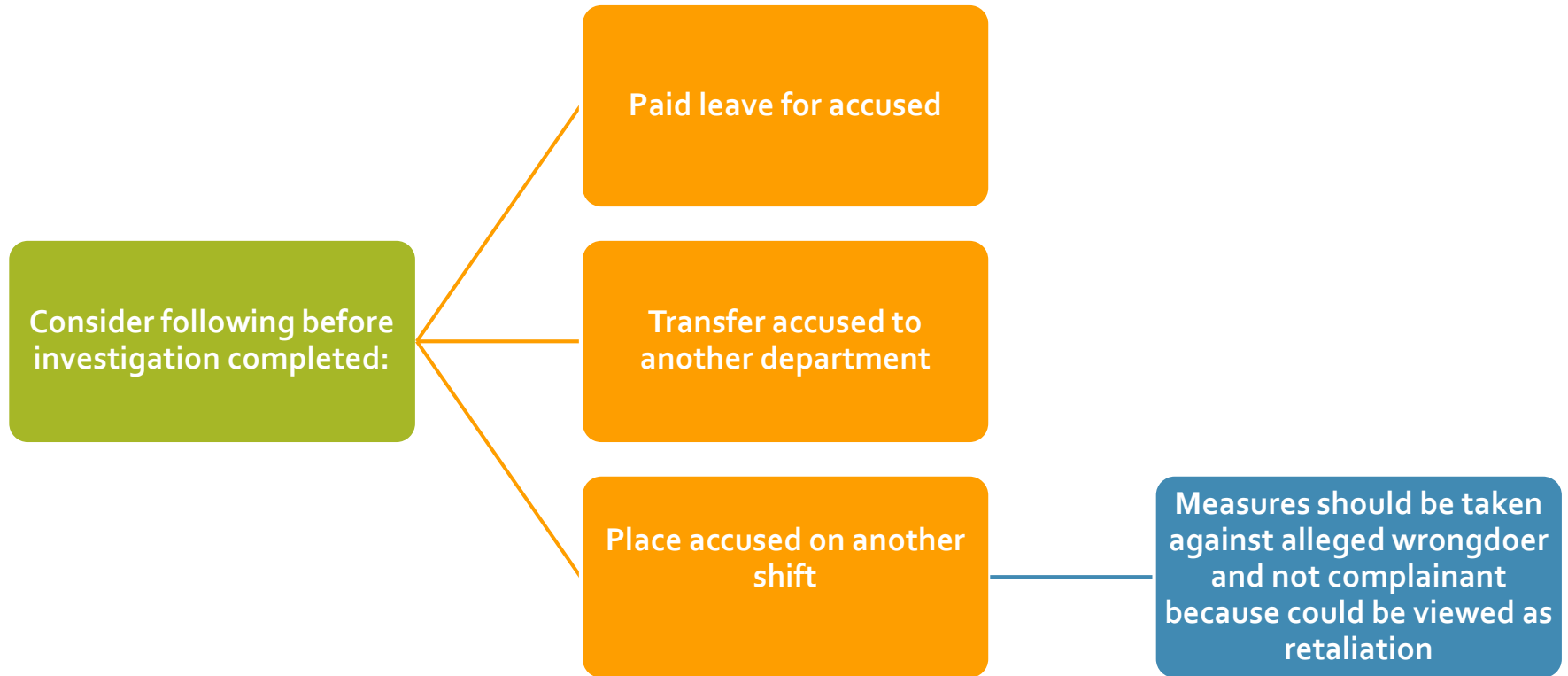
Implement corrective measures

Check in with the complainant to make sure corrective action effective and retaliation has not occurred

Ensure preservation of relevant documents, both electronic and hard copy



Interim Measures



Unexpected Issues

Recalcitrant complainant, accused or witness

- Explain that complainant's failure to cooperate may cause company to doubt credibility
- Explain that accused's refusal to cooperate may lead to inference he/she engaged in wrongdoing

Common Mistakes

Promising complete confidentiality to parties or witnesses involved in the investigation

- Explain that confidentiality is qualified/limited
- Information will only be shared on a “need to know” basis

Common Mistakes (cont'd)

Failing to properly document the investigation

- Relevant documents are not properly dated or signed and cannot later be identified with respect to when or by whom document was prepared.

Common Mistakes (cont'd)

Taking the side of one of the parties involved in the investigation

- Important for investigator to remain neutral and conduct an unbiased, objective investigation
- Applies whether empathizing with complaining employee or defending conduct of accused

Common Mistakes (cont'd)

Being a “lazy” investigator

- Do not simply ask the witnesses, complainant, or accused to provide you with a written statement
- Important to have interactive interviews to assess credibility and immediately follow up on issues raised

Common Mistakes (cont'd)

Failing to talk to accused prior to reaching conclusion

- Not uncommon for Employer to reach conclusion based on strong facts against employee that employee “did it”
- No matter how implausible an explanation might be, should still get accused’s “side of the story” prior to imposing discipline
- Employee may “admit guilt” or give false statements

Common Mistakes (cont'd)

Asking complainant, witnesses and accused to keep the investigation confidential

- National Labor Relations Board balances employees' rights under the NLRA to discuss terms and conditions of employment with co-workers against employer's right to demand confidentiality in the investigation
- Banner Health System, 362 NLRB No. 137 (2015). Employer must have legitimate and substantial business justification for demand that witnesses not discuss the investigation

Common Mistakes (cont'd)

Failing to come to a conclusion

- In the “he said – she said” type of case, easy to state that no conclusion can be reached
- Must reach a conclusion based on who is most likely telling the truth

Common Mistakes (cont'd)

Failing to advise Board of Directors about allegations of sexual harassment or assault

- Allegations of sexual harassment that may end up in news or involve high ranking executives should be disclosed to Board
- Board of Directors should never learn about allegations via a news report



Thank You/Questions

PITTSBURGH, PA
625 Liberty Avenue
Pittsburgh, PA 15222-3152
Main: 412-297-4951
Fax: 412-209-0672