

# Sexual Harassment Litigation Strategies

Howard M. Miller, Esq.



**CAASNY 2019 ANNUAL MEETING**  
*The County Attorneys' Association of the State of New York*

***Sexual Harassment  
Litigation Strategies***

Presented by: Howard M. Miller, Esq.  
Member, Bond Schoeneck & King, PLLC

---

---

---

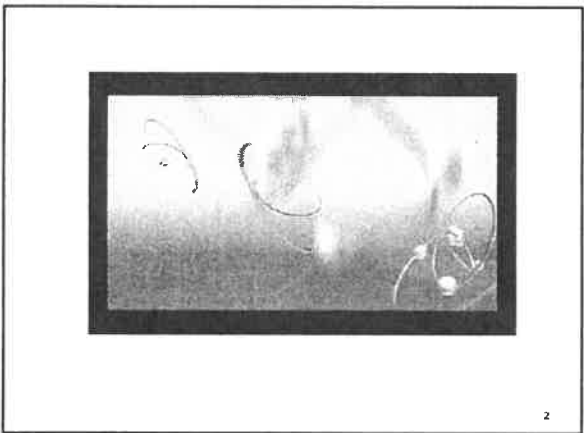
---

---

---

---

---



---

---

---

---

---

---

---

---

**Harvey Weinstein: Catalyst**

3

---

---

---

---

---

---

---

---

### The “Weinstein Effect”

- A growing list of high profile individuals have been accused of sexual harassment
- The number of claims against low profile individuals has also been on the rise

4

---

---

---

---

---

---

---

---

### How Common is Harassment?

- According to the EEOC’s Select Task Force on Harassment in the Workplace
  - 1 in 4 (25%) women report experiencing “sexual harassment” in the workplace
  - 2 in 5 (40%) women report experiencing sexually-based behaviors, such as unwanted sexual attention or sexual coercion
  - 3 in 5 (60%) women report experiencing unwanted sexual attention, sexual coercion, or other sexist or crude/offensive behavior

5

---

---

---

---

---

---

---

---

### Recent Trends

- The number of EEOC charges alleging sexual harassment dropped every year between 2010 and 2017
  - During this period, the number of sexual harassment charges dropped 15.7%
- Preliminary data regarding Fiscal Year 2018 (10/1/17-9/30/18) shows that EEOC charges filed alleging sexual harassment increased by more than 12% over Fiscal Year 2017

6

---

---

---

---

---

---

---

---

### Harassment Trends

- Sex-based harassment is the single most common form of harassment alleged in EEOC charges
  - 46% of all harassment charges allege harassment on the basis of sex
- Of the charges alleging sexual harassment, the percentage filed by men has increased
  - 1997 – 11.6%
  - 2017 – 16.5%
- 54% of charges alleging harassment allege harassment on a basis other than sex

7

---

---

---

---

---

---

---

---

### Defenses to Harassment Claims

- Training
- A timely & thorough investigation of complaints
  - *Martinez v. Triangle*, 293 A.D.2d 721, 741 N.Y.S.2d 427 (2d Dep’t 2002) (dismissing sexual harassment claims where company investigated the claims).
- Be proactive
  - Pre-hire disclosures
  - Clear company policy on consensual relationships
    - Right to reassign employees
    - Mandatory disclosure of the relationship to HR?
    - “Love agreements”

8

---

---

---

---

---

---

---

---

### Faragher Defense

- Under Title VII of the Civil Rights Act of 1964 (EEOC), the investigation can be used by the Employer to limit or avoid liability with respect to claims for hostile work environment harassment when the complainant has suffered no adverse employment action
  - *Burlington Industries V. Ellerth*, 524 U.S. 742 (1998)
  - *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

9

---

---

---

---

---

---

---

---

**Brett Kavanaugh 'sexual assault victim' speaks out**

© 2018 Associated Press



Brett Kavanaugh, since the allegations

A woman who alleged she was sexually assaulted by US President Donald Trump's Supreme Court nominee Brett Kavanaugh, has identified herself

10

---

---

---

---

---

---

---


---

---

---

**Why Does This Matter?**

- Impacted persons now pursuing publicity and/or humiliation vs. confidential monetary settlements
- Media / social media impact on reputation and goodwill of alleged harasser and the harasser's employer
- Widespread examination of legal and social standards



11

---

---

---

---

---

---

---

---

---

---



**A Sexual-Assault Claim Spotlights National Dilemma**

**WOMEN IN THE WORKPLACE**

**Workplace Gender Gap**

Articles from the Wall Street Journal (Oct. 15, 2018, Oct. 23, 2018).

---

---

---

---

---

---

---

---

---

---

- *Minarsky v. Susquehanna Cnty.*, 895 F.3d 303 (3d Cir. 2018) (discussed the recent increase of sexual harassment cases appearing in the national news and that “people in positions of power and celebrity have exploited their authority to make unwanted sexual advances).

13

---

---

---

---

---

---

---

---

### The Problem of False Claims

- Avoid rush to judgment.
  - e.g., Duke University lacrosse team - widely reported 2006 criminal case in which three members of the Duke University men's lacrosse team were falsely accused of rape.



14

---

---

---

---

---

---

---

---

### Duke's President, Richard H. Brodhead:

*I'll end with the deepest lesson this case taught me. When I think back through the whole complex history of this episode, the scariest thing to me, is that actual human lives were at the mercy of so much instant moral certainty, before the facts had been established. If there's one lesson the world should take from the Duke lacrosse case, it's the danger of prejudgment and our need to defend against it at every turn. Given the power of this impulse and the forces that play to it in our culture, achieving this goal will not be easy. But it's a fight where we all need do our part.*

See Duke President Shares Lessons Learned, Regrets About Lacrosse Case, Duke Today, September 29, 2007, available at [https://today.duke.edu/2007/09/rhb\\_jawconf.html](https://today.duke.edu/2007/09/rhb_jawconf.html).

15

---

---

---

---

---

---

---

---

### Social Media Harassment

- Food service director complained that someone drew a graphic sexual image of her on a bathroom wall.
- Image was posted on Facebook and shared with co-workers.
- Court held that a reasonable jury could find Employer liable for harassment because plaintiff's supervisor knew employees were sharing images of the drawings but ignored plaintiff's complaints.
- Alleged harassment was severe enough to create a hostile work environment because the drawings were shared on Facebook during work.
- See *Meng v. Aramark Corp.*, 2015 U.S. Dist. LEXIS 36278 (N.D. Ill. Mar. 23, 2015).

16

---

---

---

---

---

---

---

---

### What is Sexual Harassment?

- Unwelcome conduct which is either of a sexual nature or which is directed at an individual because of that individual's sex when:
  - Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual (*quid pro quo*)
  - *- or -*
  - Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment (*hostile environment*)

17

---

---

---

---

---

---

---

---

### What is Sexual Harassment?

- Sexual harassment is a form of sex discrimination and includes harassment on the basis of:
  - Sex
  - Sexual orientation
  - Self-identified or perceived sex
  - Gender expression and gender identity
  - Transgender status
  - Pregnancy
  - Sex stereotyping
- The policy applies to men, women, same and opposite sex relationships (male to female, male to male, female to female, female to male), members of the same protected group.

18

---

---

---

---

---

---

---

---



### What Should Be Investigated and Why?

- Concerns/obligations extend beyond the work day and the physical building
  - Social media
  - Work events/parties
  - Conferences

19

---

---

---

---

---

---

---

---

### Off-Hours Harassment – Takeaways

- Employers have a legitimate business interest in protecting its employees from sexual harassment from co-workers that occurs inside and outside of the workplace.
- If an employer neglects to address sexual harassment complaints, it may be held liable for sustaining a hostile work environment.
- Anti-harassment policies should clearly specify that off-duty harassment would lead to discipline.

20

---

---

---

---

---

---

---

---

### Off-Hours Harassment – Takeaways

- The employment relationship does not end when employees “punch out” for the day.
- Must be mindful of employee interactions outside of work that may create concerns regarding prohibited harassment.



21

---

---

---

---

---

---

---

---

### Off-Hours Harassment – Policies

- Anti-harassment policies should contain the following:
  - Behavior at work, and outside of work.
  - How employees will be held accountable.
  - What actions may be taken if policies are violated.
  - Prohibitions against harassment/threats of co-workers and complaints/threats against customers on social media.
  - A warning that misconduct on social media may be treated as seriously as other workplace misconduct.

22

---

---

---

---

---

---

---

---

### Off-Hours Harassment

- Employee terminated for sexually harassing his co-workers at work and outside of work.
- Employee filed a grievance.
- Employee’s union argued that the incidents outside of work should not be considered.
- Termination was upheld at arbitration.
- See *Thyssenkrupp Budd Co.*, 121 Lab. Arb. (BNA) 164 (Goldberg, 2005).

23

---

---

---

---

---

---

---

---

### Off-Hours Harassment

- Employee terminated for sexually harassing his co-worker outside of work.
- Employer’s anti-harassment policy did not mention harassment outside the workplace.
- Arbitrator upheld the termination because the harassment was egregious and because of the psychological strain it placed on the employee and her family.
- See *Escalade Sports*, 118 Lab. Arb. (BNA) 1761 (Kilroy, 2003).

24

---

---

---

---

---

---

---

---

### Employer Liability for Employee Posts - *Blakey v. Cont'l Airlines*

- Plaintiff claimed co-workers posted defamatory and false messages about her on "Continental Forum", an online bulletin board where employees posted messages and "threads" for each other.
  - E.g.: "Lawsuit, lawsuits lawsuits. That is all we hear about Tammy Blakey. ... you are a wart (really bad choice of words with your ALLEGED problem) on the judicial system. I have zero respect for you and your kind."
- If on notice of retaliatory harassment, employer had duty to remedy the harassment.

25

---

---

---

---

---

---

---

---

### Liability for Employee Posts

*To put the issue in perspective, we need to shrink the context a bit. There was a television series a few years ago called "Wings." Wings (NBC television broadcast, April 1990 through May 1997). The program concerned a small, regional airline, its pilots, ground crew and maintenance people. If there were at that small airport a lounge used exclusively by the pilots and crew of that airline and a bulletin board in that lounge contained the same or similar comments and asides by the pilots and crew, there would be little doubt that if management had notice of messages that met the required substantive criteria of being "sufficiently severe or pervasive to alter the conditions of employment and to create an intimidating, hostile, or offensive working environment," Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 592, 626 A.2d 445 (1993), a cause of action for hostile work environment sexual harassment could be asserted.*

*- Blakey v. Cont'l Airlines, 164 N.J. 38, 56 (N.J. 2000).*

26

---

---

---

---

---

---

---

---

### True/False

It is lawful to retaliate against an individual who has made a complaint of harassment (for example, terminate his/her employment) if the complaint is found to be false

1. True
2. False

27

---

---

---

---

---

---

---

---

### Retaliation

It is unlawful to retaliate against an individual who has made a good faith complaint of harassment *regardless of whether the complaint is ultimately found to have merit.*

28

---

---

---

---

---

---

---

---

### Limiting Retaliation Liability

- Do you utilize retaliation notices when investigating complaints of discrimination and harassment?
- Have you trained your managers and supervisors on what constitutes retaliation and how to avoid retaliation claims?

29

---

---

---

---

---

---

---

---

### NYS-Mandated Sexual Harassment Training

- **Who** must be trained:
  - All employees, including:
    - Full-time
    - Part-time
    - Per Diem
    - Temporary/Transient/Seasonal
    - Individuals employed for one day for the employer, or only working one day in New York State

30

---

---

---

---

---

---

---

---

**NYS-Mandated  
Sexual Harassment Training**

- **What** must be included in the training?
  - Employers must use the NYS model sexual harassment prevention training program; or
  - Employer must use a program that meets or exceeds the NYS minimum standards.

(cont'd)

31

---

---

---

---

---

---

---

---

**NYS-Mandated  
Sexual Harassment Training**

- **NYS minimum standards:**
  - The training must:
    - be interactive
    - include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights
    - include examples of conduct that would constitute unlawful sexual harassment

32

---

---

---

---

---

---

---

---

**NYS-Mandated  
Sexual Harassment Training**

- **NYS minimum standards:**
  - include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment
  - include information concerning employees' rights of redress and all available forums for adjudicating complaints
  - include information addressing conduct by supervisors and any additional responsibilities for such supervisors.

33

---

---

---

---

---

---

---

---

**NYS-Mandated  
Sexual Harassment Training**

- Additional key elements noted in the Model Training:
  - Provide training in the language that is spoken by employees
  - Address:
    - Who can be the target of sexual harassment.
    - Who can perpetrate sexual harassment.
    - Where sexual harassment can occur.
    - Sex stereotyping.
    - What to do if you are harassed or witness harassment?
    - Investigation process and corrective action.
    - Additional protections and remedies.
    - Retaliation.
    - Other types of workplace harassment.

34

---

---

---

---

---

---

---

---

**NYS-Mandated  
Sexual Harassment Training**

- **When must employees be trained?**
  - All employees must receive training prior to October 9, 2019 and annually thereafter.
    - “Annual” can be based on a calendar year, a year based upon each employee’s start date, or any other method (e.g., school or fiscal year).
  - Training for new employees is “encouraged” “as soon as possible” from their start date.

35

---

---

---

---

---

---

---

---

**Training Best Practices**

Primary goals should be:

- educate as to the employer’s conduct expectations.
- foster a culture where employees are encouraged to speak up on behalf of themselves and others and to “boundary set”.
- foster a culture where employees are willing to adjust their behaviors to accommodate others’ thresholds of tolerance.
- educate as to the mechanics of making a report.
- assure all employees that reports will be *taken seriously* (a complainant’s concern) *but also* that reports will be *fairly investigated* (a respondent’s concern).

- Note: Even if harassment alleged does not rise to violation of the law, individual is protected from retaliation if the person had a good faith belief that law was violated. However, retaliation is not intended to protect persons making intentionally false charges of harassment.

36

---

---

---

---

---

---

---

---

### Other Key Points from Updated NYS Guidance on Training

- Live training (including by phone or video conference) is not required, but is a “best practice.”
- May be able to provide employees with supplemental training to cover any minimum requirements omitted from prior anti-harassment training.
- Verified and compliant prior training from a different employer may satisfy the annual requirement.

37

---

---

---

---

---

---

---

---

### Training – Do’s

- Train
  - Avenues of complaint
  - Administrators
  - Supervisors
  - All employees
  - In a consistent manner (using the same delivery method)
- Address retaliation
  - Retaliation includes threats of physical violence outside of work hours
- Include examples/case studies
- Keep records of training materials and who attended

38

---

---

---

---

---

---

---

---

### Training – Don’ts

- Limit to sexual harassment
- Focus on legal standards, while failing to address employer’s expectations
- Go through the motions, delivering the same training in the same format you’ve delivered year after year
- Allow employees to share personal/confidential experiences
  - If this happens, the trainer should interrupt and recommend the story be discussed privately and with the appropriate office contact.
  - After the training, follow up with this individual to ensure they are aware of the proper reporting steps.
  - Managers and supervisors must report all incidents of harassment.

39

---

---

---

---

---

---

---

---

**Mechanics of an Effective Investigation**

---

---

---

---

---

---

---

---

**Steps in the Investigative Process**

- Complaint/report comes in... then what?
  - Pre-assessment
  - Gathering of evidence/witness interviews
  - Evaluation of evidence/determination
  - Follow-up with complainant and accused

---

---

---

---

---

---

---

---

**Be Prompt!**

- As soon as complaint is made or information acquired
  - The longer the delay in commencing the investigation, the more likely the response will be found not to be effectively remedial and prompt
- Whether or not student/employee formally complains – beware of informal complaints
- Even if student/employee asks you not to take any action, an investigation may be required

---

---

---

---

---

---

---

---



### Pre-Assessment

- Review complaint/incident
  - Discrimination or harassment or
  - Program inequity
- Assess whether removal/separation is necessary
- Consider the kinds of information you'll need
  - Interviews of parties
  - Interviews of witnesses
  - Documentation, voicemails, text messages, emails, records of individuals swiping in and out of buildings, using a meal card, etc.
  - Consider whether video evidence might exist
    - Think about this EARLY because it may be lost quickly

---

---

---

---

---

---

---

---

### Removal

- Ask
  - Does accused present a threat or risk the integrity of the investigation?
- Should have approval process so one person is not making the decision

---

---

---

---

---

---

---

---

### "Big I" Investigation

- What additional information is required to make an informed decision?
- Can this information be obtained at the building level without compromising the results?
  - Scope
  - Witnesses
  - Confidentiality
  - Bias
- Remember – anytime you are speaking with a represented employee about something that may lead to discipline *for that employee*, union representation is required, unless waived in writing

---

---

---

---

---

---

---

---

### Conducting the Investigation

- Gather as much "hard" evidence as possible
- Interview the complainant first
  - Identify the full scope of the complaint
- Then interview witnesses/accused
- Then interview any additional witnesses, if any, identified by the accused
- Interview each witness separately

---

---

---

---

---

---

---

---

### What is the Right Demeanor for an Investigator?

- Fair
- Objective
- Concerned for both complainant and respondent
- Unrevealing of personal views
- Not leaping to conclusions
- Not promising a particular result

---

---

---

---

---

---

---

---

### Questioning the Parties and Witnesses

When speaking with a party:

- Do not ask questions rapid-fire
- If person pauses, do not hurry him/her
- Allow breaks as requested
- Do not interrupt
  - Go back if you have to, to fill in the blanks
- Get to specifics but do so with sensitivity
  - "He touched me down there".
    - "I realize that this is difficult but we need to make sure that we understand what happened. When you say 'down there', are you saying that he placed his hand inside your underwear and touched your vagina?"

---

---

---

---

---

---

---

---

### Sensitive Questioning

• Non-judgmental or minimally judgmental ways to elicit relevant information

– “What happened next?”

– “Did . . . happen?” (as opposed to “why did or didn’t something happen”)

- The “why” may be relevant, but be really sure it is relevant before asking

– “[Complainant/Respondent] says that . . . happened. Would you like to say anything in response to that?”

– “Would you tell us how you were feeling or what you were thinking about when . . . happened?”

---

---

---

---

---

---

---

---

### Sensitive Questioning

• Both parties should be allowed the opportunity to explain what happened from start to finish, but

– A party may be more comfortable answering only specific questions

• If there are written statements already, do your homework in advance and know what facts you would like clarified

---

---

---

---

---

---

---

---

### Sensitive Questioning

• You need to understand the party’s account of the facts, but doing so needs to be done thoughtfully

– Not all things you are curious about may be appropriate questions

– Even appropriate questions can be asked the wrong way

---

---

---

---

---

---

---

---

**Interviewing the Complainant**

- Give the complainant opportunity to provide statement
- Gently, ask for witnesses
  - Remember to do this for every allegation
  - You want to know not only who saw or heard the alleged conduct, you also want to know who was there at the time
  - If others did not see or hear the same thing, that may be relevant in and of itself

---

---

---

---

---

---

---

---

**Interviewing the Complainant**

- Be certain to ask about prior occurrences
  - Have there been prior instances of the same offensive conduct?
  - Were they reported?
  - To whom?
  - Any action taken?
- Especially with student witnesses, do not assume that they will know what information is relevant to share with you – you need to ask

---

---

---

---

---

---

---

---

**Interviewing the Complainant**

- At the conclusion of the interview:
  - Invitation to contact you with additional information
  - Do not promise complete confidentiality
  - Communicate a realistic timetable
  - Let complainant know that retaliation is prohibited, and she/he should inform you if retaliation occurs

---

---

---

---

---

---

---

---

### Interviewing Witnesses

- Introductions
- A short explanation of what is going on
- Open-ended questions first
- Specific questions later
- Invite the witness to share anything else he/she thinks is relevant or would like considered
- Invite the witness to contact you if he/she later remembers or would like to share anything else
- Encourage the witness to try to keep the matter confidential

---

---

---

---

---

---

---

---

### Interviewing the Accused

- Prepare for the interview
  - Make certain you have reviewed relevant documentation
  - Review notes of complainant's and witnesses' interviews
  - Open-ended questions first, specific questions later
  - Get the accused student's side of the story, including identification of any witnesses the student believes will support his story

---

---

---

---

---

---

---

---

### Determining Responsibility

- Your role is not to pick a side or to promote an agenda
- Your loyalty must be exclusively to the integrity of the process and reaching the warranted outcome
- Recognize any biases and actively override them

---

---

---

---

---

---

---

---

### What If It's a He Said/She Said?

- Most cases involve credibility determinations
- The investigators job is to resolve credibility issues and draw conclusions

---

---

---

---

---

---

---

---

### Determining Credibility of any Party or Witness

- Demeanor
- Opportunity
- Accuracy
- Contradictions
- Admissions and denials
- Probability of information given
- Motivation/bias
- Corroborating statements or evidence

---

---

---

---

---

---

---

---

### Determining Credibility

- Look for corroboration
  - Text messages
    - Increasingly, this is the place for proof
  - Social media
  - Incidental witnesses
    - Have no dog in the fight
    - Can be very important regarding capacity
      - Who did they bump into?
      - What did they notice – able to stand, talk, look in eye, speak coherently?
    - May be able to confirm timing or location

---

---

---

---

---

---

---

---

### Post-Assessment

- Review personnel/academic file
- Review investigation report
  - Ask questions if you see gaps
- Consult legal
- Consult supervisor or counselor
- Meet with employee and union/student and parent
- Determine appropriate action
- Inform employee/union student/parent
- Follow-up with complainant

---

---

---

---

---

---

---

---

### Written Report

- Recount the investigation steps
- Allegation by allegation, explain the rationale for the investigatory conclusions
  - What have you determined occurred and why did you conclude that these facts occurred
- Make a determination of responsibility or not, allegation by allegation
- Recommend sanction(s) or forward to appropriate administrator for recommendation

---

---

---

---

---

---

---

---



65

---

---

---

---

---

---

---

---

### Mock Harassment Investigation



64

---

---

---

---

---

---

---

---

### Mock Sexual Harassment Investigation

- Gold Coast County, N.Y.
- The key players are:
  - **Melissa Alvarez**, Complainant
    - Secretary in the Parks Department
  - **Sam Studley**, one of Melissa’s co-workers
  - **Stormy Sessions**, Accused, Melissa’s supervisor
  - **Nicki Rossi**, Director of Human Resources

65

---

---

---

---

---

---

---

---

### The Complaint

From: Alvarez, Melissa  
 Sent: May 20, 2019  
 To: Rossi, Nikki  
 Subject: Harassment

Ms. Rossi,

My supervisor, Ms. Sessions, regularly engages in sexual banter with my co-workers, in which they all boast about their sex lives. I wanted to bring this to your attention but I am reluctant to file a formal complaint. Please keep this confidential!

Melissa Alvarez

66

---

---

---

---

---

---

---

---



### Scenario

- Ms. Rossi speaks to Melissa, acknowledges receipt of her note and offers to assist her in informally resolving the complaint
- Ms. Rossi indicates this will then be handled as a formal complaint and an investigation will occur.

67

---

---

---

---

---

---

---

---

### The Investigation Plan

- Interview Ms. Alvarez (Complainant)
- Identify students to interview
- Conduct follow up interviews as needed

(cont'd)

68

---

---

---

---

---

---

---

---

### Interviews

69

---

---

---

---

---

---

---

---

### Interview of Ms. Alvarez

- Where do you start?
- What do you ask her?

70

---

---

---

---

---

---

---

---

### Addressing Retaliation Concerns

- Issue the complaining party, alleged wrongdoer and all witnesses a written statement:
  - Restating prohibition of retaliation
  - Directing complaining party and witnesses to report retaliatory action
  - Identify avenues of complaint
  - Obtain acknowledgment; provide copy
- Issue the Complainant and Respondent copies of the Policy

71

---

---

---

---

---

---

---

---

### Questions for Witnesses

- Funnel approach – start broad
  - Get background info
  - Then - “Tell me what happened?”
- Probe for details
  - Who? What? When? Why? Where?
  - Who witnessed?
  - Who did you tell about it?
  - Explore basis for witness knowledge – how do you know this?
- Any notes/documents or other physical evidence?
  - Text messages and emails
- Anyone else we should speak to?

72

---

---

---

---

---

---

---

---

### Interviewing the Complainant

- Discuss comfort with investigator's ability to investigate objectively
- Determine if there are any safety or security concerns requiring interim action
- Inquire how he/she would like complaint resolved
- Outline next steps
- Establish timeline for follow up
  - Note: if timeline changes, communicate this to complainant

73

---

---

---

---

---

---

---

---

### Summary of "Intake" Meeting

- Alvarez reports that much of work time is devoted to discussing sex. Ms. Sessions talks about her own sex life and encourages the male co-workers to talk about their sex lives.
- Alvarez reports that there are rumors that Ms. Sessions meets with some of the male co-workers after work and has even offered to "set-up" one of these co-workers with women she knows.

74

---

---

---

---

---

---

---

---

### What Next?

- Question if, and when, to place Ms. Sessions on leave;
- Search work computer
- Get ready for interviews

75

---

---

---

---

---

---

---

---

**Summary of Studley Interview**

Studley acknowledges that Ms. Sessions does in fact engage in sexual banter during work hours. He has met with Sessions and other employees at local restaurant. He has a text message from Ms. Sessions about him meeting a 25-year old female cousin of Ms. Sessions who is visiting from Spain and who is "loose."

(cont'd)

76

---

---

---

---

---

---

---

---

**Summary of Sessions Interview**

- Denies any inappropriate banter
- Admits to meeting up with subordinates, but denies any inappropriate banter;
- Admits to wanting co-worker to meet her cousin, but claims that it was not a "set-up" but instead would be educational to meet someone of a similar age from another Country

77

---

---

---

---

---

---

---

---

**Now What?**

- Review documentation
- Interview other students
- Follow up interviews
- Make a determination
- Recommend an outcome

78

---

---

---

---

---

---

---

---

### Determining Appropriate Remedial Action

- Do you have the whole story?
- Do the facts stack up?
- Was investigation thorough and comprehensive?
- Was there violation of policy and/or law?
- Are there mitigating circumstances?
- Disciplinary Charges?

79

---

---

---

---

---

---

---

---

### Other Issues

- Resignation v. charges

80

---

---

---

---

---

---

---

---

### Sexual Assault Hypothetical

81

---

---

---

---

---

---

---

---

**Sexual Assault Hypothetical**

- Bella, a County employee, files a complaint for sexual assault. Relevant facts from Bella’s complaint:
  - She and several friends were hanging out at her friend’s house
  - Bella had two shots of vodka and was feeling buzzed but good
  - At about 11 p.m., co-worker Nate shows up.

82

---

---

---

---

---

---

---

---

**Sexual Assault Hypothetical**

- Bella and Nate go to her friend Cara’s room together
- Bella and Nate start to “make out”
- Nate has had several drinks
- Nate starts to pull down Bella’s pants
- Bella tells him to stop, but is not sure he heard;
- Nate starts touching Bella under her panties;
- She says stop again, this time more loudly;
- Nate does not stop;
- After several minutes, someone walks in on them and the incidents stops

83

---

---

---

---

---

---

---

---

**Sexual Assault Hypothetical**

- Bella says that after someone walked in, she immediately told her friend, Sue, what happened and they both left the house.
- Bella has avoided all contact with Nate since the incident.

84

---

---

---

---

---

---

---

---

### Incapacitation

- Evaluating Intoxication vs. Incapacitation
  - Intoxicated does not necessarily mean incapacitated
  - The question is whether a person could make a “knowing decision” to engage in the activity
    - A bad decision or a decision one would not have made if sober is NOT the standard
  - No “legal limit” test like for driving
  - Alcohol impacts individuals differently
  - Focus should be on the *impact* of alcohol consumption

85

---

---

---

---

---

---

---

---

### Incapacitation

- How much alcohol was consumed and how quickly? And when in relation to the incident?
  - Factors in intoxication: weight, gender, genetics, food consumption
- Did the complainant pass out or black out?
- Did the complainant vomit at any point?
- How was the complainant’s speech, gait, focusing of the eyes, speaking in a way that made sense at the time of the incident?
- What was the complainant’s condition when last seen by reliable third-party witnesses?

86

(cont'd)

---

---

---

---

---

---

---

---

### Incapacitation

- Did the complainant seem to understand where s/he was and where other people were? Was his/her thinking organized or disorganized?
- Could the complainant walk or did someone have to assist or carry her/him?
- What physical tasks did the complainant perform, and how well did s/he perform them (e.g., texting, taking photos, removing clothes, etc.)?
- Could the complainant make and maintain eye contact with others?

87

---

---

---

---

---

---

---

---

### Consent

Decision points

Was there sexual contact or activity?

If yes, was there what appeared to be consent to that particular sexual act?

If yes, was the consent valid?

68

---

---

---

---

---

---

---

---

### The Investigation

- Additional Facts
  - Sue, Bella's friend, says that Bella was very drunk at the point she went into the bedroom
  - Sue says when Bella ran out of the bedroom, she was crying and told Sue that Nate had put his hands down her pants without her consent. Sue and Bella both then immediately left.
  - Jackson, Nate's friend, says Bella did not seem drunk and when she left the bedroom she was not upset and that when she left with Sue, they were both laughing.

(cont'd)

69

---

---

---

---

---

---

---

---

### Sexual Assault Hypothetical

- Other guests said Bella appeared "buzzed" and saw her "run" out of the bedroom and immediately leave with Sue. They could not tell whether Bella was crying, but she looked disheveled and approached Sue as if she was upset. No one else heard giggling.

70

---

---

---

---

---

---

---

---



### The Investigation

- Nate says that Bella had been flirting with him for several weeks.
- When he got to the party, Bella invited him to the bedroom.
- Bella did not appear drunk
- Nate says they started kissing, and Bella guided his hand down her pants.
- Nate says Bella never said "no" or gave any other indication that she was not consenting.
- Nate admits that Bella has avoided him since the party. He has not asked her why and has just assumed that she was embarrassed.

B1

---

---

---

---

---

---

---

---

### Determination

- Who is credible?
- Did Bella have capacity?
- What is an appropriate determination here?

B2

---

---

---

---

---

---

---

---

### Mistakes to Avoid

- ✓ HR Executives are well schooled in sexual harassment issues; but supervisors in the "trenches" have not received sexual harassment training.
- ✓ Front-line supervisors do not report to or consult with H.R. when they become aware of actual or potential sexual harassment.
- ✓ Honoring a request "not to do anything" with the complaint.
- ✓ Employees have never received, or have never signed off on having received, company's sexual harassment policy.
- ✓ Complainant is dissuaded subtly or overtly from reporting sexual harassment.
- ✓ "One size fits all" investigation that fails to consider unique facts and circumstances of each case.

B3

---

---

---

---

---

---

---

---

### Mistakes to Avoid

- ✓ "Rushing to judgment" or otherwise overreacting by taking disciplinary action before the investigation is completed.
- ✓ Failing to inform the alleged harasser of the specific allegations.
- ✓ Failing to inform accuser, accused and other witnesses that retaliation will not be tolerated; failing to remind accuser that any perceived retaliation and/or continued harassment should be reported immediately.
- ✓ Failing to provide the alleged harasser with sufficient opportunity to fully and completely tell his/her side of the story and to respond to each specific allegation.
- ✓ Sticking to scripted questions; not listening carefully to answers and not asking appropriate follow-up questions.

94

---

---

---

---

---

---

---

---

### Mistakes to Avoid

- ✓ Failing to take complete and accurate notes during investigation.
- ✓ Pressuring investigators to reach a desirable or pre-ordained conclusion.
- ✓ Developing preconceived beliefs and prejudices early in the process that taint and/or effectively prevent impartial fact-finding inquiry.
- ✓ Failing to understand the "culture" of the particular department/office setting.
- ✓ Failing to obtain a complete understanding of what may be motivating the accuser (including but not limited to, the timing of the complaint), the accused and potential witnesses.

95

---

---

---

---

---

---

---

---

### Mistakes to Avoid

- ✓ Creating false or unrealistic expectations about how the investigation will play out.
- ✓ Making overly broad promises about confidentiality.
- ✓ Failing to proceed with investigations after complaining party decides that he/she does not want to continue with the process.
- ✓ Perpetuating antiquated attitudes about what must be tolerated in the workplace.
- ✓ Imposing disciplinary action that is insufficient to deter future conduct.
- ✓ Failing to convey results or interim investigatory progress to the accuser in time sensitive manner.

96

---

---

---

---

---

---

---

---

### Mistakes to Avoid

- ✓ Concluding that harassment or inappropriate conduct occurred, but then concluding that because such conduct was not based on sex or another protected category, not taking disciplinary action.
- ✓ Failing to be sensitive to the ongoing work relationship of the complaining party and the accused during the investigative phase and after the investigation has concluded.
- ✓ Sending emails or leaving voicemails during our investigation that reveal partial or complete conclusions before investigation is fully complete.
- ✓ Failing to obtain all relevant documents such as emails (including deleted emails), diaries journals, cell phone records, saved or retrievable voicemails.

97

---

---

---

---

---

---

---

---

### Checklist for an Effective Investigation

- Prepare a Flexible Investigation Plan that is Tailored to the Unique Circumstances
  - First determine if the nature of the allegations warrant "interim" action (e.g., is there a physical/safety threat).
  - Plan who should be selected to conduct the interviews, who will be interviewed, in what order, who will be present (does any witness have right to union representation?); where will the interview take place.

98

---

---

---

---

---

---

---

---

### Checklist for an Effective Investigation

- Review pertinent documents in advance of interviews:
  - sexual harassment policy;
  - has this department received training?;
  - records of any prior allegations against the accused or complaints by the accuser (but don't form pre-judgments based on prior incidents);
  - disciplinary or other policies that may have relationship to the alleged conduct;
  - personnel files.
- Create and update a list of documents that need to be obtained during the investigation
  - Current and deleted emails and voicemails; cell phone records; did accuser keep journal/diary?

99

---

---

---

---

---

---

---

---

**Checklist for an Effective Investigation:  
What & How to Ask Questions**

– General Rules

- Always have two investigators
  - One should be taking copious notes; lead questioner should be focusing on listening to answers and forming appropriate follow-up questions.
- Physical setting of interview should ensure privacy and create a sense of comfort.

100

---

---

---

---

---

---

---

---

**Checklist for an Effective Investigation**

- Tone of interviews should be non-accusatory, non-legalese and non-confrontational.
- Ask open-ended questions
  - start with basic overview of person's job, responsibilities, history with company.
  - move slowly to specifics of allegations.
  - don't respond with incredulity or judgment to answers.
  - don't engage in casual, social, "chummy" conversation - you want to be pleasant, but business-like and direct.

101

---

---

---

---

---

---

---

---

**Checklist for an Effective Investigation**

- Probe for motives, bias, etc.
- If there is a gap in time between the alleged discriminatory/harassing conduct and the filing of the complaint, carefully probe as to why.
- Make sure to ask who witnessed the events for each specific incident.
- Ask accuser who he/she told about the harassment; if accuser initially says no one, come back to that question later and ask it in a different way.
- It should be made clear to all individuals who are being interviewed that this is a fact-finding endeavor - - no conclusions will be reached or judgments drawn until investigation is complete.

102

---

---

---

---

---

---

---

---

### Checklist for an Effective Investigation

- Explain how the process works.
- Make crystal clear that there is no tolerance for retaliation.
- Pay attention to demeanor/body language of witnesses (e.g., uncertainty in answers, fidgeting; is witness forthcoming or defensive; avoiding eye contact, etc.). Remember, however, that this is only one part of a credibility determination and should not be the sole basis for a conclusion.
- Pay careful attention to discrepancies in witness's own account and between accounts of other witnesses; ask probing, non-judgmental questions to clarify or highlight discrepancies.
- Determine if signed witness statements are warranted, possible and/or preferable

103

---

---

---

---

---

---

---

---

### Checklist: Closing the Interview

- Direct witnesses to maintain confidentiality about the investigation.
- Remind witnesses again about retaliation.
- End interview with questions such as:
  - Is there anything else you think I should know about this matter?
  - Is there anything I haven't asked you about that you think needs to be discussed or clarified?
  - "It is very common for people to leave a meeting like this and realize later that there is something they forgot to mention or wished they had said, if that happens to you please contact me." "Will you promise me that you will do that?"

104

---

---

---

---

---

---

---

---

### Checklist: Preparing the Report

- List chronology of events, including chronology of your investigation.
- List employees involved.
- Facts that should be summarized include:
  - How and when the matter came to your attention: identity of complainant.
  - Identity of witnesses and testimony of each.
  - Work/social/personal history between accuser/accused and between relevant witnesses (e.g., were they friends, romantically involved, etc. before alleged harassing conduct took place).
  - When and where did each incident allegedly occur and who witnessed it.
  - Background information and context that may bias or color the witnesses' perceptions.
  - Timing of the complaint with respect to other things happening in workplace - did accuser or other witnesses just get a bad evaluation; denied or is up for a transfer, promotion, etc.

105

---

---

---

---

---

---

---

---

- **Facts that should be summarized include (cont'd):**
  - What is the unique culture of this particular work setting (e.g., does everyone engage in “banter;” share sexual jokes; sexual emails, etc).
  - For each incident, state clearly in neutral, non-judgmental language precisely what was said and done by each participant and when?
  - Carefully identify documentary or physical evidence and make sure that all such documents are maintained and preserved as part of the file.
- **Support subjective conclusions with objective facts**
  - Subjective conclusions should be stated in non-inflammatory language; over the top language makes investigator look biased and unprofessional.
- **If disciplinary action is warranted, must be sufficient to deter future conduct and must be supported with facts.**
- **Visualize the report being used as an exhibit down the road in litigation after-the fact by a judge or jury (We are looking to provide a shield for the company, not offer a sword to someone to be used against the company).**

106

---

---

---

---

---

---

---

---

- Checklist: Following Up**
- **After interview, reconsider and reassess whether additional documents need to be reviewed, additional witnesses need to be interviewed and/or whether certain witnesses need to be interviewed again.**

107

---

---

---

---

---

---

---

---