



# Sexual Harassment

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Presented By



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# Presenter

- Labor and Employment attorney for Littler in Phoenix
  - Advise employers and management
  - Train management and employees
  - Draft employer policies and procedures
  - Represent employers and management in litigation
  - 14 years public and private sector employment law experience
- Trainer for the Anti-Defamation League
  - Anti-bias training



# Agenda

1. Legal definition of sexual harassment
2. The new era of #MeToo
3. Sexual harassment investigations



# Advisory

- Training is not legal advice
- Potentially offensive materials are for learning purposes only
- Humor does not mean issues are taken lightly

# Sexual Harassment Defined

Sexual harassment includes unwanted sexual advances, requests for sexual favors or visual, verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made a term or condition of employment; or
- Submission to, or rejection of, such conduct is used as a basis for employment decisions affecting the individual; or
- Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile or offensive working environment.

# Sexual Harassment Defined

Sexual harassment also includes various forms of offensive behavior based on sex. The following is a partial list:

- Unwanted sexual advances.
- Offering employment benefits in exchange for sexual favors.
- Making or threatening reprisals after a negative response to sexual advances.
- Visual conduct: leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons, posters, websites, emails or text messages.
- Verbal conduct: making or using derogatory comments, epithets, slurs, sexually explicit jokes, or comments about an employee's body or dress.
- Verbal sexual advances or propositions.
- Verbal abuse of a sexual nature, graphic verbal commentary about an individual's body, sexually degrading words to describe an individual, suggestive or obscene letters, notes or invitations.
- Physical conduct: touching, assault, impeding or blocking movements.
- Retaliation for making reports or threatening to report sexual harassment.

# Hostile Work Environment Defined

## Hostile Work Environment

- **Unwelcome conduct based on someone's membership in a protected category that unreasonably:**
  - Interferes with an employee's job performance, or
  - Creates an intimidating, hostile, or offensive work environment



# Hostile Work Environment Defined

## Hostile Work Environment

1. Verbal or physical conduct based on protected category
2. Unwelcome
3. Sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.
  - Objective: reasonable, based on totality of the circumstances
  - Subjective

## It Doesn't Matter That:

- The person intended to be funny
- Others thought it was funny
- The person complaining seemed to go along at the time
- The people complaining were “only” bystanders
- The person didn't know the law



Leaders Are Crucial



# Understand A Leader's Significance

- When a leader speaks, the organization speaks
- When a leader acts, the organization acts
- When leaders fail to act,  
the organization has failed to act
  - Leaders = “Eyes, Ears and Voice”  
of employer



# Liability Summary

- **Manager's Conduct:**

- Strict liability, regardless of whether the employer had a policy or did not know of the harassment because ***you are the Company***
  - As you act, the Company acts
  - As you fail to act, the Company fails to act
  - ✓ Person is a “supervisor” if the employer has empowered that employee “to take tangible employment actions against the victim, *i.e.*, to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’”

# Liability Summary

- **Employee/ 3rd Party Conduct:**

- Employer liable if knew/should have known of harassment and failed to take immediate and appropriate corrective action
- There may be defenses to liability or damages if
  1. The employer took reasonable steps to **prevent** and **correct** harassment, or
  2. The employee unreasonably **failed to make a complaint** under the policy, or avoid harm otherwise

# Liability For Sexual Harassment Committed Offsite or by 3<sup>rd</sup> Parties

Third-party nonemployees working under contract with the organization may also have the right to be protected from harassing conduct. This can include temporary workers and seasonal workers.

If an employee complains, or you otherwise have knowledge of inappropriate behavior, the organization could be responsible, even if the outside party is a customer, vendor, or even a visitor.



# Sexual Harassment Policies



# Sexual Harassment Policies

- Define and prohibit Sexual Harassment
  - Use EEOC definition and examples
  - Supervisor, coworker, vendor, customer, visitor, social media
  - Disciplinary action up to and including termination.
- Detail the Complaint Procedure
  - Mandatory reporting for supervisors
  - Multiple avenues: HR; Any supervisor anywhere in chain of command; Explicitly allowed to bypass supervisor; Hotline/anonymous
  - Investigation: independent investigator (internal or external); do not promise outcome or absolute confidentiality; do promise prompt investigation and appropriate action.
- Retaliation prohibited
  - Most common EEOC claim is Retaliation
- Mandate Regular Training

# A Note on Anonymous Reports



- Do not discount
  - Many employees do not feel comfortable identifying themselves
  - Accept anonymous complaints because you want maximum feedback on how your employees are acting
  - Remain attentive if someone tells you, even anonymously, that one of your employees could be engaging in misconduct
- Investigate!

# Open Door Culture for Complaints Is Smart Business

- Employees will likely feel more empowered to report harassing behavior after #MeToo, sparking a broader dialogue about inappropriate workplace conduct

## **This is good! Why?**

- If you receive a complaint, you have the opportunity to address the issue head-on, end any inappropriate behavior, take action, protect employees, and elevate your culture

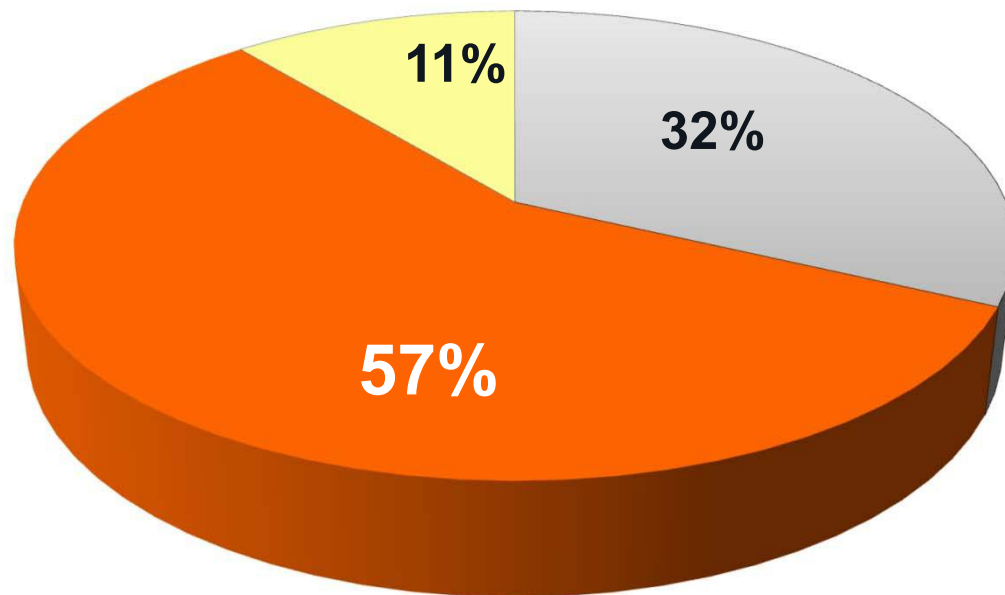




## The Flip Side: Consensual Workplace Romances

# Internal Affairs

Have you ever been involved in an office romance?



**NO**

**YES**

**NO, BUT  
WILLING**

*Source: Vault Inc.  
Office Romance Survey*

# One in Four Office Romances Involves a Superior



**23%**

of office romantics  
have dated someone  
in a higher position than  
themselves

Source: [www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?ed=12%2F31%2F2016&id=pr932&sd=2%2F11%2F2016](http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?ed=12%2F31%2F2016&id=pr932&sd=2%2F11%2F2016)



# But are These Employees Breaking the Rules?



**45%**

of employees don't know  
whether their company  
has a dating policy  
in place

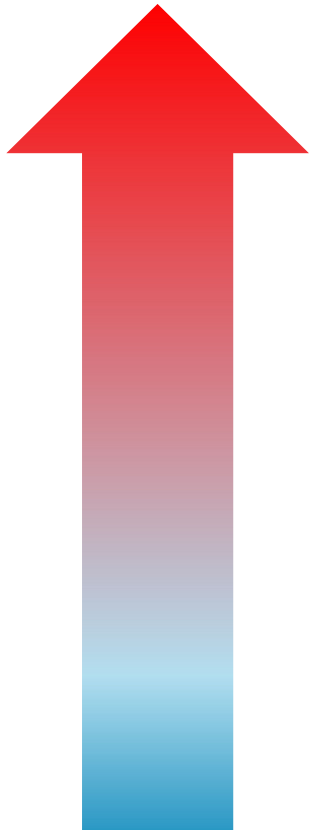
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## What Are the Risks?

- *Miller v. Department of Corrections*, (Cal. 2005) California Supreme Court found that widespread sexual favoritism accorded to numerous female employees with whom a prison warden was having sexual affairs was actionable sexual harassment because it created an “atmosphere that was demeaning to women.”
- *Broderick v. Ruder*, (D.D.C. 1988), the plaintiff, a female staff attorney at the SEC, alleged that a hostile work environment existed in her department, not due to behavior directed specifically at the plaintiff, but because other female employees benefitted from sexual relationships with their male supervisors.

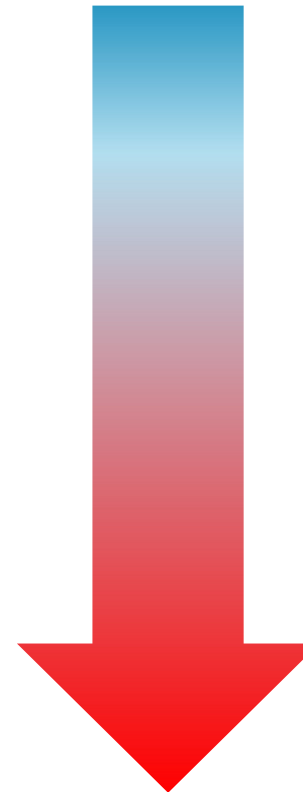


# Beyond \$\$\$



## Increased

- Employee complaints
- Client complaints
- Adverse publicity
- Costs (i.e., weakened profits)
- Legal counsel to resolve formal complaints
- Turnover
- Absenteeism
- Loss of trained and effective employees



## Decreased

- Engagement
- Morale
- Attendance
- Client/customer satisfaction
- Reputation and organization's image

#MeToo

TIME



# Hollywood

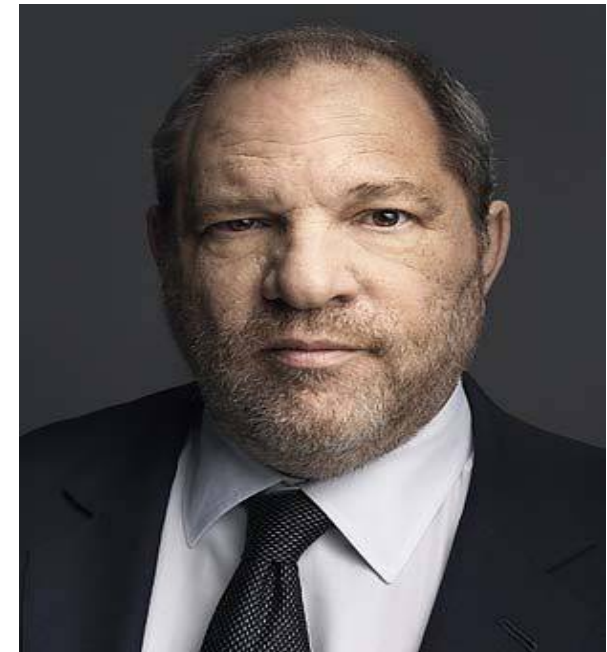






# Harvey Weinstein

- Dozens of women accused Weinstein of sexual harassment, assault, and/or rape
- Weinstein denies
- As a result:
  - Fired from production company
  - Expelled from Academy of Motion Picture Arts & Sciences
  - Wife left him
  - Political figures he supported have denounced him
  - Criminal investigation of rape and assault



# Matt Lauer

- Detailed complaint and Multiple subsequent allegations from colleagues about inappropriate sexual behavior in the workplace.
  - Lewd sexual remarks to female colleagues
  - Exposing himself to females behind closed doors
  - Using a button on his desk that allowed him to lock the door “welcoming female employees and initiating inappropriate contact while knowing nobody could walk in on him.”
- Lauer Statement: “Some of what is being said about me is untrue or mischaracterized but there is enough truth in these stories to make me feel embarrassed and ashamed.”
- As a result:
  - Fired from NBC Today Show, \$25 million per year salary
  - Wife has obtained legal counsel against him



# Raj Nair – Ford’s President

***Has the #MeToo movement hit the automotive industry’s highest levels or did something else happen?***

Raj Nair, Ford’s North American president is ousted for unspecified “inappropriate behavior,” but no one at Ford is naming the specifics on record as to what that is.

**Statement by Nair:** *“I sincerely regret that there have been instances where I have not exhibited leadership behaviors consistent with the principles that the Company and I have always espoused. I continue to have the utmost faith in the people of Ford Motor Company and wish them continued success in the future.”*



Ford CEO Jim Hackett letter to employees in December, 2017.  
***“There is absolutely no room for harassment at Ford” and there is zero tolerance” for like incidents in the future.***



# University of Arizona

## Arizona fires coach Rich Rodriguez amid misconduct allegations.

- Off-field allegations regarding workplace conduct, and allegations of sexual harassment played a part of the university's decision.
- Voluntarily submitting to and passing a polygraph test.
- Investigation led to admitting to a “consensual extramarital affair with a woman who is not affiliated with the university.”
- Arizona will pay Rodriguez \$6.28 million it owes him according to the “separation terms of his contract.”





# Sexual Harassment: A Poison to Company Culture

- **“Sexual harassment isn’t just something that happens between two people. It affects every single person within an organization.”**
  - Debbie Dougherty, Associate Dean of Research and professor of organizational communication. University of Missouri

# #MeToo

- The #MeToo movement
- Trends – beyond the law:
  - Micro aggressions
    - Clearly inappropriate behavior but isolated.
  - Implicit Bias
  - Abuse
  - Assault
  - Bullying
  - Hostile work environment
  - Far reaching movement
    - LGBT community
    - Child abuse survivors



# #MeToo Considerations

## THE POWER OF SOCIAL MEDIA



- Through social media, victims of sexual harassment are getting support and forcing change in ways other than litigation:
  - CEO's ousted
  - Careers ended
  - Companies making wholesale changes to prevent future harassment.
- Media attention can raise settlement values on pre-litigation workplace harassment and discrimination matters



# Confidentiality



How employers handled sexual harassment prior to #MeToo

- **Confidential nature of pre-suit settlements**
  - Strict Non-Disclosure agreements
    - NDA's make it difficult for the public to understand the scope and depth of workplace sexual assault.
- **Most workplace sexual harassment claims are settled outside of the court system**
  - Forced Arbitration agreements
    - Forced Arbitration lets companies keep harassment and discrimination claims out of court, effectively cloaking them from public view and, in some cases, allows serial harassers to continue their conduct for years.



# Limits on Confidentiality



- **No more tax deduction**
  - No deduction shall be allowed under this chapter for:
    - (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or
    - (2) attorney's fees related to such a settlement payment
- **Expanding personal liability**
- **Trend: States introducing laws banning confidentiality clauses in sexual harassment settlements and banning mandatory arbitration for sexual harassment claims**

# Limits on Confidentiality

- Microsoft eliminated forced arbitration agreements with employees who make sexual harassment claims.
  - More than half of American workers are bound by arbitration clauses.
  - EEOC reports that forced arbitration “can prevent employees from learning about similar concerns shared by others in the workplace.”
  - Studies show when employers have more than one case before an arbitrator the rate of victory for employees plummets compared to employers who only have one case with the same arbitrator.





## Practical Considerations for Handling Sexual Harassment Investigations

# Duty to Take Action vs. Thorough Investigation

- Company policy requires management to respond to complaints
- Company obligated to conduct a good-faith investigation
- The investigation process must be treated in as “confidential a manner as possible”
- The investigation must be thorough
  - A “good-faith investigation” constitutes a defense to any future claim and limits liability



# Duty to Take Action vs. Thorough Investigation

An employer investigating misconduct need not correctly determine that the employee committed the alleged act. The employer need only show: (1) that its investigation was done in good faith; (2) that the investigation was “appropriate under the circumstances; and (3) the employer had reasonable grounds to believe the misconduct occurred.

# Duty to Take Action vs. Thorough Investigation

- *Faragher/Ellerth* - These Supreme Court decisions made conducting prompt, thorough investigations part of establishing a defense to certain claims of unlawful harassment.

# Duty to Take Action vs. Thorough Investigation

## **EEOC Guidance on Effective Investigative Process**

- Prompt, thorough, and impartial investigation
  - » Determine whether a detailed fact-finding investigation is necessary
  - » Amount of time to complete investigation depends on circumstances
- Consider whether intermediate measures needed before completing the investigation to ensure that further harassment does not occur.
  - » scheduling changes to avoid contact between the parties;
  - » transferring the alleged harasser; or placing the alleged harasser on administrative leave with pay pending conclusion of the investigation.
  - » complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

# Duty to Take Action vs. Thorough Investigation

## **EEOC Guidance on Effective Investigative Process**

- Objective investigator
  - » The alleged harasser should not have supervisory authority over investigator, or any direct or indirect control over the investigation.
  - » Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

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

# Responding to Allegations

## **Remember that you must act when:**

- You become aware of harassment by anyone—not just those you supervise
- Even if an employee does not ask for help or asks you not to do anything or tell HR
- Referring employees back to their immediate supervisor is not good enough – especially in this climate

# What NOT to Do If You Receive a Complaint

- Don't brush off the employee, even if you initially think the issue is trivial
- Do not make jokes or trivialize the report
- Do not promise confidentiality
- Do not retaliate or appear to retaliate
- Do not gossip or talk to others (other than HR) about the complaint
- Do NOT send e-mails with assumptions and conclusions



# What NOT to Do If You Receive a Complaint

- Q: What might give the appearance of retaliation?
- A: Being defensive, accusing the victim, making unjustified employment decisions, transferring, changing hours, emails with assumptions and conclusions, gossip and more difficult working environment, etc.





# What NOT to Do When Investigating A Complaint

- *Doe v. Cannon USA* (2018)
  - Plaintiff alleged HR employees “badgered” her during questioning. HR focused on “why she hadn’t said ‘no’” to the advances rather than focusing on the situations when she had made it clear his advances were unwelcome.
  - When told the harasser made advances in a taxicab, HR the interviewer replied, “You were able to push his hand away and say no, is that right?”
  - Concluded in report, “there is no evidence to support the allegation that any relationship was forced upon her.”

# Resist the Temptation to “Over-Correct”

- In an era where high-profile offenders are being swiftly fired, organizations must continue to be cautious in investigating in accordance with established protocols
- Resist the temptation to “shoot now” and ask questions later
- Liability risks for unduly hasty terminations and/or sex stereotyping when allegations are made
- If your organization lacks the time or resources to conduct a proper investigation internally, consider outsourcing it

# Investigate Facts, Not Labels

- Focus on what they did and said, not who they are. (Video)
- Anchor investigation in facts and policies.
  - Employment actions
  - Physical actions
  - Verbal statements
  - Written statements, text, email, social media, evaluations, etc.
  - Reporting and responses to report

# Investigate Facts, Not Labels

- Do not ignore labels, but get underlying facts. If asked to make findings or recommendations, keep them fact based.

Label	Facts
Manager favors men	In performance reviews, describes male salespeople as hunters, kicking down doors, good closer; describes female salespeople as pretty young, a wildcard, emotional, talk her off the ledge, can be problem child, would benefit from male leader. <i>Factual finding: Manager engaged in gender-biased comments in reviews.</i>
Manager knows he won't get caught.	Does not acknowledge inappropriate nature of comments, does not show ability to consider team-members' concern, continues to make improper comments after it is brought to his attention, states "let me manage my team," states "I can't be biased, I promote women." <i>Factual finding: Manager fails to take ownership or accountability of gender-biased comments and its impact on his team.</i>

# Investigate Facts, Not Labels

- Practice exercise:

Label	Facts	Factual finding
Manager makes me uncomfortable		

# Anchor Investigation in Policies

## **Multiple policies may apply.**

- *Discrimination, harassment, retaliation*
- *Complaint Procedures*
- *Training*
- *Open Door*
- *Code of Ethics/Code of Conduct*
- *Merit Rules*
- *Unions and CBAs*
- *Consensual Relationship Policies (best practice – not permitted in supervisory chain)*
- *In some instances, policies will be deficient, and you will have to rely solely on definition of sexual harassment.*



# Rethink Your Sexual Harassment Prevention Training Strategies



# Refocus Training Messages

- Don't limit training initiatives to crisis periods
- Carefully review examples for stereotypes
- Instead of simply focusing on behaviors that your employees should NOT be engaging in, integrate activities and dialogue that focus on behaviors that you want to encourage:
  - “What does a respectful environment mean for you?”
  - “What does professionalism look like to you?”
  - “What are the hallmarks of a respectful conversation for you?”
  - “Identify behaviors that build work relationships?”
  - “What does inclusion mean to you?”

# Get the Right Messages to Each Learner Population

- **Executives**
- **Front-Line Supervisors**
- **Individual Contributors**

# A Word on Managers: Set – or RESET – the Tone at the Top



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- Highest levels at company must embody respect-based workplace and demonstrate that it is a priority
- Invest in training leaders—remember that many do not naturally have the skills they need to enforce harassment policies—they must be trained
- Train all employees on respectful and professional relationships in the workplace

Proprietary and Confidential

# Spend Time on Reporting Mechanisms & Retaliation




- Give it the meaningful attention it deserves in this new era
- Leadership members should be given special training on this component
  - Make them aware of their responsibilities when they receive a “complaint” and regardless of whether or not they are a “designated officer” under your policies

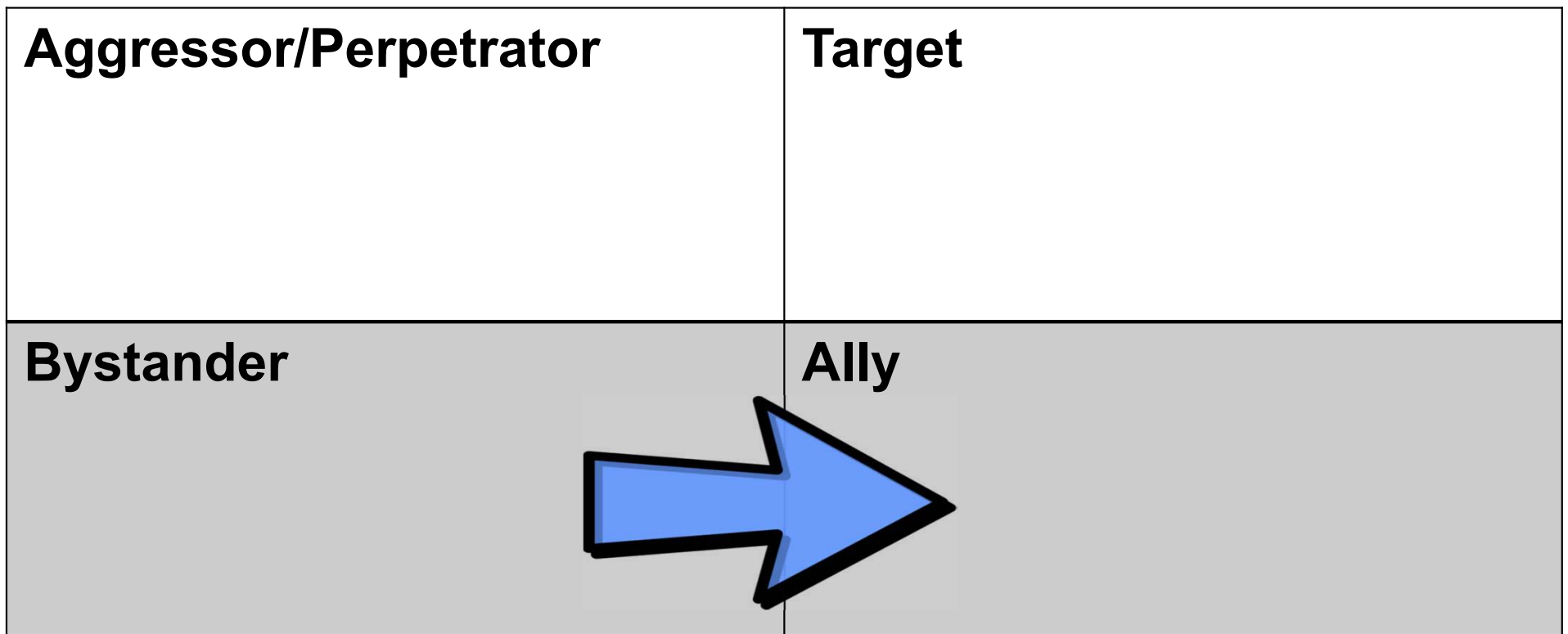
# New Frontier

- Bystanders and Allies
  - Moving beyond the traditional Aggressor-Target model
  - EEOC emphasizing bystander training
  - Supported by anti-bias research
  - Addresses culture, not just actor
  - Prepares organization to overcome common institutional barriers to a no-harassment workplace, including: fear of reporting, entitlement of supervisors, rationalization or high earners, and lack of enforcement.

# Traditional Roles in Discrimination & Harassment

<b>Aggressor/Perpetrator</b> 	<b>Target</b>

# New Roles in Discrimination & Harassment





# Policy Language and Training: Bystander Responsibility

- The burden is not only on the “victim”
- Leadership, coworkers, men and women at all levels need to be allies
- EEOC: “Doing so could transform the problem of workplace harassment from being about targets, harassers, and legal compliance, into one in which co-workers, supervisors, clients, and customers all have roles to play in stopping such harassment.”

# EEOC Statement on Bystander Intervention

*We know that most co-workers are not comfortable when harassment occurs around them, even when they are not the direct victims of the harassment.*

*Bystander training could teach co-workers how to recognize potentially problematic behaviors; motivate and empower employees to step in and take action; teach employees skills to intervene appropriately; and give them resources to support their intervention.*

***Organizational culture starts from the top. But reinforcing that culture can and must come from the bottom, middle, and everywhere else in between.***



# Questions



# Thank You!

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