

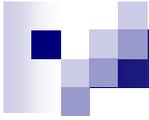
United States Equal Employment Opportunity Commission



How to Conduct a Sexual Harassment
Investigation

Rodney Klein

Education and Training Manager



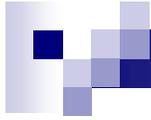
Honorary EEOC Investigator Oath

I, (state your name)

Am hereby an honorary
EEOC Investigator.

I understand...

That I will not be paid.



“Intelligent observation is not an isolated event, it’s an unfolding.”

-Roy Bedichek



What is Harassment (Briefly)?

- ❑ Unwelcome
- ❑ Connected to a protected basis (race, color, religion, sex, national origin, age, disability, and genetic information)
- ❑ Harm
 - ❑ severity vs. frequency
 - ❑ tangible (quid pro quo)
 - ❑ non-tangible (hostile environment)
 - ❑ knew or should have known (harassment of one employee by another)



Watch out for...

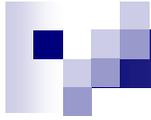
- ❑ The half complaint
- ❑ Does what happens in Vegas really stay in Vegas?
- ❑ Direct and indirect
- ❑ Fighting the inevitable (dating at work, and the eventual fallout)
- ❑ The customer isn't always right



VICARIOUS LIABILITY

otherwise known as:

“...it's all my fault”



Hey, wait a minute...it
may not be my fault
after all!!



Vicarious Liability

- Faragher v. Boca Raton, 1998
- Burlington Industries v. Ellerth, 1998



Who is a Supervisor?

- Has the authority to undertake or recommend tangible employment decisions affecting the employee;
- *Vance v. Ball State University*, U.S. Supreme Court 2013



Employment Harms

- **Tangible**

- Discharge
- Failure to hire
- Reduction of hours
- Demotion
- Failure to promote
- Denial of benefits
- Harassment
- Constructive discharge

- **Non-tangible**

- Harassment
- Constructive discharge



Affirmative Defense

Employer exercised reasonable care to prevent
and correct promptly any harassment,

and

the employee unreasonably failed to take
advantage of any preventative or corrective
opportunities provided by the employer or to
avoid harm otherwise.



Preventive Measure (Anti-Harassment Policy)

- ❑ Define workplace harassment
- ❑ Protect against retaliation
- ❑ Create multiple and accessible avenues of complaint
- ❑ Protect confidentiality
- ❑ Promise a prompt, thorough and impartial investigation
- ❑ Assure immediate and appropriate corrective action



Corrective Measures

- ❑ Investigate
- ❑ Stop any harassment immediately
- ❑ Protect against retaliation
- ❑ Provide appropriate relief



Affirmative Defense

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Not So Simple After All!

- ❑ What policy?
- ❑ Immediate actionable harm
- ❑ Reasonable fear of retaliation
- ❑ Perception of ineffective complaint process
- ❑ Other efforts to avoid harm
- ❑ Alter Ego (president, owner, partner, corporate officer)



Vicarious Liability Scenario

John is Sue's supervisor. One day, John tells Sue a dirty joke. Sue makes it clear to John that she doesn't want to hear remarks or jokes of a sexual nature. This doesn't stop John. He responds by telling dirty jokes or lewd stories each time he is in the same room with Sue over the next month.

Does vicarious liability exist?



Vicarious Liability Scenario

John owns a company, and Sue works for him. She is up for a promotion, and John tells her that she is the best qualified candidate for the position. Right after he tells her this, he asks her out on a date. She declines. Over the next week John asks Sue out on a date three times, and each time she declines. Two weeks later John awards the promotion to someone else.

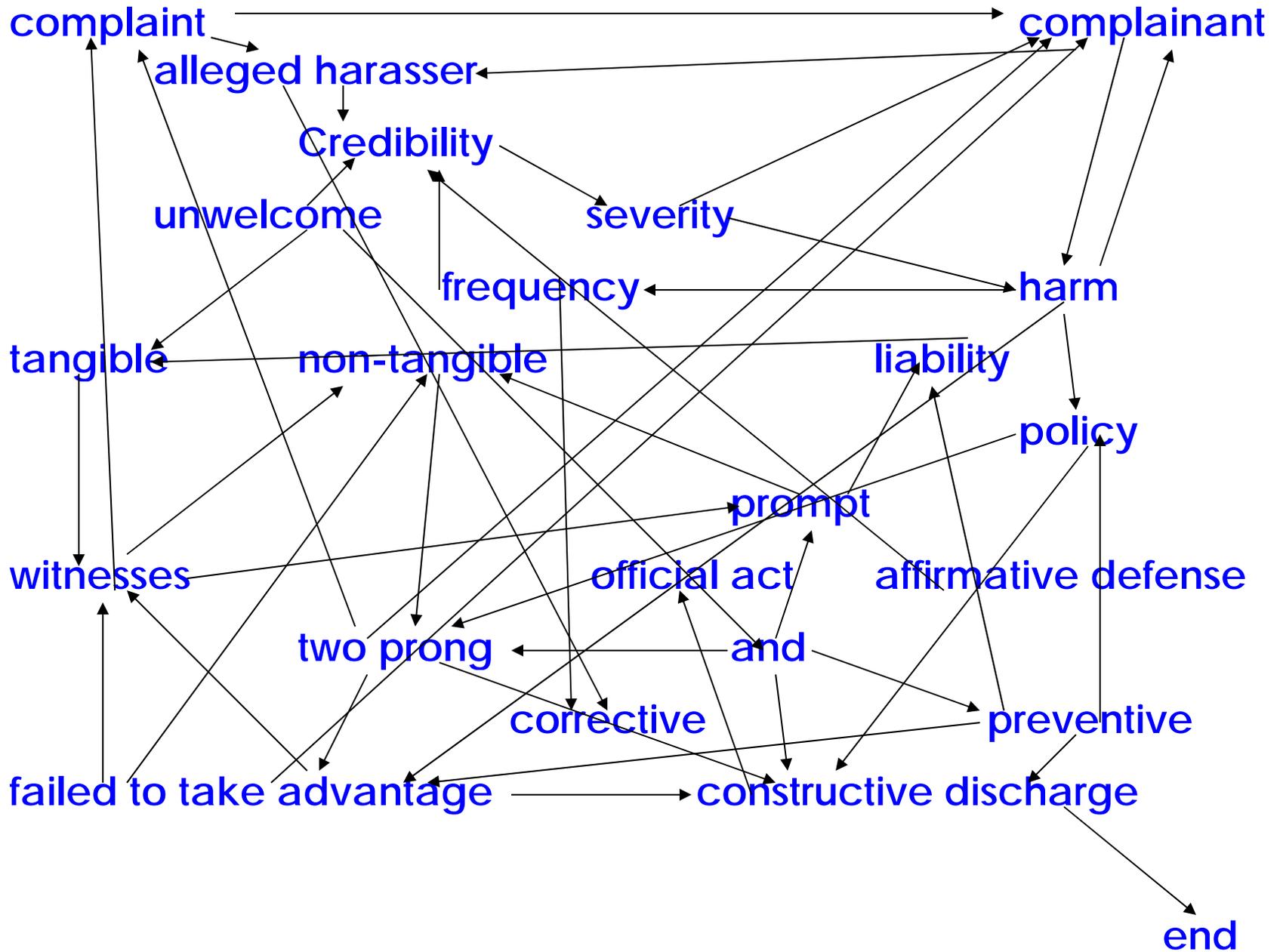
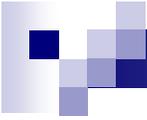
Does vicarious liability exist?



Vicarious Liability Scenario

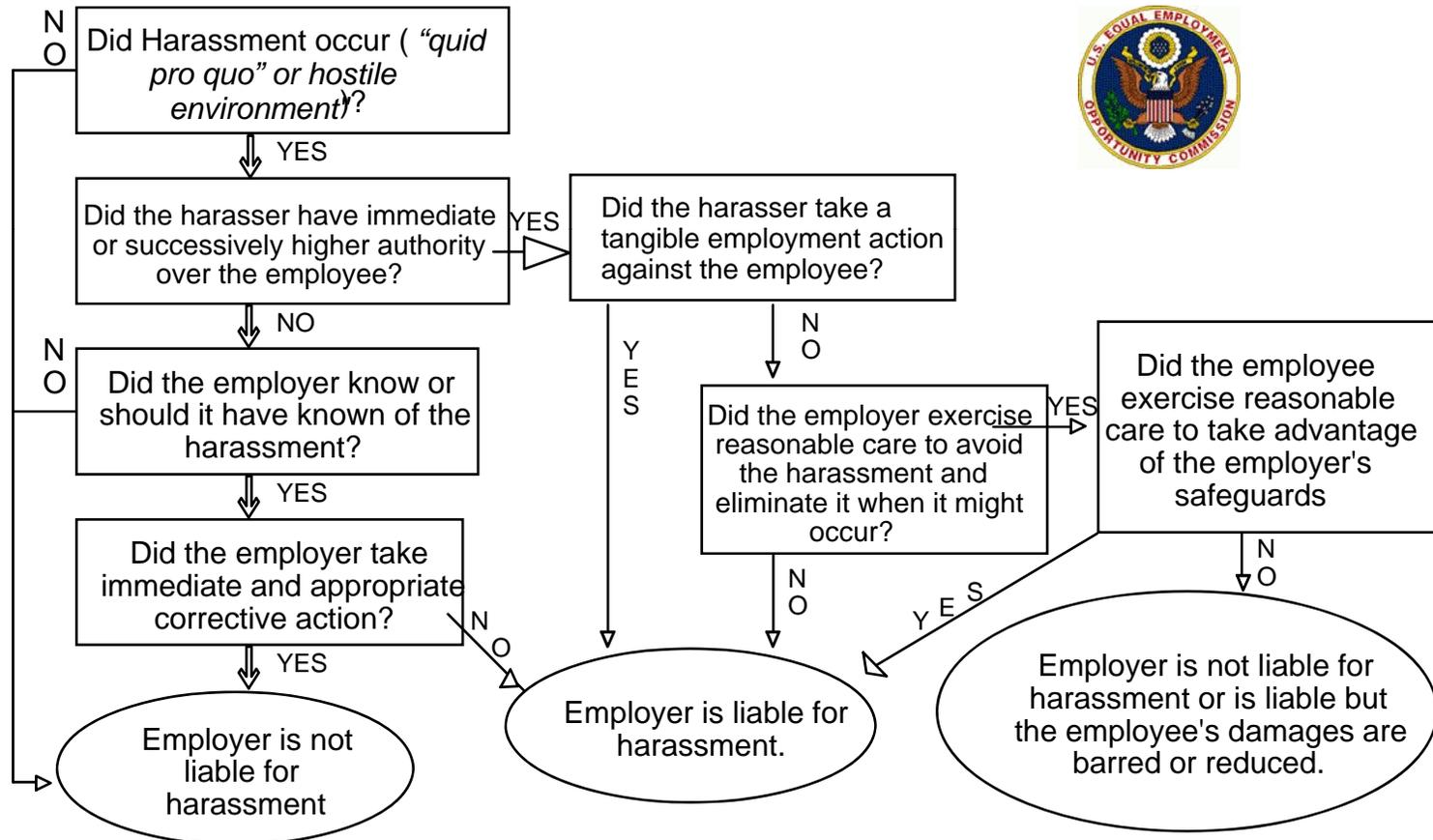
John works for Sue, and over a six month time period she repeatedly asks him out on dates. John feels extremely uncomfortable and becomes depressed, but he does not go out with Sue. He also does not utilize the company's complaint procedure because the last three employees who made harassment complaints against Sue were transferred to the company's "re-education office" in rural Romania. According to the company newsletter, two of the three were "shot while trying to escape."

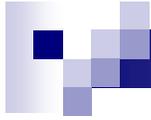
Does vicarious liability exist?



EMPLOYER LIABILITY FOR WORKPLACE HARASSMENT

U.S. Equal Employment Opportunity Commission





You want the truth!?

You can't handle the
truth!!

- Col. Jessup (Jack Nicholson)



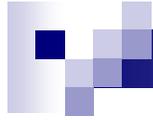
A Complaint is Made - What now?

- First impressions are lasting impressions
- Be neutral
- Take notes. Don't rely on your memory
- Ask about immediate needs
- Who, what, when, and where
- ID issues to be resolved, witnesses and documents
- Discuss retaliation (not a one time discussion)



Where's the evidence?

- Alleged Incidents
- Unwelcomeness
- Severe or pervasive
- Notice (what if notice is an EEOC complaint?)
- Reasonable care to prevent or correct
- Unreasonably failed to take advantage of preventive and corrective



Evidence should be
judged on its relevancy
and its credibility



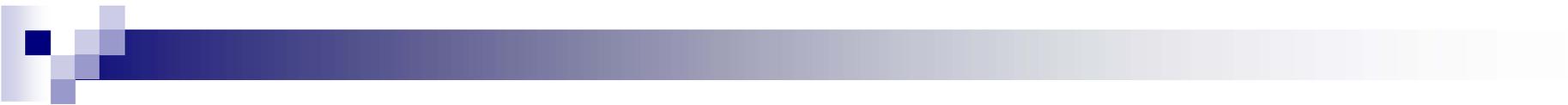
The Perfect Investigator

- Trustworthy
- Loyal
- Helpful
- Friendly
- Courteous
- Kind
- Obedient
- Cheerful
- Thrifty
- Brave
- Clean
- Reverent



Interviewing 101

- Introduce yourself
- Introduce your purpose
- Engage in a dialogue (no depositions)
- Let the interviewee tell the story
- Don't let the interviewee define terms
 - Offensive, harassing, etc. and any words ending in "ly"
- The way we lie (denial vs. spin)
- Interview alleged harasser last
- Perry Mason is broke
- Don't be afraid to lead (but not at the end)



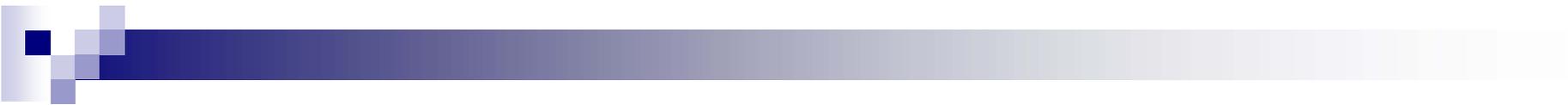
...More Tips

- Start interviews soon
- Never promise absolute confidentiality
- Work outside in
- Questions that begin with “w”
 - Who, what, when, where, why
- Don't script (follow up on what you hear)
- Watch body language (but don't get carried away)
- Use silence to your advantage



What do you want to know?

- About the incidents
- How did the complainant react to the alleged incidents?
- Affect on complainant?
- Witnesses (to the incidents, to the fact pattern, or to others who may have also been harassed)
- Note or physical evidence
- **Don't forget e-evidence*****
- Resolve or immediate relief
- No retaliation speech



Making a Decision

- Conduct the interviews
- Have key participants write up their side
- Review the documents
- Gather any additional information
 - Prepare report that contains description of issues at hand, list witnesses and documents used as evidence, summarize information, make credibility assessments and present a finding of fact.
 - Recommend action, if appropriate



Take Appropriate Action

- If it is determined that the allegations did occur:
 - Corrective action should be undertaken immediately.
 - Correction actions should be designed to end the conduct and ensure that it does not recur.
 - Severity of disciplinary action should depend on factors such as severity and frequency, impact on victim and whether the accused previously engaged in misconduct
 - Document the action taken.



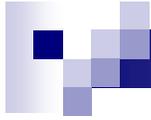
Take Appropriate Action

- If it is determined that the allegations cannot be substantiated:
 - Notify involved parties of outcome**
 - Stress non-retaliation requirement
 - Document



If You Remember Nothing Else Today, Remember This...

- Exercise reasonable care to prevent and correct
 - Review policies and complaint procedures
 - Make sure staff and supervisors are periodically trained
- When it comes to a complaint, first impressions are lasting impressions
- Keep the employee in the loop
- Know the law
 - How can you investigate something you don't know?
- Deal with your own bias and approach the investigation objectively



QUESTIONS



Rodney Klein

Education and Training Manager

Dallas District

U.S. Equal Employment Opportunity Commission

210.281.7666 (office)

210.693.9618 (cell)

rodney.klein@eeoc.gov