



# Sex, Lies and Whistleblowers:

Keeping You and Your Workplace  
Out of the Courtroom

Presented By:  
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Clifford & Garde, LLP



# A Positive Safety Culture is the Best Deterrent for Unacceptable Risks and Consequences

- Safety Culture is the combination of attributes and behaviors that ensures that safety – process and personal – is the overriding priority in every aspect of the business.
- Environment for Raising Concerns
  - No harassment, intimidation, retaliation or discrimination (HIRD)
  - Timely and effective responses to concerns
- Respectful Work Environment
  - Behaviors of all levels of leadership
  - Policies and practices are consistent, fair and documented

# Attributes of Healthy Safety Culture

<b>Leadership Safety Values and Actions</b>	<b>Problem Identification and Resolution</b>	<b>Personal Accountability</b>
Leaders demonstrate a commitment to safety in their decisions and behaviors.	Issues potentially impacting safety are promptly identified, fully evaluated, and promptly addressed and corrected commensurate with their significance.	All individuals take personal responsibility for safety.
<b>Work Processes</b>	<b>Continuous Learning</b>	<b>Environment for Raising Concerns</b>
The process of planning and controlling work activities is implemented so that safety is maintained.	Opportunities to learn about ways to ensure safety are sought out and implemented.	A safety conscious work environment is maintained where personnel feel free to raise safety concerns without fear of retaliation, intimidation, harassment or discrimination.
<b>Effective Safety Communications</b>	<b>Respectful Work Environment</b>	<b>Questioning Attitude</b>
Communications maintain a focus on safety.	Trust and respect permeate the organization.	Individuals avoid complacency and continually challenge existing conditions and activities in order to identify discrepancies that might result in error or inappropriate action.

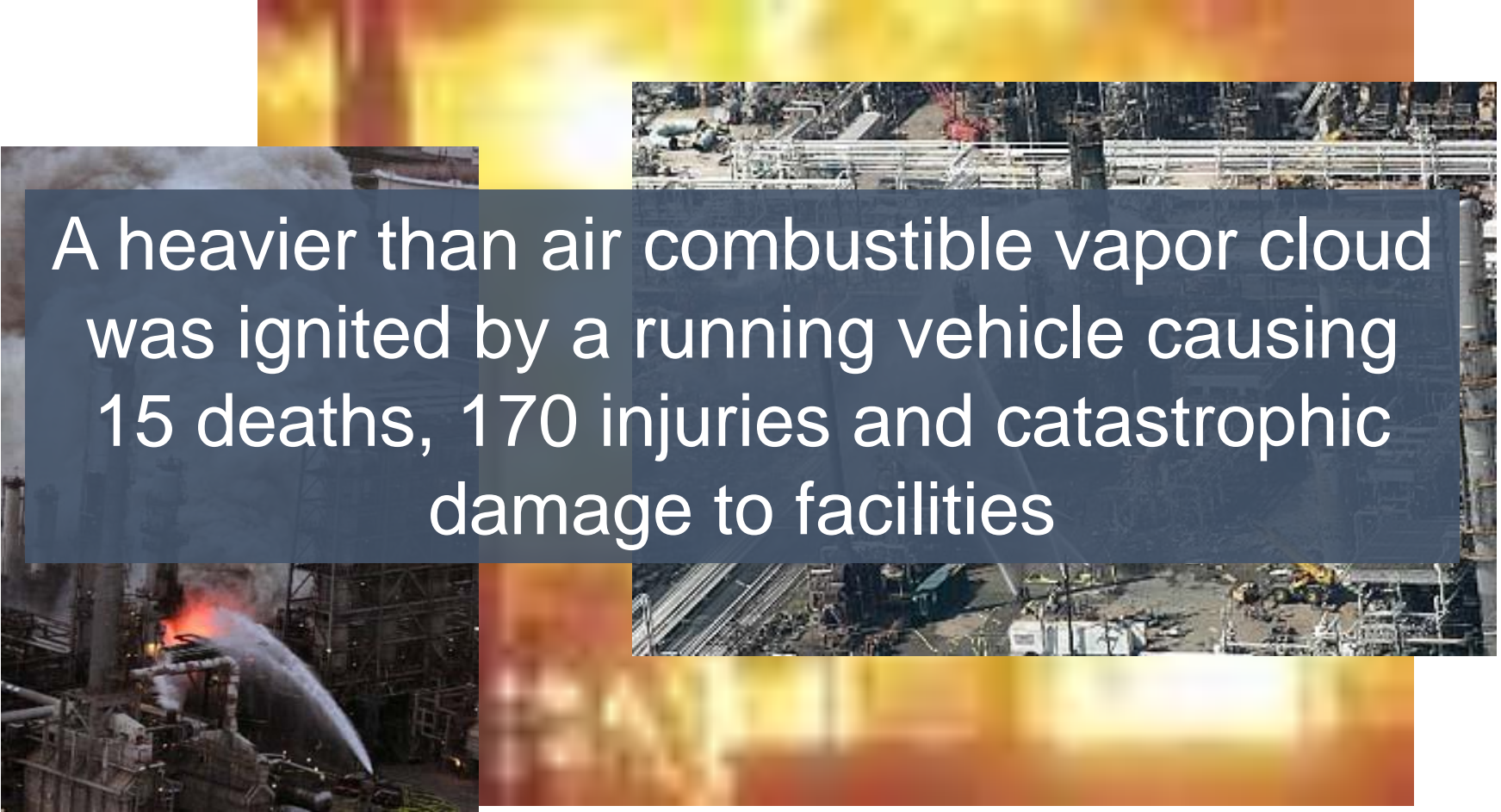
# Critical Element: Employees Must Feel Free to Raise Concerns Without Fear of Reprisal

- **Bristol Bay Code of Ethics and Business Conduct §2.2:** “Speak Up, Speak Out” program sets expectations for employees to raise concerns about “any law, rule, or regulation applicable to BBNC’s business.”
  - The Code prohibits retaliation against any person “for asking questions and reporting suspected problems.”
  - Code applies to consultants, partners, sub-contractors, and others associated with BBNC and its subsidiaries.
- **Bristol Bay Employee Handbook** also commits to “creating and maintaining a work environment where all employees feel comfortable in airing any issues or concerns that they may have with respect to their employment with BBI without fear of retaliation.”

# Getting Safety Culture Wrong is Unacceptable in Low Probability/High Consequence Industries

- Leadership must understand its responsibilities in creating the correct culture:
  - Actions, behaviors and conduct must support a work environment in which employees' actions in raising questions, stopping work in the face of uncertainty, challenging unsafe or risky actions, and/or challenging unsafe behaviors is fundamentally celebrated by management.
  - If harassment, intimidation, retaliation and discrimination (HIRD), or bullying, behavior is exhibited by anyone, leadership must know how to react and how to take prompt and effective corrective action.
  - Leadership, Human Resources, Risk/Compliance teams, and Legal must work together to ensure that there is a consistent supportive infrastructure to ensure a safe, compliant work environment exists.

# BP Texas City Refinery – March 2005



A heavier than air combustible vapor cloud  
was ignited by a running vehicle causing  
15 deaths, 170 injuries and catastrophic  
damage to facilities



# BP Texas City Refinery Explosion –2005

A heavier than air combustible vapor cloud was ignited ... causing 15 deaths, 170 injuries and catastrophic damage to facilities.

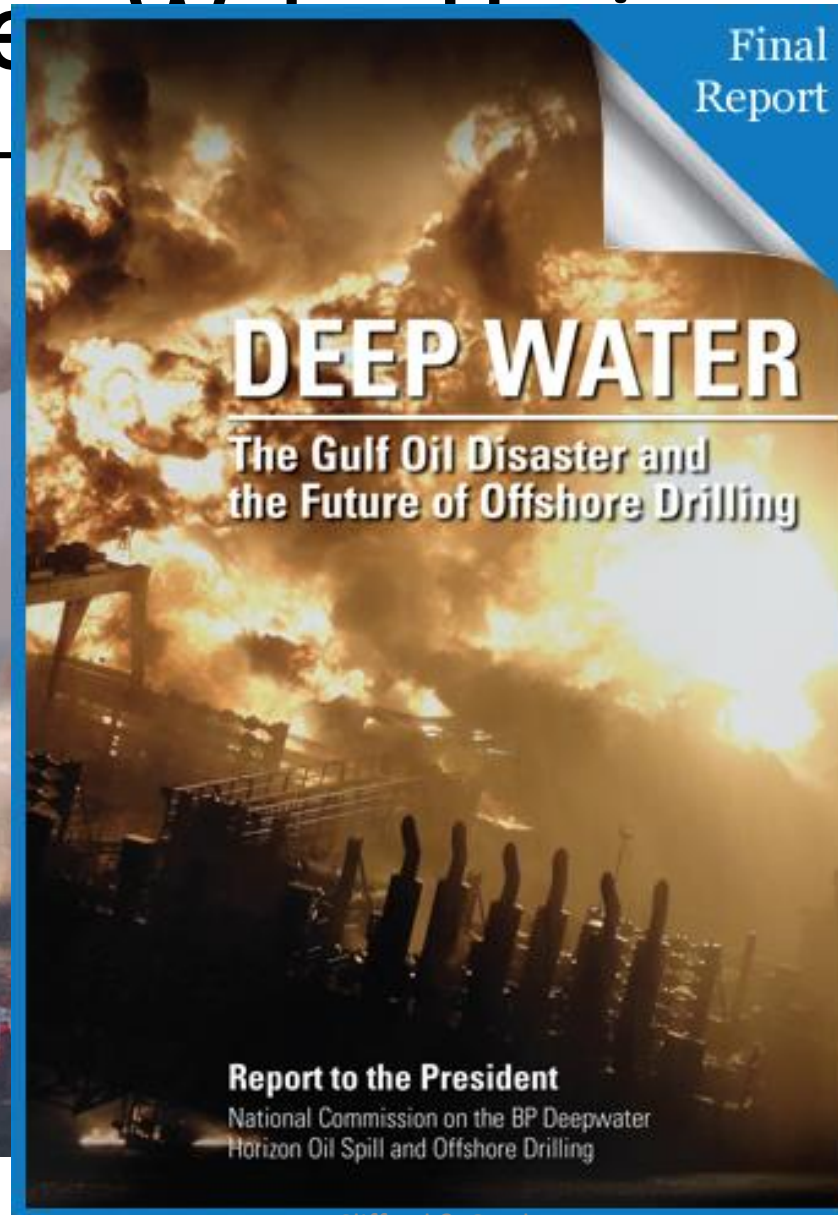


# Prudhoe Bay Oil Spill - 2006





# Deep Water Horizon 2010

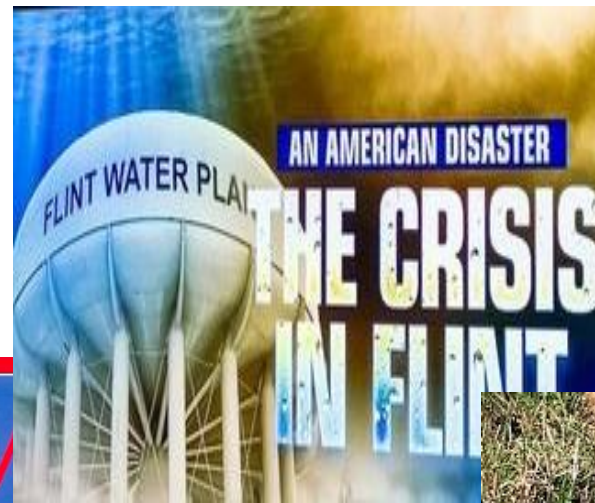


# Why didn't they speak up?

“Sherlock Holmes once solved a baffling case by noticing that the dog didn't bark. It's the same clue here as well. Every one of the 126 workers on the Deep Water Horizon knew there were serious safety problems. Every one of them knew they were risking their lives every day they went to work. Why didn't they complain?...The answer is simple; they didn't want to lose their jobs.”

*Who Is to Blame for the BP Disaster?*  
Huffington Post, Michael J. Wilson,  
August 27, 2010

# Fear = Silence = Risk





# Failure to Respond = Apathy and Lack of Responsibility = Risk

POTENTIAL CONDITION  
ADVERSE TO QUALITY REPORT (PCQR)

PCQR NO. 96-551

INITIATOR

PCQR ADDENDUM

A. ISSUE, OBSERVATION OR CONCERN

The video tape of CSDM nozzle inspection (below the RV head insulation) shows several bulges of basic acid accumulation on the RV head. Also one of the CSDM nozzle # 62 (P6) shows rust or brown staining below at the bottom of nozzle where it meets the head. The head area in this vicinity also has rust or brown staining. Reviewer to determine whether tape of CSDM flanges inspection was reviewed to determine any flange leakage during cycle to which indicates that the leakage made and brown accumulation on #62 CSDM due to leakage from previous operating cycles.

Next to see how fast (Basic Acid corrosion control) outlines several steps to help identify the scope of the problem. Following are some of the steps:

a) The total amount of brown deposits and the amount of brown on each nozzle.

b) The total amount of brown deposits and the amount of brown on each nozzle.

B. INITIATOR (Print)  
P. W. Loyal

ORGANIZATION  
DEME

PHONE NO.  
7355

DATE  
4/21/96

C. PCQR SUBJECT  
BASIC ACID CORROSION CONTROL

D. SUPERVISOR (Print)  
J. HARTMAN

STATUS AND REPORTABILITY

1 HR ☐ 4 HR ☐ 24 HR ☒ N/A

C. OPERABLE  
☐ YES ☒ NO ☒ NON T.S.

A. MODE/POWER  
0.0%

D. IMMEDIATE ACTION TAKEN  
Condition addressed in programmatic vice hardware  
therefore part 26 waived NON T.S. No immediate actions taken

E. SHIFT SUPERVISOR (Signature)  
Mike Peden

DATE  
4/21/96

TIME  
0713

GOVERNMENT EXHIBIT





# Risk Can Be Safety or Reputational



# What Impacts Employee Willingness to Raise Concerns?

- Fear of consequences – if I speak up I will be ostracized by my colleagues, terminated, or lose my place in ‘the in-crowd.’
  - Ostracized by my peers?
  - Retaliated against by my chain of command?
  - Loss of my reputation or job?
- Assessment of risk – is this issue worth my time, energy, reputation, job or job opportunities?
  - If it is worth my time, energy, reputation or job, how can I raise issues to minimize that risk?
  - What are the options available to do so?

# How to Determine Whether There Is a “Chilling Effect”?

- There are several key components of making a determination on whether there is a chilling effect within an organization:
  - Willingness to raise safety concern – usually 100%
  - Willingness to raise any concern – usually around 80%
  - Willingness to raise concerns to line management, to the ECP, to federal or state regulators, to the press?

# How to Determine Whether There Is a Chilling Effect? (cont'd)

- What are the factors used by employees in making a determination on raising concerns?
  - Are employees afraid that raising a concern will result in some form of adverse action?
    - If so, why? Have they witnessed or heard about adverse actions to someone else?
  - Do employees think that something will be done about the concerns if raised?
    - Why or why not?
  - Do employees trust their management will take their concerns seriously?



## Gahmbone video

# Case Study 1: Behaviors that Impact Willingness to Raise Concerns

- A senior manager is called to the site to mitigate an identified “chilling effect” within a certain department, which had many concerned employees and complaints. While in the cafeteria line, the executive is overheard saying “I am here to straighten out these A\_\_\_\_s....”
- The worker who overheard the statement told others what he had heard. Several employees came and told you about the statement.



**What should you do?**

## Case Study 2: Behaviors that Impact Willingness to Raise Concerns

The Engineering Manager conducts daily planning meetings. During the meetings he routinely asks if there are any questions. If a question is asked that particularly irritates him, he pulls out a red clown nose, rolls it down the table, and has the questioner put the nose on....commenting “that’s the stupidest question I have ever heard.”

One of the engineers mentions it as an example of how funny the Manager is. No one complains about it....



**What should you do?**

# Case Study 3: Behaviors that Impact Willingness to Raise Concerns

A technician objects to driving alone to a remote location to perform an inspection that requires climbing onto a pipe. She does the inspection anyway, but now her supervisor and colleagues nickname her “pansy” and start leaving pictures of pansies everywhere around her truck and work area. She complains to you.

**What are you going to do?**



[This Photo](#) by Unknown Author is licensed under [CC BY-ND](#)



The Law Protects All of Your  
Employees From Retaliation

# Objective Elements of Reprisal and Retaliation

*In order for an employee to establish a case, the employee must be able to **prove each** of the following:*

1. The employee engaged in legally protected activity.
2. The employee suffered an adverse action.
3. The employer/decision-maker had knowledge of the employee's protected activity.
4. There is some cause and effect connection – the protected activity is a contributing factor to the adverse action.

# “Legally Protected Activity”

- No employer (licensee, applicant, contractor, or subcontractor) may take adverse action against any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee engaged in protected activities under any of the following:
  - Energy Reorganization Act;
  - NRC Regulations 10 CFR 50.7;
  - Clean Air Act;
  - Clean Water Act;
  - Solid Waste Disposal Act;
  - Pipeline Safety Improvement Act;
  - Surface Transportation Act;
  - Comprehensive Environmental Response, Compensation and Liability Act;
  - Toxic Substances Control Act;
  - AIR 21;
  - Maritime and Coast Guard Regulations.

# “Legally Protected Activity” (cont’d)

Virtually -- **but not all** -- actions that an employee takes to prevent harm to people, the environment, or public good under any of the various employee protection statutes, are legally protected activity.

***Even if the concern is wrong.***

***Even if the concern has already been raised, and  
is known to the management.***

***Even if employee’s motives aren’t pure...***



## Legally Protected Activity (cont'd)

- The safety concern may be expressed orally or in writing;
- The safety concern must be specific as to practices, policies, directives, or occurrences;
- The employee must reasonably believe that compliance with applicable safety standards is in question – if regulators say okay, further refusal not protected
- The employee does NOT have to cite a particular provision, establish that a violation actually occurred, or have conclusive proof.

# Forms of Legally Protected Activity

1. Cooperating with government investigations, compliance activities or any proceedings under the applicable statutes or regulations.
2. Internal dissent to co-workers or any level of management about compliance or safety concerns.
3. External dissent to regulators, the public, the media, Congress, or others. (SOX has publicity limitations, *Tides v. The Boeing Co.*, W.D. Wa. 2/9/2010).
4. Reporting safety concerns as part of your job (i.e., inspector), is protected activity.
5. Taking action or refusing to take action that has potential safety or compliance impact.

# What is an Adverse Action?

*Any employment-related action that affects the terms and conditions of employment and has a tangible consequence.*

- Termination for cause or “lay-off”;
- Demotion in pay or responsibilities;
- Transfer of duties or responsibilities;
- Poor performance reviews, lowering mid-term evaluations retroactively, or criticism;
- Letter of warning (if it has tangible consequences);
- Hostile work environment;
- Refusal to reimburse lodging and living expenses, or medical bills;
- Sending employee home without cause;
- Other actions that are unique to the circumstances of each case.

# The Next Step... Affirmative Defense

The Employer must be able to prove **at least one** of the following by “clear and convincing” evidence:

- The person was not treated worse than other employees in similar job situations;
- The action taken against the individual was consistent with all policies and practices;
- There were legitimate business reasons for taking the action complained of, unrelated in any way to the protected activity of the complainant.

**Management would have taken the same action even if the employee had not raised safety issues.**

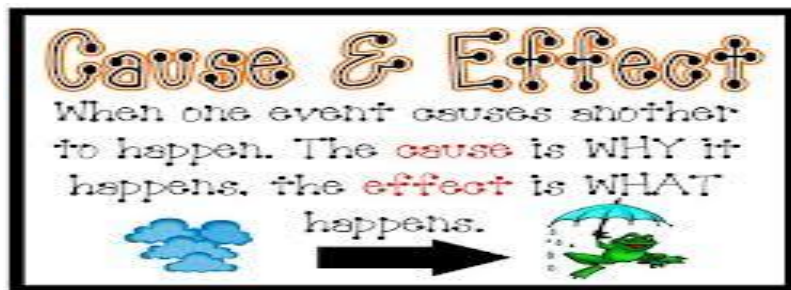
# Was There Knowledge by the Decision-Maker of the Protected Activity?

The employee must be able to prove that the decision-maker (usually the supervisor) knew that the employee had engaged in legally protected activity, **before** the adverse action occurred; either by direct or circumstantial evidence.



# Establishing a Cause and Effect Relationship

The employee must be able to prove that there is a “cause and effect” relationship between the employee’s protected activity and management’s decision to take an adverse employment action.

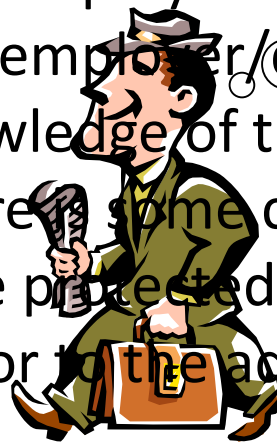


Once the employee is able to establish a *prima facie* case of retaliatory discrimination, the burden of coming forward with a legitimate business reason shifts to the employer.



1. The employee engaged in legally protected activity;
2. The employee suffered an adverse action;
3. The employer/decision-maker had knowledge of the employee's activity;
4. There is some cause and effect connection - the protected activity is a contributing factor to the adverse action.

"Wait till the  
judge hears my  
"legitimate  
business  
reason."



# Burden of Proof

Under most federal employee protection laws, employers have the highest possible burden of proof in civil law:



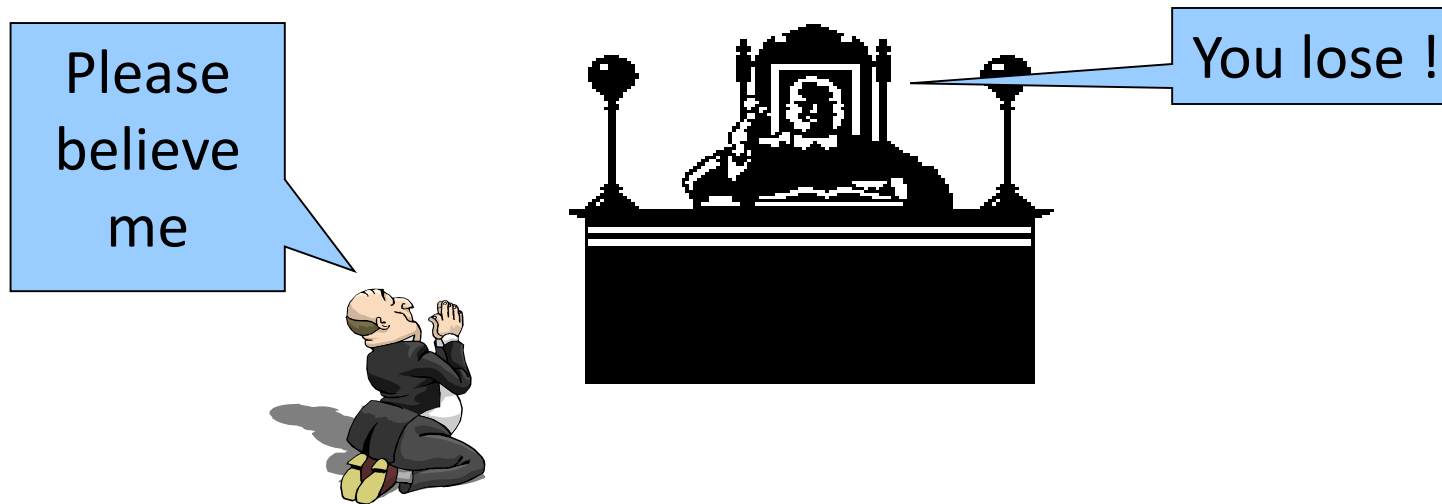
**Preponderance of the evidence**



**Clear and convincing evidence**

# Clear and Convincing Evidence

“Clear and convincing evidence” is evidence that suggests a fact is “highly probable” and “immediately tilts” the evidentiary scales in one direction.



**IF IT ISN'T WRITTEN DOWN  
IT DIDN'T HAPPEN**

# Sex, Lies and the Law



Your Responsibility



# Sexual Harassment Definition

“Sexual harassment may include explicit sexual propositions, sexual innuendo, suggestive comments, sexually-oriented ‘kidding’ or ‘teasing’, ‘practical jokes,’ jokes about gender-specific traits, foul or obscene language or gestures, display of foul or obscene printed or visual material, and physical contact such as patting, pinching, or brushing against another’s body.”

U.S. Equal Opportunity Commission, 2016 Guidelines

# Hostile Work Environment: Risk Factors

## 1) Male-Dominated Work Places

The EEOC has identified oil & gas businesses, car sales, private prisons and commercial kitchens as producing a large number of cases involving sex or race/ethnic harassment. (2014-15 statistics)

## 2) Vulnerable

**You are the one to make the difference !**

Men, women, and people of color who are vulnerable for their jobs as single parents, low paid employees, or other vulnerabilities.

## 3) Lack of Employer training, investigation and remedial steps. Where employers fail to train employees and managers about hostile work environments and workplace harassment, and what behaviors constitute such action, when employee complaints are not taken seriously or investigated promptly and thoroughly, or fail to take prompt remedial action - employers tacitly condone inappropriate conduct.

# Don't Touch – Don't Joke – Don't Ask – Don't Ignore HIRD Complaints.”

- Respectful Workplace for all
- State and federal laws prohibit sex harassment/discrimination
- Company Policies prohibit sex harassment/discrimination
- Leadership Expectations are to enforce law and policy
- Dangers of Sexual Humor in the workplace
- Dangers of Romance in the workplace
  - Flirting, marriage and partnerships, consensual “affairs”

# Humor In The Workplace: When It Isn't Funny!

- The basic principle is that making fun of others, i.e., appearance, mannerisms, intelligence, is never okay!

# Your Leadership Role in HIRD Issues

- Set your behavior expectations for your organization
- Model those behaviors – expect it from others
- Hold everyone accountable
  - Consistently across the organization
  - Always document behavioral issues and expect managers to do so
  - Ensure that HR and Legal support these goals



# Recognizing Disrespectful and Harassing Behaviors to, from, and about Other Employees

- **Verbal:** Derogatory comments, racial or sexual comments, requests for sexual favors (even in jest), flirting (when unwelcome), sexual innuendos, offensive jokes or stories, repeated taunting or propositions, name-calling, gossiping, excessive unprofessional use of profanity, threats of any type, rude and humiliating comments;
- **Non-Verbal:** Staring, derogatory or suggestive gestures, throwing kisses, shunning, mocking and ostracizing, “flipping people off”, lewd gestures or acts;
  - meeting behaviors – looking at your cell phone instead of participating in meetings, sleeping, coming late or leaving early;
- **Visual:** Offensive pictures, photos, cartoons, posters, calendars, magazines or objects;
- **Physical:** Any unwelcome touching, hugging, kissing, standing too close, heavy breathing, pranks, horseplay, fighting, slapping or similar conduct; and
- **Written:** Unwelcome personal letters, notes, emails, texting, memos or pictures left for others, “sexting,” or sending overly personal information, third-party insults, observations, rumors and gossip.



# A Definition of Workplace Bullying

“Workplace bullying is the repeated and systematic mistreatment of one or more employees with the intent to harm or sabotage their performance. Employees driven to quit or resign are a common result of workplace bullying.”



of one or more  
nigation & sabotage  
ed mistreatment of

nstitute

# Definition of Workplace Bullying (cont'd)

- Workplace bullying or "hazing" can generally be considered as negative
- Intimidation, threats, or harassment that is intended to harm or cause distress to their work
- Intimidation, threats, or harassment that is intended to cause failure and
- Consistent or repeated negative behavior that is intended to change their
- Threats, intimidation, or harassment that is intended to change their status;
- Isolation, exclusion, or harassment that is intended to change their status;
- Intimidation, threats, or harassment that is intended to change their status;
- Giving employees unreasonable workloads and stress, and overworking employees.

# What are Leaders to do?

- Model the right behaviors from the top down – do not encourage or participate in inappropriate humor.
- Set expectations for behavioral conduct and enforce it.
  - Speak up when you witness or hear inappropriate humor
  - Be a “go to” leader for all witnesses/recipients of hurtful comments
  - Intervene where you observe inappropriate conduct
- Show empathy for the employees who are victims of inappropriate humor, bullying, or being picked on.
- Hold employees accountable for their behaviors - reward those who stand up for the right values and take actions to change the behaviors of those who don't.
- Do not assume someone else present will deal with the issue. Every leader has a responsibility to act.

# Don't Lie to Employees About What Has Happened in the Workplace

## Reasons to Discuss Issues:

- Disruption of investigation
- Misinformation and Rumors
- Belief of unfairness/favoritism
- Transparency
- “Raising the Bar” standards
- Employees crave accountability
- Your personal credibility

## Guidance on Talking About Discipline:

- Honesty is critical
- No embellishment or guessing
- Do not implicate criminal misconduct or behaviors
- Be respectful to those involved
- You don't have to say anything, but if you say anything it must be the truth
- If you don't know, say so
- De-mystify discipline process