

**Massachusetts** LAPD submits three more cases of alleged sexual assault against Harvey Weinstein  
**Wynn James**

## Following S **Wake of Sexual Harassment Claim**

**IVAN MCNABB**

**ED BY ESPN**

Sexual Assault Claim Against Conductor Dutoit Is Credible, Boston Symphony Says

**After Sexual Harassment Investigation**

assault **Paris Review Editor Lorin Stein Resigns Amid Sexual Misconduct Investigation**

**GENE SUE** *Trent Franks, Accused of Offering \$5 Million to Aide for Surrogacy, Resigns*

**ASSAULT ...** Danny Masterson fired from Netflix's 'The Ranch' amid multiple sexual assault allegations

Prominent appeals court Judge Alex Kozinski accused of sexual misconduct

place  
and Use



March 9  
2018

**#YouToo:**  
**All Eyes on Employers  
Responding to Sexual  
Harassment Claims**

FRANCZEK RADELET  
ATTORNEYS & COUNSELORS



# Meet Your Speakers



**Amy Moor Gaylord**

AMG@franczek.com



**Staci Ketay Rotman**

SKR@franczek.com



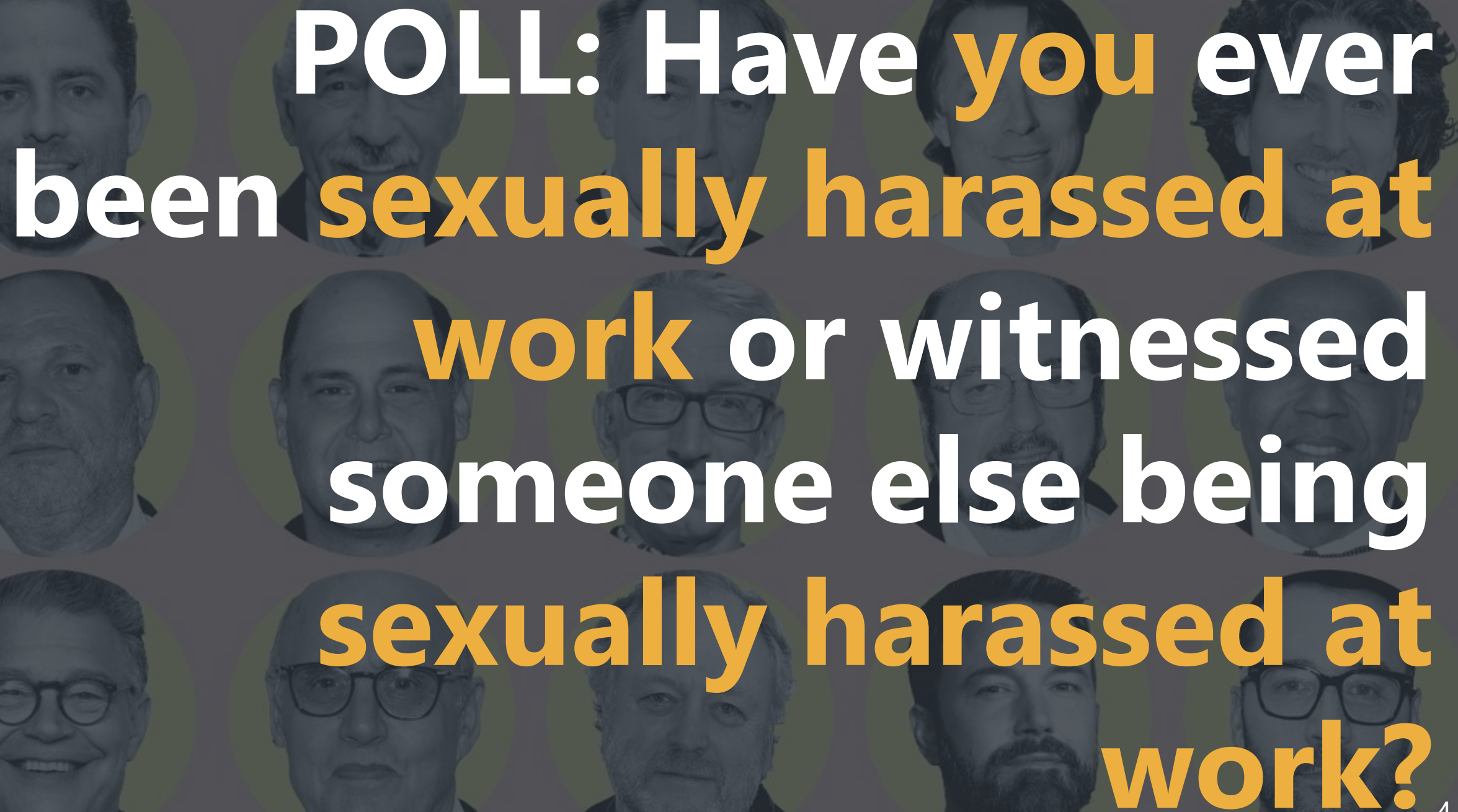
**Lindsey Marcus**

LMM@franczek.com

**FRANCZEKRADELET**

ATTORNEYS & COUNSELORS





**POLL: Have you ever  
been sexually harassed at  
work or witnessed  
someone else being  
sexually harassed at  
work?**



**Have you ever been sexually harassed at work or witnessed someone else being sexually harassed at work?**

Yes

No







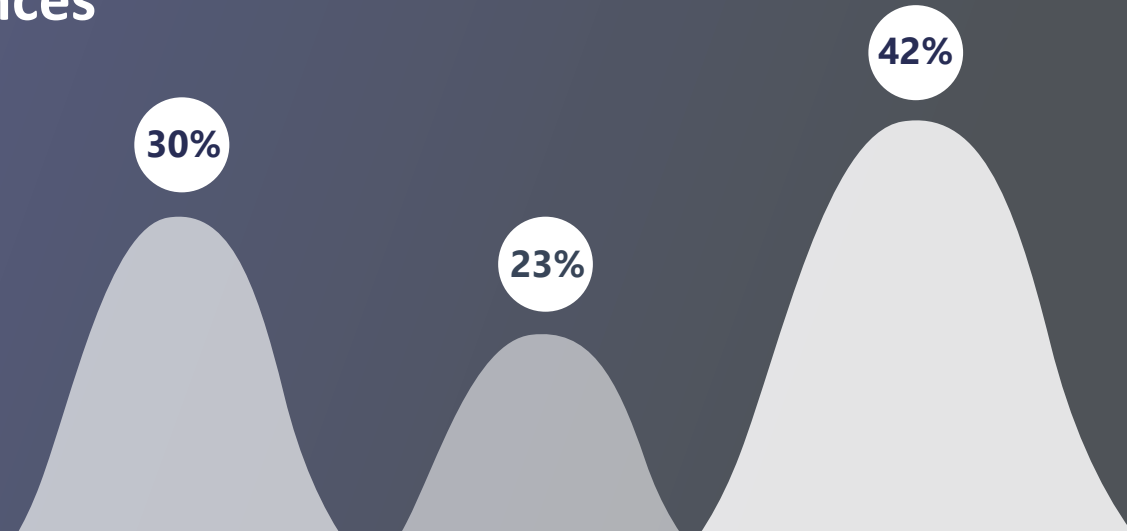
30% of women surveyed have experienced **unwanted sexual advances** from a male co-worker

23% said they were harassed by men who had influence over their jobs

**64%**

Almost 2/3 of Americans say sexual harassment in the workplace is a serious problem (up from 47% in 2011)

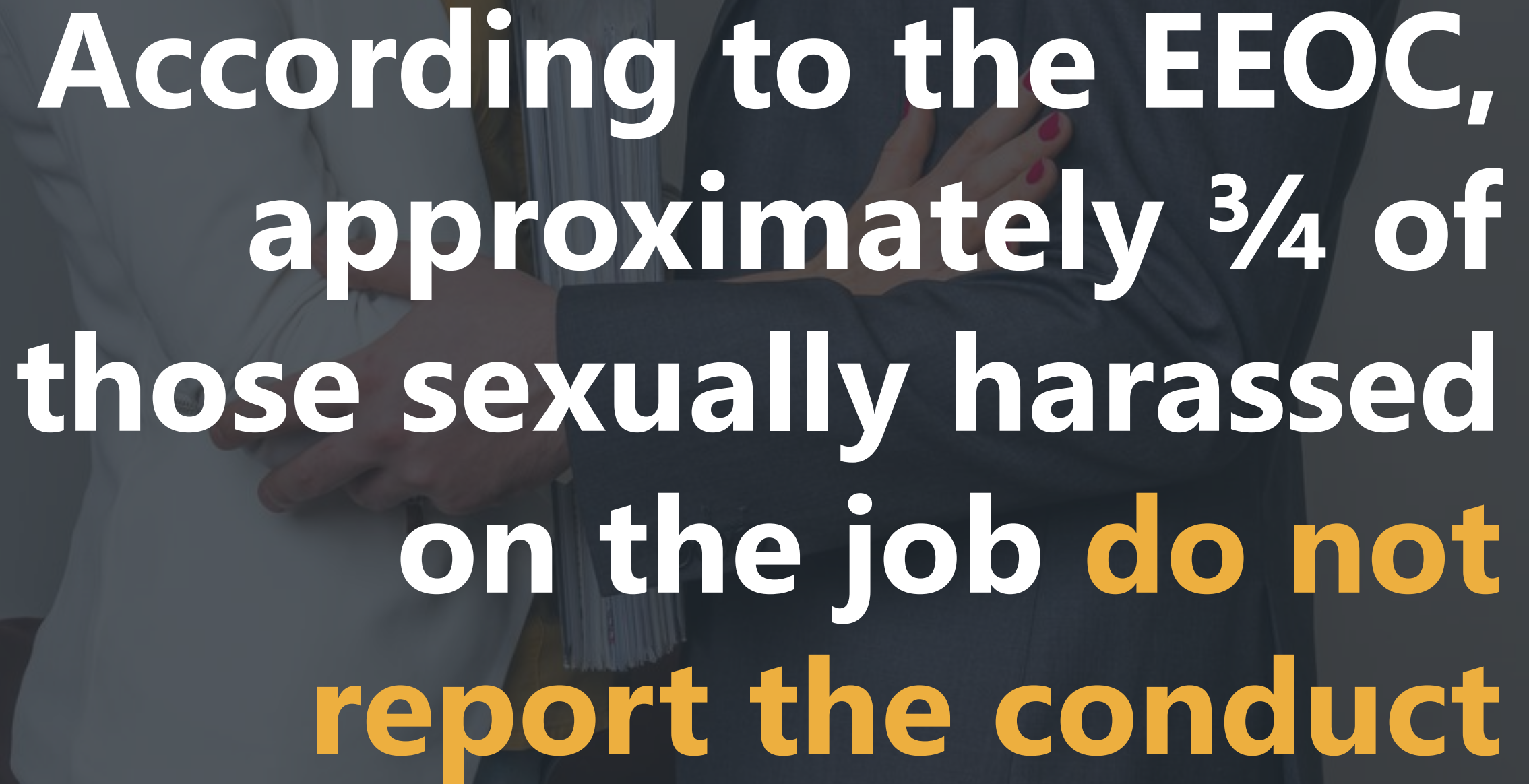
October 2017 Washington Post-ABC News poll



But only 42% reported the behavior to a supervisor and **95% of those who reported said the men went unpunished**

FRANCZEKRADELET  
ATTORNEYS & COUNSELORS





According to the EEOC,  
approximately  $\frac{3}{4}$  of  
those sexually harassed  
on the job **do not**  
**report the conduct**



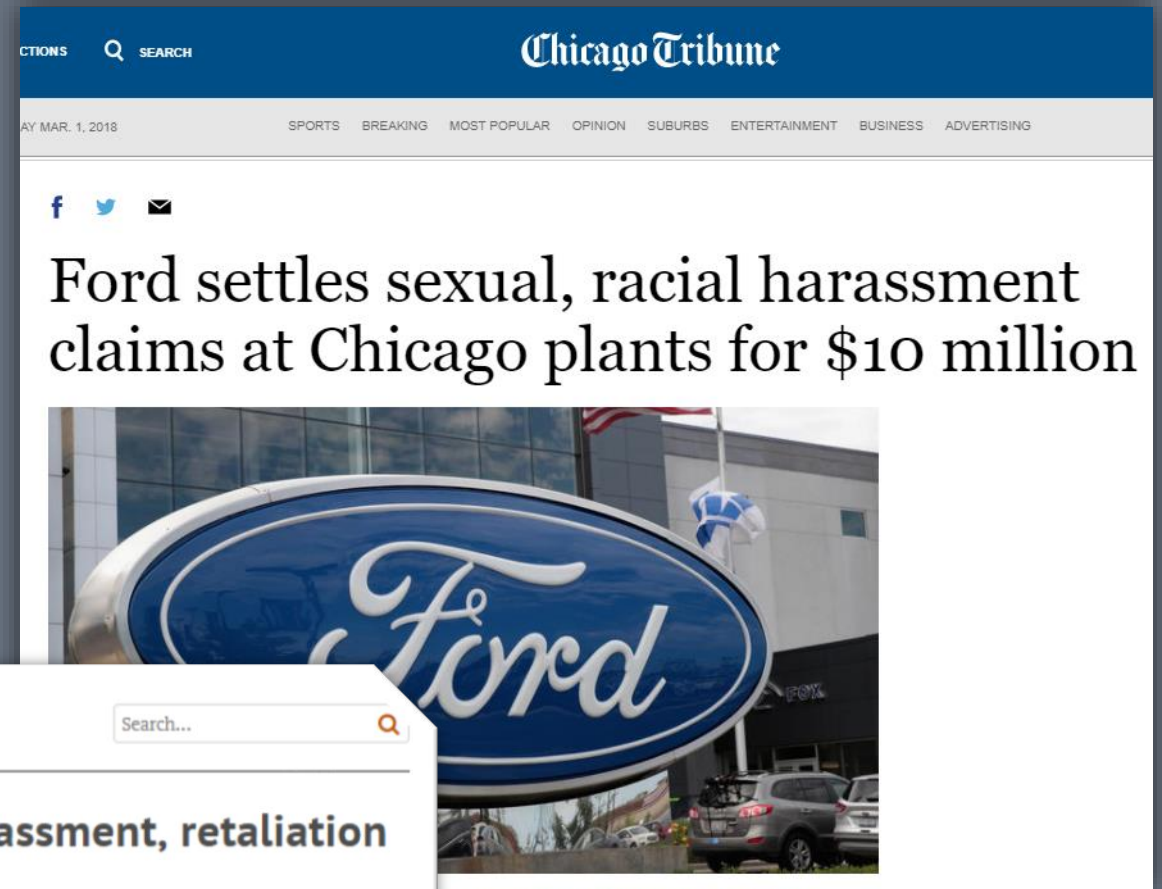


While a majority  
of U.S. companies  
offer anti-  
harassment  
training,  
**only 1/3 of  
women say  
disrespectful  
behavior is  
quickly addressed**

LeanIn.org Survey



# The Cost of Getting It Wrong





# It's Not Just the Fortune 500

- Produce company loses sexual harassment trial; victims/EEOC awarded \$17 million
- Laundry company settles EEOC sexual harassment suit for \$582,000
- Energy company pays \$70,000 to settle sexual harassment suit brought by male employee
- ALL these employers have fewer than 70 employees!



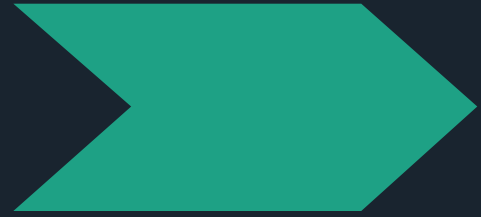


#METOO

# Best Practices How to Handle Sexual Harassment Complaints In The Era of the #MeToo Movement



# Best Practices: **General Overview**



**All complaints (formal or informal) should be investigated**



**Welcome the complaint and listen**



**Get information from Complainant as to the claim and alleged harasser(s)**



**If complaint is made to manager or supervisor, loop in HR accordingly**



# Best Practices: **General Overview**



**Comply with applicable company policies**



**Remember: Harassment is not just within the four walls of the office**





# Harassment Can Take Many Forms

- **Male on Female; Male on Male; Female on Female; or Female on Male**
- **Overtly sexual, innuendo, or based on stereotypes**
- **Verbal, written, or social media**



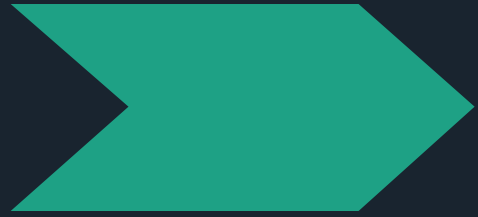


## Treat all harassment complaints in a consistent matter

- Do not treat harassment of one group more seriously than another
- Type of harassment alleged may influence who investigates
- Sexual harassment is not just men using their power to prey on women

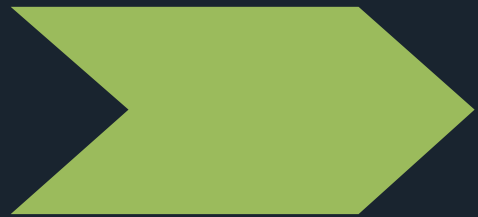


# Best Practices: **Current Environment**



**Consider hiring independent investigator**

- **Current perception of HR**
- **May get more cooperation**
- **Allegations involving C-Suite**



**Have a well thought out plan for an investigation**



# Best Practices: **Current Environment**



**Conduct expeditious, *but not hasty*, investigation**

- **Social media complications**
- **Postings alleging harassment, #MeToo**
- **May drastically limit your timeframe for investigating**



**Be sensitive to the employee's suffering and what they want**



**Stay neutral and objective**

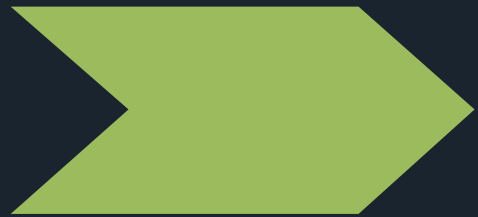


# Best Practices: **Current Environment**



**Need to demonstrate immediate action taken from both a public and employee morale perspective**

- **Protect the employee's physical safety and block any retaliation**
- **Consider temporarily re-organizing, moving or suspending employee(s) during investigation**
- **Understand that offenses may warrant discipline, but not necessarily termination**



**Have a communication plan in place**

- **For both affected employees and alleged harasser**
- **Want to avoid any defamation action**







# Best Practices: Stale Complaints



**Should you investigate a complaint even if outside the statute of limitations for harassment?**

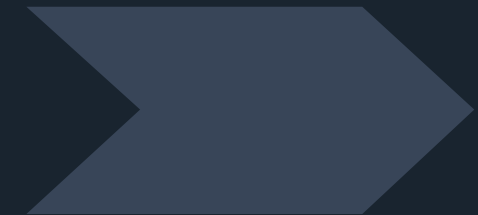
***Yes and do it promptly!***



**Determine the scope of the investigation**



**Consider hiring a media consultant**



**Be prepared to address “other claims” resulting from an investigation**





# He Said, She Said

**No longer advisable to simply say the evidence is inconclusive**

- **Legal analysis has not yet changed**
- **But public perception and reaction have changed and could affect legal defense**

**May come down to a credibility decision that you have to make**



# He Said, She Said

**Technology is making “credibility decisions” less likely**

- **Accessibility and reliance on texts, e-mails, instant messaging, social media, and other electronic posts**
- **Cannot always delete**
- **Screen shots = the new smoking gun**
- **Apps and online chat forums**

**Social media has also dramatically cut short response window**

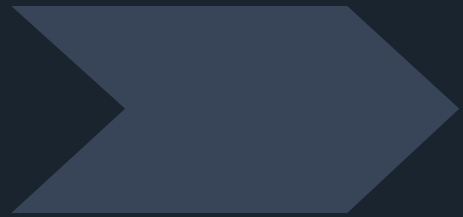
- **Response is going to have to be more swift and may likely be more severe**



# Best Practices: **Third Parties**



**Harassment of an employee by a third party – employer may still be held liable**



**Harassment of a third party by an employee – employer may still be held liable**



# Best Practices: **Anonymous Complaints**



**If the alleged conduct might violate a company policy or could potentially impact the company in a legal or non-legal manner, *do not ignore***



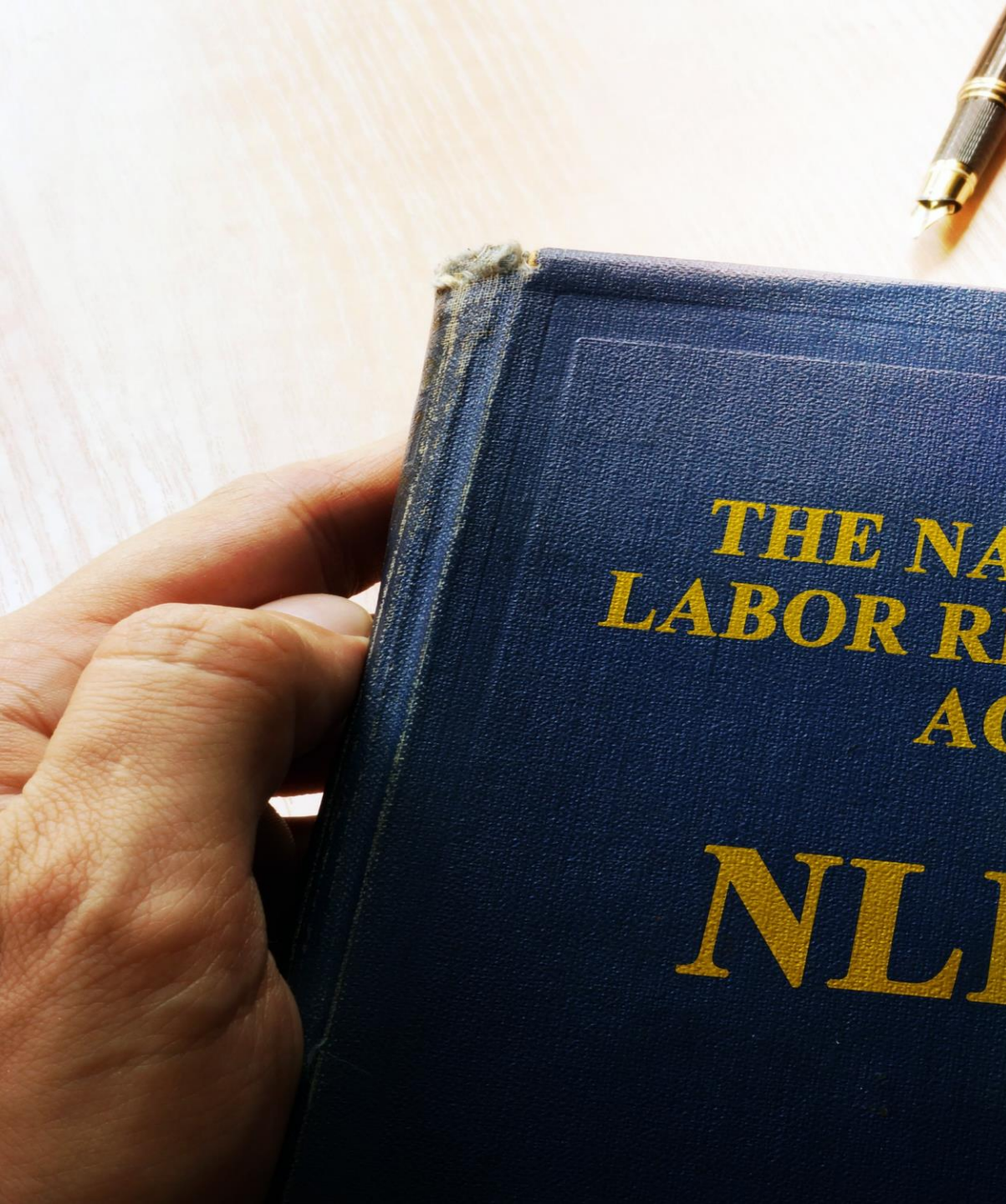
**Determine if there is enough information to identify the Complainant and/or alleged perpetrator**





# Living with a Union in a #MeToo World





- **Must follow CBA**
- **Considerations for bargaining**
- **Union representation during interviews**
- **Johnnie's Poultry assurances**
- **Tensions between the NLRA and Title VII**



COURAGE BEHAVIOUR  
KING EXPLICIT DISCR  
IMPULSION JOB CATCAL  
OUCHING WOMEN FEA  
#MeToo  
HARASSMENT SEXTIN  
ET SEXISM JUDGEMENT  
N INAPPROPRIATE INT  
SECRET PATRIARCHY PE

# Resolution in a #MeToo World



The background of the slide features a dark, blurred image of a file folder. A prominent tab on the folder is labeled 'Investigations' in a light-colored, typewriter-style font. The overall tone is professional and investigative.

**You conducted  
your  
investigation.**

**Now what?**





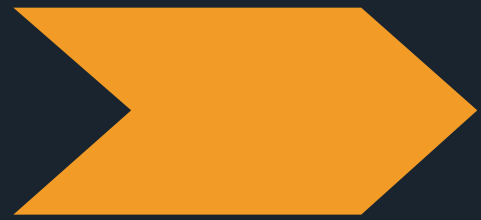
# ACTION

## Prompt and Effective Corrective Action

- **Appropriate to the circumstances**
- **Proportionate**
- **Not just to stop the harassment but to remedy the effects of the harassment**
- **Correction of any harm caused by the harassment**



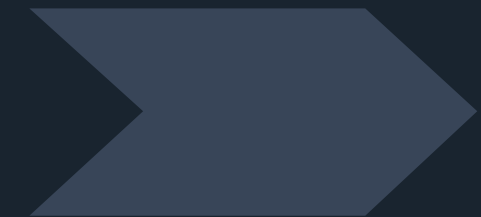
# Best Practices: Confidentiality



**Protect confidentiality of harassment allegations to the extent possible**



**Cannot guarantee complete confidentiality**



**Conflict between an employee's desire for confidentiality and the employer's duty to investigate**



# Best Practices: Resolution



**Most important thing is *to do something!***



**Make sure to circle back to Complainant**

- **Let them know when the investigation has been completed**
- **That action is being taken**
- **Assurances of no retaliation**
- **Encourage them to report any additional violations**





# Changing Culture in the Workplace









# ***Responses to #MeToo***

- **Elimination of mandatory arbitration**
  - **EEOC Enforcement Guidelines**
  - **SB 402**
  - **Chicago “Panic Button” Ordinance**
- 

**FRANCZEK RADELET**  
ATTORNEYS & COUNSELORS





**ACTION**

**What does change  
look like?**

**Listening**

**Training**

**Policies**

**Setting the  
expectation at the top**

**Accountability**

**Gender equity**



A hand holding a megaphone, positioned on the left side of the slide, pointing towards the right. The megaphone is white with a black handle and a black rim around the bell. The hand is wearing a dark suit sleeve with a white cuff.

**Open the lines of  
communication**

**Listen!**





What does  
**your training**  
look like?



# Train Like *Everyone's* Watching

Not just to mitigate litigation risk

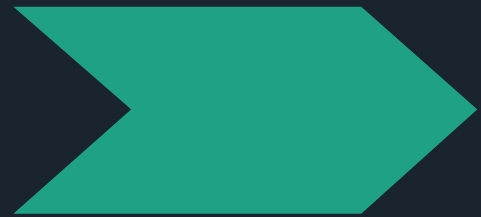
Upstander, not Just Bystander, Training

- *"That joke's not funny"*
- *"Am I the only one who found that inappropriate?"*
- *"Were you aware of how you came across in that meeting?"*
- *"I noticed that happen, are you ok with that?"*
- *Or...report it!*

Don't just do it once – or once every 5 years



# Best Practices: Policies



**Should address all forms of sexual assault and harassment**



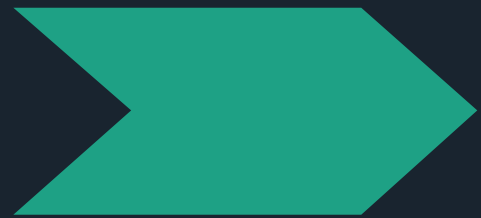
**Have a true multi-platform complaint process**



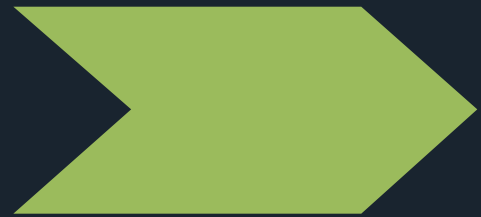
**Review regularly**



# Best Practices: Policies



**Confidentiality (to the extent possible)**



**Information “escrow”**



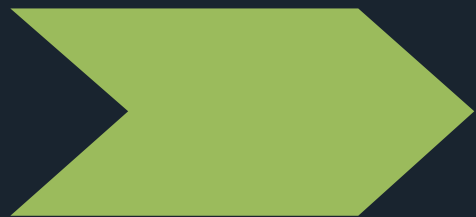
**Proportional consequences**



# Set Expectation at the Top



**Treat all with dignity and respect**

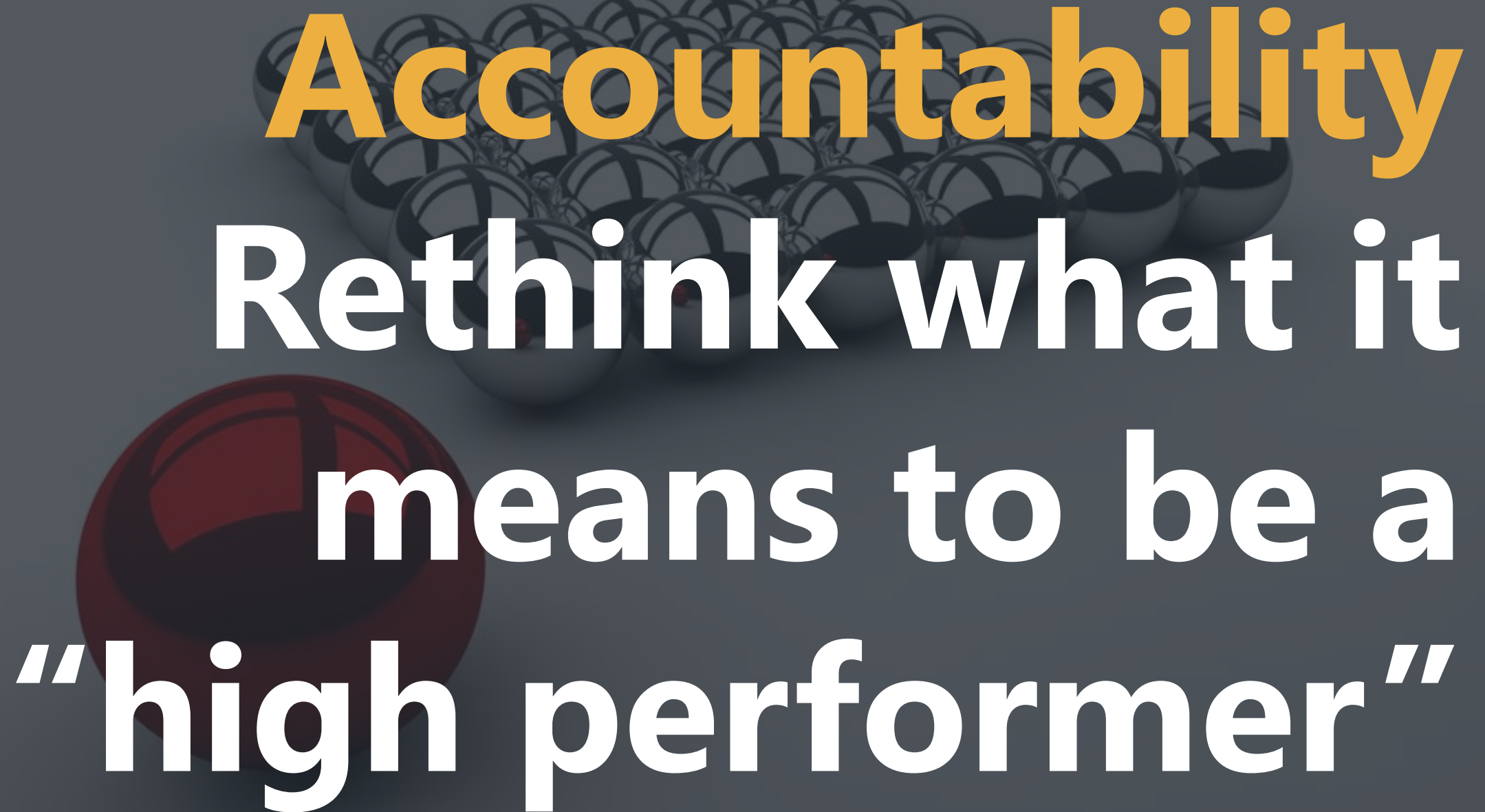


**Civility training – teach employees how to act, not just how NOT to act**



**Have the executives conduct the training**





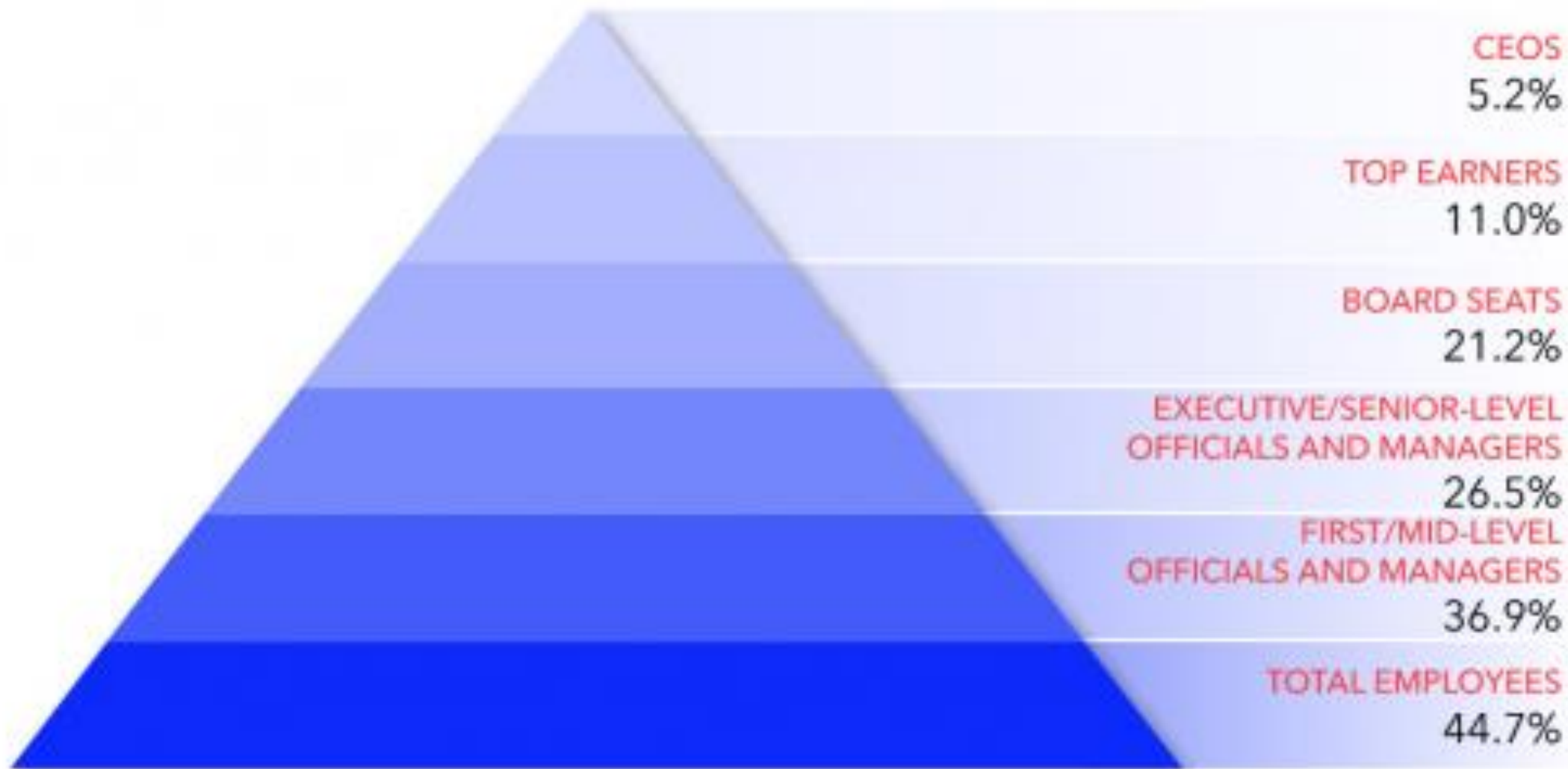
**Accountability**  
Rethink what it  
means to be a  
“high performer”



# Lynn

Lynn is the EVP of Finance and reports to the CEO. She consistently produces top quality, timely work product and the CEO relies on her heavily. Lynn is gruff with most people (except the CEO), regularly lets f-bombs fly, and sometimes yells at her 4 direct reports (two male, two female) though she typically apologizes afterward. At the holiday party, she got drunk and threw up into a plant in the corner of the room. Two of her direct reports helped her into a cab to take her home. Others at the party were drunk, but no one was as incapacitated as Lynn. No one has made a complaint about Lynn.





## WOMEN IN S&P 500 COMPANIES

Source: Catalyst.org



# The **Business Case** for Gender Equity

- Companies that went from having no women in leadership to a 30% share experienced a 15% increase in profitability
- Companies with the highest gender diversity see a higher return on equity (10%), a higher operating result (48%), and a stronger stock price growth (70%) as compared to the industry average
- More women = better problem solving
  - More trusted and more collaborative
- Millennial women are better educated



based on a real incident