

Employment Discrimination & Workplace Harassment: Legal Responsibilities and Best Practices for a Safe, Inclusive Workplace

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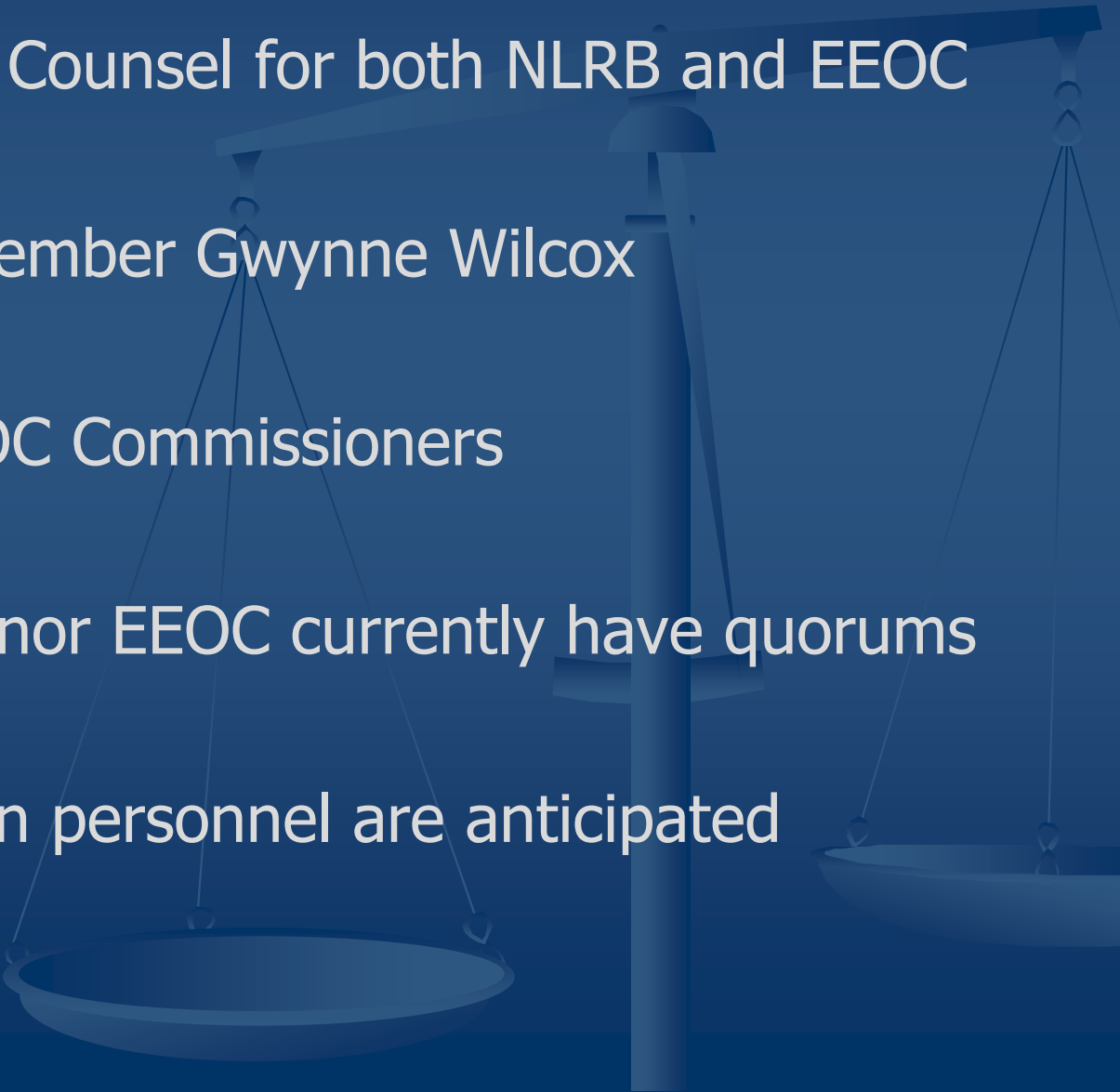
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No statements made in this seminar or in the written materials/PowerPoint should be construed as legal advice pertaining to specific factual situations

BREAKING NEWS:

President Trump Makes Dramatic Changes to Leadership of Federal Enforcement Agencies

- Removed General Counsel for both NLRB and EEOC
 - Removed NLRB Member Gwynne Wilcox
 - Removed two EEOC Commissioners
 - Neither the NLRB nor EEOC currently have quorums
 - Other reductions in personnel are anticipated
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What Does President Trump's Action Mean for Employers?

■ Expect Delays

- Without a quorum, agencies may struggle to issue rulings/guidance, litigate, or enforce policies, potentially delaying decision-making that could impact employees and employers.

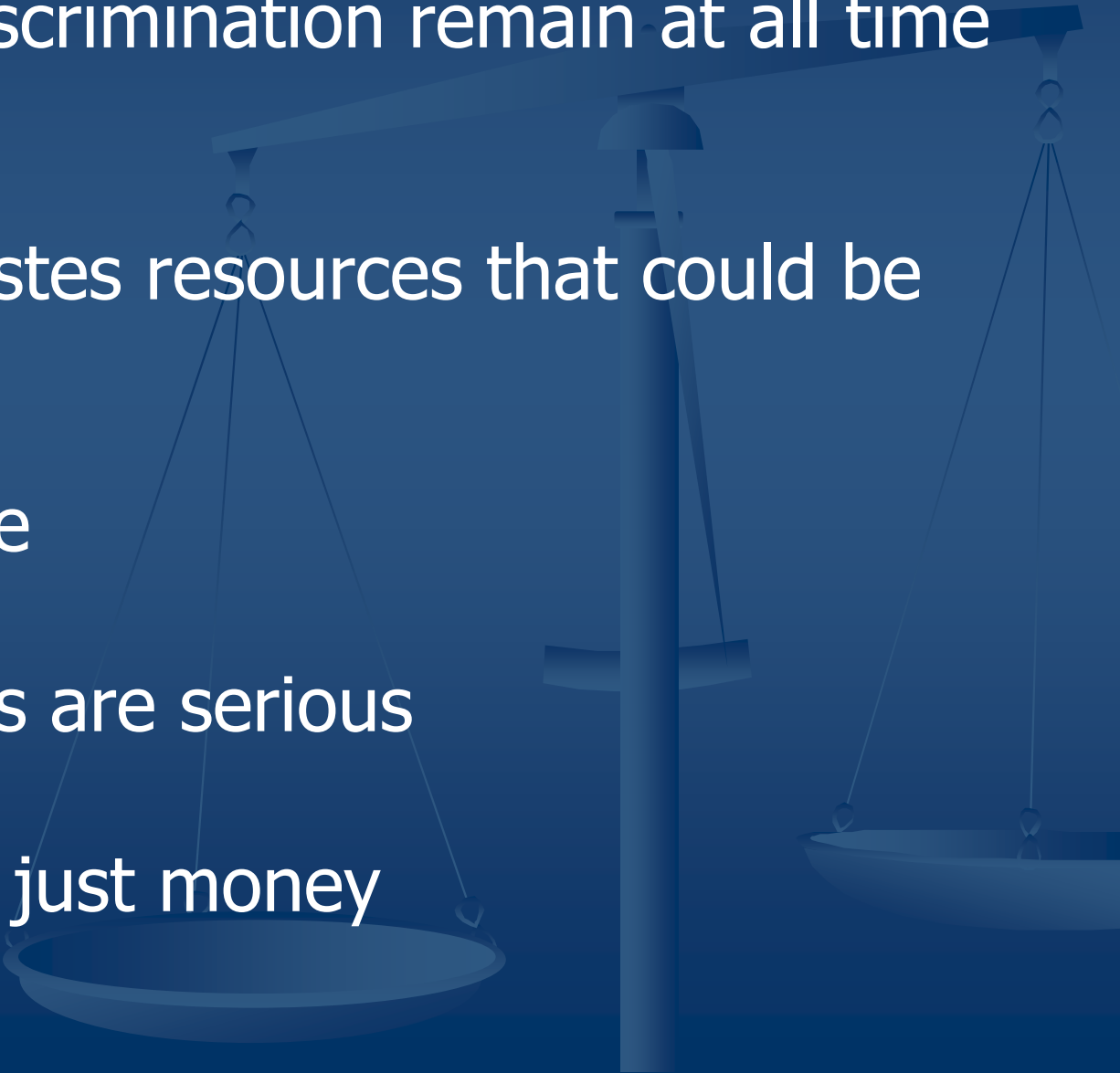
■ Uncertainty in Labor and Employment Law

- The lack of agency leadership could create a legal gray area, leaving employers in limbo on evolving federal compliance obligations and best practices.

■ Proactive Compliance is Key

- Even in a regulatory slowdown, businesses should not become complacent. Employers should continue to prioritize compliance with federal anti-discrimination and labor laws.

Cost of Discrimination:

- EEOC claims of discrimination remain at all time highs
 - Discrimination wastes resources that could be used elsewhere
 - You could be liable
 - Harassment claims are serious
 - Cost is more than just money
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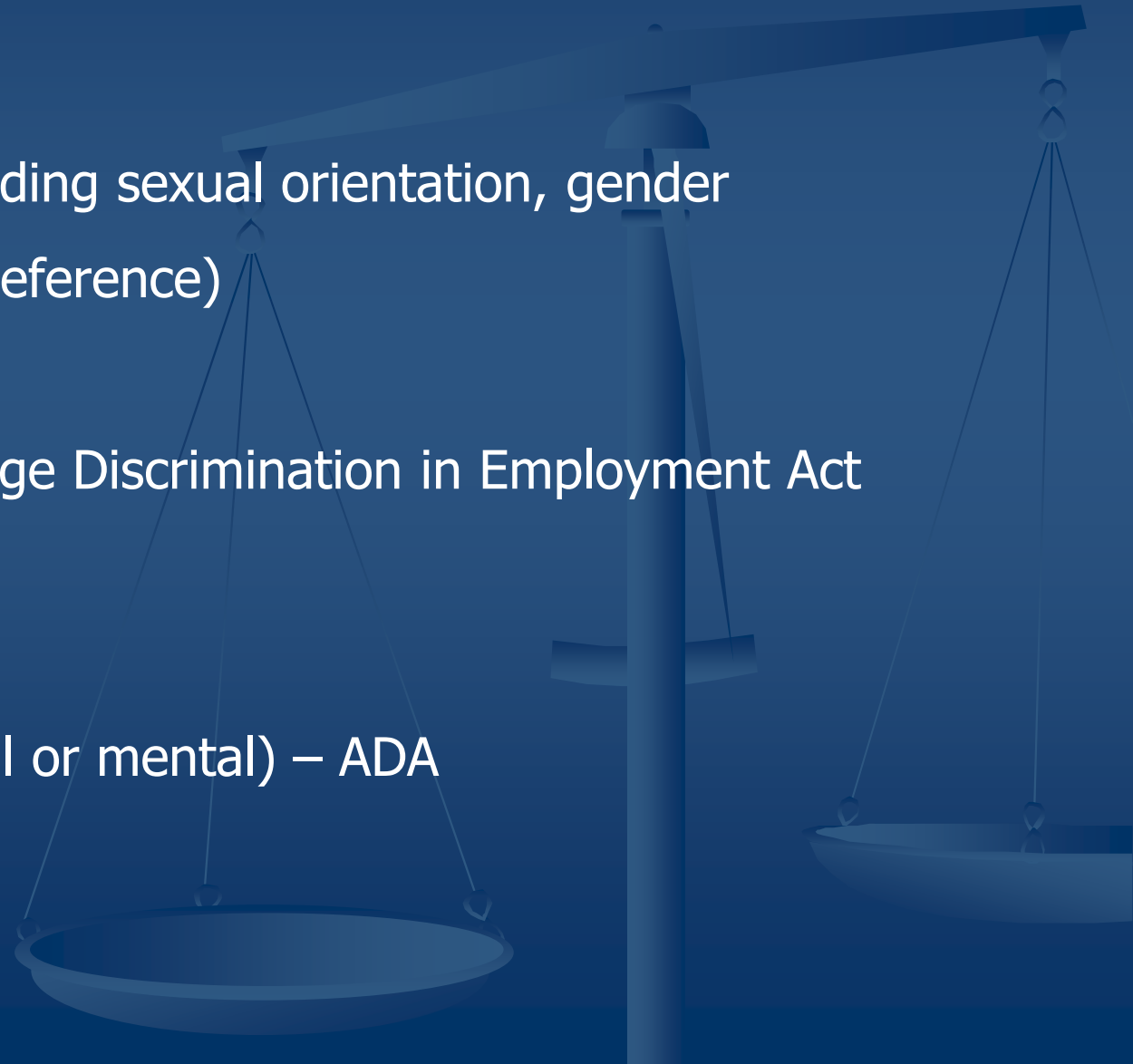
PROTECTED CLASS DISCRIMINATION

A faint, stylized illustration of a balance scale is visible in the background. The scale is tilted, with the right pan being higher than the left pan. The pans are simple, shallow bowls. The entire graphic is rendered in a light blue color that blends with the dark blue background.

Title VII of the Civil Rights Act
Pennsylvania Human Relations Act

Legally Protected Classifications:

- Race
- Color
- Sex/Gender (including sexual orientation, gender identity, sexual preference)
- National Origin
- Age (over 40) – Age Discrimination in Employment Act
- Religion
- Pregnancy
- Disability (physical or mental) – ADA

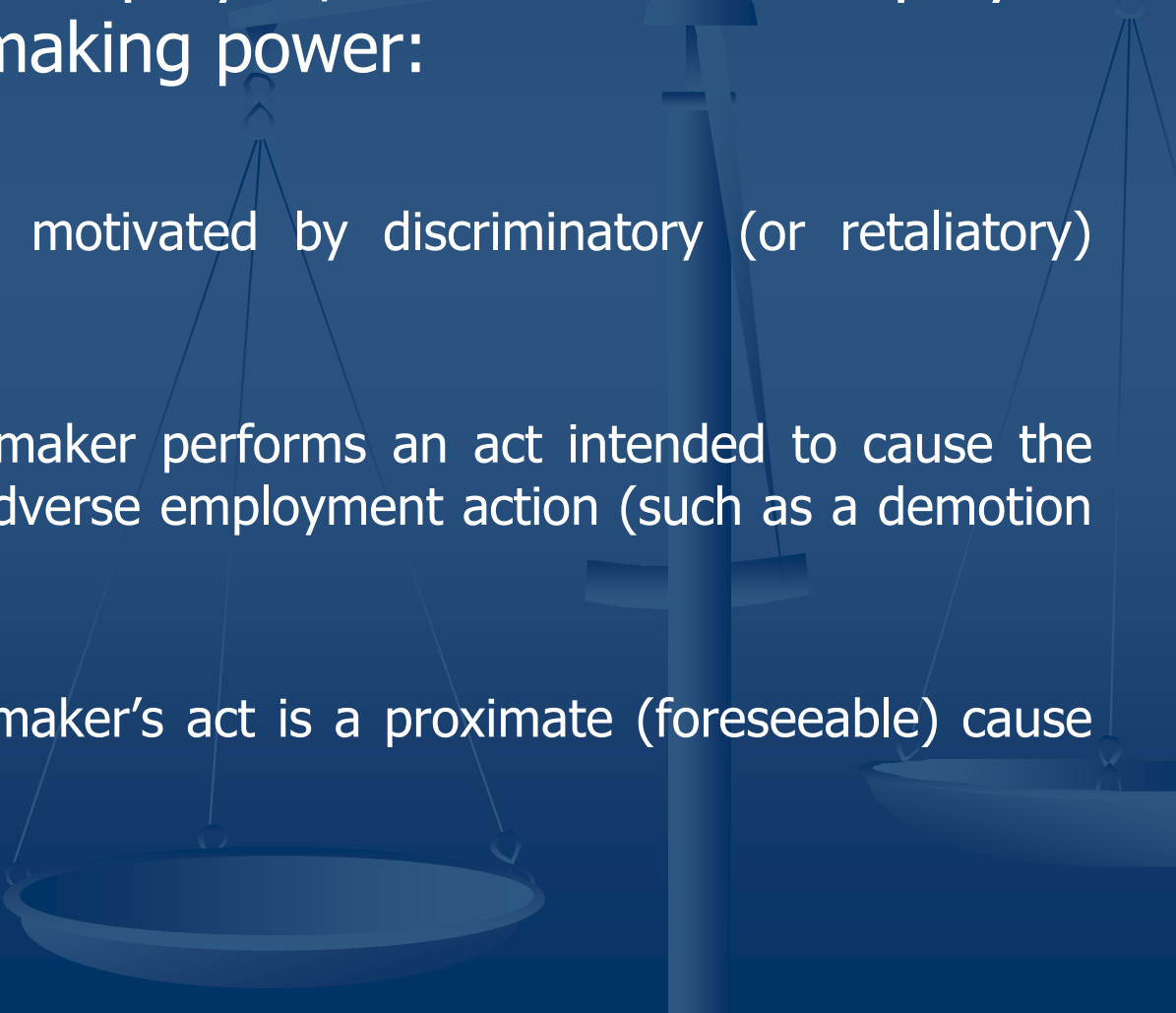


Illegal Discrimination:

- Unlawful to discriminate against any employee or applicant because of his/her/their protected characteristics
 - Includes: hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment
 - Title VII and PHRA prohibit both intentional discrimination and neutral job policies that disproportionately impact minorities and that are not job related
 - Association: equal employment opportunity cannot be denied because of marriage to or association with an individual of a different race; membership in or association with ethnic based organizations or groups; or attendance or participation in schools or places of worship generally associated with certain minority groups.

Cat's Paw Liability

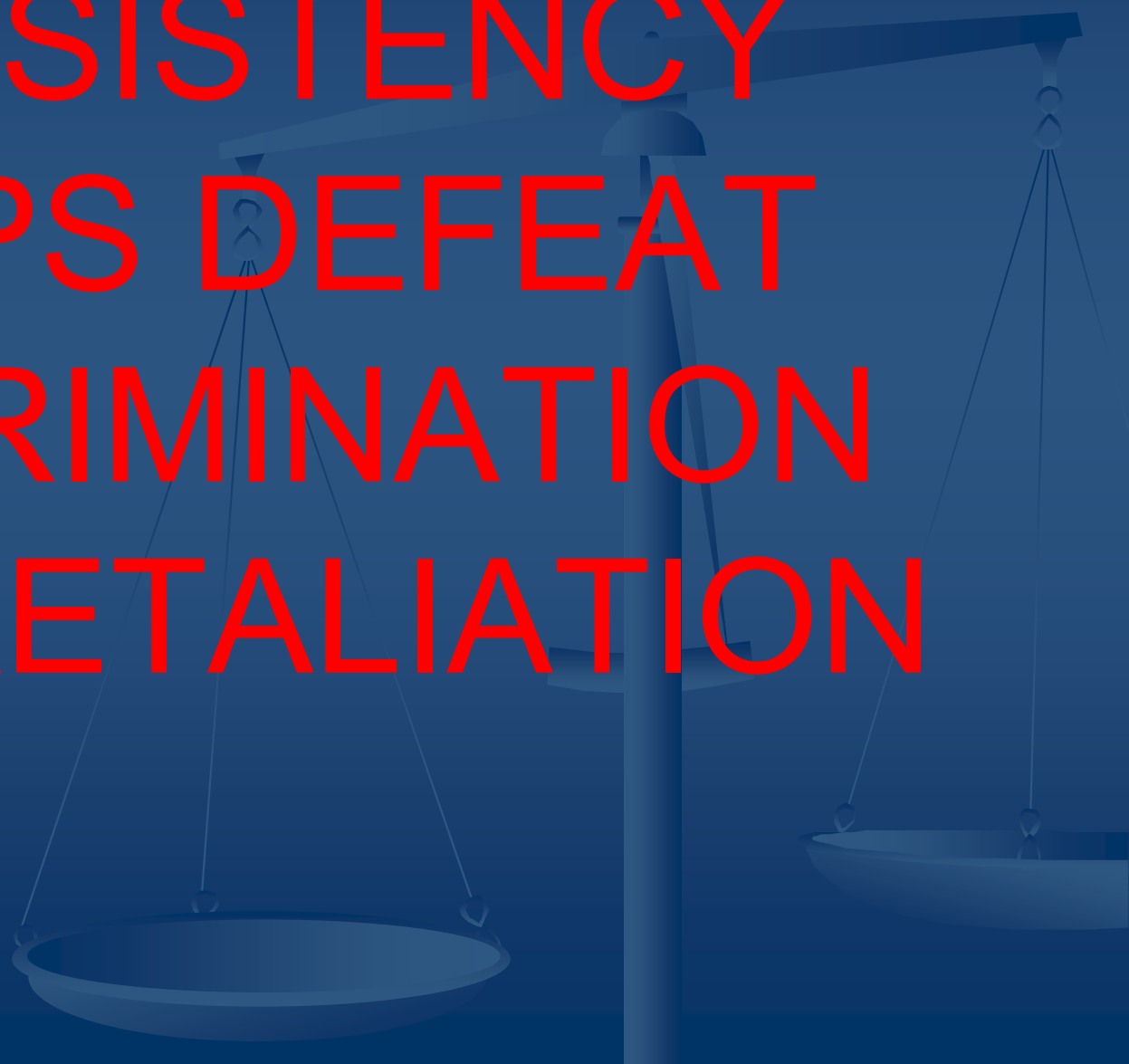
(AND WHY KITTY CATS SHOULD BE WARRY OF MONKEYS)

- Employers can be held liable for the discriminatory actions of a biased employee, even if the employee didn't have decision-making power:
 - a non-decisionmaker is motivated by discriminatory (or retaliatory) intent;
 - the biased non-decisionmaker performs an act intended to cause the employee to suffer an adverse employment action (such as a demotion or termination); and
 - the biased non-decisionmaker's act is a proximate (foreseeable) cause of the adverse action.
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RETALIATION

- Most employment statutes include anti-retaliation provisions.
- Elements of Retaliation:
 - The employee engaged in protected activity;
 - An adverse action was taken against him or her; and
 - A causal connection between the adverse action and the protected activity.
- **GENERALLY, RETALIATION IS ANY CONDUCT THAT MIGHT DISSUADE A REASONABLE PERSON FROM EXERCISING HIS OR HER RIGHTS.**
 - **THIS COULD INCLUDE ASSIGNMENT OF UNDESIRABLE TASKS, EVEN IF IT IS WITHIN THE EMPLOYEE'S JOB DESCRIPTION!**

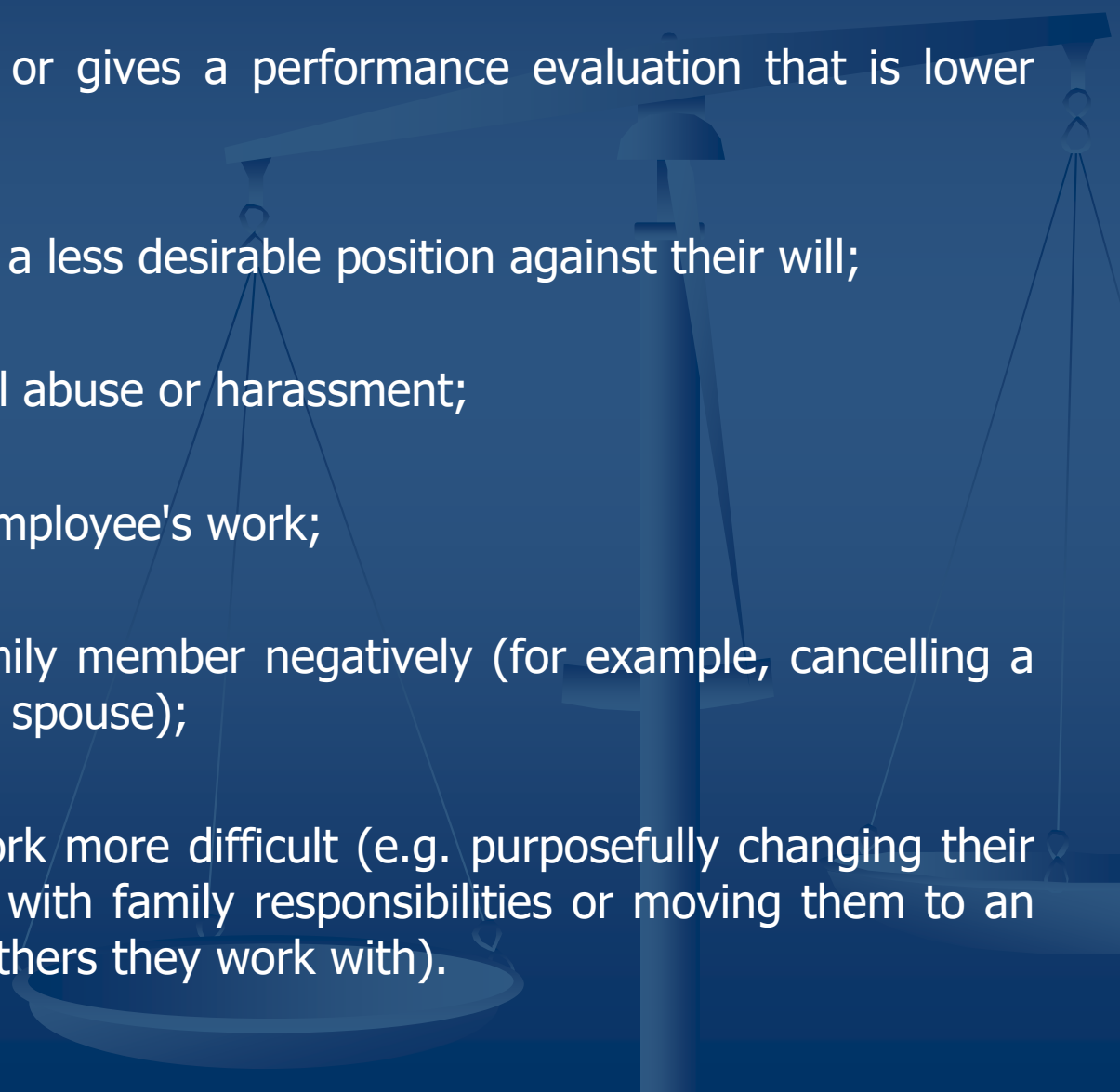
CONSISTENCY
HELPS DEFEAT
DISCRIMINATION
AND RETALIATION



RETALIATION EXAMPLES

(do not try these at home!)

Following an employee's exercise of their rights, the employer:

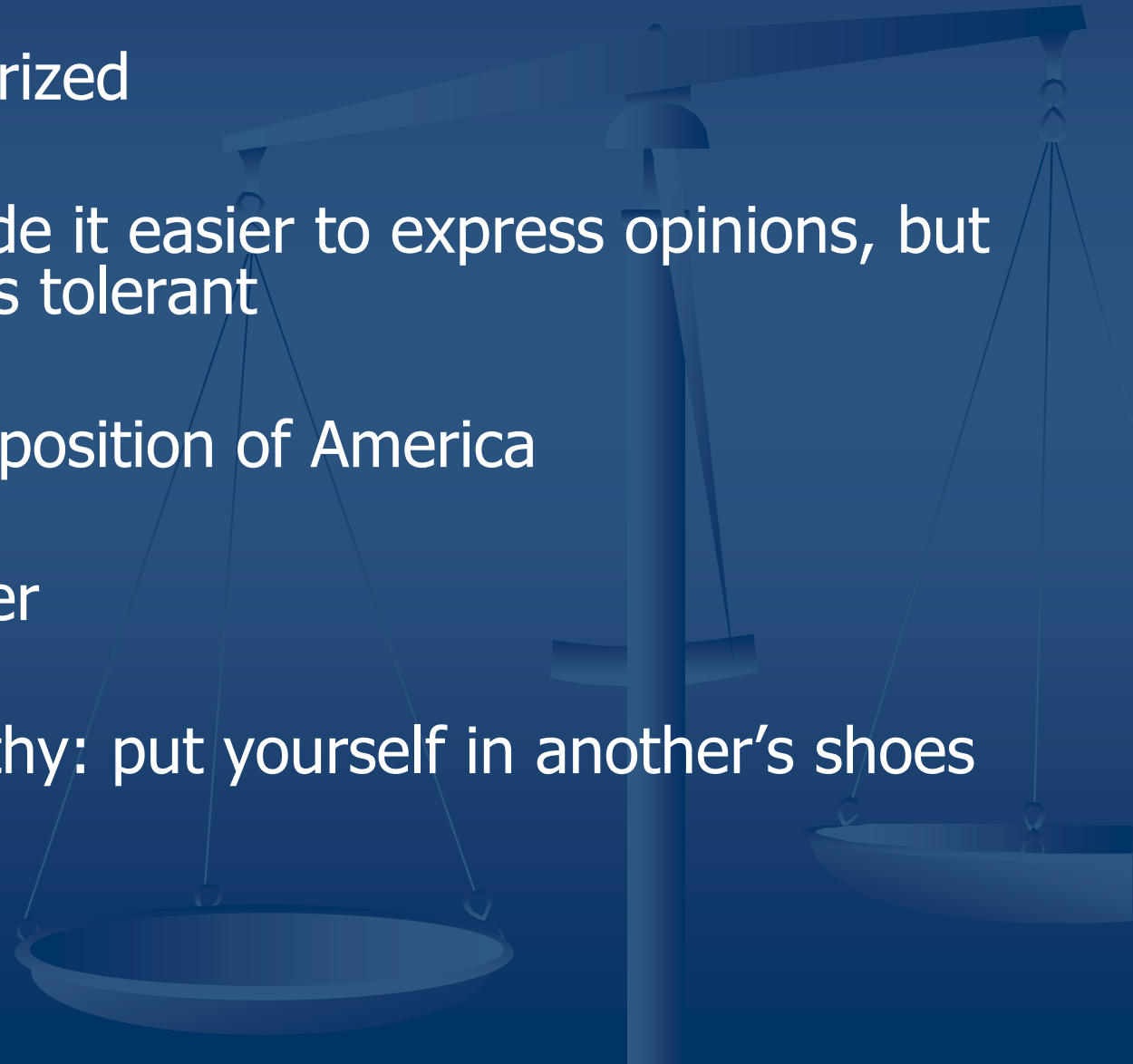
- reprimands an employee or gives a performance evaluation that is lower than it should be;
 - transfers the employee to a less desirable position against their will;
 - engages in verbal/physical abuse or harassment;
 - increases scrutiny of an employee's work;
 - treats the employee's family member negatively (for example, cancelling a contract with the person's spouse);
 - makes the employee's work more difficult (e.g. purposefully changing their work schedule to conflict with family responsibilities or moving them to an office that isolated from others they work with).
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HARASSMENT AND HOSTILE WORK ENVIRONMENT



Changing Awareness:

- Public opinion is polarized
- Social media has made it easier to express opinions, but has also made us less tolerant
- Changing ethnic composition of America
- You will work together
- Importance of empathy: put yourself in another's shoes



Illegal Discrimination and Harassment

■ Discrimination:

- Treatment in favor or against a person based on the group, class, or category to which that person belongs rather than on individual merit.

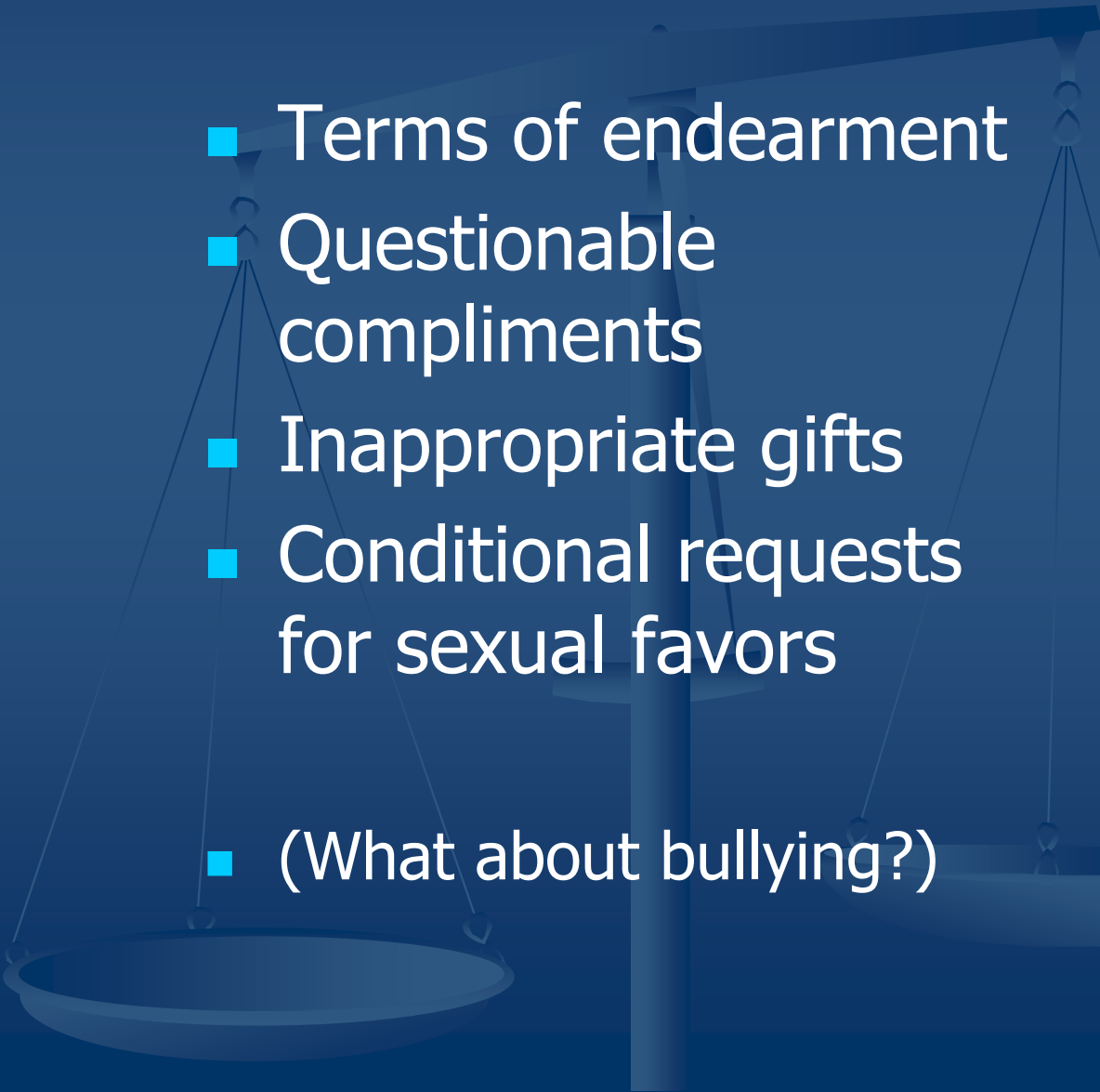
■ Workplace Harassment:

(1) *Quid pro quo* harassment:

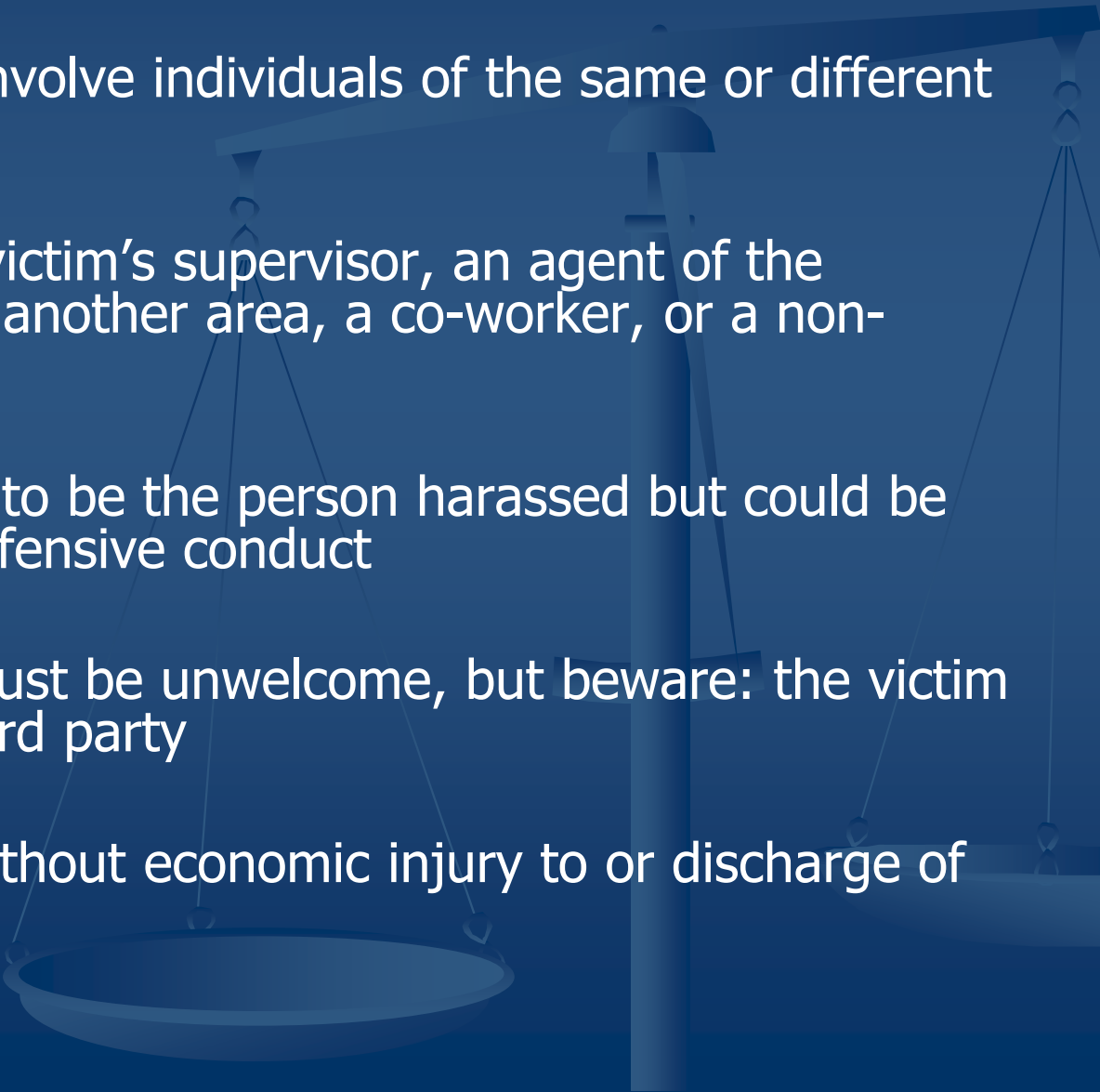
(2) Hostile environment harassment:

Conduct of a discriminatory nature which permeates the workplace and that has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment.

Conduct which can Create a Hostile Work Environment:

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- Comments
 - Physical contact
 - Jokes
 - Email
 - Pictures
 - Staring
 - Gestures
 - Terms of endearment
 - Questionable compliments
 - Inappropriate gifts
 - Conditional requests for sexual favors
 - (What about bullying?)

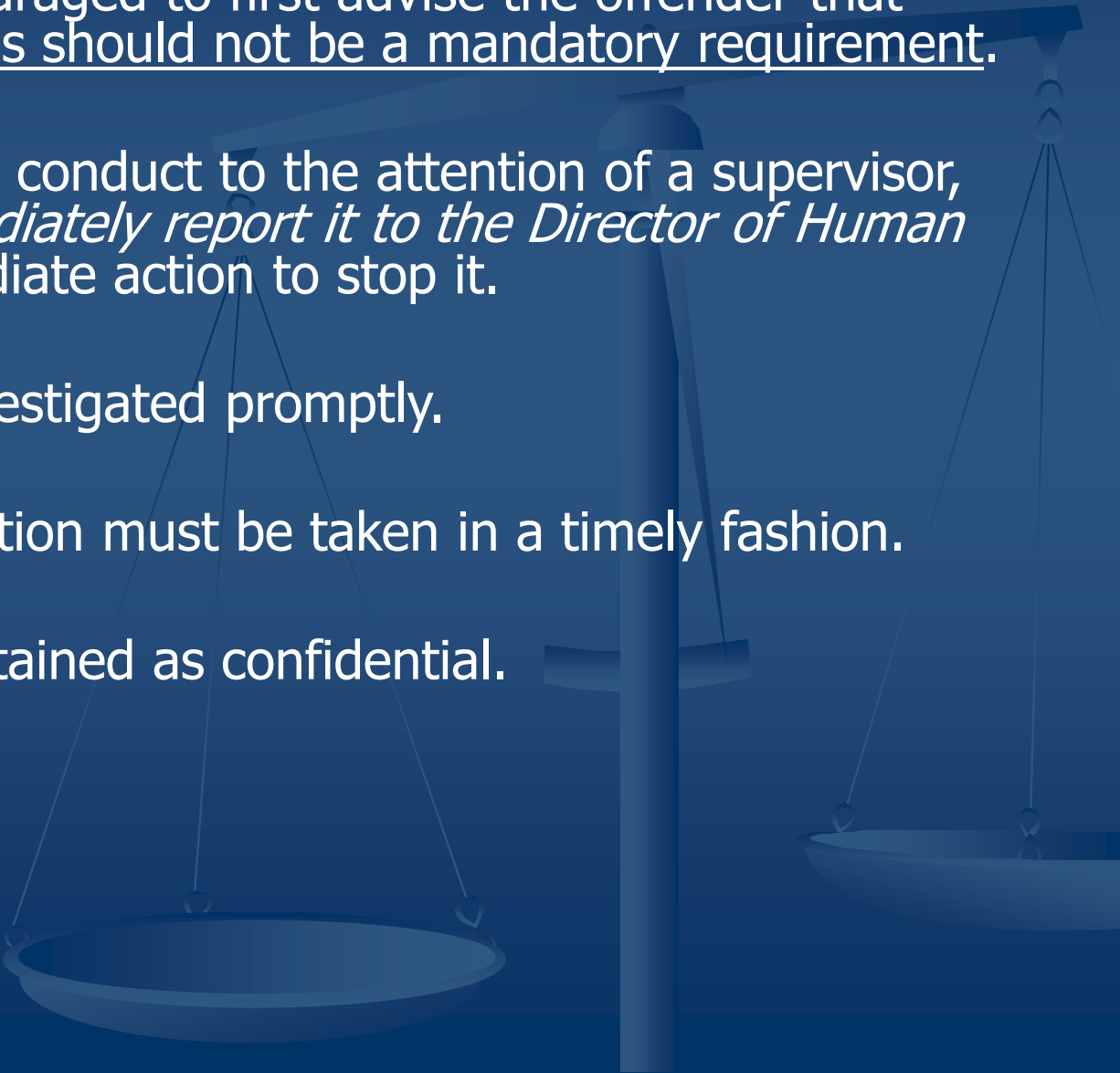
Important Facts about Illegal Harassment

- The harasser's intent does not matter
 - Sexual harassment may involve individuals of the same or different gender
 - The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee
 - The victim does not have to be the person harassed but could be anyone affected by the offensive conduct
 - The harasser's conduct must be unwelcome, but beware: the victim may be an unintended third party
 - Harassment may occur without economic injury to or discharge of the victim
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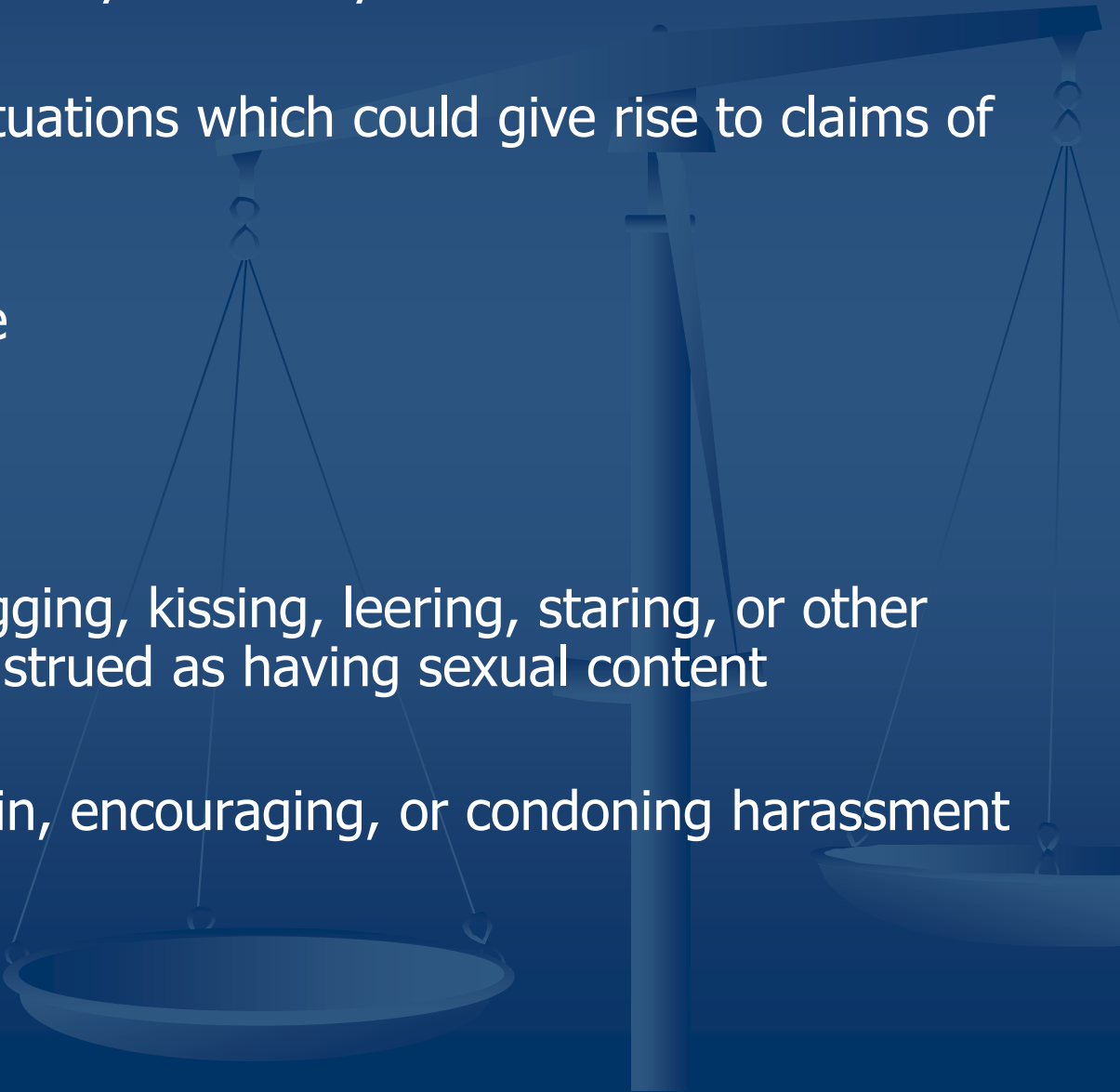
GENERIC HARASSMENT POLICY

- Harassment: any physical, verbal, or non-verbal conduct that shows hostility or disdain toward an individual based on race, color, religion, sex, sexual preference, national origin, age, disability, veterans status, marital status, or political affiliation.
- Sexual harassment: any unwelcome sexual advance, request for sexual favors, and/or other verbal, non-verbal, visual, or physical conduct of a sexual nature when:
 - a. Submission to such advances, requests, or conduct is made an explicit or implicit term or condition of an individual's employment;
 - b. Submission to or rejection of such advances, requests or conduct is used as a basis for making employment decisions affecting such individuals, or
 - c. Such advances, requests or conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.
- Harassment of any type **will not be tolerated** and can lead to discipline up to and including termination.

PROCEDURE UNDER GENERIC HARASSMENT POLICY:

- Employees are often encouraged to first advise the offender that conduct is unwelcome. This should not be a mandatory requirement.
 - If the employee brings the conduct to the attention of a supervisor, *the supervisor must immediately report it to the Director of Human Resources* and take immediate action to stop it.
 - All complaints must be investigated promptly.
 - Appropriate disciplinary action must be taken in a timely fashion.
 - Information must be maintained as confidential.
 - Retaliation is prohibited.
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HOW TO AVOID ENGAGING IN WORKPLACE HARASSMENT:

- Treat all employees courteously and civilly
 - Do not place yourself in situations which could give rise to claims of harassment
 - Watch your body language
 - Help others
 - No touching, pinching, hugging, kissing, leering, staring, or other conduct which may be construed as having sexual content
 - Refrain from participating in, encouraging, or condoning harassment
 - Work time is for work
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What a Supervisor Should do if You Suspect Harassment:

- Do not condone inappropriate behavior
- Do not wait for a formal complaint
- Treat all complaints seriously
- If you do not have firsthand knowledge, remain neutral
- Maintain confidentiality to the extent possible

(cont.)

Supervisor's Responsibilities (cont.)

- All complaints of harassment should be treated equally and should be *promptly* investigated
- Immediately report the incident to the Human Resources Manager
- Take steps reasonably designed to eliminate the harassment
- Document, Document, Document!

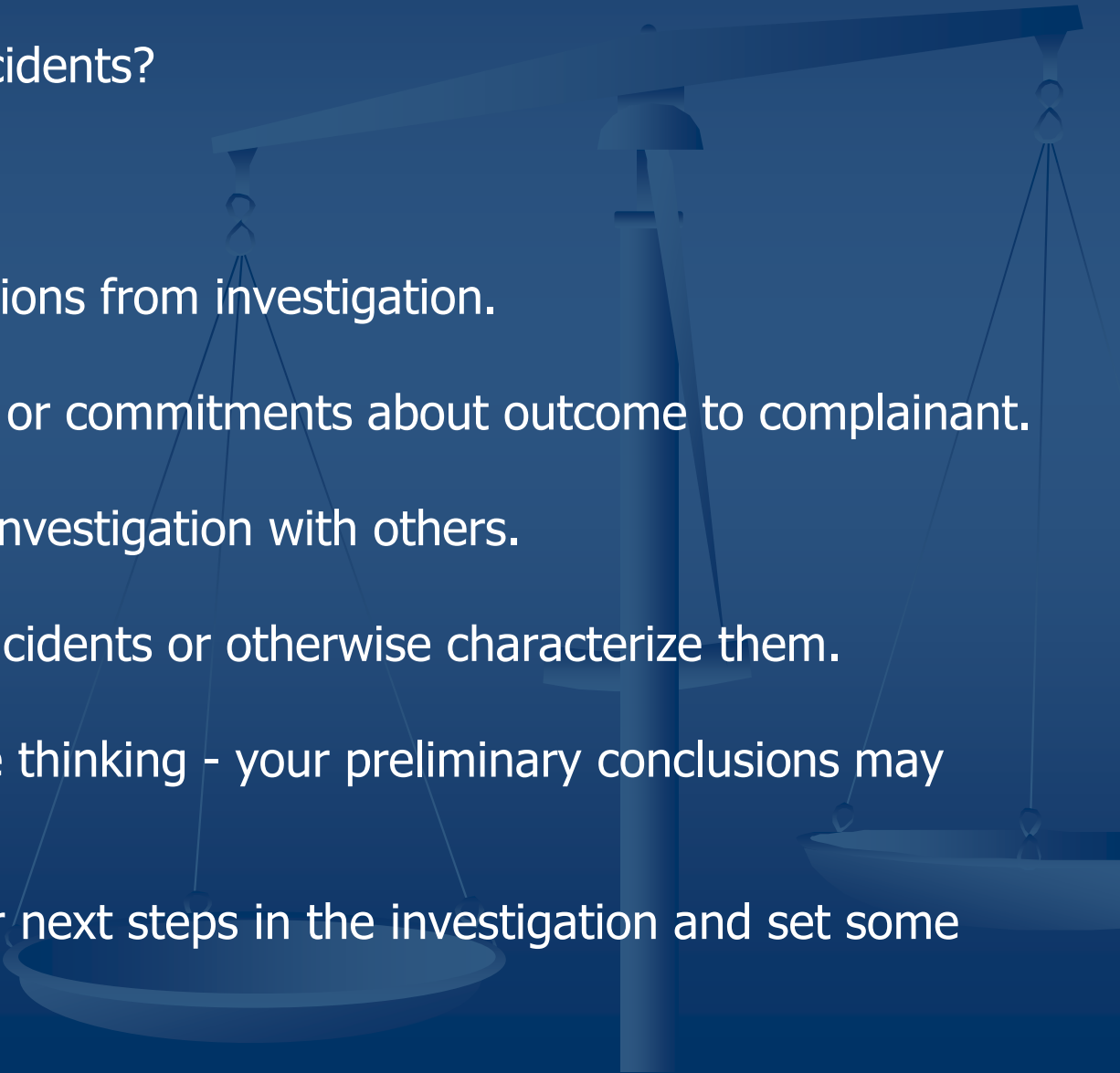
ABSOLUTELY NO RETALIATION!

- Consistency helps prevent retaliation claims

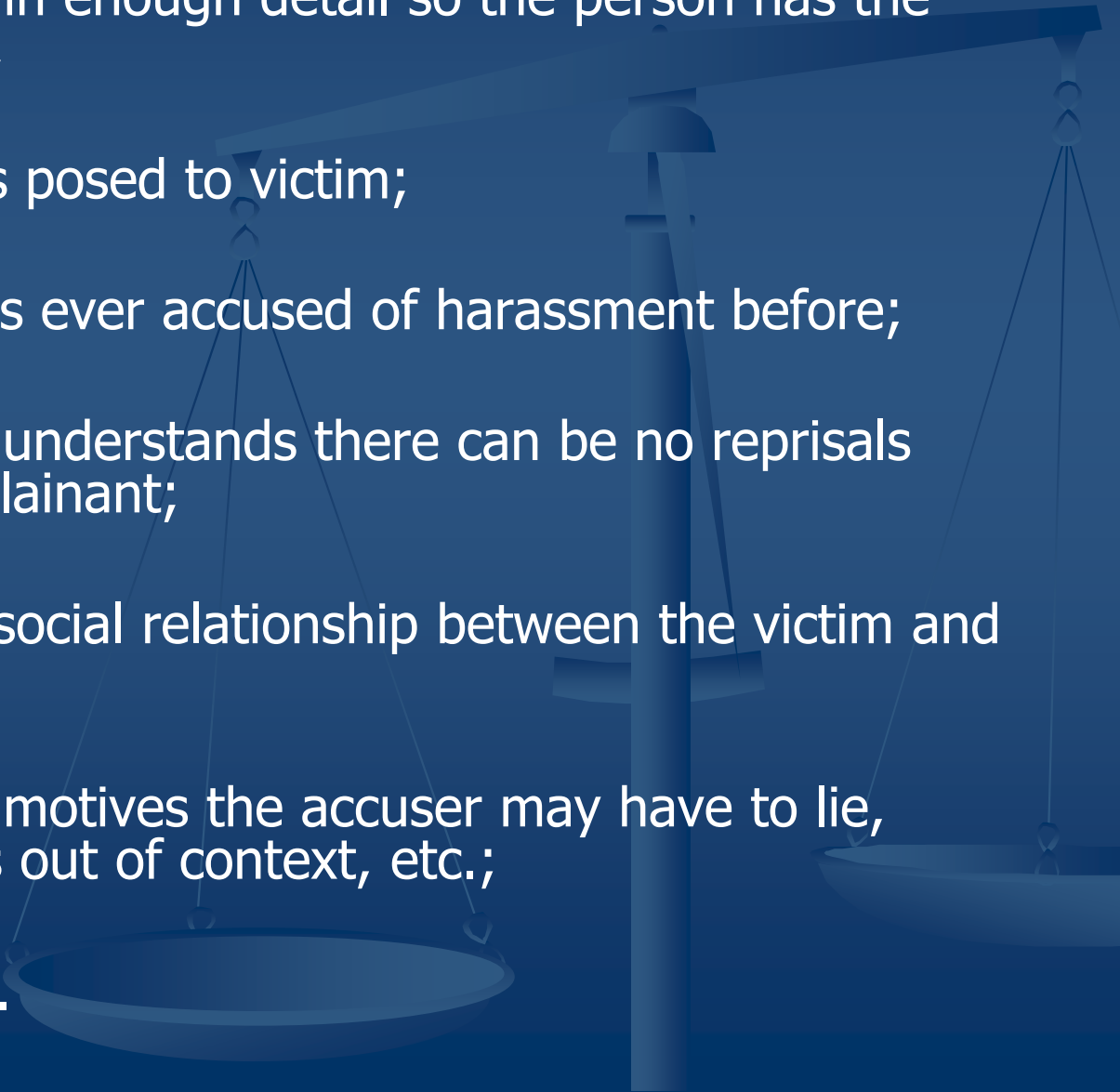
Investigation Basics:

- Determine who should conduct investigation- most likely it should be the Director of Human Resources; but if not, someone who is impartial and has good interview skills
- Be thorough and act quickly – starting the investigation in 24 hours should be the goal
- Decide how to document for accuracy and protection against "revisionist history"
- Collect and review relevant documents
 - Complaint
 - Harassment Policy
 - Personnel Files
 - Investigation of prior incidents/complaints to see if a pattern exists

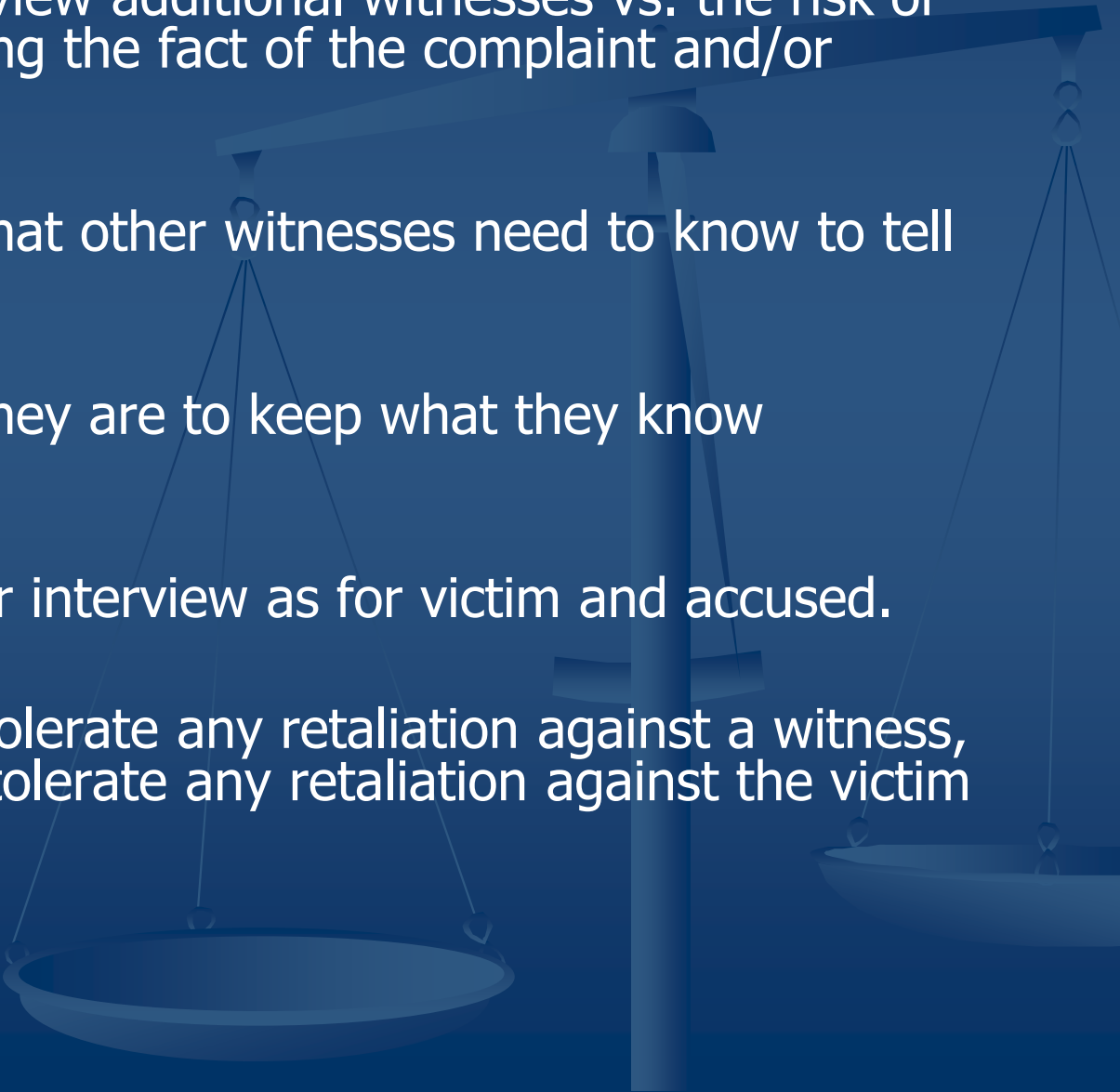
Tips to Interview Victim:

- Ask questions to elicit facts and eyewitnesses.
 - Is victim aware of other incidents?
 - Assess demeanor.
 - Ask about victim's expectations from investigation.
 - Do not make any promises or commitments about outcome to complainant.
 - Urge victim not to discuss investigation with others.
 - Do not downplay alleged incidents or otherwise characterize them.
 - Do not reveal what you are thinking - your preliminary conclusions may change.
 - Inform complainant of your next steps in the investigation and set some rough timetables.
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Tips to Interview the Accused:

- Explain each allegation in enough detail so the person has the opportunity to respond;
 - Ask similar questions as posed to victim;
 - Ask whether he/she was ever accused of harassment before;
 - Make sure the accused understands there can be no reprisals made against the complainant;
 - Determine if there is a social relationship between the victim and the accused;
 - Ask about any possible motives the accuser may have to lie, exaggerate, take things out of context, etc.;
 - Outline your next steps.
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Tips to Interview Witnesses:

- Balance the need to interview additional witnesses vs. the risk of unnecessarily disseminating the fact of the complaint and/or investigation.
 - Impart only information that other witnesses need to know to tell you what they know.
 - Stress to witnesses that they are to keep what they know confidential.
 - Similar procedure used for interview as for victim and accused.
 - Explain that you will not tolerate any retaliation against a witness, and you likewise will not tolerate any retaliation against the victim or alleged harasser.
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Resolution of Investigation:

- Prepare a written report with summary of factual findings and any other evidence, attaching the various written statements, etc.
 - Report can draw conclusions as to whether harassment did or did not occur but should not make any recommendations to higher management.
- Finding a violation of the policy is not the same as finding that unlawful sexual harassment has occurred.
- Punishment must be appropriate and must be reasonably calculated to end the harassing behavior.
- Be careful of implementing any temporary transfers, time off, etc. It could be construed as retaliation.
- Director of Human Resources and/or Solicitor should be consulted before any action is taken against accused or investigation is closed with no action.
- Follow up with the victim and perpetrator!

PRIMARY RESPONSIBILITY
FOR SUPERVISORS
AND EMPLOYEES:

BE CONSIDERATE



WHAT TO DO IF YOU SUSPECT HARASSMENT:

1. Do not wait for victim to file a formal complaint.
 2. Treat all complaints seriously. All complaints of harassment should be treated equally and should be *promptly* investigated.
 3. Tell the offending employee/supervisor that the conduct and/or statements are unwelcome and should be stopped immediately.
 4. Immediately report the incident to the Director of Human Resources, regardless of how trivial or unimportant you believe the conduct or incident may be.
 5. Document, Document, Document!
 6. ABSOLUTELY NO RETALIATION!
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