

# Responding to Employees Who Allege Violations of Whistleblower Protections

*Annual Training for  
Supervisors*

*U.S. Office of Special Counsel*





# GOALS

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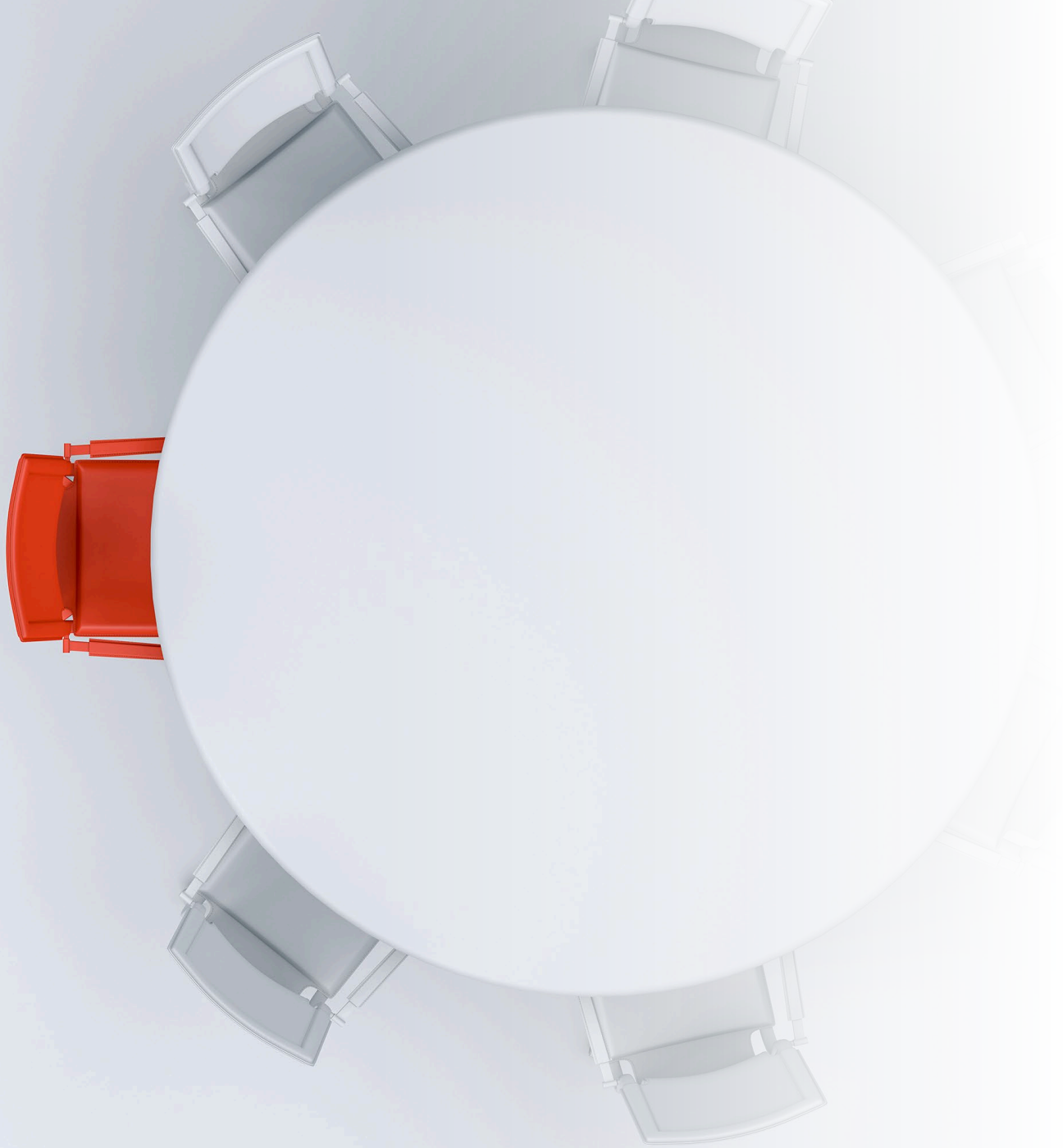
**Refresh Knowledge of Whistleblower  
Retaliation**

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**Understand How to Respond Constructively  
When Receiving Disclosures of Wrongdoing  
and Allegations of Retaliation**

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**Understand How to Foster an Environment  
Where Employees are Comfortable and Safe  
Reporting Concerns**



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# Retaliation Refresher

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# Alleging Retaliation

Supervisors may not take, fail to take, or threaten to take or withhold a personnel action for:

- Protected whistleblowing (i.e., disclosing wrongdoing) – statutory categories listed on slide 5
- Protected activity – statutory activities listed on slide 6



# Whistleblowing Categories

In general, employees must have a “reasonable belief” that they are disclosing information in one or more of the following categories and, unless prohibited by statute or classified, employees may make disclosures to anyone.

Categories:

- Violation of any law, rule, or regulation
- Gross mismanagement: substantial risk of significant impact on mission
- Gross waste of funds: more than debatable expenditure
- Abuse of authority
- Substantial & specific danger to public health or safety
- Censorship related to scientific research or analysis (scientific integrity)



# Protected Activity

Includes:

- Exercise of appeal, complaint, or grievance rights
- Testimony or other assistance to person exercising such rights
- Cooperation with or disclosures to Special Counsel, Inspector General, or component responsible for internal investigation or review
- Refusal to obey an order that would require violation of law, rule, or regulation



# Prima Facie Case of Reprisal

## *Preponderance of Evidence*

The following elements must be met:

1. **Reasonable belief** that employee made a **protected disclosure** or employee engaged in **protected activity**
2. **Personnel action** taken, not taken, or threatened
3. **Actual** or **constructive knowledge** of protected disclosure or activity; and
4. **Contributing factor** (disclosure or activity was a contributing factor in the personnel action)
  - Sufficient **timing** between the disclosure or activity and the personnel action at issue; OR
  - Circumstantial evidence



# Clear and Convincing Evidence

## *Agency Burden*

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**Agency may defend personnel action** by showing — *clear and convincing evidence* — that it would have taken the same action absent disclosure or protected activity.

### **Factors:**

- *Strength of the evidence* in support of the personnel action (*Whitmore v. Dept. of labor, 2012*)
- Existence and strength of *motive to retaliate*
- Treatment of *similar employees*





# What Do You Think?

Mallory asks for a meeting with her boss, Katrina, to discuss their organization's safety regulations that often go ignored. They discuss the problem, but Mallory never submits a written complaint.

*Is this a protected disclosure?*


1. Yes.
2. No.

# Answer

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Yes. Mallory's disclosure is protected. She is alleging a violation of agency regulations. There is no requirement for her to document her concern in writing.

However, please note that a manager or supervisor ***is generally not required*** to determine if the employee's disclosure of information meets the legal definition of a protected disclosure.



# Respond Constructively

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# Engaging in Constructive Conversations:

## Steps You Can Take to Engage Effectively

1

**Change Your Emotions.** We act worse when our emotions kick in. The solution is to take responsibility for the emotions that you bring to the conversation and avoid making assumptions about the employee's intent. Creating a negative story or judging the employee can lead a manager or supervisor to unintentionally act in a retaliatory manner.

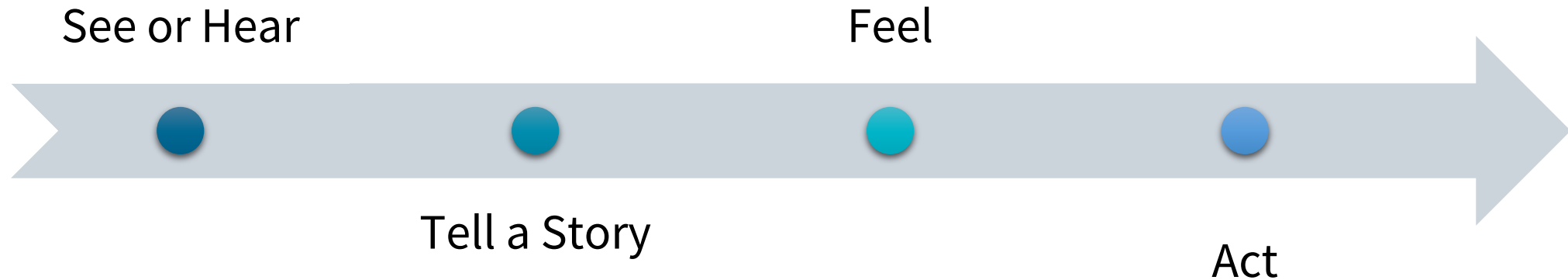
2

**Engage in Active Listening.** Be receptive to the employee's disclosure even if you do not agree. Utilize the active listening skills that you have honed and developed as a federal manager or supervisor to gather more about the employee's concerns and demonstrate interest in what they are sharing with you. Thank the employee for trusting you with their concerns.

3

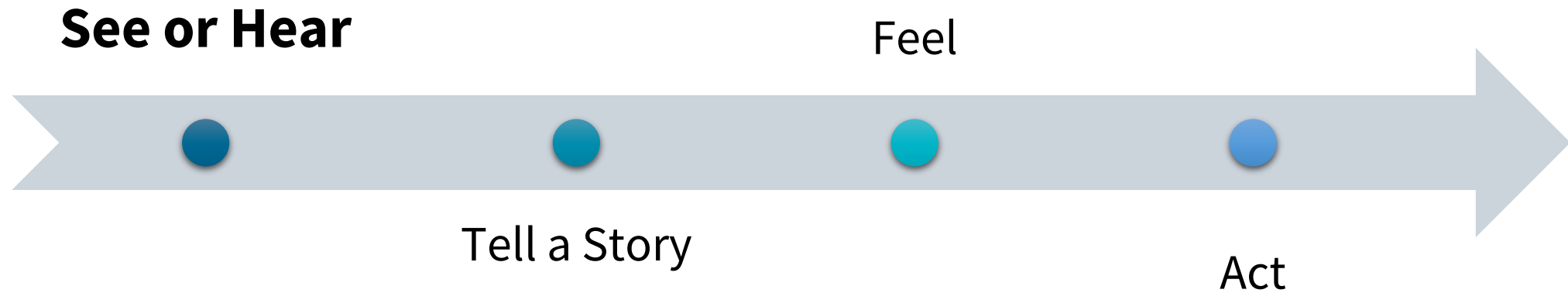
**Identify Your Goals.** Determine your goals for the conversation. Unless required by your agency, you do not need to investigate the employee's disclosures or concerns about reprisal. You also do not need to assess if the disclosure of information or allegations of reprisal meet the legal definitions. Focus on what the employee is seeking from the conversation.

# Change Your Emotions



**\*As you navigate through the next few slides, think about the story you might tell yourself, how you would feel and potentially act.**

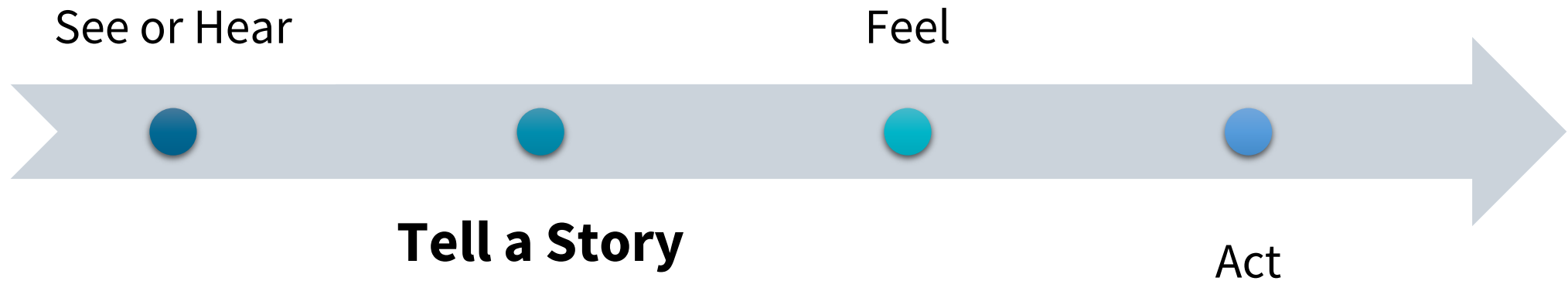
# You See or Hear...



You are sitting in your office late one afternoon when an employee stops by and asks to have a quick chat. The employee shares that she has reason to believe that senior leadership (which may or may not include you) is mismanaging a high-level project.

***What story might you tell yourself?***

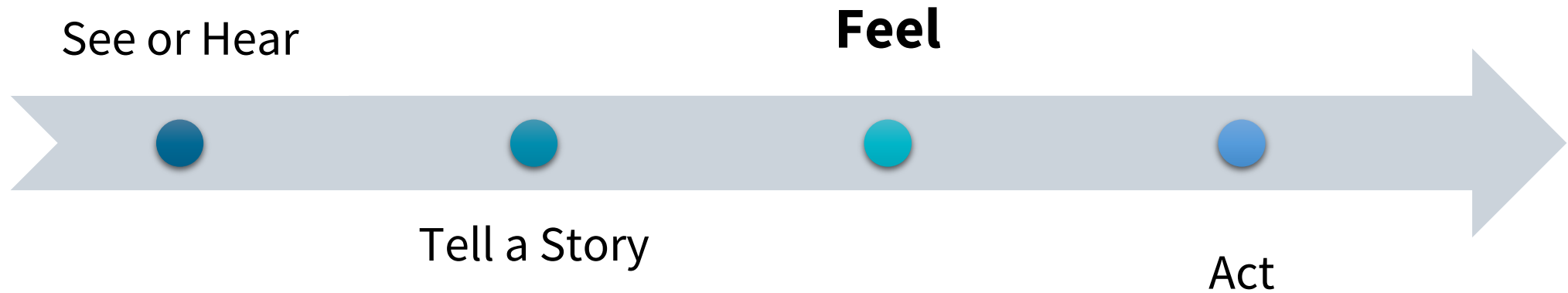
# You Tell a Story...



You decide the employee is questioning senior leadership and potentially your effectiveness as a manager. She is upset that you were promoted over her two years ago.

***How might you feel?***

# You Feel...

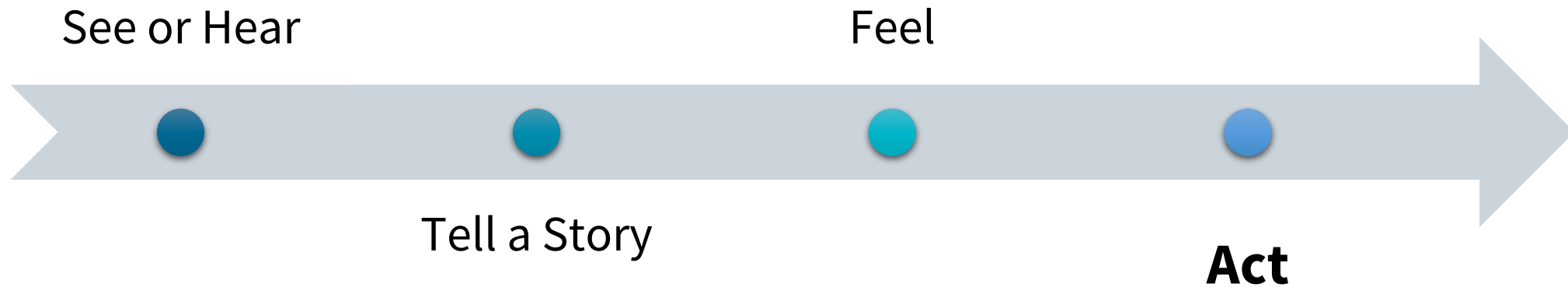


You feel that she is discounting all the hard work and long hours that you have put into managing the project. She also does not understand how you have accepted her work and revised it repeatedly, without complaint.

***How might you act?***



# You Act...



You disregard the employee's comments and begin scrutinizing her work on the project.

**NOTE:** Not managing performance *until* after an employee makes a disclosure or engages in protected activity is a potential pitfall for managers and can result in a retaliation complaint. It is important to manage employees' performance from day one.

# Engage in Active Listening

## Neutral

- Encourage employee to continue
- Demonstrate interest in what the employee is saying

## Reflective

- Display empathy
- Help employee recognize and evaluate feelings

## Clarifying

- Gather additional information

## Summarizing

- Bring discussion into focus
- Repeat back main points

# Barriers to Active Listening



**AVOID ARGUING, BEING DEFENSIVE OR TRYING TO JUSTIFY A POSITION**



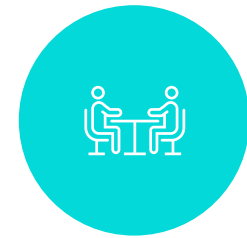
**AVOID ANALYZING EMPLOYEE OR THEIR MOTIVATION**



**AVOID MINIMIZING THE EMPLOYEE'S MESSAGE OR FEELINGS**

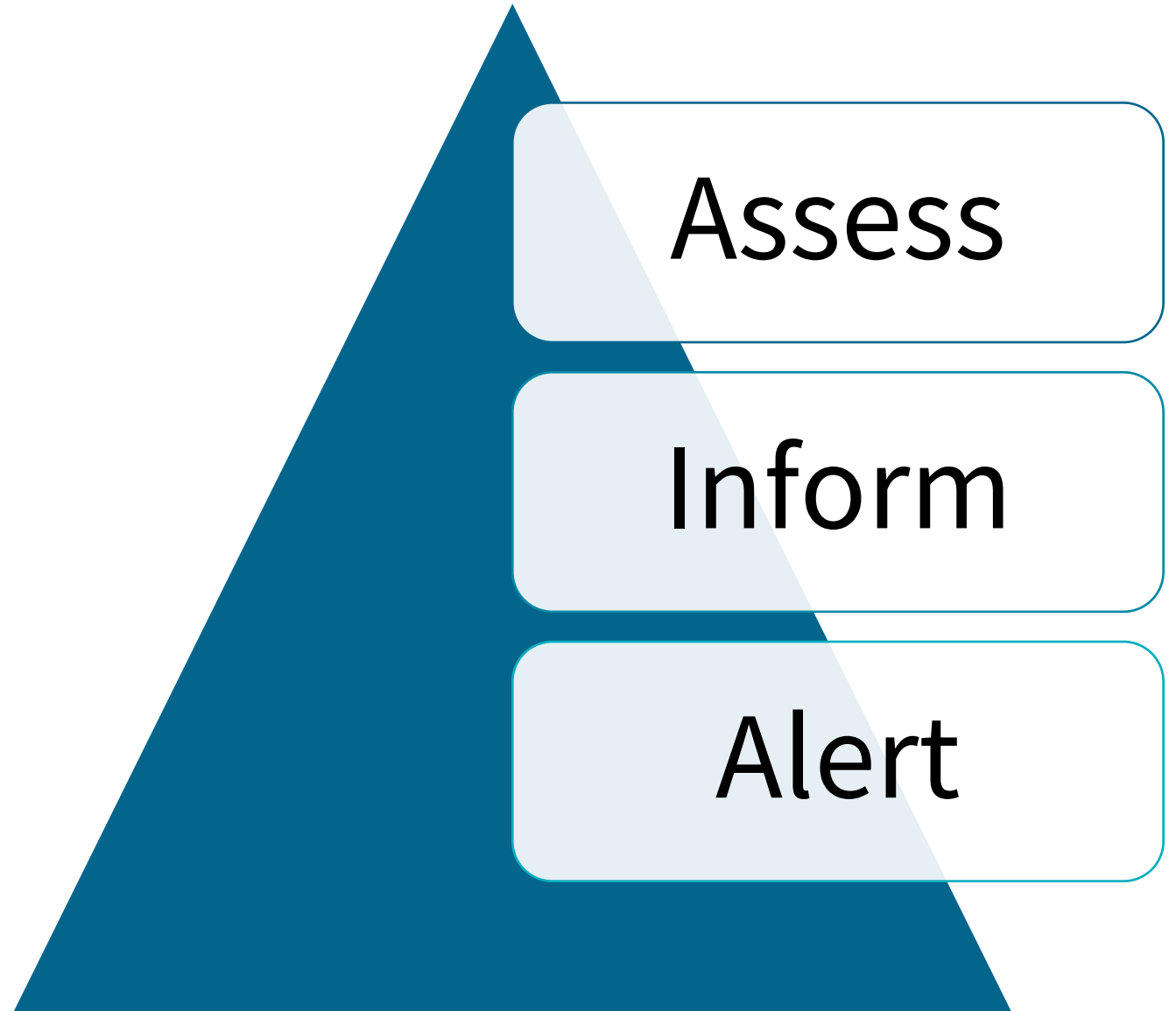


**AVOID INTERRUPTING OR REDIRECTING THE CONVERSATION**



**BE AWARE OF NEGATIVE BODY LANGUAGE – RAISED EYEBROW, ROLLING EYES, TURNING AWAY FROM EMPLOYEE**

# Identify Your Goals



# The following points will assist managers and supervisors with responding to disclosures and allegations of retaliation:

## Assess

Ask open ended questions to determine the employee's intent. Are they sharing information for supervisory awareness, requesting an investigation, or seeking guidance on how to file a complaint?

## Inform

Inform the employee of their right to disclose government wrongdoing or allege retaliation to anyone (unless barred from release by statute), including but not limited to, OSC and/or the OIG.

## Alert

Alert employee to agency policy on protecting confidentiality and share your obligation to alert the appropriate agency investigative authority if, for instance, the employee discloses a danger to public health or safety or any other imminent harm.



# EXERCISE

# Hannah's Issue

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Hannah, a claims benefits specialist, has concerns about the lax enforcement of an agency regulation. Specifically, she has learned that there is an “unwritten” practice of not checking changes to monthly income when assessing benefits for widows and widowers. She reviewed the documentation for a few widow beneficiaries and believes that certain widows continued to receive SSI, despite reporting “new” monthly incomes that would now make them ineligible for benefits. Although Hannah’s supervisor has ignored her concerns, Hannah is convinced that she is right and that the problem must be corrected. Hannah shares her concerns with two colleagues in her department.

Hannah’s first-line supervisor, Mark, learns about the communication. Mark believes that Hannah does not have enough information to make a disclosure. Shortly thereafter, Hannah learns that Mark has initiated an inquiry into her performance and conduct. No other action has been taken against Hannah.

# Hannah Comes to Your Office

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How do you handle the conversation? What type of questions might you ask and what type of information might you provide?

**NOTE:** You happen to know that Hannah’s supervisor, Mark, is vengeful and may harm Hannah’s career if she files a complaint. You also know that Mark will be careful not to take an official “personnel action.”

**Points to think about:**

- a. Do you discuss Mark’s history of harming employees’ careers?
- b. Do you discourage Hannah from filing a complaint?
- c. What do you say about the complaint avenues and processes?



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# Foster a Retaliation Free Environment

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## Encourage

**Employees to report wrongdoing** – raise whistleblowing during staff meetings, highlight disclosures that resulted in positive change. Supervisors set the tone!



## Inform and Remind

Employees that they ***DO NOT*** have to go through their supervisory chain to make a disclosure. Non-disclosure agreements should include the statutory 5 U.S.C 2302(b)(13) language.



## Assure and Ensure

Employees that the they **have protections from retaliation for whistleblowing**. Acknowledge employee's concerns about coming forward, reinforce that the choice to file a complaint belongs to the employee, and remind them of statutory protections.

# Assure and Ensure Employees

## ASSURE

*You will not retaliate against any employee for reporting wrongdoing*

### **Establish a Positive Culture around Whistleblowing:**

- You can always come to me, but you do not have to
- Reporting violations of law and mismanagement makes our organization better
- Reporting gives us the opportunity to change things for the better
- Avoid statements or actions that could serve to chill whistleblowing

## ENSURE

*Employees can always contact the OSC or OIG if they believe that they are experiencing retaliation or want to make a disclosure*

### **Influence the Climate with Open Communication:**

- My direct supervisor can be reached at...
- Identify other offices at your agency that may be able to review or investigate disclosure
- OSC can be reached at...
- OIG can be reached at...

# What Do You Think?

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Chris works for the Procurement Office as a Contract Specialist. While working on a contract, Chris discovers that one of the supervisors in the procurement office, not in his chain of command, executed duties as a Contracting Officer without the certifications required by the Federal Acquisition Regulations. Chris reports this information to you, his supervisor. What is the best course of action?

- A. Tell Chris that if he goes down this road it will not help his career.
- B. Inform Chris that the information is not accurate and that he should be careful about spreading rumors.
- C. Direct Chris to make a written statement and then submit the statement to the OIG.
- D. Investigate his complaint.
- E. Ask Chris how he wants to proceed and if you can document his concerns.

# Answer

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E. The best course of action is to ask Chris how he wants to proceed and if you can document his concerns. Is he bringing the information to your attention for supervisory awareness? Does he want to know how and where to file a complaint? Listen to Chris, thank him for bringing his concerns to your attention, and alert him to his rights under the law.

**Remember:** Sometimes employees just want to be heard and ensure that someone at the agency is listening and hearing their concerns. In the rare circumstance where you are required to elevate the disclosure, be transparent and tell Chris why you must report the incident.

# How Can You Succeed?

1

Be knowledgeable about whistleblowing procedures and protections

2

Be consistent in managing employees

3

Be measured in speech and actions

4

Be mindful of how you engage when you have differing points of view, e.g., body language

5

Seek advice from your local experts when unsure