

# Whitney Campbell Christensen

Government Relations Attorney  
Ward and Smith, P.A.

Welcome!



# Ken Gray

Labor and Employment Attorney  
Ward and Smith, P.A.

*Ken's practice experience encompasses various areas of employment-related litigation. He advises clients and litigates cases involving all forms of employment discrimination, wrongful discharge, and breach of employment contracts from small start-up companies to Fortune 500 corporations. Ken is a frequent lecturer on employment discrimination, workplace retaliation, workers' compensation, and wage and hour law issues.*



# Emily Massey

Labor and Employment Attorney  
Ward and Smith, P.A.

*Emily's practice focuses on a wide range of labor and employment law issues, including personnel policies and handbooks, background checks, employment discrimination and harassment, employee discipline and termination, drug and alcohol testing, and various wage and hour matters.*







**We will use interactive polling  
during the presentation.**

**To the number 22333,  
text WSEMPLAW to join!**





# Ethics and Professional Responsibility in the #MeToo Era

  
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In the News

**What the Fox! Dramatic shakeup at top news network**

**O'Really? 'Horrrifying' that Fox re-signed predator Bill after his \$32M payoff to squelch sex-harass accuser**

**Producer. Predator. Pariah.**

**Spacey 'Tried to seduce boy of 14'**

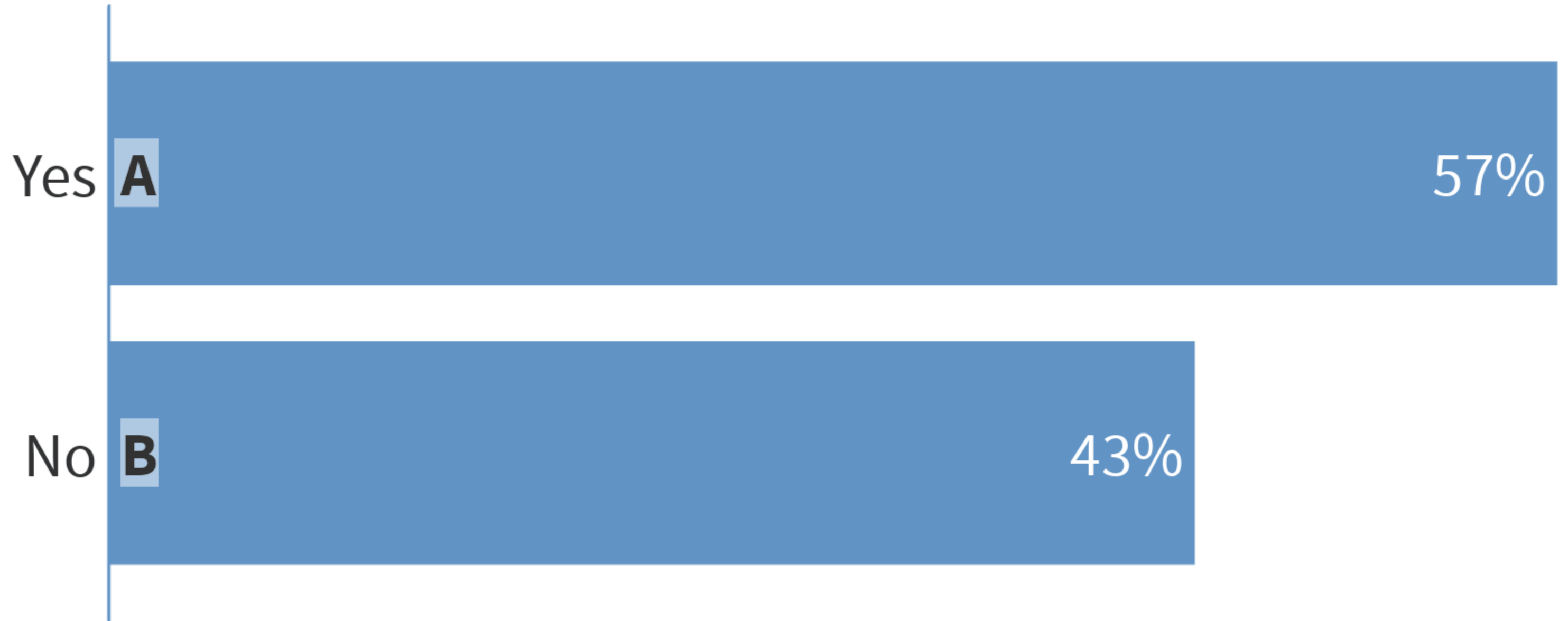
**Dirty Rock - Lauer exposed self to staffer, fired by NBC**

**Charlie Gross – Women staffers expose Rose's groping, sex talk & naked prancing**

**Mark Zuckerberg's personal security chief out over allegations of sexual harassment**



# Have you ever been involved, in any capacity, in a sexual or other unlawful harassment claim in the workplace?



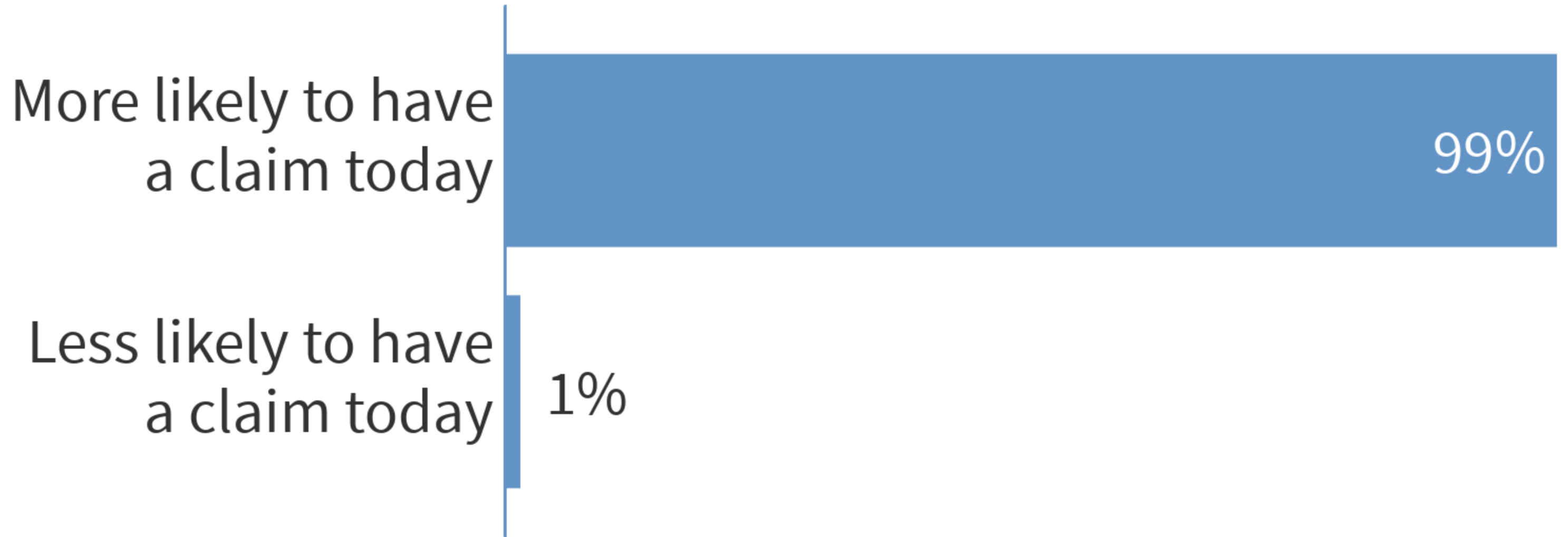
**Do you think the typical workplace today is more or less likely to have a harassment claim brought against it as compared to 20 years ago?**

More likely to have a claim today

99%

Less likely to have a claim today

1%



## Newsflash:

According to the EEOC's 2018 Performance and Accountability Report, released November 15, 2018, charges alleging sexual harassment increased by 13.6% in 2018.

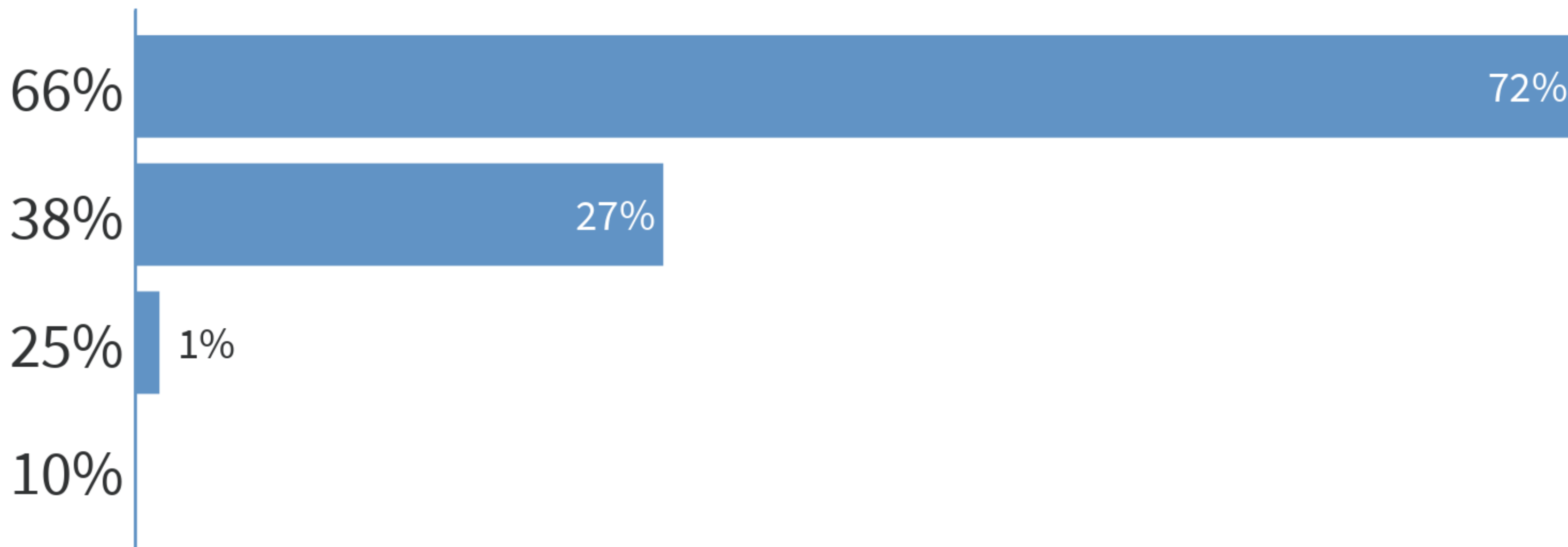




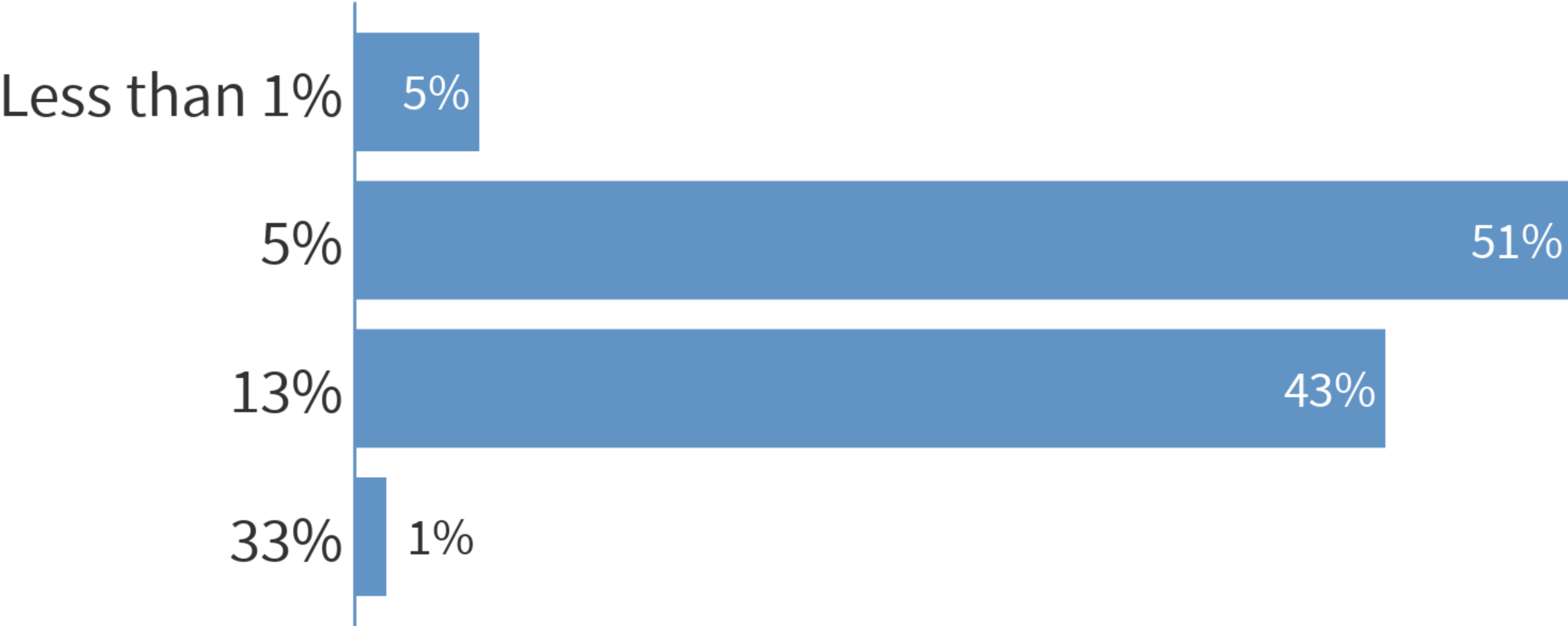


Just the Facts . . .

# According to a leading 2018 survey, what percentage of women have experienced sexual harassment in the workplace?

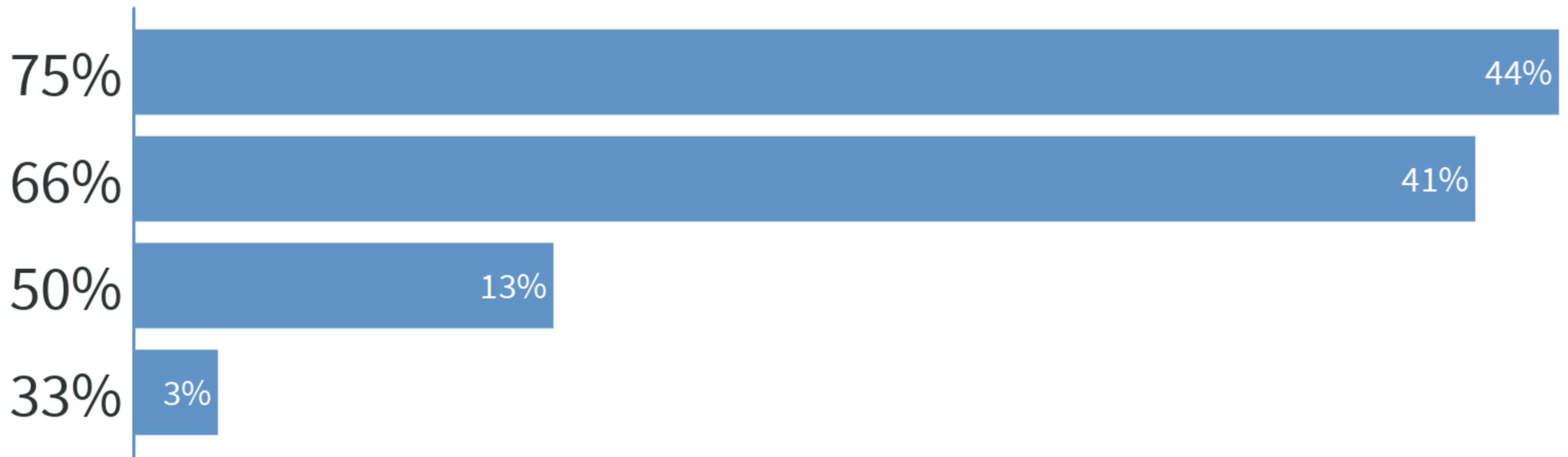


# According to a leading 2018 survey, what percentage of men have experienced sexual harassment in the workplace?

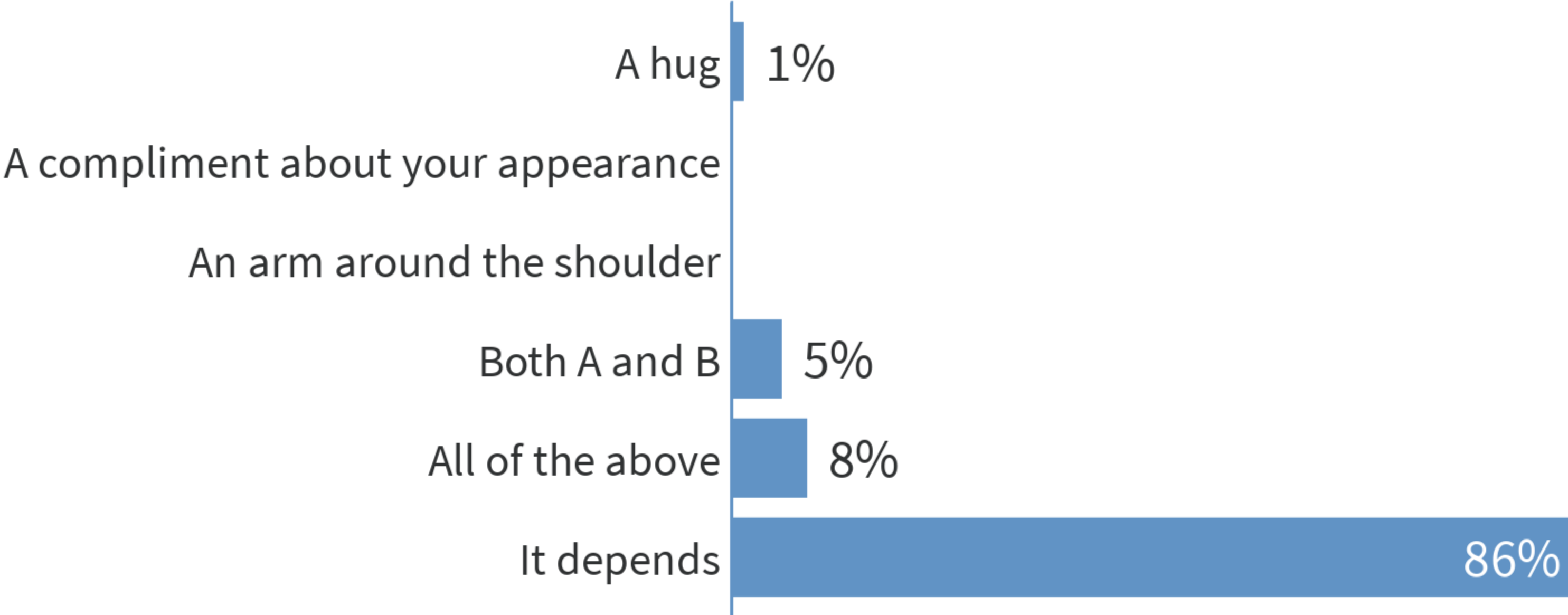




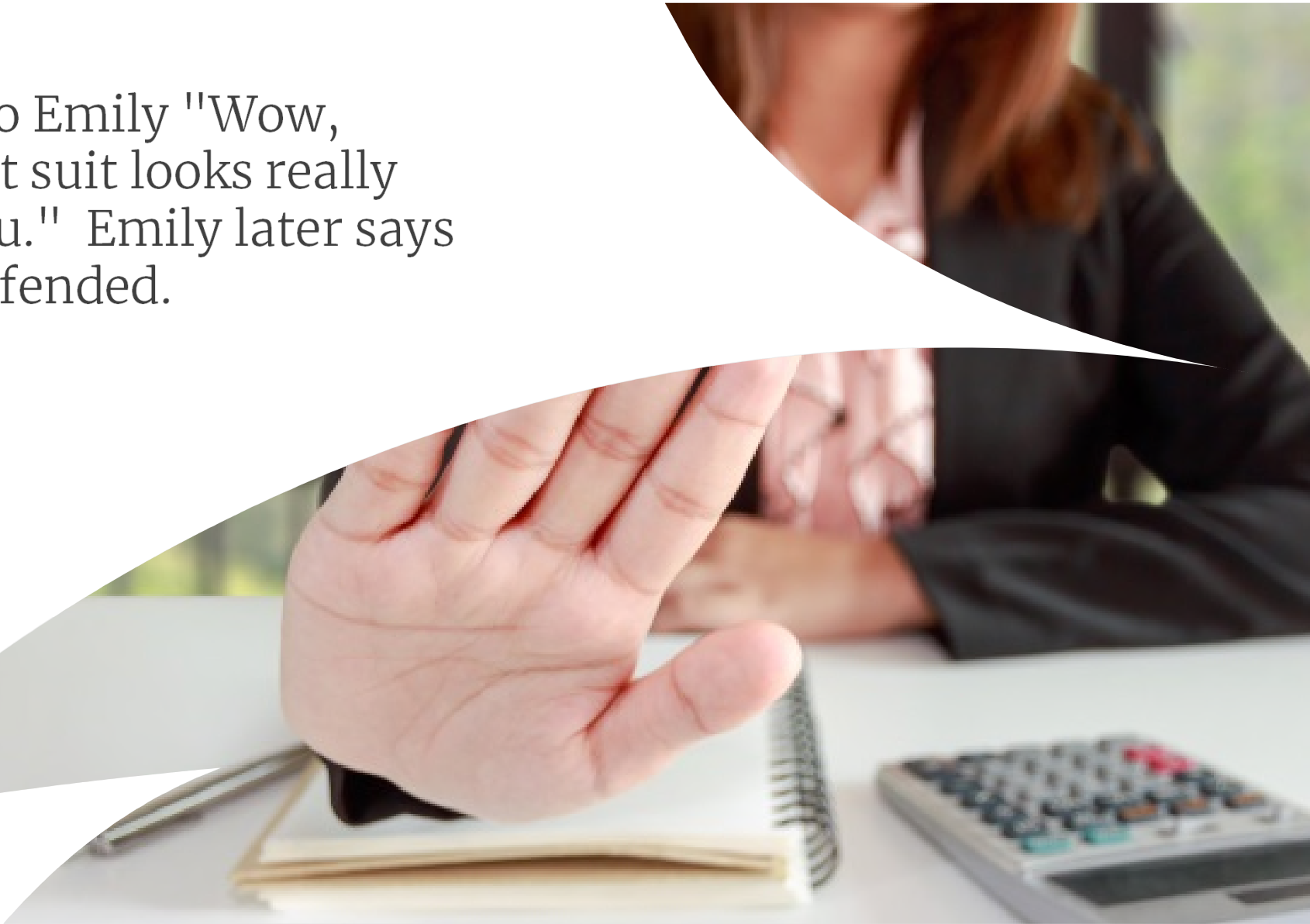
**According to the EEOC's task force on the study of harassment in the workplace, released in 2016, what percentage of individuals who experience harassment never reported it?**



# Which of the following would you consider appropriate conduct from a co-worker?



Ken says to Emily "Wow, Emily, that suit looks really nice on you." Emily later says she was offended.





# Does Emily have a valid claim of sexual harassment?

No, because it is a compliment

Yes, because it is offensive to Emily

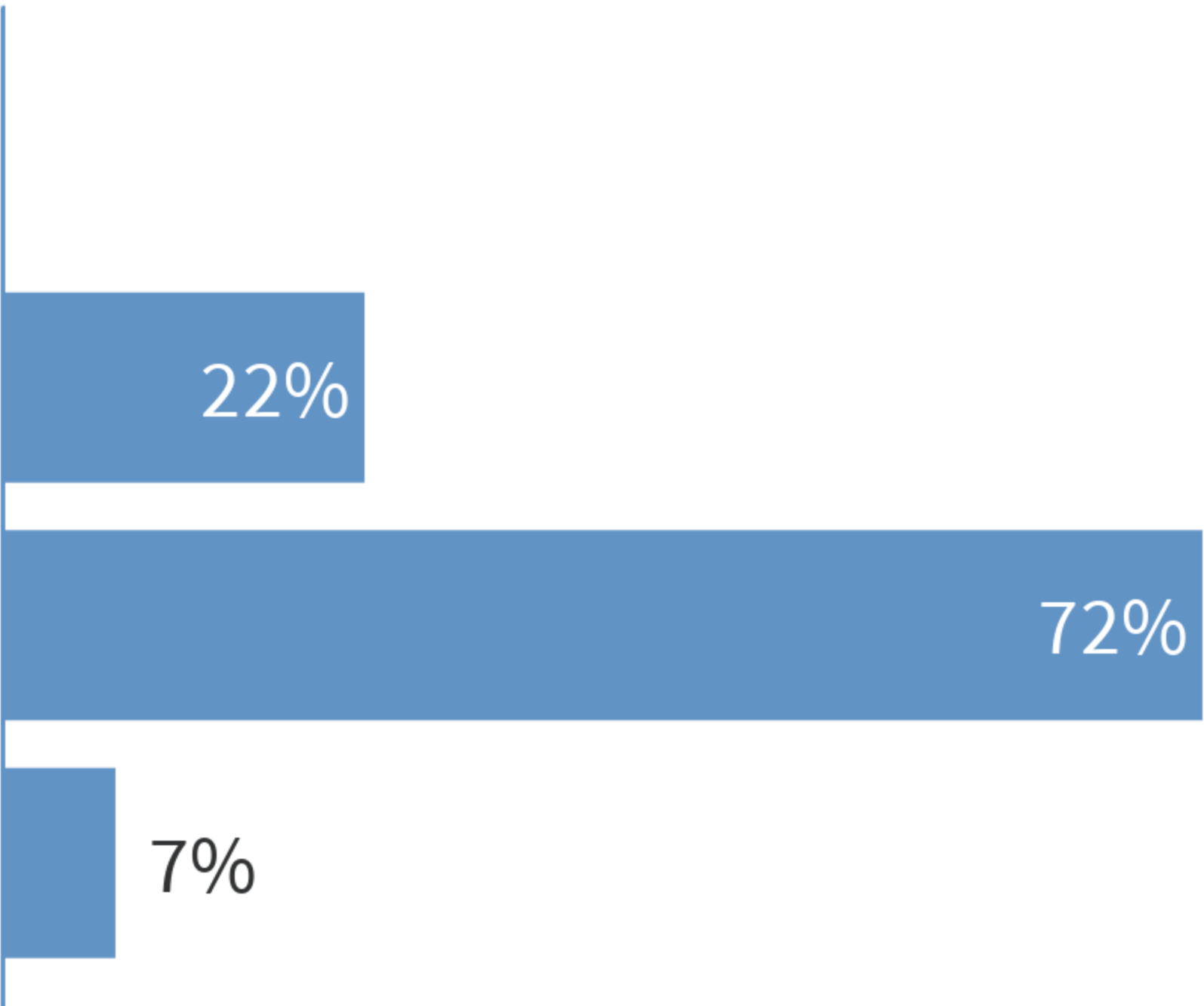
22%

No, but Ken should not comment about Emily's attire going forward

72%

Yes, because Ken is Emily's supervisor

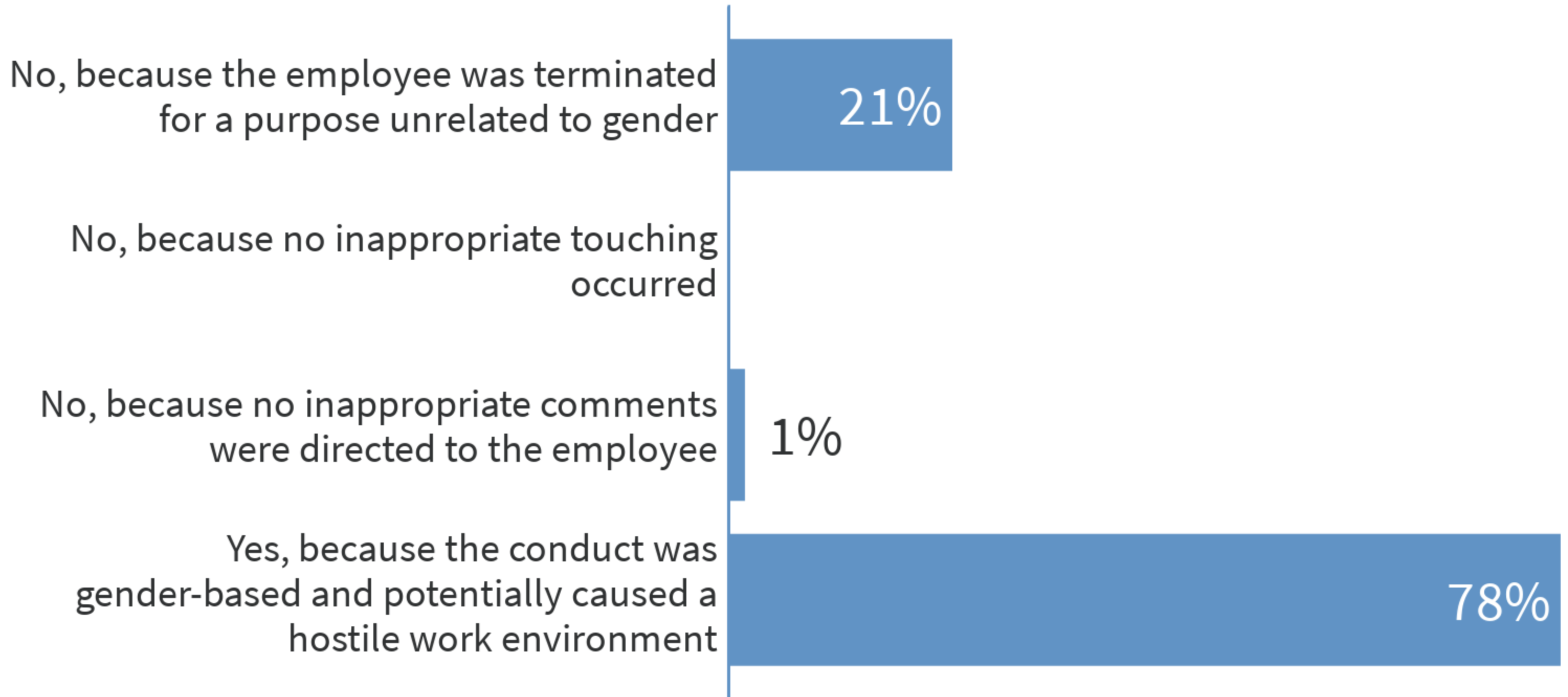
7%



Evangeline is hired as a low-level clerk, but is then promoted 6 times in less than 2 years to become an assistant manager. She hears that certain male coworkers, including a senior manager, are circulating rumors that she has been "sleeping her way to the top." Evangeline complains to HR that the rumors are untrue. Several weeks later, the senior manager terminates her employment for poor management ability.



# Is the employer at risk?



To state a claim under Title VII for a hostile work environment because of sex, claimant must show the workplace harassment was:

- (1) Unwelcome;
- (2) Based on the employee's sex;
- (3) Sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and
- (4) Imputable to the employer.







Sally confides in you that the owner of the company hugged her and kissed her on the cheek at a recent office holiday party. She says she thinks it was harmless, but that it still made her feel uncomfortable. She is very reluctant to make a big deal about it, so she asks you to keep it confidential.

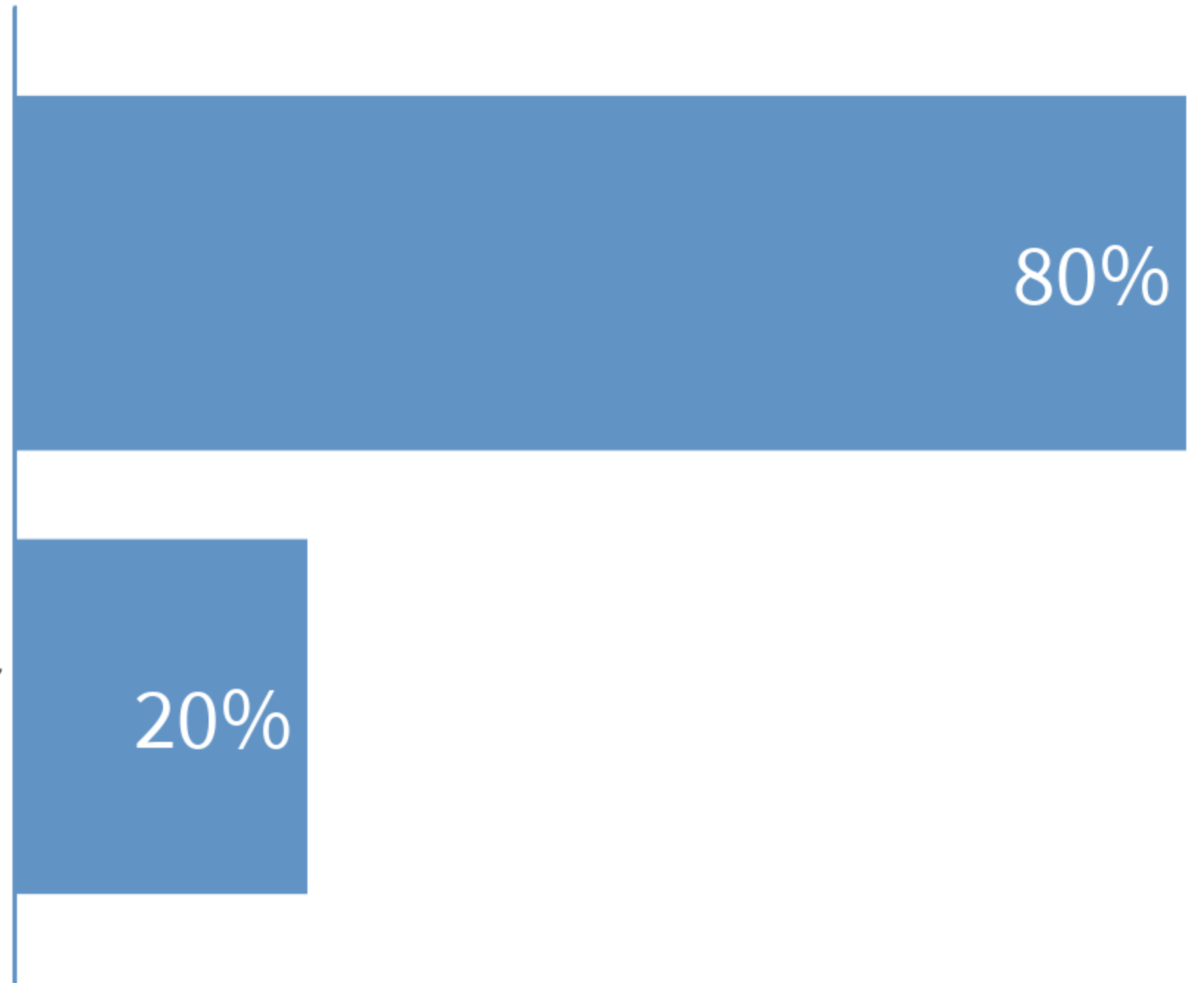
# What should you do?

Inform Human Resources  
(or the equivalent contact)

80%

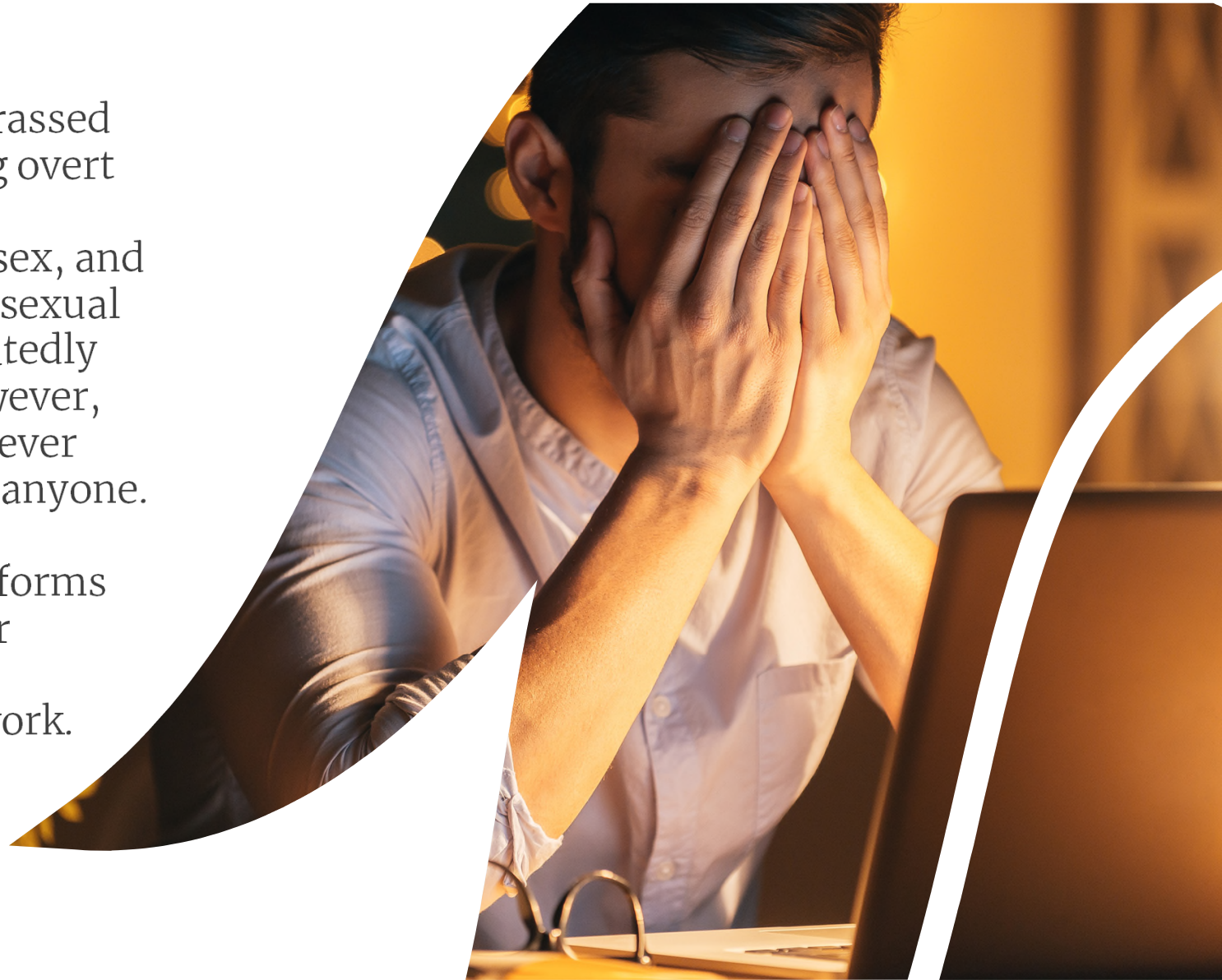
Make a note to yourself and  
inform Human Resources if  
you hear another complaint

20%



John contends that his supervisor Mary has harassed him for years by making overt sexual comments, propositioning him for sex, and even offering to pay for sexual acts. John says he repeatedly asked Mary to stop; however, fearing retaliation, he never formally complained to anyone.

Out of the blue, Mary informs John that he is no longer permitted to perform "voluntary" overtime work.



# Is the employer liable?



No, because the employee never complained about alleged harassment

19%

Yes, because the supervisor changed the employee's working conditions

81%





When a supervisor is the harasser and the harassment culminates in a "tangible employment action," the employer is strictly liable.

- Tangible employment action includes significant change in status, such as hiring, firing, failure to promote, or a decision causing significant change in benefits.

If the harasser is not a supervisor and/or if no tangible employment action occurs, then employer is entitled to assert an affirmative defense against liability.

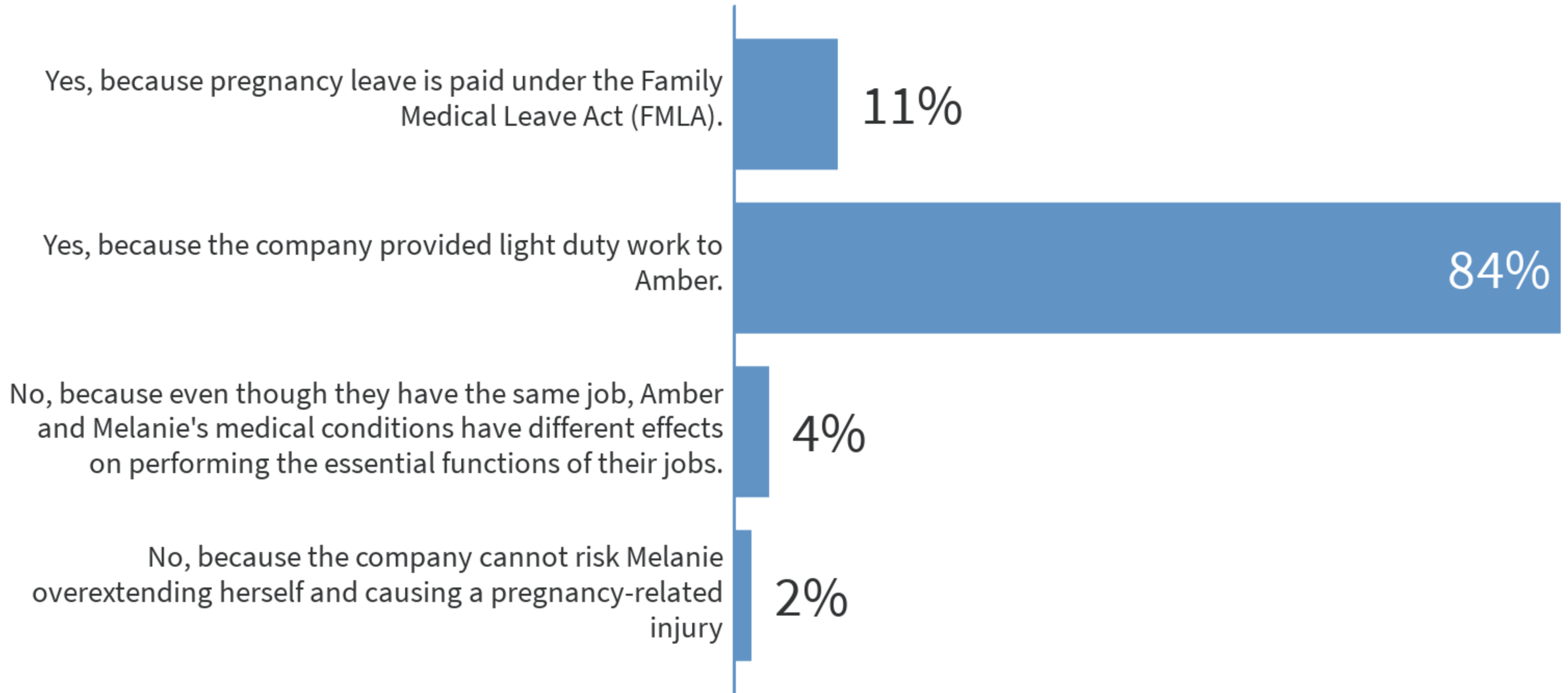
- Employer must establish that (1) it exercised reasonable care to prevent/correct harassment, and (2) plaintiff unreasonably failed to take advantage of the preventative/corrective opportunities.



Amber and Melanie perform the same job as paramedic for an emergency medical transit (EMT) company. Amber broke her foot during an off-duty accident. Amber is able to walk but needs to take it easy; her doctor released her to return to work on light duty for two months. The EMT company assigns Amber to a temporary light duty position.

Melanie is pregnant and is unable to stand or walk for long periods of time during her last month of pregnancy. Melanie requests light duty until she gives birth, as supported by a doctor's note. The EMT company told Melanie that she needed to take unpaid leave for the last part of her pregnancy.

# Does the EMT company have a problem?





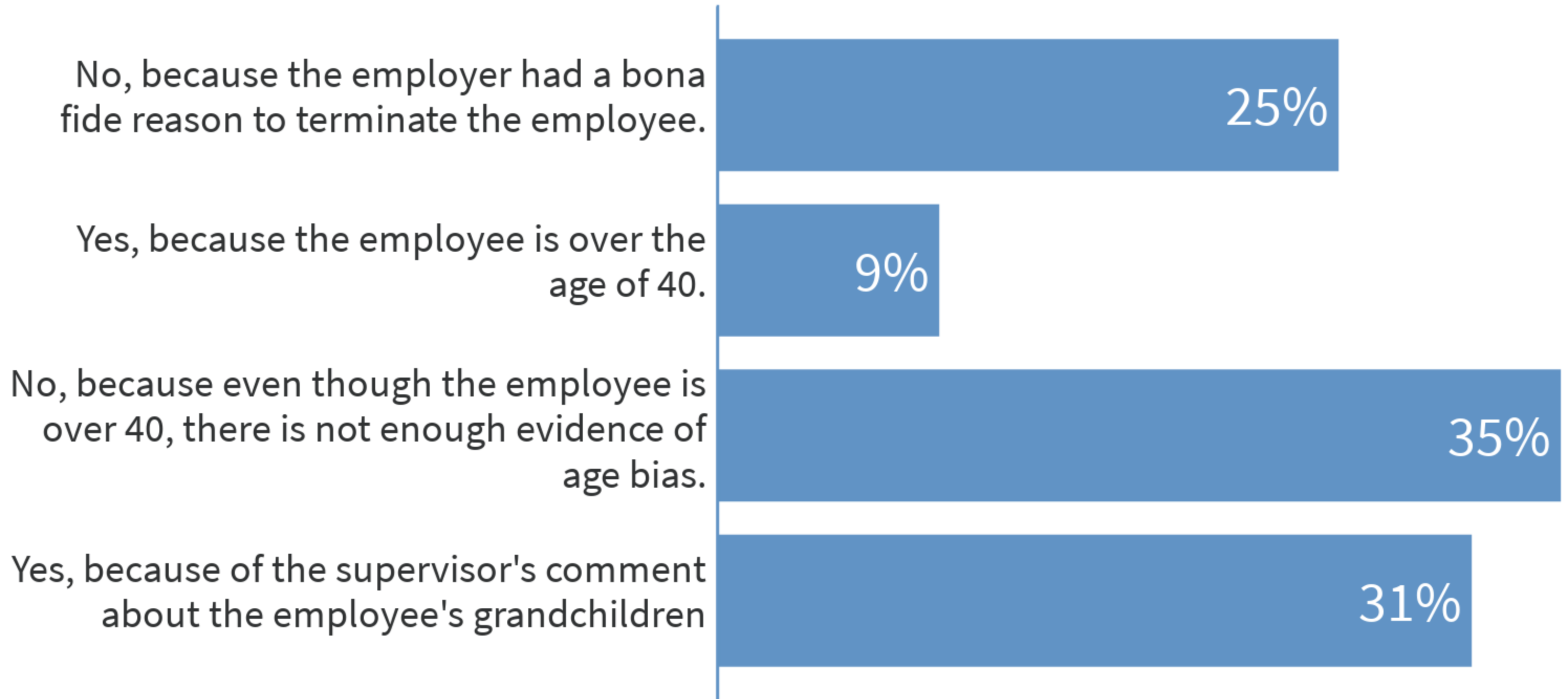
Amanda, age 65, works for an insurance company. Her supervisor informs her that she violated company policy by backdating an internal form. Amanda has a good relationship with her supervisor and they had a productive conversation about the error, and the supervisor thought it was not a big deal.

A week later, Amanda is fired due to the backdating. When the supervisor told Amanda goodbye, she told her to stay in touch and enjoy time with her grandchildren.





# Does the employer have a problem?



- Establish a **clear policy** prohibiting harassment;
- Ensure your harassment policy addresses scenarios for **any** potential harasser;
- Establish and foster an **open door policy** to ensure early reporting;
- Hold harassment training sessions for employees when hired and at least **every two years**;
- Hold harassment training sessions for managers when hired and at least **every year**;
- **Review** your harassment policy on an annual basis to ensure (1) it is clear and up to date and (2) the organization is following the policy;
- **Bottom line:** Encourage an environment of mutual respect.

## Best Practices





## What if Someone Complains about Harassment?

- Supervisors must immediately report the complaint to the appropriate contact within the organization (usually HR);
- Conduct prompt, thorough, and impartial investigation;
- Protect the confidentiality of harassment complaints (to the extent possible);
- Take immediate and appropriate corrective action if investigation reveals that harassment has occurred;
- Document the entire process.



## Your Role as In-House Counsel

- Carry out and enforce the harassment complaint and investigations process.
- Remember your ethical responsibilities to your client.

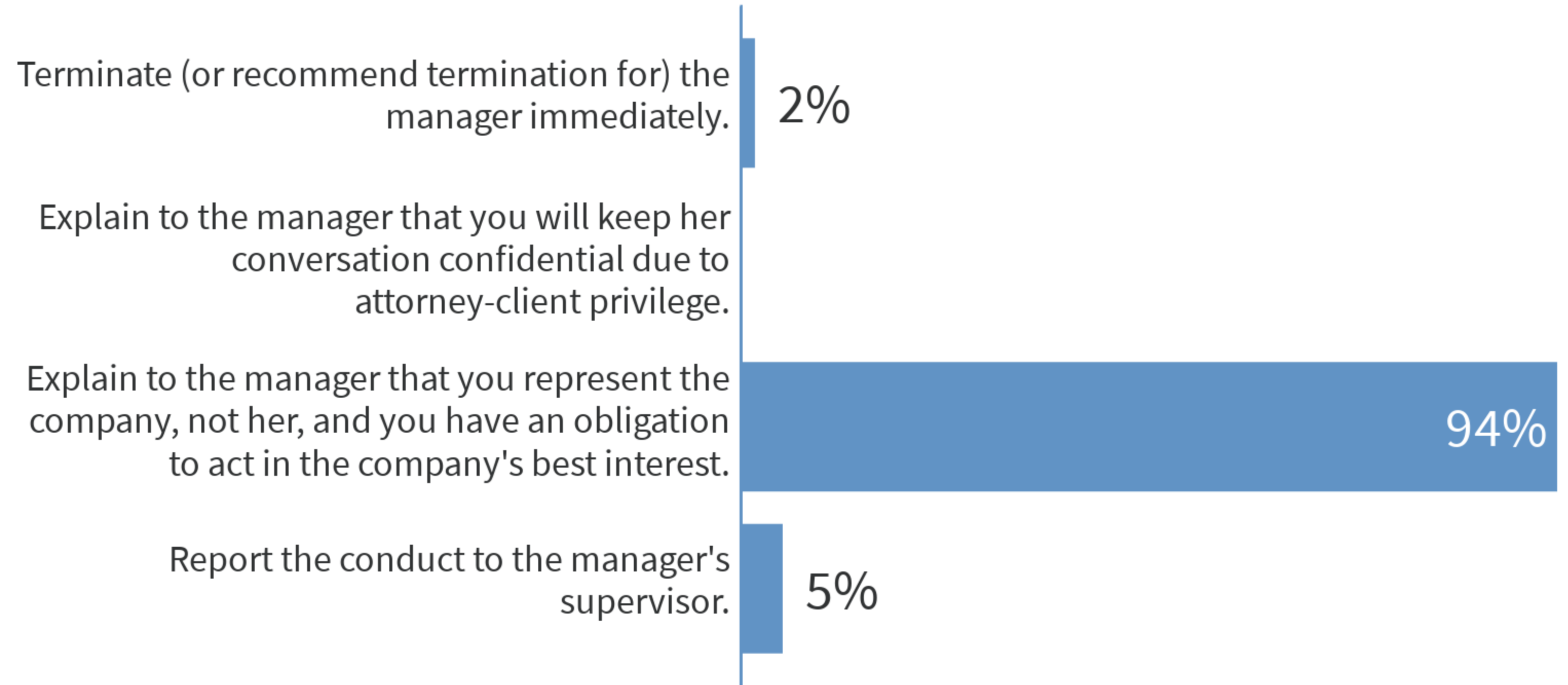


You are in-house counsel for a private company. A manager comes to you seeking legal advice because she told a racial joke in front of her subordinates and she admits the joke was inappropriate. No subordinate has yet raised a complaint. The manager asks that you keep your conversation confidential.





# What do you do next?



Terminate (or recommend termination for) the manager immediately.

2%

Explain to the manager that you will keep her conversation confidential due to attorney-client privilege.

Explain to the manager that you represent the company, not her, and you have an obligation to act in the company's best interest.

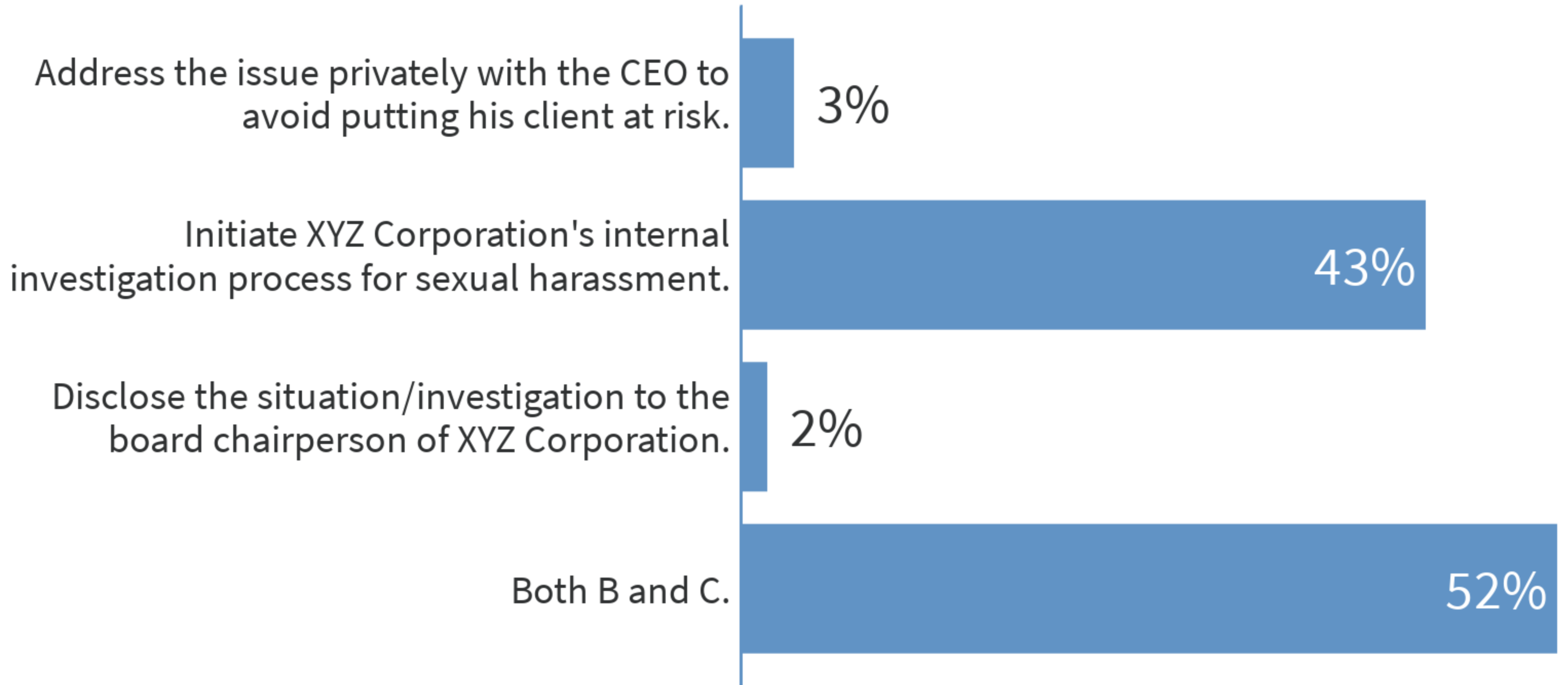
94%

Report the conduct to the manager's supervisor.

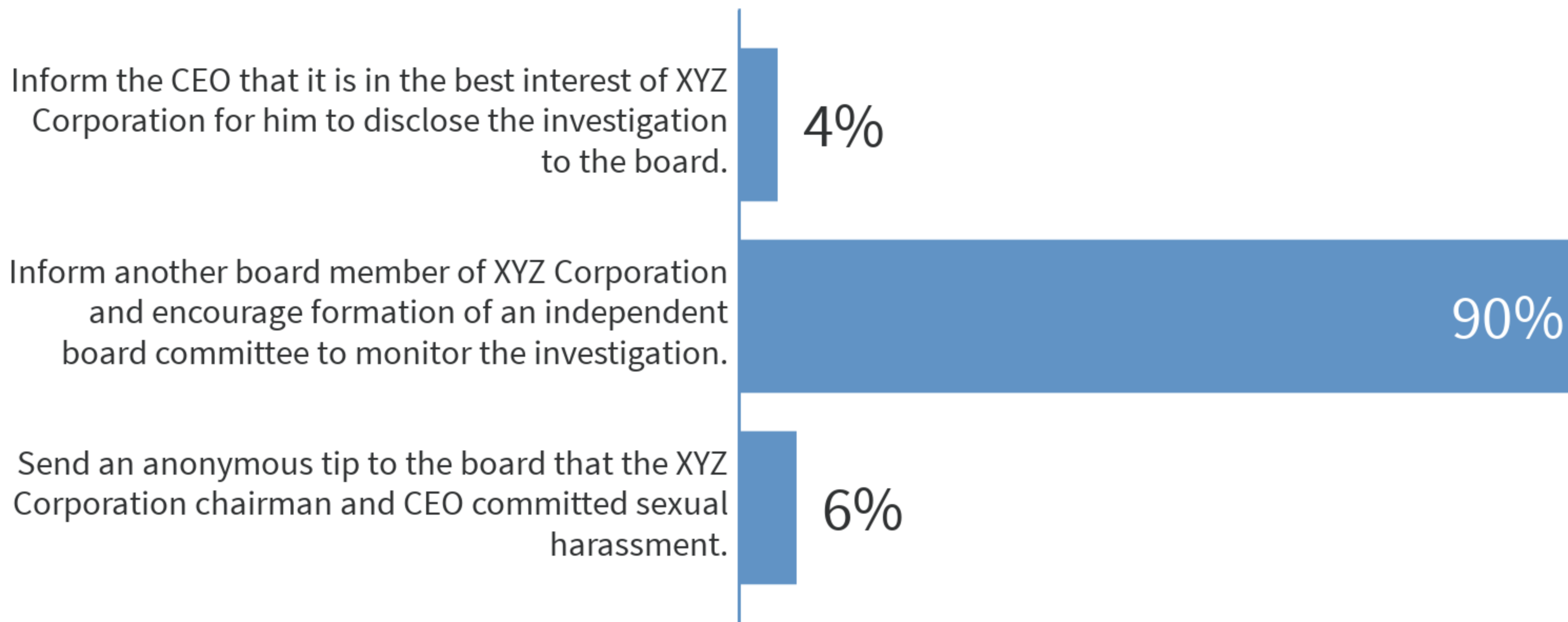
5%



# What is Robert's responsibility?



# Under the same scenario as before, what if the CEO is also the chairman of the XYZ Corporation board?





## Ethical Obligations of In-House Counsel

- Who is your client?
- When an individual in your organization approaches you:
  - Identify your client
  - Tell the person that they are not your client
  - Tell the person that the discussion *may* be protected by attorney-client privilege; however, the organization may choose to waive the privilege
- Reference: *Upjohn* and Rule 1.13(f))





## Ethical Obligations of In-House Counsel (cont.)

- Confidentiality under Rule 1.6
  - Again, who is your client?
- Role of advisor under Rule 2.1
  - Consider moral, economic, social, and political factors



**Thank you.**

**Questions?**

  
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**This program has been pre-approved  
by the North Carolina State Bar for  
1.5 hours of ethics CLE.**

**Accreditation information and Certificates of  
Attendance are available at the registration table.**