

# Workplace Harassment After #MeToo

**Deborah Hudson, Lawyer  
Turnpenney Milne LLP**



Industrial Relations Centre (IRC)  
Faculty of Arts & Science  
Queen's University  
Kingston, ON K7L 3N6

Tel: 613-533-6628  
Fax: 613-533-6812  
Email: [irc@queensu.ca](mailto:irc@queensu.ca)  
Visit us at: [irc.queensu.ca](http://irc.queensu.ca)

## Overview

On October 5 2017, the New York Times published an article detailing serious sexual harassment allegations against famous Hollywood producer Harvey Weinstein.<sup>1</sup> Three days later, his company's Board of Directors terminated his employment effective immediately.<sup>2</sup> In this context, actress Alyssa Milano took to Twitter, encouraging all women who have been sexually harassed or assaulted to change their status to "Me Too" (a hashtag originally coined by activist Tarana Burke) in order to give people a sense of the magnitude of the problem.<sup>3</sup> Since then, "Me Too" hashtags spread virally across the world's social media accounts, having reportedly been posted or commented on millions of times.<sup>4</sup> The women who came forward about sexual harassment allegations were referred to as "silence breakers", and Time Magazine named these "silence breakers" its "2017 Person of the Year".<sup>5</sup> This movement led to an outpouring of new allegations against various male celebrities and public figures on an ongoing basis. What followed was the rapid downfall of many of those accused, leading to prompt resignations and terminations from their respective roles.

Meanwhile in Canada, two high profile politicians recently resigned promptly after public allegations of sexual harassment and/or misconduct were made. Amidst the #metoo movement, the Toronto Rape Crisis Centre reported an increase in calls.<sup>6</sup> It appears many employers experienced a similar spike in sexual harassment related complaints, likely due to heightened awareness of the issues and women encouraged to speak out by those who already had. Workplace sexual harassment is a complicated subject. It involves far more than inappropriate comments or unwanted sexual advances. Sometimes consensual relationships can be considered sexual harassment when a significant power imbalance exists. Consensual relationships gone sour can turn into sexual harassment if reprisals or unwanted advances occur after the relationship ends. Joking co-workers and jock culture may create a toxic working environment for those exposed to it. Complainants may not wish to come forward due to fear of losing their jobs. Not all complaints are meritorious, leaving some respondents wrongly accused, stigmatized and/or wrongfully dismissed. When receiving a sexual harassment complaint, employers have an obligation to inquire most often by way of an investigation. Third-party or external

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<sup>1</sup> Jodi Kantor and Megan Twohey. "Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades", NYTimes.com, last modified October 5, 2017, <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>

<sup>2</sup> Robehmed, Natalie. "Harvey Weinstein Fired From The Weinstein Company", Forbes.com, last modified October 8, 2017, <https://www.forbes.com/sites/natalierobehmed/2017/10/08/harvey-weinstein-fired-from-the-weinstein-company/#12af4f216681>

<sup>3</sup> Milano, Alyssa (@Alyssa\_Milano). "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet." 15 October 2017, 1:21 pm. Tweet.

<sup>4</sup> Unknown. "More than 12M "Me Too" Facebook posts, comments, reactions in 24 hours", CBSNews.com, last modified October 17, 2017, <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/>

<sup>5</sup> Stephanie Zacharek, Eliana Dockterman and Haley Sweetland Edwards "Time Magazine Person of the Year". Retrieved from: <http://time.com/time-person-of-the-year-2017-silence-breakers/>

<sup>6</sup> McLaughlin, Amara. "Toronto sexual assault, harassment services flooded by calls triggered by #MeToo movement", CBC.ca, last modified October 27, 2017, <http://www.cbc.ca/news/canada/toronto/toronto-sexual-assault-harassment-services-flooded-by-calls-triggered-by-metoo-movement-1.4375827>

investigators may be most appropriate in sensitive situations. Given the complexity of sexual harassment issues, findings and fault may not always be clear cut. In some cases, employers should terminate the respondent. In other cases, substantiated findings may not warrant termination, but instead discipline and training. The workplace culture must be considered and may require change, and every circumstance must be considered based on its own facts.

The #metoo movement has empowered many women who were the victims of unjust behaviour to come forward, although the movement has its own inequities by persecuting and often impacting the livelihood of the accused without due process, or any process whatsoever. The court of public opinion quickly makes judgment, but employers should not do the same. Due process is important for all parties, as an employer has an obligation to all of its employees, both in terms of maintaining a safe workplace for all, and in terms of not summarily dismissing someone simply because an allegation is made. This article will explore the complex considerations regarding sexual harassment in Canadian workplaces, consider the roles and obligations of all parties involved, and review the importance of investigations and due process in relation to workplace sexual harassment complaints.

### **What is Sexual Harassment?**

Sexual harassment is a form of discrimination based on sex. Harassment is defined by Ontario's *Human Rights Code* as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".<sup>7</sup> While this definition suggests that more than one incident (i.e. "a course of conduct") is required to amount to harassment, a serious isolated incident can sometimes be significant enough to meet this definition.

Both women and men can experience sexual harassment in employment. Women may be more vulnerable as they have historically held lower paying jobs and/or lower status jobs, although employees in high paying and/or leadership roles can also experience harassment; no one is immune. Sexual harassment is not confined to opposite sex exchanges. Women can sexually harass other women and men can sexually harass other men, and this may occur regardless of the sexual orientation of those involved.

The Ontario Human Rights Commission's "Policy on Prevent Sexual and Gender-Based Harassment" provides a useful overview on the expansive definition of what may constitute sexual harassment, as it provides as follows:

Over time, the definition of sexual harassment has continued to evolve to reflect a better understanding of the way sexual power operates in society. For example, it is well-

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<sup>7</sup> *Human Rights Code*, R.S.O. 1990, c. H.19, s. 10(1)

established that harassment and discrimination based on sex may not always be of a sexual nature. Behaviour that is not explicitly sexual may still amount to harassment because of sex. The situation must be viewed in the overall context.

...

Human rights law clearly recognizes that sexual harassment is often not about sexual desire or interest at all. In fact, it often involves hostility, rejection, and/or bullying of a sexual nature.

...

The following list is not exhaustive, but it should help to identify what may be sexual and gender-based harassment:

- demanding hugs
- invading personal space
- unnecessary physical contact, including unwanted touching, *etc.*
- derogatory language and/or comments toward women (or men, depending on the circumstances), sex-specific derogatory names
- leering or inappropriate staring
- gender-related comment about a person's physical characteristics or mannerisms
- comments or conduct relating to a person's perceived non-conformity with a sex-role stereotype
- displaying or circulating pornography, sexual pictures or cartoons, sexually explicit graffiti, or other sexual images (including online)
- sexual jokes, including circulating written sexual jokes (*e.g.* by e-mail)
- rough and vulgar humour or language related to gender
- sexual or gender-related comment or conduct used to bully a person
- spreading sexual rumours (including online)
- suggestive or offensive remarks or innuendo about members of a specific gender
- propositions of physical intimacy
- gender-related verbal abuse, threats, or taunting
- bragging about sexual prowess
- demanding dates or sexual favours
- questions or discussions about sexual activities
- requiring an employee to dress in a sexualized or gender-specific way
- paternalistic behaviour based on gender which a person feels undermines their status or position of responsibility

- threats to penalize or otherwise punish a person who refuses to comply with sexual advances (known as reprisal).<sup>8</sup>

The above list is not exhaustive, but provides useful examples to illustrate the significant range of conduct that might constitute sexual harassment.

Gender-based harassment is one type of sexual harassment that often is not motivated by sexual interest or intent. The Ontario Human Rights Commission's "Policy On Preventing Sexual And Gender-Based Harassment" provides the following definition of gender-based harassment:

Gender-based harassment is one type of sexual harassment. Gender-based harassment is "any behaviour that polices and reinforces traditional heterosexual gender norms" (Elizabeth J. Meyer, "Gendered Harassment in Secondary Schools: Understanding Teachers' (Non) Interventions," *Gender and Education*, Vol. 20, No. 6, November 2008, 555 at 555). It is often used to get people to follow traditional sex stereotypes (dominant males, subservient females). It is also used as a bullying tactic, often between members of the same sex.

Example: A grade 9 male student has many female friends and is more interested in the arts than athletics. A group of boys at his school repeatedly call him "fag," "homo," "queer" and other names.

Unlike some other forms of sexual harassment, gender-based harassment is not generally motivated by sexual interest or intent. It is more often based on hostility and is often an attempt to make the target feel unwelcome in their environment. In some cases, gender-based harassment may look the same as harassment based on sexual orientation, or homophobic bullying. With the addition of the new grounds of "gender expression" and "gender identity" to the Code, many claims alleging gender-based harassment may also cite discrimination and/or harassment based on gender expression. Depending on the circumstances, it may be appropriate to cite gender identity as well.<sup>9</sup>

The above definitions illustrate that sexual harassment encompasses a significantly wide-range of conduct, which is not always motivated by sexual interest or intent.

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<sup>8</sup> Ontario Human Rights Commission's "Policy on Sexual and Gender-Based Harassment". Retrieved from: <http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment/2-identifying-sexual-harassment>

<sup>9</sup> Ontario Human Rights Commission's "Policy on Sexual and Gender-Based Harassment". Retrieved from: <http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment-0>

## Poisoned Working Environment

Sexual harassment may create a poisoned working environment which can impact many individuals in a workplace, not just persons who are directly involved in the conduct. A poisoned work environment can occur in various circumstances, including (but not limited to) when an employee is the direct target of sexual harassment or when the employee indirectly experiences sexual harassment by seeing, overhearing or otherwise observing inappropriate comments, gestures, jokes or the like, within the working environment.

The Human Rights Tribunal of Ontario recently issued a decision defining what constitutes a poisoned work environment. In *Crete v. Aqua-Drain Sewer Services Inc.*<sup>10</sup>, a female employee filed an application with respect to her former employer's failure to investigate her sexual harassment complaint as well as a reprisal. The applicant complained to her employer about a co-worker inappropriately touching her and kissing her. She testified that her male co-worker referred to her as "sugar tits" on multiple occasions. The employer never investigated the applicant's complaint, then terminated her employment. The Tribunal found that the employer had failed to investigate her complaint, there was a poisoned workplace, and that it had engaged in a reprisal terminating the applicant's employment. In describing the poisoned work environment, the Tribunal held as follows:

It is well established that if a person is subject to discrimination and harassment at work, the work environment can become "poisoned". If sexually charged comments and conduct contaminate the work environment, then such circumstances can constitute a discriminatory term or condition of employment ...

A workplace may become poisoned where discrimination or harassment on a prohibited ground becomes a part of a person's workplace, becoming a term or condition of employment.

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The term "poisoned work environment" is usually applied in circumstances where the work environment has become toxic because of pervasive discrimination or harassment, most commonly involving grounds relating to race or sex.<sup>11</sup>

In finding that the employer created a "poisoned work environment" the Tribunal noted the following:

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<sup>10</sup> 2017 HRTO 354 (CanLII)

<sup>11</sup> *Crete v. Aqua-Drain Sewer Services Inc.*, 2017 HRTO 354 (CanLII) at paras 49 to 51.

- the power imbalance between the applicant and her supervisor;
- the employer's awareness that the comments and the conduct were unwelcome through the applicant's written complaint;
- the sexualized comments did not cease and the conduct was allowed to continue; and
- the employer permitted the harassment to become a term or condition of employment.

This decision succinctly describes circumstances that amount to a poisoned working environment, although notably, the sexual harassment need not be directed specifically at an individual to create a poisoned working environment. The presence of comments and conduct within the environment may be enough to make the workplace toxic for those there.

### Consensual Relationships

Many mistakenly believe that the issue of consent fully determines whether or not sexual harassment has occurred, although the issue of consent is not straight forward. Consensual relationships can constitute sexual harassment in some circumstances where there is a significant power imbalance between the parties, even when the subordinate employee consents and specifically desires the relationship. An example of this is occurred in the decision of *Cavaliere v. Corvex Manufacturing Ltd.*,<sup>12</sup> where the Ontario Court of Superior Justice held that an employer had just cause to terminate a manager for having a consensual sexual relationship with a subordinate. Termination was warranted irrespective of the fact that the court found that:

The relationship was, on its face, consensual. Her interest in the affair was based in lust; the basis of his interest may have been the same or otherwise.<sup>13</sup>

In making this determination that just cause was warranted irrespective of this consent, the court described the female employee as a vulnerable immigrant from Vietnam who did not speak fluent English. Citing the risk of civil action and the need to protect employees, the Court found the plaintiff's dismissal to have been justified. He took advantage of his position. The plaintiff also negatively impacted the working environment as the female employee's husband worked at the same workplace.

Some consensual sexual relationships may not create issues from the outset but issues can arise later on if/when the subordinate is treated in a preferential or prejudicial manner by the superior involved in the relationship. For instance, in *O'Malley v. Pacific Customs Brokers (Airport) Ltd.*,<sup>14</sup> the Plaintiff

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<sup>12</sup> 2009 CarswellOnt 3199

<sup>13</sup> *Cavaliere v. Corvex Manufacturing Ltd.*, 2009 CarswellOnt 3199, at para 21.

<sup>14</sup> 1984 CarswellBC 806.

was a 49-year old general manager at a small business. He had an affair with a 22-year old female shipping clerk, and this affair became known in the workplace. The court found that the manager showed favouritism to the shipping clerk, and the staff complained about this favouritism. In these circumstances, the court found that the manager's consensual affair warranted just cause for dismissal. The decision is also illustrative of the fact that a consensual affair can impact workplace morale when there is favouritism or even just perceived favouritism due to that affair, creating conflict and impacting leadership within the organization.

Many sexual harassment complaints arise after a consensual relationship sours, and issues arise after the affair ends. This occurred in *Menagh v. The City of Hamilton*,<sup>15</sup> where the plaintiff had a consensual affair with a co-worker. When the plaintiff's co-worker ended that relationship, the plaintiff continued to pursue her, sending her flowers in the workplace, attending her home and ultimately unsuccessfully trying to convince her boss to terminate her employment. The plaintiff attempted to use his power to impact his ex-lover's employment circumstances and embarrass her in the workplace. In finding against this spurned lover, the court found that the plaintiff's conduct constituted sexual harassment and reprisal, warranting just cause for dismissal. While this particular example is more extreme than some, it demonstrates how sexual harassment can occur after a consensual relationship ends.

Power dynamics, break ups, favouritism and reprisal can all result in a finding that sexual harassment has occurred. In light of this, it is often the safest view for supervisors and managers to avoid consensual relationships with subordinates, or at the very least ensure any conflict of interest is removed. Employers should consider implementing policies and training for its management team and include the requirement for managers and supervisors to report conflicts of interest created by such relationships, in attempts to limit any potential resulting liability. Employees entering into such relationships should be cautious, understanding the risks involved. At the very least, having the manager or supervisor remove themselves from overseeing the subordinate could assist in limiting impact on morale, favouritism and potential reprisals.

### **Workplace Policies**

Many Canadian jurisdictions require that employers implement workplace harassment and discrimination policies often vis-à-vis occupational health and safety legislation. Whether or not such policies are mandated, all Canadian employers are obligated to maintain workplaces free from harassment and discrimination, in accordance with applicable human rights legislation. In this regard, creating a policy that provides definitions and processes to make complaints and investigate complaints is recommended in all workplaces.

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<sup>15</sup> 2005 CarswellOnt 4961 (S.C.J.); (2007), affd by 2007 ONCA 244

In considering language to be included in a discrimination and harassment policy, employers should reference the applicable human rights and/or health and safety legislation to ensure consistency in definitions, while also meeting minimum standards and requirements.

Any discrimination and harassment policy should include a manner and process for resolving allegations. Especially in cases of sexual harassment or intimidation by a manager or supervisor, an employee may feel trapped and may not know where to seek help. Establishing a clear, time sensitive policy for the review, investigation and resolution of complaints of harassment and discrimination is imperative. Equally important is ensuring that the process is promptly initiated and is completed in as confidential manner as possible. Employers may consider titling the policy as a “Respectful Workplace Policy” or words to that effect in order to focus on promoting a respectful workplace from the outset.

A well drafted policy should be coupled with employee training on the subject matter to ensure employees know what their rights are and what channels to use in the event of any potential issue. If the policy exists, but employees have not been made aware of its existence, there can be issues if there is a later attempt to rely on the policy. Beyond training employees on the policy itself, employers should also consider generalized harassment and discrimination training to ensure all employees are made aware of the types of conduct that may constitute harassment and discrimination. Pro-active approaches can help avoid future liabilities and costly disruptions in the workplace. Ideally, training will help maintain a positive working environment, or at the very least, ensure complaints are made earlier on at a time where it is easier to remedy the situation.

Beyond workplace harassment and discrimination policies, some employers have “Workplace Romance Policies”. Such policies may contain measures to encourage disclosure of relationships that could lead to an actual or perceived conflict, and allow for discussions and mechanisms to be implemented to avoid such potential conflicts. While such policies could be helpful, such policies could potentially be discriminatory (for instance based on marital status), and as such should be vetted by a professional to ensure legal compliance prior to implementation.

### **Sexual Harassment Complaints**

Sexual harassment complaints may come in many different ways, from informal remarks to formalized written complaints. On some occasions, an employee who has witnessed (rather than experienced) sexual harassment may come forward. Any and all complaints should be taken seriously. Employers are encouraged to have a formalized complaint process which provides direction for employees to submit a complaint, perhaps even by a prescribed form. That said, sexual harassment complaints are sensitive in nature and employees may find it difficult to come forward,

perhaps not wanting to raise a ‘formal’ complaint. In other circumstances employers may even receive anonymous complaints. In all circumstances, complaints should not be ignored or minimized.

In Ontario, the *Occupational Health & Safety Act*<sup>16</sup> provides that an employer must ensure that an investigation appropriate in the circumstances is conducted into “incidents” or “complaints” of workplace harassment.<sup>17</sup> The language clearly stipulates an investigation is required even without a formal complaint, as long as the employer is aware of any ‘incident’. Even if not statutorily required to investigate in other jurisdictions, it is always best practice to investigate any potential issues to avoid liabilities and be ready to defend a potential claim should there be one. The scope and the magnitude of the investigation can vary depending on the circumstances; however, once management is aware of an incident or a complaint, further action should be taken to meet statutory obligations (if such exist), to avoid human rights liabilities and most importantly, to protect and maintain a healthy and productive working environment that is free from harassment and discrimination.

### **Investigating Complaints**

A fair and reasonable investigation may be legally required and also can provide a defense for employers, and to assist in a future human rights complaint and/or a lawsuit from the respondent/accused. For instance, in *Morgan v. University of Waterloo*<sup>18</sup> the Human Rights Tribunal of Ontario considered an application relating to workplace harassment against both the university and an individually named respondent (a counsellor). The applicant worked with the individually named respondent as a counsellor. In allowing the application, in part, the Tribunal found that the individually named respondent was personally liable for sexual harassment; however, the university was not. The Tribunal specifically held that the university’s response to the complaint was “reasonable” and that the university had met its duty to investigate the circumstances. In this regard, a reasonable response and proper investigation can vitiate liability even in a circumstance where there is a finding that workplace harassment occurred.

The following is a summary of best practice steps to consider when conducting a workplace investigation. The steps below are generally in the order that they should take place, although fluidity and flexibility is required and each circumstance will unfold differently:

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<sup>16</sup> R.S.O. 1990, c. O.1

<sup>17</sup> *Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1, s. 32.0.7

<sup>18</sup> 2013 HRTO 1644 (CanLII)

- **Appoint Investigator:** Determine if an internal or external investigator will be appointed. In complicated or highly sensitive cases, a third-party professional investigator may be preferable.
- **Complaint Document:** Obtain a detailed written complaint document from the complainant. In the event the complainant cannot or will not write out a complaint document, prepare a complaint document outlining the allegations, and if possible, review this document with the complainant. In the event of an anonymous complaint, create a complaint document with the allegations set out therein. This step can be taken prior to appointing an investigator, or can be done by the investigator once appointed.
- **Mandate:** Establish the scope/mandate for the investigation. Is the investigation to consider a few particular allegations or an overall audit of the working environment? Is the investigation fact-finding only, or should the investigator be applying policy, and/or law? There should be a clear mandate setting out what issues to consider. The mandate could change depending on how the investigation unfolds, although the investigator should ensure any change in mandate is discussed with those instructing on the investigation.
- **Advising Parties of Investigation:** The Respondent(s) should be told that an investigation will take place. Confidentiality and privacy should be respected and knowledge of the investigation should be limited to those who need to know. This principle of confidentiality in investigations should be reinforced to all parties. To do this, an investigator might consider requesting that the parties sign a confidentiality agreement.
- **Work Environment during Investigation:** Consider what steps need to be taken to ensure a productive and safe working environment during the investigation. A determination should be made on a case-by-case basis. In some circumstances a change in reporting structure or an unpaid leave may be warranted, but this may not be the case in all circumstances. There is a balance between ensuring the complainant feels protected and the respondent does not feel like a finding of guilt has been made prior to the investigation being completed.
- **Provide Complaint Document to Respondent:** The Respondent is entitled to know details of the complaint made against him or her. The best practice is to provide this by way of a written complaint document at the outset of the investigation. In the event that this does not occur, the respondent at the very least is entitled to know specific details and relevant documents that relate to the complaint to provide a fair opportunity to present a defense.

- **Policy and Relevant Documentation Review:** The Investigator should review and consider any relevant workplace policies and procedures and the complaint document. The investigator should also review relevant emails, surveillance or other documentation that relates to the investigation mandate.
- **Conduct Interviews:** Interviews should take place in a private location. In a larger company, the human resources department could be appropriate or a management area. In some circumstances, an offsite location may be preferable (such as hotel board room). In person meetings are preferable but some circumstances may require phone or Skype interviews.
  - **Complainant Interview:** Best practices suggest the investigator should first meet with the complainant. The complainant should provide all relevant evidence, including their verbal testimony but also any documents, emails, text messages, etc. The investigator should obtain as many specific details as possible. If unionized, the complainant is entitled to union representation. The complainant is also typically entitled to request that their counsel attend the interview, if they have obtained counsel.
  - **Respondent Interview:** The investigator should meet with the respondent to review the complaints against him/her. The respondent may ask to bring a lawyer or union representative (which generally should be allowed). The investigator should provide the respondent with evidence against him/her, such as allegations or hard evidence (i.e. video and text messages) during the course of the interview. Transparency plays an important role in due process.
  - **Witness Interviews:** After meeting with the complainant and respondent, the investigator will determine other witnesses to meet with. The investigator can ask the complainant and respondent whom they feel the Investigator should meet with, but ultimately it is in the Investigator's discretion to determine the witness list.
  - **Complainant Follow-Up Interview:** After hearing from the respondent and witnesses, the investigator should follow up with the complainant to review any discrepancies in evidence.
  - **Respondent Follow-Up Interview:** Generally, best practices set out that the respondent should also be afforded an additional chance to present further information or speak to any discrepancies in evidence or similar.

- **Documenting Interview Notes:** Best practices suggest that the investigator should create interview notes during all interviews, and at the end of the meeting, provide the interviewees time to review and confirm accuracy of the notes. Once accuracy is confirmed, the witness can then sign off on the notes. Reviewing of the notes is particularly important for the complainant and respondent.
- **Report on Findings:** After collecting all evidence, the investigator will make findings. Often this occurs by way of a written report. In sexual harassment cases, often evidence may solely be based on he said/she said accounts with no other witnesses. In this case, the investigator will have to make findings of credibility.
- **Determining Outcome/Response:** Once the employer receives the findings, a determination must be made, in concert with legal counsel, on next steps. If there is egregious sexual harassment, this may require terminating the respondent. If there are some findings of misconduct that are not as serious, discipline and training may be warranted instead of termination. If the workplace environment is an issue, the entire workplace may require training and remedial action. If the complaint is unsubstantiated, a determination on how to address the complainant must be made, particularly in the case where an allegation may have been fabricated. In any event, each matter requires a case-by-case determination as to the employer's appropriate response.
- **Communicating Findings:** It is important that the employer close the loop at the end of the investigation. While the complainant and respondent are not necessarily entitled to the full details of the investigation report, it is important that the findings are communicated to them and next steps are provided to help them move forward. A written closing letter would be best practice.

The above is a summary outline of best practice steps in an investigation. A proper investigation will require time to ensure due process and fairness to all parties. An investigation should be completed in a timely manner, but it certainly should not be rushed. A fulsome exploration of the facts is far more important than a prompt determination which could result in unjust findings.

### **The Respondent/Accused**

Those accused of sexual harassment (or responding to any workplace investigation) may wish to seek advice from their union (if any) or an employment lawyer to ensure that they are adequately prepared for the investigation process. The investigation process can assist the respondent by potentially exonerating them and allowing them to provide their side of the story. If the respondent brings a lawyer or union representative, they should ensure that their support person does not

interfere with their evidence. Often, while lawyers or union representatives may be trying to assist the respondent, they instead try to shape the evidence and not allow the respondent to speak. This can become an issue when determining credibility.

If any of the circumstances could warrant criminal charges (i.e. assault), it is prudent to seek advice from criminal counsel, and consider whether or not participation in the investigation is appropriate in that context.

### **The Union's Obligations**

In the case of a unionized environment, the union may play a role in assisting either a complainant or a respondent in a sexual harassment complaint. This can become complicated when both parties are bargaining unit members. In this regard, the union is encouraged to provide assistance in a fair way to both parties, failing which, either party may be in a position to file a grievance, duty of fair representation complaint or human rights complaint against the union.

### **Communicating the Findings & Closing the Loop**

Once an investigation is completed, the employer should communicate findings to both the complainant and the respondent. While the employer is not required to provide full disclosure of the entire investigative process, summary findings certainly are important to demonstrate the employer has completed the process and to allow the parties some closure. Ontario's *Occupational Health and Safety Act*,<sup>19</sup> speaks to these obligations and applicable statutory obligations should be considered. The employer should advise the complainant which allegations were substantiated and which allegations were not substantiated. The employer is not required to provide full details of the remedial response, although the employer can state if one was taken (i.e. a statement that corrective action will be taken). Where a complaint is not found to be substantiated, there could be some circumstances where the complainant is deserving of discipline, although if the complaint was made in good faith, discipline would not be appropriate.

Sexual harassment complaints are certainly complicated, and substantiated findings against someone will not always warrant termination. Sexual harassment can be found in a spectrum of conduct, from inappropriate comments to unwanted touching or assault, a significantly varied scale. In light of this, when there is a finding of misconduct, employers must determine on a case-by-case basis an appropriate remedial response. If there is a workplace culture issue, it may be training for everyone and one-on-one training for the respondent (along with written discipline). If the conduct is significant, termination may be appropriate, but even where termination is appropriate, there may not be significant misconduct to warrant a just cause dismissal without pay. The employer must

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<sup>19</sup> R.S.O. 1990, c. O.1

balance the rights and obligations of all persons involved, and ensure that any response is reasonable and ensures an environment free from harassment and discrimination going forward.

### **Media Frenzy**

Finally, some comments on the role of media in these situations. The #metoo movement has resulted in the court of public opinion rushing to immediate judgment within moments or hours of allegations being made. Employers must be careful to not rush to such judgment and instead engage in due process. Despite this, unfortunately, media attention may sometimes require some form of prompt response. If and when the media is involved in a particular workplace allegation, an employer would be well advised to seek advice from an appropriate public relations specialist. An employer has an obligation to all parties in the workplace, including both the complainant and the respondent. In this regard, fast judgment and action without due process, could result in a finding that the respondent was not fairly treated, and may warrant significant damages. In some cases, the employer may be able to work with the respondent on a resolution and public messages by way of a resignation agreement, although this approach has risks; if the respondent does not agree, there could be a finding of constructive dismissal.

### **Conclusion**

The landscape of sexual misconduct complaints is swiftly changing. Public awareness and media scrutiny have put the issue of sexual harassment under the microscope and empowered women to speak up. While the #metoo movement signals positive societal changes, the media's approach and rushed judgments on the alleged harassers does not conform with legal obligations of Canadian employers in addressing workplace sexual harassment or discrimination issues. Appropriate investigations should be conducted, and such investigations can take time. In the end, it is better for all parties involved to have a comprehensive process completed to ensure the issues are fairly and accurately addressed. Employers should take a proactive approach by implementing relevant policies and providing respectful workplace training from the outset. When incidents or complaints occur, a fulsome investigation, and a fair process is required to ensure the employer is meeting its obligations to all parties.

## About the Author



Deborah Hudson is a lawyer at Turnpenney Milne LLP, representing both employees and employers in all aspects of workplace law. Her legal practice focuses exclusively on labour and employment law, with a specific interest in: human rights, civil litigation, wrongful dismissals and labour arbitrations.

Deborah regularly advises employers and employees in relation to matters occurring at all stages of the employment relationship, including: Reviewing/drafting employment contracts; drafting/interpreting employment related policies and procedures; advising on medical accommodation matters; providing advice in relation to workplace investigations and human rights matters; assisting in all levels of progressive discipline and drafting/reviewing termination packages.

Deborah values the importance of early and productive resolution discussions when beneficial and appropriate. In circumstances where resolution is not achievable or advantageous, Deborah advocates on behalf of her clients in all legal forums. Deborah has appeared as counsel before various courts and tribunals including: the Ontario Superior Court of Justice, the Human Rights Tribunal of Ontario, the Ontario Labour Relations Board, the Tax Court of Canada, the Workplace Safety and Insurance Appeals Tribunal and the Workplace Safety and Insurance Board.

Deborah has authored and contributed to a number of publications touching on various labour relations and employment law matters. Deborah has previously published three articles for Queen's IRC: "[Workplace Bullying and Harassment: Costly Conduct](#)" in 2015; "[Invisible Barriers: Accommodating Mental Illness in the Workplace](#)" in 2016; and "[The Golden Years: The Aging Workforce and Human Rights Matters](#)" in 2017. Deborah was a contributing author of [Startup Law 101: A Practical Guide \(2017\)](#),<sup>20</sup> the *Ontario Human Rights Code: Quick Reference – 2015 Edition*<sup>21</sup>, *Accommodation Issues in the Workplace (2014)*<sup>22</sup>, and *Halsbury's Labour Laws of Canada*.<sup>23</sup>

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Industrial Relations Centre (IRC)  
Queen's University  
Kingston, ON K7L 3N6  
[irc.queensu.ca](http://irc.queensu.ca)