Employers in Ontario are required to maintain a safe workplace, free from harassment and violence. Workplace harassment and violence include workplace sexual harassment and workplace sexual assault. This duty includes an obligation to handle sexual harassment complaints seriously, promptly and sensitively. Failure to do so could expose the employer to liability.

In Part I of this Guide, we covered what constitutes sexual harassment and sexual assault in the workplace, and what an employer’s obligations are with respect to sexual harassment and sexual assault, pursuant to the Occupational Health and Safety Act (“OHSA”) and the Ontario Human Rights Code (“Code”).

As outlined in Part I of this Guide, one of the duties
an employer has under the OHSA is to conduct a thorough, prompt and diligent workplace investigation with respect to complaints of sexual harassment and sexual assault.

In this part of the Guide, we will provide guidance to employers on how to properly conduct an unbiased and thorough workplace investigation into complaints of sexual harassment and sexual assault.

HOW TO CONDUCT AN UNBIASED AND THOROUGH WORKPLACE INVESTIGATION WITH RESPECT TO SEXUAL HARASSMENT & SEXUAL ASSAULT

As outlined in Part I of this Guide, an employer’s obligation to investigate allegations of sexual harassment or sexual assault is triggered as soon as the employer becomes aware that an incident has occurred.

The following are steps the employer should take to conduct a thorough and unbiased investigation:

1. Select an investigator(s)

Investigators must be impartial, unbiased, knowledgeable and responsive to issues and complaints of sexual harassment and sexual assault.

An investigator who is perceived as biased or who has a friendship or reporting relationship with the complainant or the respondent should not be selected. Possible investigators to select in an investigation may include:

- human resource personnel,
- a private investigator,
- outside consultants, and/or
- legal counsel.

2. Obtain Background Information on the Complainant and the Respondent

Once the investigator is selected, the investigator should first review both the complainant and the respondent’s personnel file, job description and performance reviews. While reviewing their files, it is important to verify that the complainant and the respondent have both:

- Received copies of the employer’s anti-harassment, anti-discrimination and anti-retaliation policies and complaint procedures;
- Received periodic training about these policies and procedures;
- Signed acknowledgment of receipt of employee handbooks; and
- Signed acknowledgment of attending training sessions such as signed attendance sheets.

By reviewing the complainant and the respondent’s files, the investigator can identify any prior complaints or grievances filed by or against the complainant or the respondent that may be relevant to the investigation.

3. Outline the Scope of the Investigation

It is important for investigators to stay organized given the complex-nature of investigating
allegations of sexual misconduct at the workplace. Investigators should prepare an investigative work plan and an outline of questions for the complainant, the respondent and potential witnesses. Investigators should also identify and review documents and determine the relevancy of each document.

Possible documents to review may include:

- Written complaint(s);
- Policies, procedures and instructions;
- Prior relevant investigation files;
- Prior relevant complaints;
- Personnel files of the individuals involved;
- Minutes of staff meetings;
- Collective bargaining agreements; and
- Other relevant business records.

While investigators are preparing to investigate the complaint, the employer should consider separating the complainant and the respondent pending the results of the investigation. The investigator must inform all parties involved of the importance of maintaining confidentiality during the investigative process and the employer’s zero-tolerance policies for harassment and retaliation against anyone participating in the investigation.

4. Conduct the Interviews

Typically, the investigator will interview the complainant first, then the respondent, followed by witness(es) separately.

(i) Interviewing the complainant

The complainant may be extremely emotional during the interview. It is important for the investigator to remain calm and set a proper tone by introducing themselves to the complainant and explaining the purpose of the interview.

Following the introduction, the investigator should address confidentiality at the beginning of the interview. It is important to disclose to the complainant that the investigator will maintain confidentiality of the information discussed to the extent reasonably possible, but that the investigator might be required to disclose some information to conduct a proper investigation. In addition, the investigator should inform the complainant that the employer does not tolerate retaliation for complaints of sexual harassment, sexual assault or for participating in an internal investigation. The investigator should remind the complainant to immediately report any incidents of retaliation to the investigator if such incident occurs.

Some example questions that the investigator should ask the complainant may include:

- Who was involved in the alleged misconduct?
- Where did the alleged misconduct take place? Was it at the workplace or offsite? Were there any witnesses? If yes, whom?
- What transpired between the respondent and the complainant that formed the basis of this complaint?
- What, if any, is the nature of their relationship (reporting, social, personal or dating etc.)?
• When did the complainant first meet the respondent?

• When did the incident take place? – specific date(s), times, etc.

• How often did the incident(s) occur?

• What was the complainant’s response when the incident occurred? How did the complainant react?

• Did the complainant tell anyone about the incident? Who? When? Where? What is the extent of their knowledge about the incident?

• If there is a span of time between the alleged harassing conduct, ask the complainant what prompted him or her to report the incident now instead of at the time of the incident?

• Ask the complainant whether he or she is aware of anyone else who has been harassed or assaulted by the respondent or anyone else and how he or she acquired this information.

• Ask if the complainant believes his or her job performance has suffered or if she or he has experienced any psychological injury as a result of the harassment or assault. If the complainant claims the conduct has negatively impacted his or her performance or mental state, ask for specific examples. Ask if the complainant has sought treatment.

• Ask for any documentary evidence that the complainant believes supports his or her allegations of sexual harassment, including any relevant e-mail, notes, photographs, voice mails, and audio or video recordings.

• Ask the complainant what specific relief and/or solutions he or she is looking for.

However, don’t make promises to provide the requested relief.

• Ask the complainant if there are any other incidents of harassment, assault or discrimination, or any other relevant information, that he or she has not told you about.

It is important for the investigator to periodically summarize what the complainant has said to ensure the accuracy of the complainant’s account and for the investigator to demonstrate attentiveness to the complainant’s responses. At the conclusion of the interview, the investigator should inform the complainant that there may be follow-up interviews depending on the situation and also that the complainant should contact the investigator regarding any concerns and any additional facts or events that were not mentioned.

After the interview, the investigator should review their written notes for accuracy and completeness. If the notes are difficult to read or contain shorthand, they should be rewritten or typed to improve legibility and clarity. These notes should also be provided to the complainant to ensure they are accurate.

(ii) Interviewing the Respondent

The respondent may be defensive, confused and confrontational during the interview. It is important for the investigator to set a proper tone
by introducing themselves to the respondent and explaining to the respondent that a full and through investigation on allegations of sexual harassment and or sexual assault will be conducted. The investigator should remind the respondent of the employer’s commitment to the anti-harassment, anti-discrimination and disciplinary action policies.

Following the introduction, the investigator should address the importance of maintaining confidentiality at the beginning of the interview. It is important to disclose to the respondent that the investigator will maintain confidentiality of the information discussed to the extent reasonably possible, but that the investigator might be required to disclose some information to conduct a proper investigation. In addition, the investigator should inform the respondent that the employer does not tolerate any form of retaliation against those participating in an internal investigation of sexual harassment or sexual assault.

To diffuse the tension, the investigator should start by obtaining background employment information of the respondent such as when and how the respondent began working for the employer and the overview of his or her position and job responsibilities.

As necessary, the interview should explain the specifics of each allegation made against the respondent. The investigator should review one allegation at a time to ensure a thorough investigation of the matter. At a minimum, the investigator should require the respondent to confirm or deny each allegation.

Sample questions to ask the respondent about each alleged incident of misconduct may include:

- Who was involved in the incident that transpired between the respondent and the complainant?
- What, if any, is the nature of their relationship (reporting, social, person or dating etc.)?
- What transpired between the respondent and the complainant that would give rise to complaints of sexual harassment or sexual assault?
- Where did the alleged misconduct take place?
- When did the respondent first meet the complainant?
- Why does the respondent think the complainant filed these complaints of harassment or assault?
- Does the respondent know of any other complaint of harassment, assault or discrimination the complainant has lodged with the employer or any other employer?
- Did they ever have a personal and/or dating relationship outside of the office?
- Has the respondent ever been alleged of harassment, assault or discrimination before, in this workplace or elsewhere?
- Has the complainant ever told the respondent that he or she does not like certain behaviour and asked the respondent to stop?
- Has the complainant initiated any jokes,
gestures, or behaviour that could be considered harassing or discriminatory?

If the respondent denies the allegations against him or her, ask why the respondent believes the complainant has raised these allegations. Discuss what potential motives might exist to cause the complainant to report these complaints. The investigator should ask the respondent for any documentary evidence that the respondent believes supports his or her position, including any relevant e-mails, notes, photographs, voice mails, and audio or video recordings. The investigator should also ask the respondent if there are any other witnesses or people who might have relevant information, and the extent of their knowledge.

It is important for the investigator to periodically summarize what the respondent has said to ensure accuracy and to demonstrate to the respondent that the investigator is attentive to what he or she has to say.

At the conclusion of the interview, the investigator should inform the respondent that the investigation is to continue and there may be follow-up interviews depending on the situation. It is important for the investigator to inform the respondent to contact the investor immediately regarding any concerns (including retaliation) and immediately disclose any additional facts or events that he or she may have failed to mention during the interview.

The investigator should also inform the respondent of possible disciplinary actions that could be taken in the event the allegations made against them are substantiated and/or the respondent retaliates against the complainant for filing the complaint or any of the witnesses for participating in the investigation.

After the interview, the investigator should review their written notes for accuracy and completeness. If the notes are difficult to read or contain shorthand, they should be rewritten or typed to improve legibility and clarity. These notes should also be provided to the respondent to ensure they are accurate.

(iii) Interviewing the Witness(es)

Similar to interviewing the complainant and the respondent, the investigator should introduce themselves to the witness(es) and explain that the purpose of the interview is regarding the allegations of sexual harassment and or sexual assault. Prior to asking questions of the witness(es), the investigator should address confidentiality at the beginning of the interview as discussed above.

The questions to ask are designed to elicit information while providing minimal information to allow the witness(es) to discuss his or her own version of events surrounding the complaints of sexual harassment and or sexual assault.

Sample questions to ask the witness may include:

- What is the witness’ relationship with the complainant and the respondent?
- Did he or she witness any inappropriate behaviour on the part of the complainant or the respondent? If yes, ask the witness to explain what they have witnessed.
- Are there any other witnesses or people who might have relevant information, and what is the extent of their knowledge?
• Is there any documentary evidence that the witness might have related to the allegations, including relevant e-mails, notes, photographs, voice mails, and audio or video recordings?

• Review the lists of sample questions set forth above for the complainant and the respondent to see if the investigator should ask any of these questions of the witness.

If the witness is unable to corroborate events, the investigator should inquire why the complainant, the respondent, or another witness might have suggested the witness be interviewed. If the witness is uncooperative, the investigator should communicate the employer’s policy regarding participation in internal investigations and explain that the witness’ refusal to cooperate with the investigation might result in disciplinary action up to and including discharge. The investigator must state the consequences in a firm, professional matter-of-fact manner and not in an aggressive, threatening way. If the witness refuses to cooperate even after the warning, it is crucial to document such refusal.

5. Concluding the Investigation and Writing a Report

After the investigator gathers all relevant information from interviewing the complainant, the respondent and witnesses, the investigator must assess the credibility of all parties, review all the information provided, including documentary evidence, and reach a conclusion on whether it is likely that the harassment occurred. If the investigator determines that based on all the information and evidence the alleged harassment or sexual assault did likely occur, the investigator will then need to decide what, if any, corrective and/or disciplinary action needs to be taken. The investigator should consider the nature, duration and seriousness of the harassment when determining the nature and extent of corrective or disciplinary action.

The investigator should provide the employer with an investigation report which sets out the investigation process, the evidence gathered, the findings and the reasons for the findings including the evidentiary standard that was applied in the investigation.

Once the employer is satisfied that the investigation was conducted properly, at minimum, the outcome of the investigation should be reported in writing to the complainant and respondent. If it is found that the harassment or assault likely occurred, the discipline or corrective action to follow also needs to be communicated to the complainant and respondent in the above report. This notice to the respondent could be in the form of a written warning, a suspension, termination, or corrective action such as workplace harassment training. However, if the harassment or assault allegation is unfounded, it is especially important to explain the basis of that finding to the complainant and respondent and address any further concerns the complainant may have.

WE ARE HERE TO HELP!

Understanding an employer’s obligations pursuant to the OHSA and the Code with respect to sexual harassment and sexual assault is crucial to avoid penalties and prevent liability. Contact Minken Employment Lawyers for assistance with reviewing and drafting workplace policies, conducting investigations in the workplace and addressing or responding to allegations of sexual harassment and sexual assault. Contact us today at contact@minken.com or call us at 905 477-7011. Go to our website and sign up for our newsletter to receive up to date information, including new legislation and Court decisions impacting your workplace.

Please note that this Guide is for informational purposes only and does not constitute legal advice. Every case is different, so we strongly recommend speaking to an experienced Employment Lawyer at our firm about your specific circumstances.

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