
Preventing and Responding to a Workplace Sexual Harassment Complaint

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Prevalence of Workplace Harassment

- According to Statistics Canada:
 - ❑ 25% of women and 17% of men said they had been the target of sexualized behaviour in their workplace in the preceding year
 - ❑ 20-30% of employees who experienced inappropriate sexualized behaviour said it was perpetrated by a person in authority
 - ❑ 13% of women and 3% of men said they had been sexually assaulted in a work-related context at one point in their lives
 - ❑ Among women who experienced sexual assault in a work setting in the previous year, 31% stated the perpetrator was a client, patient or customer

- Anyone can be a victim of workplace sexual harassment

Agenda

- What is workplace sexual harassment?
- Employer legal obligations
- Prevention strategies
- Responding to a complaint
- Corrective action and remedial measures

WHAT IS WORKPLACE SEXUAL HARASSMENT?

What is Workplace Sexual Harassment?

- Definition varies by province and legislation
- Generally requires a course of conduct but one significant incident can be sexual harassment
- General themes are:
 - It has a connection to or nexus to the workplace
 - It includes
 - Unwelcome sexual contact, advances, propositions or solicitation including abusing a position of authority
 - Leering, inappropriate staring or unwanted physical closeness
 - Sexually offensive remarks, jokes or rumours
 - Displaying sexually explicit pictures or graffiti
 - Reprisal for making a complaint

What is Workplace Sexual Harassment?

- Example: under the Ontario *Human Rights Code* (“*Code*”)
 - Every employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by their employer or agent of the employer or by another employee.
 - Every person has the right to be free from sexual solicitation and reprisal
 - Harassment means “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome”
 - To fall under the *Code*, harassment must be based on a protected ground – *e.g.*, sex, race, gender, age, disability, *etc.*

What is Workplace Sexual Harassment?

- Example: under the Ontario *Occupational Health and Safety Act* (“OHSa”) “workplace sexual harassment” means:
 - Engaging in a course of vexatious comment or conduct against a worker in a workplace, including virtually through the use of information and communications technology, because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome
 - Making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome

What is Workplace Sexual Harassment?

- **“Known or ought reasonably to be known”** has both a subjective and objective element
 - **Subjective** → harasser’s own knowledge of how their behaviour is being received
 - **Objective** → the point of view of a “reasonable” third party, how such behaviour would generally be received
 - Perspective of a “reasonable” third party takes into account the perspective of the person being harassed

What isn't Workplace Sexual Harassment?

- Under OHSA, workplace harassment **is not** “a reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace”
 - **Alberta, Saskatchewan, Manitoba, Prince Edward Island, and Newfoundland and Labrador** occupational health and safety legislation also defines what isn't workplace harassment
- Harassment is not
 - Work-related supervision or direction
 - Reasonable imposition of discipline
 - Performance evaluation
 - Policy implementation
 - Minor conflict/disagreement

What isn't Workplace Sexual Harassment?

Peninsula Youth Centre v OPSEU Local 216, 2026 CanLII 29964 (ON LA)

- Grievor alleged employer engaged in a pattern or harassment and bullying
- Arbitrator found harassment not substantiated
 - Individual's feelings of harassment are not sufficient, must be an objective element to harassment
 - Employee may feel offended, annoyed or intimidated by conduct, but if conduct is objectively reasonable, it will not constitute harassment
 - There is a difference between rude or unprofessional behaviour and workplace harassment
- Grievance dismissed

What isn't Workplace Sexual Harassment?

Toronto (City) v Canadian Union Of Public Employees, 2025 CanLII 121087 (ON LA)

- Grievor alleged employer harassed and discriminated against her by assigning her duties not part of her job and not assigned to coworkers
 - *E.g.*, meeting minutes, archiving, brochure printing, mail pick-up
- Arbitrator held there was no *prima facie* case of harassment
 - No evidence of a course of vexatious conduct which had an “abusive quality” to it
 - To the contrary, evidence employer was responsive to grievor’s requests, such as re-assigning meeting minutes to another coworker

EMPLOYER LEGAL OBLIGATIONS

Employer Legal Obligations

Risks of Non-compliance

- Significant risks for non-compliance with legal obligations regarding sexual harassment

- **Human rights**

- Vicarious liability when harassment created poisoned work environment or where harasser was manager or directing mind

- **Health and safety**

- Order or financial penalty for contravention

- **Civil liability**

- Constructive dismissal, moral or aggravated damages

- **Reputational harm**

Employer Legal Obligations

OHSA Duties

- Employer must ensure it:
 - Develops a workplace harassment program and policy
(and reviews it as often as necessary but at least annually)
 - Provides a worker with training re the program and policy
 - Investigates all incidents and complaints of workplace harassment
(investigation appropriate in the circumstances)
 - Informs the complainant and respondent *(if they are a worker)* in writing of results of the investigation and any corrective action

Employer Legal Obligations

Workplace Harassment Program & Policy

- Harassment program must be made in consultation with the workplace health and safety committee or representative
- Must include:
 - Procedure to report incident of workplace harassment, including if the alleged harasser is a supervisor or employer
 - How incident or complaint will be investigated and dealt with
 - Information about confidentiality
 - How a worker will be informed of the results of the investigation

PREVENTION STRATEGIES

Prevention Strategies

Recognizing Risk

■ **Situational and Environmental Risk Factors**

- ❑ Power imbalances – supervisor/subordinate dynamics, high discretion over promotions or job security
- ❑ Isolated or unsupervised work setting – remote site, after-hours
- ❑ Working with the public – late nights, limited security
- ❑ Work-related social events with an intoxicant, such as alcohol – holiday parties, conferences, client entertainment

Prevention Strategies

Recognizing Risk

■ **Behavioural Warning Signs**

- ❑ Escalating boundary testing – inappropriate jokes, comments about appearance, unwanted personal questions
- ❑ Persistent unwelcome contact – repeated invitations, excessive messaging, physical proximity
- ❑ Abuse of authority – benefits or favourable treatment based on personal or sexual compliance
- ❑ Retaliation – negative treatment, exclusion or schedule changes after concerns are raised
- ❑ Workplace culture that normalizes or dismisses inappropriate behaviour

Prevention Strategies

Training

■ **Best Practices for Effective Training**

- ❑ Conduct training at onboarding and regular refreshers
- ❑ Cover definitions of harassment and sexual harassment, reporting procedures, and consequences for non-compliance
- ❑ Use scenario-based exercises to help workers identify inappropriate conduct and understand bystander intervention
- ❑ Provide enhanced training for supervisors – how to recognize warning signs, receive complaints, and respond appropriately
- ❑ Document all training – maintain attendance records

Prevention Strategies

Virtual or Off-duty Harassment

■ **Increased focus on online conduct**

- ❑ OHSA now applies to telework performed in a private residence
- ❑ OHSA definition of harassment now explicitly includes “virtual” conduct

■ **Off-duty conduct can constitute “workplace” harassment**

- ❑ If there is a sufficient nexus to the employment relationship
 - *E.g.*, social media post targets a co-worker, harassment at an off-site work event, after-hours messaging
- ❑ Employer’s obligation to investigate is triggered if the conduct enters the workplace

Prevention Strategies

Virtual or Off-duty Harassment

Metrolinx v ATU, Local 1587, 2025 ONCA 415

- In a private WhatsApp group chat on their personal devices, five Metrolinx employees shared explicit, derogatory and sexist messages about other employees, including a female coworker
- The coworker received screenshots and reported them to a supervisor but declined to file a formal complaint
- Metrolinx investigated and dismissed the five employees for cause
- Arbitrator reinstated employees, finding:
 - Metrolinx lacked authority over private, off-duty conduct, and
 - Its policy required a formal complaint to trigger an investigation

Prevention Strategies

Virtual or Off-duty Harassment

Metrolinx v ATU, Local 1587

- Court of Appeal for Ontario disagreed:
 - ❑ OHSA requires employer to investigate every incident *and* complaint of workplace harassment – no formal complaint needed
 - ❑ Off-duty conduct on personal device can be disciplined if it has a workplace impact
 - ❑ Matter remitted to a new arbitrator for reconsideration

“Regardless of where the impugned conduct originated, it made its way into the workplace and became a workplace issue”

Prevention Strategies

Progressive Discipline

■ **Typical Steps**

- Verbal warning or coaching for less serious conduct
- Written warning with clear expectations and consequences for repeated or escalating behaviour
- Suspension for serious or continued misconduct
 - Where permitted by a collective or employment agreement
- Termination for cause if conduct is sufficiently egregious or prior discipline has not corrected behaviour

Prevention Strategies

Progressive Discipline

■ **Key Considerations**

- ❑ Progressive discipline promotes a culture of accountability
- ❑ Apply discipline consistently and document each step
- ❑ Level of discipline must be proportionate to misconduct
 - A single serious incident may constitute just cause for termination, even without prior progressive discipline
- ❑ Ensure the employee understands expectations and is given a reasonable opportunity to improve
- ❑ Communicate next steps if conduct does not change

Prevention Strategies

Progressive Discipline

Lantic Inc. v Public and Private Workers of Canada, Local 8, 2025 CanLII 11383 (BC LA)

- While on the picket line, grievor used megaphone to catcall a female security guard
- After strike, employer suspended grievor without pay pending investigation and later terminated employment for cause
- Arbitrator found incident was just cause
- Although the employer did not attempt progressive discipline, grievor's conduct was egregious

RESPONDING TO AN INCIDENT OR COMPLAINT

Responding to an Incident or Complaint

Reporting

- Policy must set out reporting mechanism, including to whom a complaint can be made when respondent is a manager or senior leader
- Supervisors and managers should be trained on what to do when they receive a complaint
 - How to speak with employees, whom to contact, documentation, and note taking
- Remember, employer may have obligation to address incident of harassment, even without a formal complaint (*Metrolinx*)

Responding to an Incident or Complaint

Confidentiality

- Important to protect confidentiality of complainant and respondent to extent possible
 - Cannot promise or guarantee confidentiality to parties
- Disclosure should be as limited as necessary to address incident and investigate
- Communicate confidentiality requirements to participants as part of the investigation process

Responding to an Incident or Complaint

Internal or External Investigator

■ **Internal Investigator may be appropriate if:**

- Complaint is straightforward and does not involve senior leadership
- Internal team has training and experience
- Internal resources can act quickly

■ **External Investigator may be appropriate if:**

- Allegations involve senior leader or person in a position of authority
- Real or perceived conflict of interest with internal resources
- Complaint is complex, involves multiple parties, or carries significant legal risk
- Organization does not have trained or experienced internal investigators, or capacity to respond quickly

Responding to an Incident or Complaint

Investigation Process

- Investigator must:
 - Speak with complainant to understand the complaint
 - Give respondent an opportunity to respond to the allegations
 - Interview any relevant witness
 - Collect and review relevant documents
 - Take appropriate notes during interviews
 - Analyze the evidence and make a determination of whether there was a breach of the legislation or policy

- Note: Specific timelines set out by regulation in the federal sector

Responding to an Incident or Complaint

Investigation Report

- Investigator must prepare a written report summarizing:
 - Scope of investigation
 - Steps of investigation
 - Evidence gathered
 - Findings of fact (including analysis of credibility)
 - Conclusion about whether or not workplace harassment occurred

Responding to an Incident or Complaint

Reprisal

- Employee cannot be reprimanded against for making a good faith complaint
- Carefully consider implications of making changes to a complainant's working conditions following a complaint
 - Even if legitimate, may be scrutinized
- If necessary to separate parties during investigation, take steps to minimize negative impact on complainant

CORRECTIVE ACTION AND REMEDIAL MEASURES

Corrective Action and Remedial Measures

Post-investigation Communication

- Both the complainant and respondent (if a worker) need to be advised in writing of:
 - Outcome of the investigation, and
 - Any corrective action imposed
- Parties not entitled to a copy of the investigation report, unless
 - Policy or collective agreement provides otherwise, or
 - Employer is in the federal jurisdiction

Corrective Action and Remedial Measures

Post-investigation Communication

Shannon Horner v Stelco Inc. Lake Erie, 2024 CanLII 16448 (ON LRB)

- Employee filed a harassment complaint alleging she had been harassed on social media by several unionized co-workers
- Employer investigated and gave complainant a letter which said her complaint was upheld and corrective action would be taken
- Employee complained the letter was deficient - Ontario Labour Relations Board agreed
- Letter did not disclose:
 - Which respondents were found to have engaged in harassment
 - The specific corrective measures that had or would be taken

Corrective Action and Remedial Measures

Disciplinary and Non-disciplinary Action

- **Non-disciplinary** options include mediation, coaching, training, and/or apology
 - Designed to address the conflict and move parties forward
- **Disciplinary actions** are designed to punish and correct
 - Same considerations apply to discipline for harassment as for other forms of misconduct
 - Effect of a “zero tolerance” policy

Corrective Action and Remedial Measures

Just Cause for Termination

Hucsko v A.O. Smith Enterprises Limited, 2021 ONCA 728

- Male employee with 20 years of service made four sexually harassing comments to a female co-worker
- Employer investigated, substantiated the complaint
- Employer issued a corrective action memo requiring sensitivity training and a direct apology
- Employee disagreed with findings, agreed to training but refused to apologize
- Employer terminated employment for cause
- Trial judge found no just cause and awarded 20 months' notice

Corrective Action and Remedial Measures

Just Cause for Termination

Hucsko v A.O. Smith Enterprises Limited

- **Court of Appeal overturned the trial decision and upheld termination for just cause**
- Sexually harassing comments **combined** with lack of remorse and refusal to comply with reasonable remedial steps constituted an irreparable breakdown of the employment relationship
- Court of Appeal also considered:
 - Employer's harassment policy
 - Recent harassment training on the policy
 - Senior position the respondent held and degree of trust

Corrective Action and Remedial Measures

Just Cause for Termination

Render v ThyssenKrupp Elevator (Canada) Limited, 2022 ONCA 310

- Employee with 30 years of service and a clean disciplinary record slapped a female co-worker's buttocks and said “good game” during an exchange of office banter
- Court of Appeal upheld termination – a single incident of sexual harassment can constitute just cause
- Court rejected “office culture” as a mitigating factor
- However, employee entitled to statutory termination pay because the incident was not “wilful misconduct” under the *Employment Standards Act*

Corrective Action and Remedial Measures

Returning Parties to the Workplace

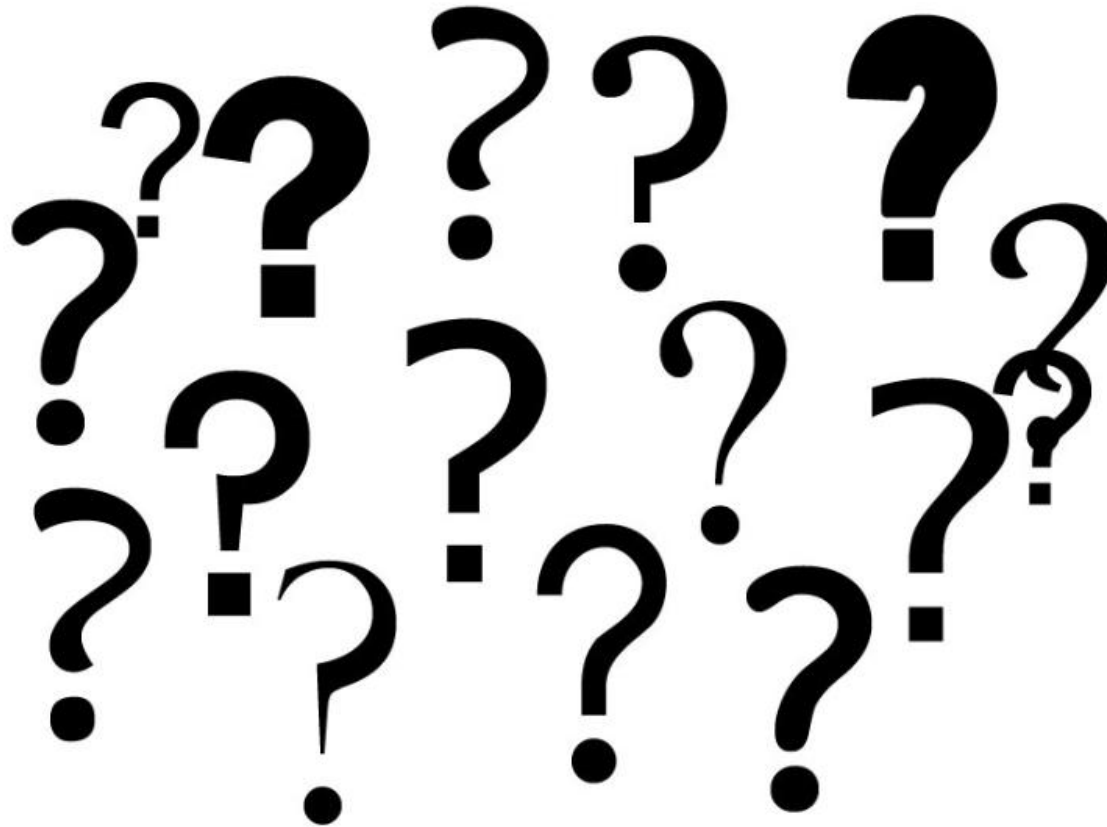
■ Reintegration

- Assess whether workplace modifications are needed
 - *E.g.*, adjusted reporting line, physical separation, schedule change
- Communicate expectations clearly to both parties
- Consider whether additional supports are appropriate
 - *E.g.*, counselling, mediation, or coaching

■ Monitoring and Follow-up

- Regular check-ins with complainant and respondent
- Monitor for signs of retaliation or reprisal and take immediate action if identified
- Document all follow-up steps

Questions?





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