



# Conducting A Harassment Investigation



## Why Investigate?

Acts of violence and harassment in the workplace are illegal (Occupational Health & Safety & Human Rights legislation). Employers are expected to provide harassment and violence -free work environments.

Harassment and human rights matters are highly sensitive and emotional situations to deal with, and require sound and thorough investigations to properly handle and effectively address these issues in a timely fashion (and to avoid poisoned work environments).

Human Rights issues can be costly, time-consuming and can affect productivity, employees' livelihoods and morale, and have serious legal implications for an organization. The organization's legal, financial and corporate reputation can be placed at risk.

## Due Diligence:

An organization's legal liability for harassment/discrimination and violence in the workplace is determined by the extent to which an employer exercised its due diligence.

## Demonstrating Due Diligence

- Having a human rights policy with ongoing education and training.
- Having appropriate internal mechanisms for handling human rights concerns and complaints.
- Resolving any matters in a timely and effective manner (degree or extent of action taken is appropriate and reasonable).
- Taking all steps to prevent such incidents from occurring or recurring (monitoring, leadership, education, being "pro-active").



## Objectives of a Quality Investigation

- To determine if there is sufficient evidence to support the allegation or complaint being made, or the concerns raised/ observed (“duty to act”).

## A Quality Investigation...

- Can minimize legal liability (if any).
- Can assist in identifying and implementing any proactive steps or measures to prevent a recurrence.
- Can allow an organization to move forward with certainty to take appropriate action to correct the problem (if necessary).

## When to Investigate

- The issue of concern identified, or the complaint being made, fits within the scope of the internal violence and harassment policy under the Occupational Health & Safety or Human Rights legislation.
- As soon as possible, in order to minimize liability, costs, disruption, employee morale and privacy/confidentiality issue

## Pre-Investigation Considerations

Internal policies, procedures (written vs. oral complaints, signed statements) Informal Fact Finding vs. Formal Investigation

Who conducts the investigation?

- Internal vs. External
- More than one investigator?

## Evidentiary Considerations

- Types of evidence (direct, indirect)
- Concept of “Best Evidence”
- Retention of evidence: maintaining an investigation file

## Safety, Confidentiality and Privacy Issues

### Standards of Proof

- **Prima facie case**
- Civil standard - **Balance of Probability:** “evidence in support of the allegations is sufficiently credible to lead a fair minded person to make a finding of discrimination...”

### Burden of Proof

#### Prima Facie Case

There is a statement from a complainant setting forth allegations against the “respondent” which, if they are accepted “on their face”, indicate that discrimination has occurred.

The “burden of proof” would then shift to the respondent (the one being accused) to refute the allegations and establish that discrimination did not occur, or that the respondent had a Code-related defense, which allows certain narrowly-defined kinds of discrimination to occur.



## Admissibility of Evidence

- Governed by the Statutory Powers and Procedures Act
- Anything relative to the subject matter is admissible (more relaxed standard)
- Can determine issues of credibility, reliability

## Administrative Fairness Issues (Both Parties)

- Right to a timely, neutral, unbiased investigation
- Right to representation
- Right of respondent to know who made
- Right of respondent to know case complaint (i.e., the complainant) (particulars) against him/her and
- Right to know outcome (disclosure) opportunity to reply (right to be heard)
- Limits to the right of disclosure
- Right to appeal or reconsideration (privacy considerations)



## The Investigation

### Issues/Facts/Evidence Model

Issues are the questions you have about the complaint (allegation, particulars)

Facts are what you must investigate and prove

Evidence is how you find and prove or disprove the facts.

### Interviewing Witnesses

- Investigation Planning: Issue identification, witnesses, parties
- Preparation: Review of any information, case law, similar fact situations
- Interview Setting: Best time, location (atmosphere and privacy), special needs
- Control of Interview: Power imbalances, comfort levels, psychological impact





## Interviewing Techniques

**Introduction:** Your authority to act, note location, date, time of interview and make note of all who attended, also if in person or done by telephone.

**Interview Style:** “Run-on” or verbatim vs. “Q&A” format: pros and cons, open-ended vs. closed questions (avoid interruptions and leading the witness).

**Determine** if any coaching, collusion has taken place. (goes to “weighting” of evidence.)

**Watch** your own language used and how you characterize events and issues. Do not indicate or show approval, disapproval, use plain language.

**Start** with easier questions, issues (helps to establish rapport) and use active listening techniques (paraphrasing, asking to repeat, probing).

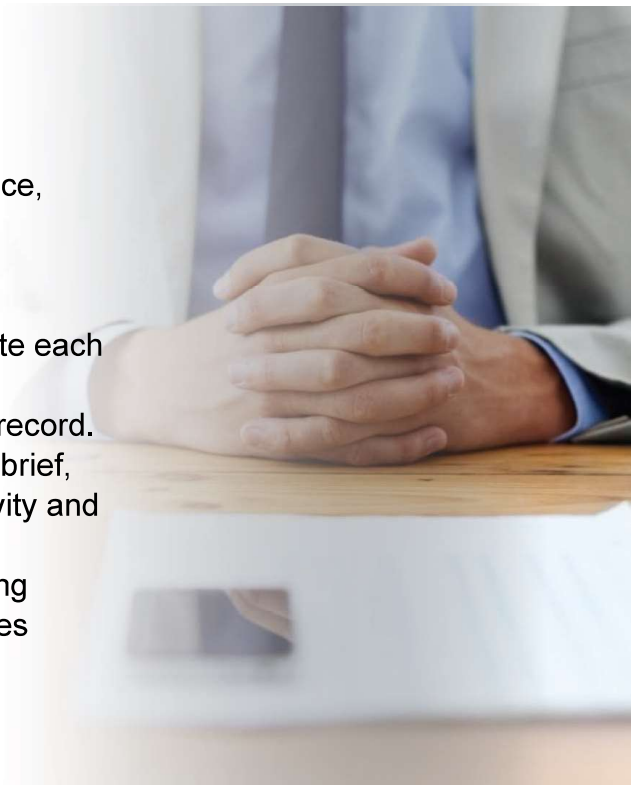
**Closing out the interview:** opportunity to review, correct and sign notes, provide copy of statement, advise what will happen next. Leave the door open for further contact.

**Conducting a Second Interview** and when.

**Retention of Evidence:** How it came into your possession, when it came into your possession, from whom, original, keeping an investigation file.

## Documenting How To's

- Use a Pen (preferably black)
- Write clearly (recording, use of video, note taker)
- Contemporaneous
- Put an identifier on all papers, documents and physical evidence, avoid gaps in notes.
- Record/use actual words, language of witness (no matter how graphic).
- Get parties to initial any corrections and sign (or initial) and date each page of statement.
- If a party declines to review, sign or date, make a note for the record.
- Your own notes pertaining to the interview or investigation: be brief, clear, neutral/objective and professional – avoid subjectivity and inappropriate language.
- Maintain consistency: Dating, signing, ensuring accuracy, noting time, location, parties attending, length of interview, parties advised of process, your authority to interview, right to representation, file identifiers, page numbering (e.g., page 1 of 6, etc.).



## Concluding an Investigation

- Making a Determination/Finding: Analysis and weighting of evidence – does the complaint have merit?
- Will a written report be required? (Format)
- Making recommendations
- Review of the findings and outcome (Disclosure)
- Taking Action/Liability Issues/Corrective Action
- Prevention



## Investigation Checklist

- o Neutrality/Impartiality/Credibility of the Investigator(s) (Perceptions/Appearance)
- o Confidentiality/Privacy Issues q Safety Issues
- o Right to Representation (Role of Union)
- o Translation/Accessibility/Cultural Considerations
- o Thorough Investigation/Obtain Best Evidence q Credibility/Reliability Factors
- o The Investigation File/Documentation
- o Communicating Results of Investigation (To Whom – Disclosure)
- o Periodic Review – Maintaining Records/Statistics/Being Proactive
- o The Possibility of External Investigations (Human Rights Tribunal, Police, Union, Provincial or Federal Labour Dept. Civil Suit)

