

## BALANCED RESPONSES TO ALLEGATIONS OF SEXUAL MISCONDUCT IN THE WORKPLACE ARE KEY

By Sheryl L. Johnson

Addressing and responding to sexual misconduct in the workplace is complex and involves many facets. The #metoo movement has underscored: (i) the fact that until recently many complainants have been hesitant to come forward while still employed for fear, amongst other things, of reprisal; and thus (ii) the importance that every complaint should be accepted on its face in good faith, with compassion and with as much privacy as is possible in the circumstances. This includes under the employer's internal complaint processes in both union and non-union contexts.

Such an approach is necessary as no person should have to endure such misconduct in their workplace let alone be re-victimized by having their characters questioned and their complaints disbelieved, marginalized or the subject of gossip. Such re-victimization can occur, for example, when their complaints are not acted upon in a timely manner - or at all, or where an employer inappropriately or ineffectively responds to or investigates such complaints. The latter can occur when the employer is more focused, intentionally or not, on protecting its brand and ensuing a desired outcome than on the impact of the allegations on the workplace parties or their legal obligations. This good faith acceptance of a prima facie case is the legal process required of employers responding to human rights violation allegations. Employee allegations of sexual misconduct - whether brought forward under a statutory occupational health and safety or human rights process, an internal workplace complaint process, or which arise out of an employer's common law obligations to its employees, ought not to be responded to any differently. They must be responded to in a timely and appropriate manner free from bias, the pull of self-interest and prejudgment or misconceptions about any party or witness. However, such acceptance is not and never should be the end of the matter.

Balanced against such an acceptance is the requirement of due process. The strength of our democratic and legal institutions is dependent on due process and natural justice (i.e., the duty to act fairly) being applied to all cases. To achieve equilibrium with an appropriate, fair and effective process, workplace allegations of sexual misconduct must be heard and investigated to the fullest and most private extent possible before determinations of credibility and fact are made. The longer a workplace investigation goes on for, the greater the potential for emotional, reputational and career harm being caused to a party. In complicated, particularly egregious circumstances or circumstances involving a senior manager, owner or public face of a business, due process often requires that an experienced independent investigator be retained to ensure both that a proper and complete investigation is conducted as well as is seen as having been conducted.



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Under due process, as complainants are treated with good faith, so too must be respondents. Meaning that respondents ought not be presumed guilty of the alleged misconduct without more - no matter the social context or political environment. Respondents must be provided with an opportunity to respond to the allegations against them and ought not to unnecessarily suffer from reputational or career harm caused by an employer responding without moderation. To do so exposes respondents to gossip and/or the besmirching of their characters, which can potentially end a career or an employee's career progression with little to no opportunity for recovery.

Respecting due process is in every employer's best interests from each a legal, public relations and employee relations perspective. An employer's failure to be fair and balanced in its response can increase either of the parties' potential damages awards (e.g. result not only in damages for wrongful dismissal but leave the employer open to claims in negligence in breaching their duty of care as well as punitive and other tort damages for conducting an improper investigation), negatively impact the organization's brand, and thus its profitability, as well as undermine employee morale resulting in increased absenteeism and use of employer benefits as well as reduced recruitment and retention opportunities. Added to this, where there is a failure of due process and a party assesses that the complaint has been unsatisfactorily resolved, a party is incentivized to: (i) file a statutory human rights or occupational health and safety complaint (as applicable); (ii) commence civil proceedings; and/or (iii) commence criminal proceedings. The ability to concurrently utilize these forums (except criminal) will depend on the Canadian jurisdiction. No employee is barred from filing a statutory complaint or commencing any other available legal proceedings if the employee fails to receive a satisfactory response from the employer's internal processes.

Aristotle's wise words: "The virtue of justice consists in moderation, as regulated by wisdom" still ring true.

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