#MeToo: Investigating and Responding to Allegations of Workplace Sexual Harassment

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PART 1: WHAT CONSTITUTES WORKPLACE SEXUAL HARASSMENT?

I. LAWS GOVERNING HARASSMENT

A. Federal Law Pertaining to Workplace Harassment


Harassment is a form of discrimination that violates Title VII. Harassment is unwelcome conduct based on a person’s race, color, religion, sex, national origin, age, disability, or other protected class.
2. **EEOC Regulations and Guidelines**

The Equal Employment Opportunity Commission ("EEOC") enforces the provisions of Title VII, including harassment on the basis of sex.

The EEOC defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. 1604.11(a).

3. Sexual harassment by governmental actors may violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Such a claim may be actionable pursuant to 42 U.S.C. § 1983. *Jenkins v. Univ. of Minn.*, 838 F.3d 938 (8th Cir. 2016).

**B. State Law Pertaining to Workplace Harassment**

The Minnesota Human Rights Act ("MHRA") prohibits discrimination based on race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age in employment and educational settings, among others. Minn. Stat. § 363A.01, et seq.

1. **The MHRA’s definition of sexual harassment parallels that of the EEOC and specifically defines it as:**

   Unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

   a. submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment…;
b. submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment…; or

c. that conduct or communication has the purpose or effect of substantially interfering with an individual's employment…or creating an intimidating, hostile, or offensive employment… environment. Minn. Stat. § 363A.03, subd. 43.

II. CATEGORIES OF SEXUAL HARASSMENT

A. Employee-to-Employee Harassment/Hostile Environment

Employer may be vicariously liable for employee-to-employee harassment if:

1. the employer knew or should have known of the harassing conduct; and

2. the employer failed to take immediate and appropriate corrective action.

B. Supervisor-to-Subordinate Sexual Harassment

The United States Supreme Court has made it clear that employers can be subject to vicarious liability for unlawful harassment by supervisors. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

1. Who is a supervisor? An individual qualifies as a supervisor if:

   a. the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or

   b. the individual has authority to direct the employee’s daily work activities.

2. Employer may be vicariously liable for supervisor-to-employee harassment unless:

   a. the employer took reasonable care to prevent and promptly correct any sexual harassment; and

   b. the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm or otherwise.
III. WHAT CONDUCT REACHES THE LEVEL OF HARASSMENT?

A. **Severe and Pervasive Conduct.** The United States Supreme Court has ruled that Title VII forbids conduct that is objectively offensive to such a degree that it alters the conditions of the victim’s employment. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

B. **Factors Considered.** To determine whether conduct reaches the level of harassment, courts consider the totality of the circumstances including the following:

1. The severity of the conduct:
   a. Is it offensive or abusive from a reasonable person’s point of view (objective test)?; and
   b. Is it offensive or abusive from the subject’s point of view (subjective test)?

2. Whether the conduct is physically threatening or humiliating, or a mere offensive utterance;

3. The frequency of the conduct – generally one incident is not sufficient, unless extremely severe; and

4. Whether the conduct has altered the conditions of the victim’s employment.

C. **Not a Code of Civility.** The Supreme Court has stated that the law of sexual harassment is not a code of civility in the workplace. Discourtesy or rudeness should not be confused with harassment, and that a lack of sensitivity does not alone, amount to actionable harassment. Differences in the way men and women routinely interact with members of the same sex and opposite sex do not constitute harassment. A single offhand comment or an isolated incident generally will not amount to “discriminatory changes in the terms and conditions of employment.” An unpleasant or cruel work environment is not necessarily a hostile environment.

IV. RETALIATION IS PROHIBITED

A. Both federal and state law prohibit retaliation based on an employee’s complaint or reporting of sexual harassment. Employees have a right to a harassment-free
workplace, and no adverse action may be taken against them because they have exercised this right. 42 U.S.C.A. § 2000e-3(a). Minn. Stat. 363A.15.

B. Retaliation may look like:

1. Termination
2. Denial of promotion
3. Unjustified negative evaluations
4. Increased surveillance
5. Demotion in position, wages, hours, job classification, job security
6. Any other action that is likely to deter reasonable people from pursuing their rights.

Note: Retaliation may occur even when the underlying claim of harassment is not upheld.

V. CONSEQUENCES OF WORKPLACE SEXUAL HARASSMENT

A. School District Liability.

Sexual harassment can open a school district up to liability from lawsuits, EEOC investigations, and Department of Human Rights investigations.

Employers are responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knew or should have known about the harassment, unless it can show that it took immediate and appropriate corrective action.

B. Discipline

C. Unwanted Publicity and Public Scrutiny.

VI. SEXUAL HARASSMENT CASE LAW UPDATE

A.  Blake v. MJ Optical, Inc., 870 F.3d 820 (8th Cir. 2017).

A long-time employee voluntarily resigned from her position. She alleged that the Vice President of the company would touch and grab her buttocks, and made inappropriate comments. The Court found no harassment because the employee
worked with the VP for almost 15 years without complaining to anyone about the conduct or telling him to stop. The two often joked around, told each other “I love you” and platonically touched each other. The employee did not indicate that the conduct was unwelcome and therefore could not claim a hostile work environment.

B. *Jenkins v. University of Minnesota*, 838 F.3d 938 (8th Cir. 2016).

The Court found that University employed scientist, Ted Swem, was not entitled to qualified immunity. The Court found that although Jenkins did not immediately report Swem’s conduct, she demonstrated that it was unwelcome by telling him many times she was not interested. The Court also found that a reasonable public official would have known that his actions could amount to sexual harassment, even without physical contact.


The Federal District Court of Minnesota found that the company could assert the Ellerth-Faragher affirmative defense for the sexual harassment of Radmer because the company was never given an opportunity to remedy his working conditions, therefore there was no constructive discharge and no tangible employment action. The company took reasonable care to prevent sexual harassment with its anti-harassment policy and it was never able to correct the behavior because it had no notice of the alleged harassment.


Employee was terminated three weeks after filing a complaint purporting sexual harassment by his direct supervisor. The Federal District Court of Minnesota found that his good faith, objectively reasonable complaint was sufficient to trigger the protections of Title VII and the MHRA even if the underlying incidents do not amount to actionable sexual harassment.

E. *Blomker v. Jewell*, 831 F.3d 1051 (8th Cir. 2016).

Employee alleged seven incidents spanning a three-year period with two different men. The Court found that the alleged behavior might have been vile or inappropriate but did not rise to the level of actionable sexual harassment. None of the alleged incidents involved actual touching and some of the allegations were not definitively sexual in nature.

Jury returned a verdict that the employee was not constructively discharged or subjected to sexual harassment or a hostile work environment, the employer exercised reasonable care to prevent and correct harassing behavior, and the employee unreasonably failed to take advantage of the employer’s preventative or corrective measures. The Court of Appeals affirmed the District Court’s decision not to allow evidence of inappropriate conduct that did not involve the employee.

**PART 2: INVESTIGATING AND RESPONDING TO ALLEGATIONS OF WORKPLACE SEXUAL HARASSMENT**

I. **ISSUES TO CONSIDER IN THE CURRENT #METOO CLIMATE.**


- 46% of Americans think women not being believed is a major problem.
- 50% of Americans think men getting away with committing sexual harassment/assault is a major problem.
- 34% of Americans think employers firing accused men before finding out all the facts is a major problem.
- 31% of Americans think women falsely claiming sexual harassment/assault is a major problem.
- 51% of Americans think increased focus on sexual harassment has made it harder for men to interact with women at work.

II. **PREVENTING SEXUAL HARASSMENT AND DEALING WITH REPORTS OF SEXUAL HARASSMENT.**

A. **Policy Against Harassment and Discrimination.**

1. State law requires school districts to adopt a clear policy against discrimination and harassment of all protected classes in all areas set forth under state law. *See* Minn. Stat. § 121A.03. Many school districts have
adopted the model Harassment and Violence policy drafted by the Minnesota School Boards Association (Policy 413).

2. The School District’s policy should have a clear reporting process and should be easily accessible to all employees. Posting the policy or notice of where the policy can be found and a general statement regarding the policy in employee lunch rooms should occur.

B. **Where Obvious, Don’t Wait for a Complaint.** School districts should correct harassment that is clearly unwelcome regardless of whether a complaint is filed. For instance, if there is graffiti in the workplace containing racial or sexual epithets, management should not wait for a complaint before erasing it.

C. **Take Steps to End Harassing Conduct.** Before conducting the investigation, the school district should take steps to make sure that any harassment does not continue. If the parties have to be separated, then separation should not burden the employee who has complained of the harassment. Involuntarily transferring the complainant could constitute unlawful retaliation.

D. **Form of Complaint Does Not Matter.** Complaints must be investigated whether or not the employee/complainant wants to make a “formal” complaint or reduces it to writing. This is to protect the Employer from liability. Verbal complaints may be reduced to writing by the supervisor receiving the complaint.

**III. INVESTIGATING ALLEGATIONS OF SEXUAL HARASSMENT.**

A. **Document the Discovery.** Whoever brought the complaint to your attention and/or discovers the alleged misconduct should create a written statement that describes everything the person knows about that conduct, including the names of potential witnesses, the identity of the alleged wrongdoer (if known), the date that the misconduct occurred or was discovered, and any other potentially relevant information.

B. **Determine Whether an Investigation is Necessary.** To determine whether an investigation is necessary, school officials should consider the following:

1. Does the behavior complained of violate the law or the District’s policies?
   a. Each District should look to its own policies. Contact counsel with any questions regarding the law.

2. Is an investigation required by policy?
a. Some Districts require an investigation upon the discovery of evidence of certain violations. It is important to be aware of these policies and conduct an investigation in accordance with them.

3. Does the conduct in question involve a pattern of prohibited behavior?

4. Could the conduct result in liability to the School District?

5. Did the alleged wrongdoer admit to the conduct?

6. Even if a complainant or subject is no longer an employee of the School District, the District may have an obligation to investigate. Such an investigation could pose a logistical problem because, for instance, employers cannot compel non-employees to participate in investigations. Any refusal to participate should be documented.

7. Remember that a failure to investigate or an insufficient investigation can lead to liability. *Gyulakian v. Lexus of Watertown, Inc.*, 56 N.E.3d 785 (Mass. 2016) (awarded for $500,000 in punitive damages).

C. **Act Promptly.** If the District decides to conduct an investigation (or is mandated to conduct one pursuant to District policy), even minimal delays may result in lost evidence or provide the alleged wrongdoer with an opportunity to conceal the truth or come up with a “story.”

D. **Choosing an Investigator.** The District should decide whether it will investigate alleged misconduct internally or whether it will hire a third-party investigator. In making this determination, the District should consider the following:

1. The potential ramifications of the problem, both practical and legal;

2. Whether an internal investigator will be viewed as biased because of his/her position with the employer;

3. The long-term impact of using an internal investigator, including the future work relationship, if any, between the investigator and the subject of the investigation;

4. The ability of an internal investigator to efficiently conduct the investigation in a thorough, objective, and timely manner; and
5. The likelihood of the investigator having to testify at a grievance arbitration, litigation, or other matter related to the investigation and subsequent discipline.

E. **Determine Whether the Alleged Employee Wrongdoer Should be Placed on Administrative/Investigatory Leave Pending the Outcome of the Investigation.** Depending on the nature of the alleged misconduct, the employee’s duties, and the duration of the planned investigation, it may be appropriate or necessary to immediately place the alleged wrongdoer on administrative leave pending the outcome of the investigation.

F. **Review Policy Before Investigation Commences.** It is beneficial to review the applicable school district policies prior to conducting the investigation. Know the standards at issue.

G. **Who Should Be Interviewed?** The investigator should interview the employee who complained of harassment, the alleged harasser, and others who could reasonably be expected to have relevant information.

When considering which fact witnesses to interview, the investigator should take the following into consideration:

- Does the complaint list witnesses to the alleged misconduct?
- Does the complaint leave out individuals who may have important information relevant to the investigation?
- Who was present for the alleged misconduct?
- Who received the initial complaint?
- Who can provide necessary background information?

Keep in mind that additional witnesses are often identified through both the interview process and a review of relevant documents or other evidence.

Do not limit yourself to witnesses suggested by the complainant.

H. **Tennessen Warnings.** Prior to investigative interviews, witnesses should be given a Tennessen Warning. The Minnesota Government Data Practices Act (“MGDPA”) states that an individual who is asked to provide any private or confidential data concerning the individual shall be informed of the following:
1. The purpose and intended use of the requested data;
2. Whether the individual may refuse or is legally required to supply the requested data;
3. Any known consequences arising out of supplying or refusing to provide the private or confidential data; and
4. The identity of other persons or entities authorized by state or federal law to receive the data. Minn. Stat. § 13.04, subd. 2.

I. **Seek all Relevant Documents/Evidence.**
   1. Are there e-mails or text messages relevant to the alleged harassment?
   2. Did the complainant keep a journal or notes about what happened?
   3. Does the District have any video footage of the alleged incident?

IV. **INTERVIEW BASICS.**
   
   A. **Explain the Purpose of the Interview.** Do not make any comments that could be perceived as minimizing the complaint.
   
   B. **Define your Role in the Investigation.** Regardless of your other roles, make it clear that you are there as an impartial investigator. Do not take sides.
   
   C. **Explain the Investigation Process.** Explain that the District will follow up on information it receives. Ask the interviewee to report any contact from the alleged wrongdoer or any retaliation (from whatever source) immediately.
   
   D. **Do Not Promise Confidentiality.** Information received during the scope of an investigation is subject to the MGDPA and must be released in accordance with its provisions.
   
   E. **Ask Specific Questions.** Who, what, when, where, why, how? Get as detailed of information as possible. Do not allow an interview subject to make generalizations or to offer conclusions as opposed to facts.
   
   F. **Ask the Tough Questions.** Even if the subject matter is uncomfortable.
   
   G. **Ask for Documents.** Ask each interviewee if he/she has any tangible evidence that corroborates his/her recollection of events. Documents such as e-mail
correspondences, notes, diary entries, time sheets, or calendars, might all contain relevant and valuable information. Recordings of voicemail messages might also contain helpful information.

H. **Ask Each Interview Subject to Identify Other Witnesses to the Misconduct.**

I. **Do Not Guarantee Results.** Investigators should not expressly or implicitly guarantee any particular outcome of the investigation. Nor should they suggest or imply that disciplinary action will be taken against the alleged wrongdoer.

V. **GENERAL TIPS FOR INTERVIEWING COMPLAINANTS AND FACT WITNESSES.**

A. **Ask Short, Open-Ended Questions.** The goal is to have the witness talk more than the investigator. Investigators should avoid “leading” questions. This is not a time for cross examination.

B. **Always Cover the Who, What, When, Where, Why and How Questions.** Follow each line of questioning to its logical conclusion based on the witness’ personal knowledge, as opposed to what he or she has heard from others. Get the details.

C. **Assume that the Investigator will Defend the Interview Questions in Court.** Be impartial and thorough. Keep in mind that the investigator’s notes may become discoverable evidence at some point.

D. **Observe Witness Demeanor.** Document those observations in the investigation notes.

E. **Follow-Up.** If a witness answers “I don’t know” or “I can’t recall,” break the question down and/or rephrase it to determine whether the witness does not have the information or is being evasive. If you believe the witness is being evasive, circle around and come back to the question at other points in the interview. If you have an objective reason to believe that the witness would know or remember particular information, do not hesitate to express surprise when the witness answers “I don’t know” or “I don’t remember.”

F. **Visual Representations.** If you believe it would be helpful, have the witness draw a picture of the alleged misconduct or the location at which it occurred. It may also be helpful to have the witness take you to the site of the alleged misconduct for a personal inspection.
G. **Disclose as Little as Possible.** Use your judgment as to how much to tell the witness about the complaint.

H. **Ask the Complainant if Extent of Complaint Has Been Covered.** In order to safeguard against the Complainant later coming up with additional complaints/accusations the District has never been informed of and then saying that the District did not respond appropriately to those complaints/accusations, it is important to ask the Complainant whether what they have stated is everything that forms the basis of his/her complaint.

I. **Ask that the Witness not Discuss the Process with Anyone Else.** Witnesses should not talk about the allegations, the content of their individual interviews, or the fact that there is an investigation being conducted.

J. **Impact.** Inquire about the impact of the alleged conduct.

K. **Understand the Complainant’s Concerns.** Remember the complainant may be embarrassed or fear retaliation.

L. **Complainant’s Desired Outcome.** Inquire as to what the complainant would like to see happen, but do not make any promises.

M. **Take Appropriate Action.** If the complainant expresses a desire that you do not do anything with the information he/she tells you, explain that the school district must take appropriate action and why.

N. **Do Not Make Promises.** Do not make any promises about who will be interviewed or when the investigation will be completed. Do not disclose the identity of witnesses.

O. **Retaliation.** Ask the complainant to bring any retaliation to your attention and explain what that means.

VI. **INTERVIEWING THE ALLEGED WRONGDOER.**

A. **Union Representation for Employee Subjects.** If applicable, the investigator should determine whether a union representative will be available for the interview in the event that the subject requests such representation at the start of, or during, the interview itself. The U.S. Supreme Court has held that individual employees have a right to refuse to participate in an investigation without union representation if they reasonably believe that discipline may result from the investigation. *N.L.R.B. v. Weingarten*, 420 U.S. 251 (1975). Consequently, if
the alleged wrongdoer requests union representation, the employer might have to reschedule the investigation until such time as representation is available.

B. **Opening Remarks.** Prior to asking any questions, the investigator should explain the following to the alleged wrongdoer and his/her union representative:

1. The role of the investigator as a neutral fact finder;

2. The Tennessen warning, which the investigation subject should be asked to sign prior to asking any questions;

3. Ground rules for the interview, such as not interrupting each other and professional conduct; and

4. The alleged wrongdoer should be expressly informed that this interview may be his/her only opportunity to tell his/her side of the story before a decision is reached.

C. **Refusals to Answer.** The investigator should decide in advance how to respond to the alleged wrongdoer’s refusal to voluntarily answer questions. Typically, an individual will voluntarily cooperate if he/she knows that the interview may be his/her only chance to tell his/her side of the story. A typical Tennessen warning contains language to that effect. If the individual being questioned is an employee and he/she decides not to answer anyway, the investigator should consider whether he/she is willing or able to issue a Garrity warning to compel answers.

D. **Follow-up Questions.** Be prepared to ask appropriate follow-up questions in order to obtain the full response to each allegation. In addition to the general considerations discussed above, the following tips may help an investigator get the full response from an alleged wrongdoer:

1. **Be Blunt.** Do not dance around delicate topics. Ask the question directly.

2. **Ask Why.** If the alleged wrongdoer admits to any particular action, ask what his/her intent was.

3. **Check Credibility.** If the alleged wrongdoer denies the allegations, ask whether he/she believes anyone would have a reason to fabricate the allegations.

E. **Closing Remarks.** Before ending the interview, the investigator should:
1. Ask for any other information that may be helpful, or other information that the alleged wrongdoer would like to provide;

2. Explain that retaliation will not be tolerated. Direct the alleged wrongdoer not to take any action that could reasonably be perceived as an attempt to retaliate against any person who may have participated in the investigation. Stress that the term “retaliation” will be considered as broadly as possible;

3. Direct the alleged wrongdoer not to take any action that could give the appearance of attempting to influence the testimony of other witnesses; and

4. Direct the alleged wrongdoer employee not to discuss the investigation or the allegations with anyone other than his/her union representative and attorney.

F. Additional Tips for Interviewing the Alleged Wrongdoer.

1. Be prepared for anger and defensiveness on the part of the alleged actor.

2. Do not merely state the complainant’s allegations and ask the alleged actor to simply verify or deny. Insist on details of the alleged wrongdoer’s version of the facts.

3. Do not threaten.

4. Do not describe what disciplinary action might be taken. Advise the alleged wrongdoer that any decisions regarding disciplinary action will be made at the conclusion of the investigation.

5. Do not make any promises about when the investigation will be completed or who will be interviewed.

6. Do not reveal the names/identities of witnesses.

VII. RESPONDING TO HARASSMENT—CORRECTIVE ACTION.

Once an investigation is complete, the school district must decide what, if any, response is warranted. Again, the appropriate response will depend upon the facts of each case. The following are examples of the broad range of responses which may be appropriate:
A. Talk with the alleged harasser. This will only be the appropriate remedy for behavior that is not very serious, or it may be combined with other responses.

B. Provide the alleged harasser with a copy of the harassment policy, and remind him/her of the appropriate standards of behavior.

C. Physically separate the offender from the victim, if possible.

D. Additional monitoring of the alleged harasser and/or the victim may be necessary.

E. Impose discipline if the alleged harassment justifies it.

F. You may direct the alleged harasser to attend counseling or additional harassment training.

G. Contact the police if you have reason to believe that the conduct constitutes criminal behavior.

H. Provide ongoing training to all staff regarding appropriate workplace behavior and the harassment policy.