

HARASSMENT INVESTIGATION PROCEDURAL RIGHTS FOR QUFA MEMBERS

1. The Legal Context

Queen's University has a legal obligation to prevent, inquire and address harassment under both the Ontario Human Rights Code, ('the Code'), and the Occupational Health and Safety Act, ('the OHSA').

The OHRC defines harassment as "*a course of behaviour that is known or ought to be known to be unwelcome*", based on one of 17 listed personal attributes, including sex, race, disability and gender. These are often referred to as prohibited grounds.

The OHSA defines harassment as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is *known or ought reasonably to be known to be unwelcome*". Often referred to as either workplace or personal harassment, the prohibition has been interpreted to include a wide spectrum of unwelcome behaviour, from offensive remarks or actions causing psychological harm, to physical or sexual violence. It has also been interpreted to include bullying and the inappropriate use of texts, email and social media.

Under the OHSA, the University must develop and clearly communicate anti-harassment policies, provide anti-harassment training and respond to allegations of harassment in a timely, fair and appropriate investigation. This may include retaining a neutral and experienced investigator or separating the complainant and the respondent to an allegation during the investigation.

2. QUFA Procedural Obligations

QUFA has the obligation to support and represent the procedural rights of both complainants and respondents to an allegation of harassment.

QUFA Staff must ensure that Members have a clear understanding of the definition of harassment, and the role that QUFA Staff and the QUFA Executive play in advising and protecting the procedural rights of both complainants and respondents throughout and following the investigation.

3. Procedural Rights of the Complainant

Right to an Informal Resolution Process

QUFA Staff will listen to your concerns and help to distinguish actions that if true would support a claim of harassment under with the OHRC or the OSHA from a reasonable exercise of management rights. Actions related to performance, absenteeism, workload, or the enforcement of other provisions of the Collective Agreement do not constitute harassment. If you are experiencing difficult but non harassing behaviour or are interested in trying to resolve the matter

on an informal basis, you can contact the Conflict Management Services provided for in the Collective Agreement, or discuss other options for resolution with QUFA Staff.

Right to File a Complaint

You have the right to file a complaint under the University Harassment Policy. If the University decides to investigate the matter, they must follow the negotiated process found in the Collective Agreement. The respondent will normally have the right to know who raised the allegations and be provided with a copy of the allegations to respond to. During the investigation, both you and the respondent will be bound by confidentiality.

Right to File a Complaint of Harassment under the Ontario Human Rights Code with the Tribunal

You may elect to file a complaint of harassment under the OHRC directly with the Ontario Human Rights Tribunal (the OHRT). However, you can only proceed in one forum. If you elect to proceed directly to the OHRT, QUFA will not represent you, and you will be asked to sign a waiver indicating that you have waived any rights under the C.A., including the right to grieve with QUFA representation.

Preparing Your Complaint

Your complaint should document the who, what, where and when of your allegations, identify any witnesses, and provide a short summary of what the witnesses will say.

You should also include relevant evidence such as emails, photographs or other documents that would support your allegations.

QUFA staff will not make submissions on your behalf to the University or the investigator. At your request, QUFA Staff will attend any meetings with the investigator or University for the purposes of taking notes. QUFA Staff is also available to ask any questions or assist you as needed in protecting your procedural rights through the investigation process. These include your right to confidentiality and your right to be free from reprisal. If the University feels that you and the respondent need to be kept apart at any time during the investigation, you should not be asked to accept changes to your working conditions that could be seen as punitive, and changes should not be made to your conditions of work without prior consultation with QUFA.

4. Procedural Rights of the Respondent

The University is required by law to investigate the allegation of harassment, in a timely, fair, and thorough investigation as required by the relevant provisions of the Collective Agreement and the law. You are entitled to know the particulars of the allegations to make a full response, but during the investigation both you and the complainant are bound by confidentiality.

Under certain conditions, the University has the right to separate you from the complainant at any time during the investigation, but that such action cannot be taken without prior consultation with QUFA. Such action is typically seen as acceptable only if there are underlying safety issues.

Response to Allegations

It is important that you respond to each allegation in the context of the definition of harassment. Harassment does not require intent, but rather, is focused on whether the alleged behaviour was known or ought to have been known to be unwelcome.

In your response, you should first organize your comments into one of three categories: (1) the allegation happened, (2) the allegation is false, or (3) you have no knowledge of the matter. You should then add any facts that add context to the event that are relevant to the allegations. For example, you may agree that you raised your voice at a meeting, but you have facts that explain why that happened and why it did not constitute harassment. It is also important to identify personal circumstances such as a disability, family status, an addiction or other mitigating factors that should be taken under consideration by the University in assessing the appropriate response to the behaviour.

As the respondent, you have the right to make written or oral submissions to the allegations. There are pros and cons to each approach.

Written Submissions

Written submissions can be prepared before you meet with the investigator and give you time to carefully review the allegations and consider and review facts that you want to submit. At your request, QUFA Staff can review the written submissions with a view toward identifying any allegations that have not been responded to or statements that appear to be irrelevant, inconsistent, or potentially harmful to your case. However, the final decision of what to include in the response is yours. QUFA Staff cannot and will not edit the written response or make submissions to the investigator on your behalf. The document will be considered evidence if the matter proceeds to a formal hearing, and therefore you should be confident about any facts you provide.

Written submissions tend to be time consuming, as you are anticipating what facts or questions the investigator has about the allegations. As a result, the first written submissions often generate a request for further information from the investigator who may not have fully understood your story, or if your response hasn't fully addressed all their concerns.

The investigator is typically a professional with other files and each additional round of questions will add time to the investigation and prolong the matter.

Oral Submissions

If you elect to make oral submissions, you can request that QUFA Staff or a delegate attend the meeting with the investigator for note taking purposes only. QUFA Staff cannot and will not make submissions to the investigator on your behalf, but they can make general comments about the fairness or thoroughness of the interview process. After your initial interview with the investigator, you should be provided with a copy of the record of your oral submissions made by the investigator and given the opportunity to amend or add to the record before signing the statement. Once you sign the document as being a true account of your evidence, it can be produced as evidence should the matter proceed to a legal hearing.

Oral interviews can expedite the investigation process, as the investigator may be able to ask you the questions they want addressed and record the responses to create the written record in one or two meetings.

Assessment of Credibility

The role of the Investigator is to determine the facts based on a balance of probabilities. When faced with conflicting evidence, the Investigator must weigh the credibility of the witnesses to determine who is “most likely” to be telling the truth. Based on the allegations you are being asked to respond to, this could be an important factor to consider when deciding to respond with written or oral submission. You should discuss this with your QUFA support person before making the election.

5. After the Investigation - QUFA Has Carriage of the Matter

If the investigator concludes that the respondent has engaged in harassment, the member will be given the opportunity to meet with the Dean or Provost to provide any additional information that may be relevant to what if any disciplinary action should be taken. QUFA staff will assist the respondent by providing a framework for their response and attend the meeting for support or to take notes. They cannot make representations on behalf of the member.

Regardless of the outcome of the investigation, only the QUFA Executive, and not the members, can refer a grievance to Arbitration.

QUFA legal counsel has the right to review the full investigation file, to ensure that the process was fair, thorough and non-biased. QUFA will also consider whether the University response, if any, was reasonable and proportionate with the findings. If both requirements are met, QUFA may elect not to proceed with the grievance process. Both the complainant and the respondent have the right to appeal the decision of the QUFA executive.

If the matter is referred to Step 2 and arbitration, QUFA will continue to have carriage of the matter. This means that QUFA will determine strategy, decide how far to take the matter, and appoint legal counsel when needed.