

# HILL ADVISORY NEWS

*“Working with the human side of business”*



## Should a Warning be Issued Prior to Dismissing Someone for Sexual Harassment ??



- \* Peter was an office manager of a financial organization. He was employed with the company for 22 years and reported to the president, who was rarely in the office. One day a board member overheard Peter make a tasteless remark to his female assistant, Carol. After speaking to several of the other female staff, it became apparent to the board member that in addition to Carol, Peter was tyrannical, sexist and disrespectful towards another female staff member. The board member reported the problem to the president who attempted to resolve the problem by changing the reporting structure so that the assistant and another female staff member no longer reported to Peter. The changes seemed to work and there were no further reports of any inappropriate behaviour.
- \* However, Peter's former assistant had not revealed the extent of the harassment she had suffered. A few months later Carol told her new supervisor Peter had repeatedly told her that she looked sexy, made comments about her sex life, and suggested she go on a cruise with him, posing as his wife. She also claimed Peter physically assaulted her on two occasions. The first incident occurred when he came up behind her, hugged her tightly and fondled her breasts. On another occasion, he rubbed against her leg on the subway. She said she had not reported the incidents for fear of losing her job. Instead she tried to deal with the problem herself. She reminded Peter he was a married man and she tried to make a joke of his unwelcome comments and gestures.
- \* When the president was informed of these allegations, he confronted Peter who denied everything. The president felt Peter was lying and fired him. However out of compassion, he offered Peter one year's salary. Peter refused it and sued the company for wrongful dismissal. ....
- \* The trial judge found the assistant's allegations were true and that "she had been deprived of her right to a harassment - free workplace."
- \* However, he noted Peter had been a valued employee for 22 years and was 59 years old when he was dismissed. The judge felt this made the chances of future employment negligible. The trial judge also noted that Peter had stopped his inappropriate behaviour when the reporting structure changed. The judge stated Peter was entitled to a warning stating his conduct was unacceptable and any recurrence would not be tolerated. Since the employer had not given Peter a warning, they had not established that Peter had been dismissed for 'just cause.' Peter was therefore awarded 20 months salary in lieu of notice. The employer appealed the decision .....
- \* The Appeal Court held that the trial judge had failed to consider the impact the continuation of Peter's employment would have had on the assistant, Carol. She had testified that "through to and beyond the date of Peter's termination, she suffered from migraine headaches, stomach pains and nightmares; lived in constant fear of embarrassment; and was terrified she would lose her job if she spoke up."
- \* The Court also felt the trial judge had ignored the importance of Peter's denial of the serious allegations. Once the employer had proven the allegations were true, Peter's denial limited the employer's options i.e. a warning, an apology or counselling. The Court stated "Without some acknowledgment of fault and steps taken to reassure staff" it was its' view "that the president could not have responsibly left Peter in charge of the group of female employees, subject only to a warning."
- \* As a result, the Appeal Court overturned the trial judge's ruling as the judge failed to appreciate that Peter's conduct was so serious, and the impact on the victim so manifest, the employer had no option but to dismiss him. Accordingly, the appeal was allowed.

**\*\* This case points out the difficult choices an employer faces when confronted with the dismissal of a long-term employee due to isolated incidents of inappropriate conduct ..... and the risk of a wrongful dismissal suit if no 'just cause' is found to exist. But perhaps more important - is the requirement for the employer to provide a harassment-free workplace for all employees ..... period! The courts no longer appear to accept the fact the existence of a sexual harassment policy and employee training on how to handle sexual harassment incidents automatically eliminates the employer from responsibility in all cases of sexual harassment. The employer may be liable for sexual harassment if appropriate action is not taken against the harasser! \*\***

**Q. If I'm in the middle of a harassment investigation and the Respondent suddenly confesses, what do I do then? Do I stop the investigation?**



- \* If the complaint is at the low end of the harassment scale, i.e. jokes; taunts; comments; etc. then we would suggest using the confession as an opportunity to enter the resolution process. However, remember that this process should have a written agreement attached to it. **This is your protection should the Respondent change their mind again.**
- \* If the complaint is at the high end of the harassment scale, i.e. sexual harassment involving physical touching; sexual assault; stalking; etc. then the confession should be noted as part of the Respondent's statement and the investigation should continue.
- \* You might then consider interviewing the key witnesses to the complaint, and if the Complainant is supported by their evidence, stop the investigation process at that point. **This is not written in stone! Stop and think about the complaint;**

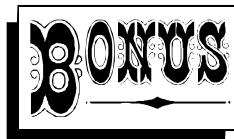
- \* the confession; and where you are in the investigation process before making a decision.

**Q. I am an employee of an organization. When I'm assigned to investigate a harassment complaint, does my employer's liability insurance cover me in the event I make a mistake?**

- \* Generally an employer's liability insurance will cover you during the investigation process. However, if you conduct the investigation in a manner that is negligent; deliberately mishandled; mismanaged; etc. then like any other form of negligence, your employer's liability insurance may not provide you with coverage.
- \* We suggest you contact the insurance carrier of your employer's liability insurance to clarify when you would be exempt from the coverage offered.

**Q. How can we stop witnesses from talking to other people about the investigation? What if we caution the witness to keep the matter confidential and the witness does not do so?**

- \* We see more and more policies that contain language referring to 'maintaining confidentiality' as it relates to an investigation and complaint. Policies state that failure to do so will result in disciplinary action. That is about the only thing you can do - **discipline for a breach in confidentiality.**
- \* The fact that we can't stop someone from talking shouldn't deter you from telling every single witness that confidentiality is expected. Most witnesses will respect the request or expectation. If someone does not, then discipline that witness.
- \* Your actions will speak volumes to the rest of your witnesses and your employees.



**"Newsletter by E-mail?"**



We wish to extend our appreciation to Paula Doyle, Warren Bobbee and Claire Clement at the City of Regina for organizing the Harassment Awareness and Prevention training sessions for managers and supervisors in January and February. We had a great time!

We always enjoy our visits to Nova Scotia Community College in Halifax. Special thanks go out to Claudine Lowry and Michelle Creelman for again coordinating another successful Harassment Investigation Workshop in February.

Thank you to Carolyn Golar at Triple M Housing in Lethbridge, Alberta. You did a great job of arranging the Harassment Awareness and Prevention training sessions for your managers and supervisors.

Thanks also go to Monte Liebrecht for organizing the Saskatchewan Human Resource Association get-together which provided a 1/2 day session on the latest trends in the harassment field. Cam Hill enjoyed being a key speaker at this event!

**Any organization that completes and returns the enclosed Survey/Questionnaire by the end of April - will receive an additional 10% reduction on any public workshop offered this year for one of their employees .....**

**For information on our current public workshops or to obtain a current public workshop schedule contact Janet in Calgary:**

- \* Fax/Phone: (403) 254 - 0462
- \* E-mail: burkettr@cadvision.com

**EARLY BIRD SPECIALS**

Seating is limited! .....  
Register early & save \$\$\$

\* \* \* \* \*

Even though *Cam Hill & Associates* are constantly on the move - you can always get in touch with us!!

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- \* Fax/Phone: (204) 831-7661
- \* or visit us at our 'brand new' web-site ..... [www.hilladvisory.com](http://www.hilladvisory.com)

We are looking at the possibility of e-mailing our newsletter to our readers in the near future!!

For 'speedy' transmission of the newsletter, it will be e-mailed in Adobe Acrobat format. For those readers who do not currently have the Adobe Acrobat program, this software can easily be downloaded from the Internet at:

- \* [www.adobe.com](http://www.adobe.com)

We would appreciate it if those interested in receiving the newsletter by e-mail would advise of their e-mail address by contacting (Donna) the Editor at:

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