

HILL ADVISORY NEWS

“Working with the human side of business”



Professor Invites Student to Home to Discuss Graduate School Over Wine by Candlelight Is This Sexual Harassment ??



- * Malakeh was an Iranian student at a Canadian university. Dr. Harry Sutter was her tenured senior professor. Malakeh was intent on gaining admission to graduate school and asked Dr. Sutter to assist her. Dr. Sutter agreed and suggested that she meet with him at his home to discuss what he could do to help. During her visit to Dr. Sutter's home, Malakeh became uncomfortable at some of his remarks and asked that he drive her home. He did so and suggested they get together again at his home to discuss her entry to graduate school.
- * When Malakeh arrived at Dr. Sutter's home for her second visit, she was surprised to find it lit by candlelight, music playing and a bottle of wine waiting. As the evening continued, Dr. Sutter discussed a former girlfriend who was also Iranian. He indicated he was interested in Malakeh's experience as a refugee and asked her some personal questions. He told her he was single and that he had not had 'physical contact' for quite some time. Malakeh immediately put on her coat and went to the door saying that she had to leave. Dr. Sutter told her he would drive her home. He then gave her a copy of a tape recording containing some music which had been playing that night on his stereo. *Several days later Malakeh played the tape and discovered that Dr. Sutter had inadvertently also recorded their entire conversation that evening at his home.*
- * Dr. Sutter gave Malakeh an initial grade of 70% without reviewing her work. He also wrote a letter of reference to support her entry into graduate school. However, she was rejected and immediately filed a complaint against him with the university. Dr. Sutter subsequently contacted the RCMP and claimed Malakeh had blackmailed him. He said she had asked him for \$100,000 or she would ruin his reputation. Malakeh then tried to charge Dr. Sutter with sexual assault but was unsuccessful.
- * In the meantime, the university conducted their own investigation which resulted in Dr. Sutter receiving a letter of reprimand. This was not satisfactory to Malakeh so she filed a human rights complaint accusing Dr. Sutter of sexual harassment
- * The Human Rights Tribunal concluded that both Malakeh and Dr. Sutter lacked credibility. Malakeh admitted she had previously forged a letter of reference to the graduate school and also had received social assistance for which she was not entitled to. The Tribunal also found it disturbing that Dr. Sutter had given Malakeh a reference letter for graduate school when it appeared unlikely she would be accepted. The fact that he had also given her a mark of 70% without reviewing her work suggested to the Tribunal that he had been leading Malakeh on.
- * Upon reviewing the contents of the tape recording, the Tribunal subsequently determined Dr. Sutter had indeed sexually harassed Malakeh. Dr. Sutter however argued the tape recording had been 'doctored.' He claimed the voices were not part of the original recording and were added at a later time. However, several audio experts testified that was not the case. The Tribunal further stated Dr. Sutter had "created a sexualized environment consisting of seductive music, low lighting, candles, a burning fireplace, dinner, wine, a gift, rides home and personal and intimate conversation." The Tribunal also believed "The sexualized environment was not welcomed by Malakeh whose objective was academic."
- * Malakeh was subsequently awarded damages for injuries to her dignity, counselling, the cost of retaining an audio expert, lost wages and the cost of her tuition and books related to the course she had taken with Dr. Sutter. *The university was held jointly and severally liable for the damages.*
- * Dr. Sutter appealed this decision to the Provincial Supreme Court 'on the basis that the audiotape evidence was not admissible by law and that the Tribunal erred in concluding that his actions constituted sexual harassment.' Dr. Sutter added the Tribunal's decision would have a 'chilling' effect on the university environment and future student-professor relations.
- * The Supreme Court held that the Human Rights Code allows Tribunals great leeway in deciding what evidence is 'necessary and appropriate.' The Court judge continued by saying the admissibility of evidence 'ought not to be interfered with unless those determinations are patently unreasonable or in breach of the rules of natural justice.'

- * The judge ruled out any finding of tampering or altering of the tape and implicitly supported the Tribunal's conclusion *'that the tape was indeed credible and reliable evidence, sufficient to support the finding of sexual harassment.'* It was concluded its admission into evidence *'did not constitute an error in law.'*
- * The judge also stated *"While there was no finding of any overt sexual touching by Dr. Sutter there was a clear finding that he had deliberately created an environment and engaged in behaviour which maximized his opportunity for sexual gratification."*
- * The judge accepted the original findings of the Tribunal and noted that *'while Malakeh's response to Dr. Sutter's conduct was acquiescent it was not welcoming.'* It was also concluded these findings would not have a 'chilling' effect on future professor-student relations, since the university expects professors to act *'with discretion and with sensitivity to the nature of a student and the student's interests'* when the home is used as an extension of the office.
- * *The Human Rights Tribunal's decision was therefore upheld and Dr. Sutter's appeal was subsequently dismissed.*

**** As this case points out "Sexual harassment need not consist of touching or even of overt conduct. Behaviour which creates a 'sexualized atmosphere' and which invites intimacy - without directly demanding it - may constitute sexual harassment." This decision indicates that even when a student's motives are questionable and there is no compelling evidence of overt conduct, the behaviour of professors in 'social' situations will receive close scrutiny when a sexual harassment complaint is brought forward.**



Changes to our Investigative Process



Those of you who have used our investigative services are aware of the 'thoroughness' of our work - and although we want to change our investigation process to lower costs - we also want to retain the 'thoroughness' protection for our clients. On reflection, we believe we have found several approaches that will allow our work to remain efficient and effective, yet *lower costs to benefit you.*

- * Two investigators (a primary and a secondary) to interview the Complainant(s) and Respondent(s). Then *only the primary investigator interviews the witnesses.* Although this does not shorten the investigation process, it reduces the 'expense' portion of the investigation substantially.
- * Two investigators (both primary investigators) to interview the Complainant(s) and Respondent(s). Then the *two primary investigators each interview witnesses simultaneously, thus shortening the investigation interviews and process substantially - as well as 'reducing expenses.'*
- * If the client can prioritize the investigation (so that witnesses treat their interviews as urgent and free up their time) the investigation process *'can be both shortened'* as well as *'more cost effective.'* For example, when the investigator returns to the site to interview the Respondent(s), she/he can remain on site for a day, preparing witness questions, and then begin the witness interviews the following day. This would enable the client to reduce expenses by additional airfare. In order to accomplish this, however, *witness interviews need to be coordinated by the client and prioritized* so that witnesses make themselves available within the allotted time.

Although the type of complaint and the seriousness of the complaint may determine the final investigation process, we believe that by working in collaboration with our clients *we can continue to provide the type of investigation services that best serve your needs.*

We would be most interested to hear your comments in relation to the above - and invite you to contact Cam Hill directly:

- * E-mail: chill@hilladvisory.com
- * Web-site: www.hilladvisory.com

new For fall

We invite you to attend the following 'brand new' public workshops
(See Attachment)

** Dispute Resolution **

- * This 3-day workshop has been developed to take participants through resolution theories (i.e. mediation, resolution, ADR) in the mornings and work with professional actors through a variety of real conflicts in the afternoons *thus providing solid practical experience to compliment the theory.*

** Workplace Violence **

- * The use of violence to deal with relationships (both internal and external) in the workplace is escalating. This 2-day workshop is led by a retired Police Officer who is educated in conflict resolution and psychology. Participants are taken through the theory and a practical approach - *to identify, defuse and deal effectively with situations that have the potential to become violent in the workplace.*

For more information contact Sheri:
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**** Special Thanks to our many clients for all their help with various training events over the last few months. You all did a great job !**