

HILL ADVISORY NEWS



"He said"

"Working with the human side of business"

Sexual Harassment Complaint Without Witnesses Becomes "He Said, She Said" How Then is the Truth to be Determined ??



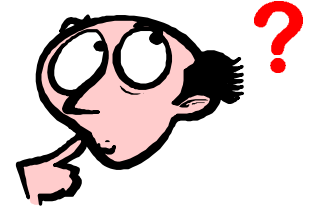
"She said"

- * Dean was employed for 5 years as a correctional officer in the Women's Unit at a provincial penitentiary and had a discipline free work record. Jessica, a casual correctional officer, alleged that Dean had grabbed her, moved her to a desk, bent her over and ground his pelvic region into her backside despite her protestation. While this was occurring, her boyfriend called. Jessica managed to struggle free to answer the telephone but said nothing to her boyfriend about the incident because Dean was still in the room. She then went for lunch and called her mother. Upon returning from lunch, Dean asked her "So how was it?" Jessica assumed he was referring to lunch and replied "Not bad." Dean grinned and said "Oh, so you'd do it again then?"
- * At this point Jessica realized that Dean was referring to the 'grabbing' incident and now believed this behaviour would continue. She then decided to speak to her supervisor. *She indicated she wanted the sexual harassment to stop and that she no longer wanted to work with Dean. She also asked that her name not be brought up since there was a 'rat code' at the penitentiary, which prevented employees from tattling on one another.* The following day Dean was called to the Warden's office and was told a complaint had been submitted regarding his recent 'flirtatious' behaviour and was given no further details. He was moved out of the Women's Unit and told an internal investigation would be held in a month. Jessica was later given the 'silent' treatment by some of her co-workers.
- * During the investigation Jessica testified there were other occasions when Dean had commented on 'her nice butt.' Dean submitted a written statement denying any of the alleged incidents had ever taken place and testified Jessica had actually 'come on to him' on several occasions - which Jessica denied. *The investigation concluded that Dean be dismissed. Dean filed a grievance and an arbitration hearing followed.*
- * The arbitrator noted the case was literally a 'he said, she said' situation since there were no witnesses.
- * The arbitrator added *"The real test of the truth must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."*
- * The arbitrator questioned Jessica's motivation to make up the allegation, knowing full well the 'rat code' existed. Her supervisor testified that when she reported the incident *"She appeared very nervous, distraught and extremely fragile."* Although the arbitrator determined it took courage for Jessica to come forward, he felt there were some unanswered questions. Why didn't she say something to her boyfriend when he called during the incident or cry out for help? There was also no evidence that Jessica looked disheveled when she went to lunch. Other women employees also testified they had not experienced any problems with Dean.
- * Both sides agreed that this was an extremely serious allegation, bordering on sexual assault. The arbitrator stated *"Cases involving serious allegations without witnesses other than the persons directly involved are among the most difficult for adjudicators to deal with."* However, he stated *"Jessica would have risked losing her job if she were lying, and the 'rat code' would surely be invoked by her lodging a complaint, giving credence to the facts she would only speak out if she were telling the truth."* He also believed the reason Jessica said nothing to her boyfriend when he phoned, or did not cry out, was because she was trying to handle the situation herself and may not have filed a complaint at all, had she not been concerned that it may happen again.
- * In light of all of this, the arbitrator concluded that *"Based on a balance of probabilities by clear, convincing and cogent evidence, the alleged incident did take place and the imposed penalty was appropriate."* The grievance was therefore dismissed. However the arbitrator did provide the following guidance regarding appropriate investigative procedures *'to ensure fairness to all parties' involved.*

** The arbitrator noted Dean had not been informed of the 'specific' allegations against him for 2 months and should have been advised immediately to allow him time to adequately respond. He stated *"What if the allegations were false or what if Dean had been somewhere else at the time of the incident? It would be difficult to confirm any of this after 2 months had gone by"* The arbitrator also recommended the employer develop a template for managers to complete immediately upon being advised of an alleged act of sexual harassment. This would record the victim's emotional state at the time of the allegation and ensure the accurate recounting of the victim's statement.



'Humour' in the Workplace



In this day and age of challenging business transitions and political correctness, it has become increasingly difficult to judge the effect of one's particular 'brand of humour' on others.

- * During our work we often encounter people that believe there can simply be no humour in the workplace because nothing is safe anymore. We often hear phrases like "I can't say anything at work" or "I guess we can't have any fun at all." We could not disagree with that sentiment more! *We urge people to find humour that doesn't target, degrade or humiliate others.* We have heard the response "There are no jokes that do not target someone." Again, we could not disagree more! Have a look at the brand of humour used by Bill Cosby for example. Sometimes good humour is the only thing that brings us back to the workplace following a difficult day - or allows us to find solutions to what seems to be insurmountable problems!
- * We believe the difficulty in people understanding that humour at work is OK lies in the interpretation of 'targeted humour.' *The real key to humour in the workplace is to simply not target anyone or any group with it, in particular following the specific groupings for which harassment and discrimination are prohibited within Human Rights and individual company policies.*
- * Whether or not a joke or humour in the workplace targets someone is, of course, subjective. As such every joke needs to be evaluated individually. We all need to remember that the 'intent' behind the joke is not what matters if it offends but rather the 'impact' which is most important under the Human Rights Act.
- * *Some employees seem to forget that the key is to be aware of the types of jokes they tell and who they tell them to.* The bottom line to all of this is to be aware of your own joke telling and humour in the office. If your jokes and humour target a person or a group of people (under the prohibited groupings in Human Rights or your company's policy) then it is simply not appropriate for the workplace.
- * That being said it may be possible to have an awareness of the type of one's humour and still make a joke that targets.
- * We do not expect everyone in the workplace to be perfect nor does your company. We believe there are jokes that are made in the workplace that cross the line (into harassment/discrimination) but are not made with ill intent. In cases like these, we advocate that the person who is offended by the comment make the 'joker' aware of their offence, and the 'joker' apologize immediately for giving offence and modify behaviour in the future. For the jokes that hang on the 'grey edge' this is the best tool for diffusion.
- * In the final analysis, we believe that if people show respect for other people's boundaries - and clearly identify their own boundaries in relation to this topic - we would all be much better off. 'Joke telling' and humour in the workplace would then be what we think it should be funny and non-offensive.

**** From the desk of Dylan Hill, Vice-President ****



Thanks



- * *We always enjoy our return visits to the Government of Northwest Territories in Yellowknife. Thanks once again to Blair Chapman for coordinating the Harassment Investigation workshops (Levels I & II) in January. We had a great time and it was nice to see some familiar faces.*
- * *We also wish to extend our appreciation to Jillian Lamothe at St.-John's Ravenscourt School in Winnipeg. You did a great job of arranging the 'refresher training events' in Harassment Awareness and Prevention in January.*
- * *Thanks also go out to Shannon Harnett at the City of Saskatoon for coordinating our regular semi-annual Harassment Awareness and Prevention training sessions for their new employees in March. It's always fun to come back and visit.*
- * *Thank you to Eileen Trotte at the Brandon School Division No. 40 for organizing the Harassment Awareness and Prevention training sessions for their Administrators and Senior Administrators last January.*

Upcoming Public Workshops

"Harassment Investigation"
Level I & Level II

Level I June 10, 11, 12
Level II June 13, 14, 15

Glenmore Inn & Convention Centre
2720 Glenmore Trail S.E.
Calgary Alberta

*Seating is limited!
Register early and save \$\$\$*

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