

HILL ADVISORY NEWS

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Protecting Workers from Sexual Harassment 'Within and Beyond' the Workplace



Can inappropriate conduct that occurs 'outside the workplace' still be considered employment - related provided there is a connection between the activity and the workplace? Should managerial and supervisory personnel be held to a higher standard than regular employees in weighing allegations of sexual harassment? An Ontario Court of Appeal recently considered these issues

- * Donald was the executive director of a national non-profit organization. He had several female employees reporting to him as well as a volunteer national board of directors. Donald held meetings throughout Canada with the board several times a year. His staff was responsible for organizing these board meetings and would often be in attendance.
- * Brenda was hired as Donald's executive assistant. Shortly thereafter, following an out of town board meeting, the staff went to a local bar. Upon returning to the hotel, Donald initiated a sexually suggestive conversation with Brenda indicating if she became sexually intimate with him, she would progress in the organization. She refused his advances. Subsequently, their work relationship deteriorated. Donald became critical of Brenda's job performance and she eventually resigned.
- * Shelley was hired as the legal counsel for the organization. One Friday after meeting with a client, Donald suggested they go to a bar for a few drinks. The bar turned out to be a strip club. Donald paid the dancer to table dance and they stayed for about an hour. Shelley became very uncomfortable and disturbed about this 'stripper' incident, but said very little as she was concerned she could lose her job if she complained to Donald.
- * A few weeks later, while on vacation, Donald invited four of his female employees to visit him at his cottage to discuss some business matters. After the business meeting, Donald asked them if they would like to go for a swim. Donald and his new executive assistant, Carla, went skinny-dipping and later everyone spent the afternoon relaxing before having a barbeque dinner. Donald slept with Carla that night and they all returned home the next day.
- * Later that month, a group of staff members attended an out of town board meeting with Donald. They had a hospitality suite with a hot tub. After several drinks, some of the staff members got into the tub. Donald took off all of his clothes and went in naked.
- * The following night there were 80 to 100 volunteers and a few staff members in the hospitality suite. As one of the staff bent over to take off her shoes, Donald reached over and squeezed her behind. A female co-worker witnessed what happened and said to him "I saw that." This co-worker immediately left and later complained about Donald's behaviour to another staff member.
- * By this time the employer was becoming concerned with reports of various incidents of a sexual nature involving Donald and female employees. They were told Donald had been '*parading around naked*' at the hospitality suite. Finally the executive committee confronted Donald with the allegations regarding the sexual incidents. Donald denied some of the allegations and said stress was responsible for others. Donald was told that he was dismissed for just cause based on several allegations of sexual harassment. *Donald took his employer to court on the grounds there was not just cause for his dismissal.*
- * The trial judge was critical of the employer for not having a sexual harassment policy in place. He noted "*Attempting to cleanse the workplace through summary firing will likely result in an undesirable effect on the general morale of the workplace.*" While he described Donald as "*Someone who liked partying with his staff, perhaps unwisely*"..... he stated "*There had not been one incident of alleged sexually harassing behaviour that occurred in the workplace.*"

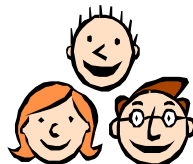
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- * The trial judge continued by saying all of the incidents constituted ‘*consensual conduct among friends outside of the workplace.*’ The judge agreed with Donald that the employer did not have just cause for dismissal and awarded him 18 months pay in lieu of notice.
- * The employer appealed the trial court decision to the Ontario Court of Appeal. The Appeal Court did not find the absence of a sexual harassment policy to be fatal to the employer’s case. It noted however that an important issue was the definition of the ‘*workplace.*’ It stated some of the incidents had occurred at meetings in hotels or other locations such as Donald’s cottage and although these were clearly business meetings, they included a social component.
- * The Appeal Court continued by saying “The incidents occurred after the official business of the meetings and because they occurred in a hospitality suite, for example, it does not mean they are outside the workplace and therefore outside the employment context. *The meetings, including the social aspects, were perceived by the staff as job related and although these incidents did not take place within the physical confines of the office, they occurred in the context of the work environment.*”
- * Regarding the trial judge’s previous decision that the incidents were all consensual, the Appeal Court determined there was ‘*consensual*’ and ‘*unwelcome*’ conduct.
- * The Court noted “*Because of the power imbalance in an employee’s relationship with a supervisor, and the perceived consequences by objecting to a supervisor’s behaviour an employee may go along with the conduct. In those circumstances, the employee will be effectively consenting to ‘unwelcome’ conduct because she feels constrained from objecting.*”
- * The Appeal Court stated the incident at Donald’s cottage was an example of this. The staff was there because Donald was on vacation and requested their input on business matters. Following the work, the staff was invited to stay for recreation and Donald and his secretary went skinny-dipping. It stated “*It was hardly a situation where the guests could control the actions of the host, their boss.*”
- * The Appeal Court closed by stating Donald’s conduct amounted to a pattern of sexually harassing conduct. Because he was the executive director of the organization and the supervisor to whom the employees reported “*His obligation to the organization was to ensure that sexual harassment did not occur and to set the standard of a workplace which protected both the employees and his employer from complaints of offensive conduct.*”
- * The Ontario Court of Appeal therefore reversed the decision of the trial judge and upheld the employer’s appeal.

****** *As this case points out - The Courts are sending out strong messages that managerial and supervisory personnel bear a special responsibility to avoid indulging in sexually questionable conduct on the job, due to their position of authority over other employees. This decision also indicates if any harassing behaviour occurs between co-workers outside the workplace and has a negative impact on their working relationships (whether or not this behaviour took place at a company sponsored event or a non-company sponsored event) the employer is responsible to take action. It is also important to note in this case that although the lack of a sexual harassment policy did not prevent the company from dismissing the executive director for just cause it is advisable that all employers have a clearly defined sexual harassment policy in place, along with appropriate education for all their staff.*



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