

HILL ADVISORY NEWS

“Working with the human side of business”



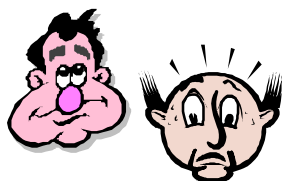
How Should an Employer Respond to Allegations of Sexual Harassment ??



A Manitoba Human Rights Tribunal has recently ruled that where an employer is aware of allegations of sexual harassment, whether or not the victim personally comes forward with the allegations the employer has a duty to investigate the complaints, ascertain the nature of the problem and take ‘reasonable’ steps to stop any offending conduct.

- * Tracy worked as a health care worker at a senior’s residence. At first, Tracy enjoyed her job but things soon changed. Boris, the maintenance man, would follow Tracy and some of the female staff members around the residence and make sexual and crude comments about them. He told Tracy that former employees had accused him of harassment but they had been let go. He claimed it was ‘*all crap*’ and that she shouldn’t listen to the gossip. Tracy became very disturbed by Boris’s attitude and the fact that he seemed to dominate the workplace.
- * Tracy tried to ignore Boris but he still followed her around. He sat next to her in the cafeteria, touched her on the shoulders and chest and also grabbed her buttocks. When Tracy told him to stop, he laughed it off and replied “Well it’s my butt. I can do what I want with it.” Tracy reported these incidents to her supervisor but nothing changed.
- * Mary, the activity coordinator, often witnessed Boris’s inappropriate conduct with various staff members. When she informed Colin, the administrator, of Boris’s behaviour he responded by saying the staff was picking on Boris who liked to joke around. Theresa, the cook, also noticed Boris’s inappropriate actions towards Tracy and other staff members and wrote a letter to Colin indicating her concerns. Colin responded by telling her “*to stop criticizing other employees in areas that are of minimal concern to you.*”
- * Two weeks before Christmas, Tracy phoned in sick. Colin called her at home and asked her why she was not coming in to work. Tracy told him the flu was going around the residence and that she did not want to catch it. She also told him about the problems she was having with Boris harassing her. Colin told her he did not put up with that type of behaviour and said “*You’re a valued employee and three more incidences like this with Boris and he’s out of here.*” Colin also told Tracy if she was unhappy at work she could quit without giving notice.
- * Tracy told him that as a single mother with two children she could not afford to quit her job right before Christmas. A few days later when Tracy opened her pay envelope she was surprised to find a EI Record of Employment indicating she had quit her job. *Tracy filed a complaint under the provincial Human Rights Code and a Tribunal hearing followed.*
- * At the Tribunal hearing, Colin argued he had no idea about Tracy’s allegations regarding Boris until he received the Human Rights complaint. He said he was aware there was a lot of joking going on. However, he indicated he was totally unaware of this ‘*touching business*’ and that no one had reported any such incidents. He conceded that Theresa’s letter made some reference to problems about Boris but that she had an axe to grind. *Colin felt that it was incumbent on the individual with the problem to come forward personally. He said he needed to determine ‘what was malicious and what was true.’*
- * Colin also stated that despite the ‘*supposed*’ problem with harassment, Tracy was still down in the coffee room regularly having a cigarette with Boris. Colin claimed that although there was no written harassment policy, there was no place for such conduct in his operation *and if only Tracy would have reported it to him he would have stopped it immediately.* Colin denied calling Tracy at home but did admit he terminated her employment without notice - and recorded it as a quit.
- * The Tribunal noted the employer holding strong personal views on the subject of harassment was not enough. *There was a test under the Human Rights Code for whether an employer had responded ‘reasonably’ to allegations of sexual harassment.* They were required to demonstrate they: were aware sexual harassment is prohibited conduct; had a complaint mechanism in place; acted quickly in handling the complaint; dealt with the matter seriously; provided a healthy work environment; and informed the complainant of their response. *Failure to meet any of these elements meant that the employer failed the test.*

- * The Tribunal stated Colin's response to the information in Theresa's letter was not dealt with as 'a serious matter.' She was told to 'mind her own business' and there was no investigation into her allegations.
- * The Tribunal noted that 'whatever concerns Colin might have had about undue meddling by Theresa in her letter to him once the spectre of harassment was raised, he was duty bound to act.' It was a serious error on his part to ignore the disclosure. Even, if it turned out to be an unfounded disclosure, it still required proper attention from management.
- * Referring to Colin's view that a complainant bears the onus of coming forward personally to the manager, the Tribunal stated 'absence of a personal complaint does not discharge an employer's obligation.' Furthermore, employees were not told that sexual remarks were improper and the difference between 'joking around' and 'harassment' was never clarified to employees.
- * The Tribunal also believed Colin had in fact called Tracy when she was off sick and had been told about the incidents regarding Boris. His remark "three more times and he's out of here" was consistent with his response to Theresa's letter. He again failed to 'treat the matter seriously.' Considering the evidence, the Tribunal determined the employer had fallen short on several elements of the test.
- * The Tribunal therefore ordered the employer 'to prepare and adopt a harassment policy acceptable to the Human Rights Commission and to implement the policy in an expeditious manner.' Since Boris was still employed at the residence, a monitoring order was added. The employer was directed to inform the Commission whenever a female employee entered or left its employ for two years - with particulars as requested by the Commission.
- * Tracy was also awarded compensation for lost wages and damages for injury to her dignity, feelings and self-respect.



' Reasonableness '



- * The term 'reasonableness' seems to be a 'scary' one for some people out there. There have been a number of people in our training sessions that have a hard time with the concept. As such, I feel it is important for managers and others who deal in the area of conflict and harassment to know how to illuminate the subject appropriately. I believe that we can identify 95% of the things that a 'reasonable' person ought to know is unacceptable behaviour in our everyday working lives.
- * "Reasonableness" is not a term that I feel good managers invented to help to describe that mythical 'respectful workplace.' It is a term that describes the legal process of drawing lines. There are several such terms in legalese, most notably 'beyond a reasonable doubt.' While the latter term is used in criminal proceedings only, it illustrates the need to balance actions, intentions and impact against some sort of measure. In civil law we are provided with the 'reasonable test.'
- * That is all well and good, but what does it mean? It means, in brief that if a 'reasonable' person had known or ought to have known that a certain behaviour was unwelcome, the line has been crossed and harassment has occurred. Further, what that means to harassment policy and legislation is that 'intent' does not matter.
- * For example: A 'reasonable' person ought to know that pushing someone off a bridge is wrong, the intent then simply does not matter! Whoops, I didn't mean for the person to die? Too bad! While the example is an exaggerated one, it demonstrates that it is easy to apply the 'reasonable test' at the extreme of human behaviour. Just so for the world of harassment. What if I tell someone a joke I heard from someone else in the workplace? What if the person I tell is offended? The 'reasonable test' now becomes a little harder to apply - right? There are other factors involved. We need more information. Could I have 'reasonably' known the joke could offend others? How about that particular person? Did I know it was not appropriate to the workplace? These and more facts may need to be known before we can determine or measure if a 'reasonable' person ought to have known the actions were unwelcome.
- * I believe that if we are all honest with ourselves, we can identify 95% of the things that a 'reasonable' person ought to know is unacceptable. If we can't, then why are we not in jail? Because we have not been caught you say? Well, I can tell you that if you cross the line with harassment, chances are that you will get caught eventually and if you find yourself in that unfortunate situation, you can be certain that the 'reasonable test' will be applied to you and the circumstances related to the case.

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

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