

HILL ADVISORY NEWS

“Working with the human side of business”



Dismissal of Sexual Harassment Complaint by Human Rights Commission ‘quashed’ by the Courts because of ‘defective’ Investigation !!



- * Joyce worked for a bank for 10 years. Daryl, her senior manager, often criticized her work performance and used foul language. This upset Joyce but she said nothing to Daryl. Prior to working for Daryl, Joyce had received positive performance appraisals from other managers.
- * One night a group of employees were driving to a restaurant for dinner. Daryl spotted a woman on the street, that was obviously a prostitute who was wearing high boots, and said *“I would like to see those boots on Joyce.”* Joyce felt very humiliated. Daryl also made *‘inappropriate’* remarks to other female employees. Joyce eventually became very distressed regarding Daryl’s behaviour and decided to speak with a counsellor.
- * The counsellor at the bank suggested Joyce have the matter investigated - but Joyce refused. Joyce later decided to send Daryl a memo which stated she wanted his *‘inappropriate’* remarks to stop. *She indicated that his attitude towards her and his lack of sexual integrity made her feel extremely uncomfortable.* Joyce also stated she felt Daryl was not being fair in terms of her work performance. She sent a copy of this memo to the company vice-president. However, just prior to Joyce sending her memo, Daryl was dismissed.
- * The employer’s internal investigation into Joyce’s allegations was delayed because the vice president claimed he was not aware from Joyce’s memo that she was making a *‘sexual harassment’* complaint. During the investigation the employer indicated they had previously encouraged Joyce to have the matter regarding Daryl’s behaviour investigated and she had refused. They were surprised when Joyce later went ahead and wrote her memorandum which they determined *‘did not address the issue of sexual harassment.’*
- * Upon completion of the investigation, the employer’s report noted *“We are unable to conclude that Daryl’s style of performance management was retaliatory or otherwise related to sexual harassment.”* The report also indicated that *“Joyce’s work performance had been substandard and that she continued to challenge and not accept responsibility for improvement.”*
- * The report added *“While the evidence does support a degree of problems with Daryl’s management style, which included the telling of inappropriate jokes and using inappropriate language this is a moot issue since Daryl is no longer an employee of the bank.”* Two months later Joyce was dismissed for *‘substandard performance.’*
- * Joyce subsequently filed a complaint with the Canadian Human Rights Commission alleging that *“The employer did not provide her with a harassment-free workplace and she was dismissed because she had rejected Daryl’s advances.”* A hearing followed
- * The Human Rights Commission appointed 3 investigators to review the evidence and prepare a final report. The evidence was based on the employer’s investigation report and on witness testimony at the hearing. Although the Commission’s final report included testimony from a co-worker who stated *“There was a lot of inappropriate sexual innuendo in Daryl’s remarks to and about Joyce,”* the investigators recommended that *“Joyce’s sexual harassment complaint be dismissed.”* As a result, the Commission declined to refer Joyce’s complaint for hearing by the Human Rights Tribunal. *Joyce subsequently applied for judicial review of the Commission’s decision*
- * Upon review of the Commission’s decision to dismiss Joyce’s complaint, the judge stated he believed the employer’s investigation must satisfy two conditions: *‘neutrality’* and *‘thoroughness.’* As part of that determination, he indicated he must be satisfied *‘The Employer’s investigation dealt with all of the fundamental issues raised in Joyce’s complaint.’* He noted *“If the employer’s report, which the Commission adopted in making its decision, was flawed it must follow that the decision by the Commission was equally flawed.”*
- * The judge noted the employer’s investigation report seemed to focus on Joyce’s work record rather than on Daryl’s management style, which included inappropriate jokes and language. Although he felt it appropriate to discuss her work record, he believed the report should have also dealt with the other fundamental issue raised by Joyce’s complaint
- * *that of alleged sexual harassment.*

* The judge stated “Consequently the employer’s investigation report did not deal with the evidence of sexual harassment and therefore it lacked thoroughness.”

* The judge concluded “Because the Commission chose to rely on the employer’s investigation report which lacked ‘thoroughness’ and was ‘flawed’ the Commission’s decision and investigation report was also ‘flawed.’

**** The judge subsequently ‘quashed’ the decision of the Human Rights Commission and ordered a new investigation be conducted. ****



Why a ‘Thorough’ Investigation You Ask ??



Let’s look at a few facts that can colour your investigation work shall we?

- * You don’t have enough time in your day to do all the work in front of you now - to do what’s expected of you.
- * Your boss doesn’t understand the importance of a thorough investigation and so - demands ongoing job responsibilities be met, while you’re attempting to investigate.
- * You wish someone else could handle this investigation work, for it makes you uncomfortable but you’re stuck with it because of your job responsibilities.
- * You don’t know if the complaint of harassment fits under your corporate policy definition.
- * There’s a complaint - that represents a problem that has to be dealt with right now before things get worse so let’s get in there and get the job done NOW!! Complete the job, finish the job, NOW! Hurry, Hurry.

Do any of these statements resonate with you? So often a corporation will rush through an investigation because of a variety of reasons - reasons they believe are valid and more important than conducting a ‘thorough’ investigation.

Time after time we see investigation work that is incomplete, rushed or simply inadequate because the investigator has not followed through on a line of questioning; has not interviewed all the pertinent witnesses; has not traced all the evidentiary material; has not

An incomplete (non-thorough) investigation can cause havoc to a corporation not to mention the primary parties involved in the dispute.

What can happen as a result could be a variety of reactions from:

- * one or both of the primary parties resigns from the corporation - thereby losing a trained, valuable resource, one that requires replacing and retraining;
- * the conclusions of the investigation are erroneous - and one of the parties moves the complaint outward into another jurisdiction and the corporation loses control of the outcome;
- * the investigation is non-conclusive - leaving both primary parties unhappy, stressed and angry - usually at the investigator and the corporation; (this generally manifests in further workplace problems or higher sick leave usage);
- * the wrong party is found to be at fault - opening the door for legal action or again, action taken outside the corporation’s jurisdiction; and the list goes on and on.

There are many negative outcomes to pursuing an investigation and then not thoroughly completing it, that are too numerous to list in this short article. People’s lives can be negatively impacted in a major way.

All of that and more rests on the investigator’s shoulders - can you bear the burden? Can you take the time to do a ‘thorough’ job? Can you ensure the work you do is excellent, not mediocre? Can you stand tall knowing the work you do is important to yourself, the parties involved and your corporation and take pride in a job done thoroughly? Only you know the answer to these questions - until they are tested in another jurisdiction - then many others will know the answer too

**** From the desk of Cam Hill, President ****



Upcoming Public Workshops to be held in Regina SK (at the Regina Inn)



**** April 28,29,30 Dispute Resolution
May 1,2 Preventing Workplace Violence**

**** May 12,13,14 Harassment Investigation Level 1
June 16,17,18 Harassment Investigation Level 2**

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

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**** See Attachment ****