

HILL ADVISORY NEWS

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Department Director Alleges he was Inappropriately Disciplined Following Sexual Harassment Investigation



- * Andre was a lawyer and the director of a government department. Yvonne and Lise were junior lawyers who reported to Andre. A workplace assessment of Andre's department had been conducted 2 years ago, and several female employees had indicated there was a general perception there had been some sexual harassment problems involving senior management. Andre was on the department's sexual harassment committee.
- * One day an out-of-town seminar was held for several of the department's employees at a resort, which Yvonne, Lise and Andre attended. On the final evening after dinner, Yvonne and Lise both grabbed their empty wine glasses and headed for one of the hospitality suites. Andre was hosting one of the suites and as they passed by, Andre asked *“Hey guys, 2 for 1? What would you like to drink?”* They replied *“red wine”* and entered the suite next to Andre's.
- * Andre brought their drinks to the adjacent suite and said *“When you come back, come to my suite. There's a big bed, a jacuzzi and peace and quiet.”* Yvonne then asked Andre *“Aren't you embarrassed to say that? You're on the sexual harassment committee and you're also my boss.”* Andre replied with a smile *“It doesn't matter anyway I'm going to resign my position in the middle of the night.”* Yvonne raised her glass and said *“To your resignation.”*
- * Yvonne and Lise both believed Andre was inviting them to spend the night and was proposing they engage in a *‘ménage a trois’*..... because of an incident that had occurred at the office a few weeks previously. Some of the lawyers liked to watch the Ally McBeal TV show since it was based on various attorneys working at a law firm. Yvonne and Lise had been in the employee lounge with several other staff members, when Andre came in and said *“Hey guys, last night was the night”* referring to the episode where 2 female lawyers had kissed. They then heard Andre ask *“Which one of my female lawyers would do that for me?”* Both Yvonne and Lise were disgusted, felt humiliated and left the room.
- * A month later Yvonne filed a formal sexual harassment complaint against Andre and an internal investigation was conducted.
- * During the investigation, Andre acted surprised and stated *“It was impossible for such allegations to be made about him.”* He indicated he had always had an excellent relationship with Yvonne and this was the first time he ever had to deal with such a complaint. He explained the *‘2 for 1’* comment referred to the drinks he was serving. He admitted he had mentioned his room and big bed and had talked about resigning. However, he stated he had invited everyone into his suite, since the other suite was getting too crowded. When asked about the Ally McBeal incident, Andre denied making the remark about *‘his female lawyers kissing’* and said he knew who did, but would not name the person responsible. In closing, he offered to apologize to Yvonne and Lise, since they both felt his comments had been inappropriate.
- * Following the investigation, an executive summary with recommendations was forwarded to the Deputy Minister for his review. It made reference to the assessment previously conducted in Andre's department and stated *“Your decision will be closely scrutinized by all female employees and will have a major impact on the commitment of senior management to ensure a harassment free workplace.”* The summary made no reference to Andre's offer to apologize.
- * Shortly thereafter, the Deputy Minister issued a letter of reprimand relieving Andre of his managerial duties and suspending him for 3 days without pay. He was also given a warning that any repetition of activity constituting sexual harassment would result in dismissal. In addition, he was ordered to attend harassment and gender equality training and to write a letter of apology to Yvonne. Andre was informed the reprimand would remain on his file for 2 years. *Andre filed a grievance and an arbitration hearing followed.*
- * Andre's counsel argued that the employer had targeted him and decided to use Andre as an example. She stated Andre had always denied having said he would like *‘to see his female lawyers kiss’* and although the comments he made about coming to his suite were inappropriate they did not constitute sexual harassment.

* The employer criticized Andre for failing to admit he had harassed Yvonne and Lise. They stated his remark about seeing *'his 2 lawyers kissing'* was humiliating and met the test for sexual harassment. They said the same held true for the references about *'2 for 1,'* the *'big bed'* and having *'some peace and quiet.'*

* The arbitrator began by noting the executive summary sent to the Deputy Minister attempted to show that *'The perception of sexual harassment in the department could have stemmed from Andre's behaviour.'* She determined this did not apply to Andre, since he was not considered a member of *'senior management'* and it could therefore not be used as evidence against him.

* The arbitrator stated that sexual harassment must include *'persistent and repetitive behaviour'* except in cases where a *'single'* act appears to be serious enough to cause a harassing effect. The arbitrator noted that in order to establish a case of sexual harassment in the workplace, *'all'* 6 of the following questions must be answered in the affirmative:

1. Has the whole of the evidence surrounding the conduct in question been obtained, considered and evaluated?
2. Has the evidence shown in a clear, cogent and compelling manner that the acts in question were in fact committed?
3. Did the behaviour consist of persistent and repeated acts or words or is a serious act referred to?
4. Are the respective versions of the alleged victim and the person who is the subject of the complaint credible in themselves in light of all the facts and if so, which version is more credible on a balance of probabilities?
5. Is the version consistent with what a practical and informed person in the same place and circumstances would immediately recognize?
6. In light of all the facts surrounding the behaviour, would a reasonable person feel that the behaviour was blameworthy, unwelcome and sexual in nature?

* Bearing this in mind, the arbitrator reviewed the 2 alleged incidents. Regarding the Ally McBeal incident, while she agreed Andre said *"Hey guys, last night was the night"* she believed Andre did not make the comment about *'his female lawyers kissing'* as there were others present who had also discussed the show.

* She also determined the incident regarding the invitation to attend Andre's suite did not constitute harassment as it was extended to everyone who was in the other suite, not just Yvonne and Lise. She also believed Andre's explanation of the *'2 for 1'* offer was not intended as an invitation to engage in a *'ménage a trois'* but was a *'joking'* reference to *'2 drinks for the price of 1.'*

* However, given that Andre suggested he would *'resign'* from the harassment committee and based on what Yvonne and Lise thought they remembered about the Ally McBeal incident the arbitrator felt their belief that Andre wanted them to participate in a *'ménage a trois'* was genuine. Based on the consistent testimonies of Andre and Lise, the arbitrator determined that both of them were credible witnesses and the most likely explanation was that a misunderstanding had occurred.

* Based on the evidence and the 6 part formula regarding sexual harassment, the arbitrator determined that Andre's behaviour was not *'persistent and repeated nor was it sufficiently serious on its own to amount to harassment.'* She also noted *"The evidence did not show Andre had the habit of making offensive or inappropriate sexual comments towards Yvonne or Lise to make them feel uncomfortable day after day, week after week."*

* The arbitrator also stated that Andre's *'joking'* comment about resigning from the committee was indeed inappropriate and he should have known better. However, this did not constitute sexual harassment. This comment was a *'minor'* and *'isolated'* incident and a disciplinary measure in the form of a reprimand would have been appropriate.

* The arbitrator concluded that the discipline which had already been imposed was more *'severe'* than Andre deserved and therefore no further penalties were justified. *She subsequently ordered the employer to reinstate Andre to his previous managerial position; withdraw the 3-day suspension; and remove the letter of reprimand from his personnel file. The employer was also required to reimburse Andre for any losses incurred with respect to pay and benefits associated with the loss of designation and suspension.*

As this decision indicates an allegation of sexual harassment will not be considered to be true unless a pattern of conduct is established - or the incident in question is sufficiently 'serious enough on its own' that it would 'never have to be repeated for there to be a harassing effect.' Investigations of sexual harassment allegations will also be held to a relatively high standard of proof the employer must establish that the events actually happened - not simply as this investigation concluded - that it was 'likely' they happened.

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