

HILL ADVISORY NEWS

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Union Claims Dismissal of Correctional Officer too 'Severe' a Penalty for Sexual Harassment Given the Workplace Culture



- * Ray was employed as a correctional officer for 25 years at a provincial detention centre. His performance evaluations over the years indicated that he had met or exceeded all requirements and contained generally positive statements regarding his job performance. There were no references to any disciplinary action taken by the employer. Charlene was a temporary employee who had worked 2 years at the centre. Ray was occasionally assigned supervisory duties and exercised direction and control over other employees, including Charlene. As a temporary employee, Charlene felt very vulnerable and was concerned that her future work opportunities may be affected by her relationship with Ray.
- * The detention centre was an adult male maximum security institution, which quite often held more inmates than it was designed to accommodate. This made for a very stressful and difficult working environment. To relieve some of the tension, it was not uncommon for the staff to exchange jokes with one another. Sometimes the jokes included 'sexual' references and horseplay.
- * One day Ray and Charlene were distributing medication to some of the inmates when Ray came up behind her and pinched her on the butt. Charlene told Ray to stop but he continued to pinch her. Charlene finally yelled for Ray to stop and he did. A few days later as Charlene was walking up to the front door of the centre, Ray once again came up behind her and pinched her butt and then did it again - even harder. Charlene turned and said "F- - - Ray, stop it hurts!"
- * A couple of weeks later Charlene was in the yard at the detention centre with her boyfriend and some other correctional officers. Ray came up behind Charlene and wrapped his arms around her. Charlene said it felt like he was trying to 'hump' her from behind. She told him to stop and jabbed her fingernails into his hands. Ray let go and said "F- - - woman, what did you do? You hurt me!" Charlene stated that if he had stopped she would not have had to hurt him. Later that day she spoke to Ray and told him he was 'stepping over the line a little.' Ray replied 'just a little' laughed and walked away. Charlene had finally had enough and filed a 'sexual harassment' complaint against Ray. Ray was subsequently suspended with pay and an investigation was conducted.
- * During the investigation 2 other female employees claimed Ray had also 'sexually' harassed them a few years earlier. In addition, it was discovered that Ray had been misusing the employer's e-mail system. Ray's computer was checked out and e-mail messages were found which consisted of pornographic photos of women. Ray had previously circulated these e-mails to other employees, some of which he had received from other correctional officers. Several other employees who were also found to have pornographic material on their computers were given written reprimands.
- * Following the internal investigation, it was recommended that Ray receive a 2-week suspension. However, the employer felt that was inadequate and a meeting was subsequently held with Ray. He was told that unless he could provide the employer with some information that would change their mind, he would be dismissed. Ray informed the employer that he had been attending sessions with a psychologist. He stated he was not aware that what he was doing was 'harassment' and that now he understood and appreciated how others viewed his conduct. Ray agreed that his behaviour was 'inappropriate' and that he did deserve some form of discipline but did not feel dismissal was justified. A few days later Ray was dismissed. *He filed a grievance and an arbitration hearing followed.*
- * The employer argued that there were usually 3 questions that had to be addressed in order to determine whether an employee has been dismissed for 'just cause.' The first question was whether Ray had 'sexually' harassed Charlene. They stated that based on the evidence 'sexual harassment' had indeed occurred. The second question was whether Ray's behaviour deserved disciplinary action. They noted that Ray himself had suggested that he deserved some form of discipline for his behaviour. The final question was whether the discipline imposed by the employer was too 'severe.' They said there had been 3 incidents of Ray's 'inappropriate' behaviour and each time they occurred Charlene had asked Ray to stop. The employer argued that Ray's actions were 'extreme' and their only alternative was to dismiss him.

Continued (2)

- * The union felt that dismissal was too 'severe' a penalty given the circumstances. They argued that Charlene had admitted that she participated in some of the 'sexual' banter and exchanges that took place in the workplace. They noted that Ray was prepared to admit he did something wrong and was willing to accept punishment for it. However, given his long work history with good evaluations, they suggested that he was not an employee with an incurable problem. They noted the fact the investigator had recommended only a 2-week suspension. With respect to the e-mails, they argued that all of the ones which were found on Ray's computer were those that had been forwarded to him from other employees.
- * The arbitrator agreed the issue to be determined was whether the discipline imposed by the employer was appropriate. He noted that Ray had accepted that his conduct warranted some form of punishment. He felt that although the allegation of 'sexual harassment' identified by the other 2 employees did occur 2 years ago, it had been resolved to their satisfaction. However, it did raise a concern that although Ray did stop his 'harassment' of those 2 individuals, he did not appear to have been able to transfer that understanding to his subsequent relationships with other employees.
- * With respect to the 'pinching' incidents, the arbitrator noted that Ray did stop when Charlene made it clear it was unwelcome although he did repeat his actions on the second occasion some weeks later. He felt that although 'pinching' can have 'sexual' implications, it was not clear that this was Ray's intention as opposed to what is often referred to in the workplace as 'horseplay' or 'teasing.' He stated there was no follow-up by Ray to suggest that he was inviting 'sexual' activity or threatening Charlene if she did not participate in some form of 'sexual' activity.
- * However, the arbitrator went on to say it was disturbing that after Ray was told to stop after the first incident he repeated his conduct several weeks later. The arbitrator felt that the third incident of Ray wrapping his arms around Charlene was more serious as it appeared to have been an action that could more easily have been interpreted by Charlene as 'sexually' oriented. Charlene felt that because of the way Ray grabbed her he was 'humping' her from behind. The arbitrator felt that since there were several other employees close by, including her boyfriend it was unlikely Ray would pursue a 'sexual' liaison at that time.
- * In regards to the 'pornographic' e-mails, the arbitrator noted that many of the witnesses who testified referred to the common practice of these types of material being circulated by e-mail. It appeared that nearly all employees received such 'pornographic' material and some would forward it to other employees who had not been copied on the original e-mail, while others would simply delete the material. There was no evidence to suggest that Ray was responsible for instigating the circulation of the offending material. He also noted that although the employer had an e-mail policy, there was no indication they had discussed it with their employees or indicated the seriousness of this activity.
- * The arbitrator concluded that Ray's conduct was totally 'inappropriate' and 'uncalled for'- but given the 'workplace culture' and the 'nature' of the offences - discharge would be inappropriate. In fact he noted the investigator had also reached a similar conclusion and recommended a 2-week suspension. Given Ray's long service, his positive work evaluations and the fact that he had never been disciplined, dismissal was too severe a penalty. *The arbitrator ordered that Ray receive a 5-month suspension and continue counselling sessions with his psychologist. He also recommended Ray receive a written reprimand for the distribution of inappropriate e-mails.*

** *The arbitrator noted that the company's 'sexual harassment' policy had not been well publicized nor were the employees educated. The 'workplace culture' also condoned horseplay, coarse language and conversations about personal 'sexual' activity. The arbitrator stated this had been a sobering experience for the employees as it should be. He stated that hopefully this would act as a catalyst that would allow the employees and employer to work together to improve the workplace environment. He concluded it was not an easy environment to work in at the best of times and for that reason It was even more important that employees show respect and concern for one another.* **

★ ★ *Thanks* ★ ★

Thank you to all our participants who helped to make our public Harassment Investigation workshops (Level 1 & 2) held in Edmonton, Winnipeg and Halifax this past year such a success!

Thanks also to London Drugs, NDP and Devon for inviting us to present our Manager's Training/ Dispute Resolution workshops. We had a great time!

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If you would like more information or wish to see a 'demo' please contact

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'of joy, of peace, of harmony and prosperity'

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