

HILL ADVISORY NEWS

“Working with the human side of business”



Employer's 'absurd' Response to Sexual Harassment Complaint Violates Human Rights Code !



- * Pamela worked for 7 years for a company that manufactured ice cream products. Her job was to stack the packages of ice cream on pallets, secure them with shrink wrap and label them. Pamela was a lesbian whose sexual orientation was common knowledge among her co-workers and management. There were often jokes about gays and lesbians in the workplace and Pamela would sometimes participate in these jokes. Craig also had the same job responsibilities as Pamela and had worked with her for the past 7 years.
- * The company had recently reduced the number of employees working on the night shift. After returning to work after the Christmas shutdown, Craig made a comment to Pamela that *“It was all her fault the company had cut staff to stop sleeping on nights.”* Pamela replied that it had nothing to do with her and then said *“What have you been smoking?”* A few days later as Pamela was walking out of the freezer, Craig began walking behind her and said *“Move your a - s you slut.”* Pamela thought the best thing to do was to ignore him. The next day Pamela was in the cafeteria with her friend Arnold ordering Chinese food. She commented to Arnold that she did not like chicken balls. Craig was sitting at a table nearby with some co-workers. Pamela heard Craig laugh and say *“It’s no surprise she doesn’t like balls.”* Pamela got very upset and told Craig to *“Watch out there is a harassment policy here and you will be part of it.”*
- * Pamela had been given permission by her supervisor to take home empty shrink wrap rolls and small pieces of wood that broke off from pallets. One day Pamela collected 10 empty rolls in a box which she planned on taking home. However, when she returned from her break the rolls were gone. She discovered the rolls had been thrown back in the garbage and immediately suspected Craig.
- * Pamela put the rolls back in another box with a note reading *“Please do not throw out.”* After returning from another break the box was again missing. She finally located the rolls in the outside garbage container buried under several garbage bags.
- * Pamela reported the incident to her supervisor, Randy, who later informed her that he had spoken to Craig and he had denied any involvement in the *‘garbage’* incident. The next day Pamela noticed a boxful of small pieces of wood she had collected had been smeared with ice cream. Pamela was upset and started to cry. She told Randy that she had a headache and was going home. Randy told her she could not go home until he found a replacement. Pamela went to see the plant manager but he was not in his office. Pamela waited for him outside his office and continued crying. After some time when he did not return, she decided to go home.
- * The next day when Pamela returned to work she called Randy and left a message that she wanted to file a *‘sexual harassment’* complaint against Craig. She also indicated that she wanted to meet with Randy at the end of her shift at 3:00 pm. At the meeting, Randy told Pamela the human resources representative who dealt with these types of complaints had left for the day and she would have to wait until the next day to discuss her problems concerning Craig. A meeting was subsequently held with the union and management present. After a lengthy discussion with Pamela, management informed her that an investigation would be conducted immediately.
- * During the investigation Craig denied making the *‘slut’* comment. However, he admitted making the reference to the *‘chicken balls’* to a co-worker seated next to him but he was sure Pamela could not have heard it. Pamela’s friend, Arnold, who was in line with her in the cafeteria was also interviewed and stated that he had not heard the comment. The co-worker who had been sitting next to Craig stated that several hours after the *‘chicken balls’* comment, Pamela had asked him what Craig had said to him.
- * Four days later Pamela’s supervisor met with her and she was told that *“It was her responsibility to clearly inform Craig that his comments were unwelcome and that since she had not done so the investigation did not find any violation of the harassment policy.”*

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- * Pamela was very disappointed with the response to her complaint and immediately filed a grievance claiming the employer was in violation of the Human Rights Code. Her grievance stated that she had been subjected to *'harassment and discrimination based on sexual orientation'* by a co-worker, Craig and that when his misconduct was brought to the employer's attention, they failed to take appropriate action. An arbitration hearing followed.
- * The employer indicated that Pamela needed to say *"I don't appreciate it and I'd like you to stop."* They were of the view that there would have only been a violation of the policy if they were satisfied that Pamela heard the *'chicken balls'* comment. Since they had concluded that Pamela did not hear this comment they believed the Human Rights Code had not been violated.
- * The arbitrator determined that based on the evidence Craig and several co-workers had concerns, perceived or real, about Pamela's work ethic and the impact it had on them. They felt that she was not carrying her weight and that it adversely affected them. Craig was particularly vocal about it and blamed Pamela for the reduction in size of the night shift. The arbitrator felt the proper course of action regarding Pamela's work ethic would have been *'to report any complaints to management.'*
- * The arbitrator did not accept the employer's position that the *'slut'* remark was necessarily unsubstantiated merely because there were no third party eye-witnesses. He stated *"Offences such as 'sexual harassment' should not be treated in such a dismissive fashion."* However, the arbitrator felt that Pamela was not a credible witness since her testimony had not been consistent. After originally saying the *'slut'* incident took place as she was walking out of the freezer, she later stated that it had occurred while she was working at her machine. The arbitrator therefore could not conclude on a *'balance of probabilities'* that the alleged comment was made.
- * The arbitrator stated the Human Rights Code *'does not permit an employee to act out his frustration about a co-worker's work ethic by resorting to sexual harassment or harassment on the basis of the co-worker's sexual orientation.'* However, he stated the only incidents which had anything to do with Pamela's *'sexual orientation'* were the reference to her as a *'slut'* and the *'chicken balls'* incident.
- * The arbitrator also felt that whether or not Pamela heard the *'chicken balls'* remark was immaterial. He stated *"Making a homophobic comment about one co-worker to another co-worker and laughing about it is as clear a case of 'discrimination' on the basis of 'sexual orientation' as one can find."* The employer's position that *'an employee can continue such remarks until directly told to stop'* was incorrect. The arbitrator felt that taking such an *'absurd'* position would only encourage harassment of those who are not strong enough to confront perpetrators.
- * The employer testified that with regard to the *'slut'* comment, they could not conclude the comment was made because there were no witnesses. Craig had also told them during the investigation that he could not recall making such a comment. Regarding the *'chicken balls'* incident, the employer agreed that Craig's comment was a reference to Pamela's *'sexual orientation'* and that such comments did breach the grounds of *'sexual orientation.'* However, the employer argued that there was no violation of the company's harassment policy because *"Although the comments were unwelcome Pamela did not ask Craig to stop."*
- * The arbitrator stated that although the employer's investigation was prompt, he felt they did not treat the alleged incidents of *'sexual harassment'* seriously. Instead they were treated as *'normal interaction in the workplace.'* Even though profanity and jokes about homosexuality were not uncommon in this workplace and although Pamela tolerated and even participated in these jokes he stated this did not give employees the right to target individuals on the grounds of their *'sex'* and *'sexual orientation.'*
- * The employer was asked if they did not think that Pamela's remark to Craig to *"watch out there is a harassment policy here and you will be part of it"* was in effect telling him to stop such comments and that they were unwelcome. The employer stated Pamela did not directly tell Craig *"I don't appreciate that comment."*
- * The arbitrator concluded the finding of the employer's investigation was *'completely inconsistent with the company's own policy that it will not tolerate any form of harassment'* and the employer was therefore in violation of the Human Rights Code.



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*For more information contact Sheri:
 Phone/fax: (204) 831 - 7661
 E-mail: sswain@hilladvisory.com*

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