

HILL ADVISORY

NEWSLETTER

Upcoming:*REGINA**Harassment Investigation**Level One & Two**October 17th - October 22nd,
2011***Special Thanks To:***All participants of the Level
1&2 held in St. John's Sept
2011. It was a pleasure to
meet and work with you all.***Upcoming:***HALIFAX**Harassment Investigation**Level One & Two**March 19-24th, 2012***Upcoming:***WINNIPEG**Harassment Investigation**Level One & Two**May 7th - 12th, 2012*

A CAUTIONARY TALE

Out of office conduct and the Employer's responsibility

This complaint and subsequent arbitration occurred in an Educational institution and involved a 20-day suspension for a female employee (Ms Pierce). The alleged events took place at the Christmas staff party, which is an annual event and is held offsite. Two staff members organized the party.

The Employer's position was that Ms Pierce intentionally grabbed a man, costumed as Santa Claus, by his testicles. The Union's position was that Ms Pierce was endeavoring to carry out a joke that went awry. If she did clutch his genitalia, the Union's position was that she did so accidentally and not deliberately.

The party itself began with pre-dinner drinks in the bar area. Dinner followed in another room of the facility. After dinner people returned to the bar area, to sit at tables and view a skit performed by faculty and staff. Socializing began during the skit and dancing and more socializing followed.

The incident giving rise to the suspension transpired while the skit was still in progress. As noted, it involved a man costumed as Santa Claus. This man was not the person playing Santa in the skit. He was a different Santa, who was not a member of the faculty or staff.

Both Santa and Ms Pierce testified about the incident. In addition, there were a number of bystanders sitting at or near the table who viewed some or all of the incident.

Santa dons an elaborate suit and moves throughout the community. For example, he will appear at schools to greet children and at hospitals to greet patients. A large part of Santa's activities are focused on fundraising for the purchase of gifts for needy children. He typically makes brief appearances, shaking hands and extending seasons greetings. Learning of the Christmas staff party, Santa decided to make an appearance. He arrived during the performance of the skit and moved from table to table, shaking hands and extending greetings.

*Already attended
Harassment Investigation
Level One? Consider joining
us for Level Two:*

During **Level Two**, the majority of time is spent on interviewing witnesses. Level Two focuses intensely on the immediate feedback of our facilitators. Appropriate handouts are also provided regarding partner dynamics, redirect interviews and evidence. The primary goal of the program is to spend time exploring the reasons for investigation techniques. Little time is formally dedicated to theory, maximum time is spent in hands-on practice. Advance study materials are provided to each participant prior to the Level Two program

Prior attendance in Level One is required. To register for an upcoming session, contact Sheri, at sswain@hilladvisory.com, or 204-831-7661

Assault

Eventually he reached a table near the bar where Ms Pierce and other members of her party were sitting.

Santa testified that a woman came up to him and stated, "You are not the real Santa" then lifted up his jacket and grabbed him by his private parts. He said he asked three times to be let go. Santa said that he was embarrassed and hurting, because he had received "a couple of good yanks". He was still sore one week after the incident.

Counsel for the Employer asked whether it might have been a "baseball handshake" and whether Ms Pierce's hand might have only brushed him. A "baseball handshake" was defined as a procedure in which a person extends one's hand to another person, as if to shake hands, then suddenly drops down and grasps the other person by the thigh. Santa replied "that was no brush; it was clutch and grab".

Santa described the events to a friend who informed him he could make a complaint to the police. Santa did not do so, as it was his hope that the matter would simply go away and be forgotten.

Witnesses

Ms Cher testified at the arbitration. She said that when Santa approached their table, Ms Pierce bent towards her and said, "I'm going to see if that's the real Santa. I'm going to grab his balls." Ms Cher said she told Ms Pierce not to do it. However, as Santa approached their table, Ms Cher said that Ms Pierce stood up and walked towards him then grabbed Santa. She also testified that Ms Pierce said the man was not the real Santa and returned to the table laughing.

Other witnesses testified in a similar manner.

Reported

The incident was reported to the Principal of the school. The report did not come from Santa, but from one of the staff members who had arranged the party. As an organizer, she felt she was responsible.

The principal acted on the information and requested a meeting with Ms Pierce and a Union representative. Ms Pierce was informed of the allegations and it was suggested that the matter could be dealt with by way of letter of apology. She did not respond to the allegations. Her Union representative spoke on her behalf and said that Ms Pierce sincerely regretted any embarrassment the school may have suffered and felt that the apology letter should come from the school.

The school wrote Santa a letter of apology and indicated that the matter was being followed up by the Superintendent (Mr Jilles).

Mr Jilles scheduled a meeting with Ms Pierce and the Union. The purpose of the meeting was to deliver a letter to Ms Pierce, informing her that the Employer was going to investigate the allegations.

Ms Pierce was asked about the allegation. She replied that she was "not guilty of that allegation". Her representative read a written statement, which described the "baseball handshake" and indicated contact with Santa's genitalia was accidental. She denied making the statements leading up to the contact and after the contact.

The investigation determined that Ms Pierce had breached the policy as the allegation was substantiated. A suspension of 20 days without pay was imposed.

Changing story

Ms Pierce changed her story a number of times before and during the arbitration hearing. At first the brush was accidental,

then it was an accidental squeeze, then "clutched". She admitted that she had doubts about her testimony after hearing Santa's evidence.

Ms Pierce was pressed as to if Santa was wrong to state there were a couple of yanks and replied, "When I heard that I thought how would he come up with that. It's possible there was a tug. There was something in my hand. It could have been genitals..."

Finding

The arbitrator found that there was ample evidence to support the conclusion that Ms Pierce did grab Santa's genitalia. He concluded that Ms Pierce did so deliberately based on the preponderance of the evidence.

The next question handled was if the Employer was entitled to discipline. The conduct occurred after working hours and away from the work site. In summary the questions to be answered were: did the actions of the employee injure to interests of the employer, damage the employer's reputation, or lead to a refusal, reluctance, or inability of the other employees to work with them.

The Board of School Trustees did not formally approve the function. Nor did the Employer bear any financial costs. However, the Employer had a relationship with the venue in a number of different areas. The arbitrator found that Ms Pierce's actions represented a threat to that relationship, though no damage was shown.

The arbitrator moved to the discipline and determined that discipline was warranted. The final question was severity. The arbitrator found that the discipline was too strong due to a variety of mitigating factors and substituted a suspension on 6 days without pay.