You Can’t Say That! Or Can You? Is There Such A Thing As Consensual Sexual Banter In The Workplace?

An allegation of sexual harassment can be one of the most difficult and sensitive issues an employer faces. Despite training and policy awareness, people can cross the line. Untangling the web of who said what may be a challenge. Electronic communications may make proof easier, however, what do you do with a cross allegation that the communications were welcomed or consensual?

Is there a difference between consensual sexual banter and unwelcome sexual harassment? If so, how can you tell?

Recently the British Columbia Human Rights Tribunal considered this issue in *Kafer v. Sleep Country Canada and another (No. 2)*, 2013 BCHRT 289. In this case, there was evidence of ongoing, explicit and crude sexualized conduct and language in the workplace. The complainant admitted that she frequently engaged in sexual banter with multiple co-workers and at times started those conversations. She also admitted that at times she felt that some of those conversations crossed the line at which point she spoke to the employees in question and asked them to stop making similar comments in the future. Her requests were complied with. However, crude sexualized banter continued. Following the receipt of an e-mail which set out a number of sexual references and made comments regarding her sexual orientation, the complainant determined matters had gone too far and complained to her manager about a wide range of conduct. The employer investigated the incident, disciplined the author of the e-mail, and told the complainant that it planned to train employees in appropriate behaviour.

Based on the totality of the evidence the Tribunal dismissed the complaint against the employer and an alleged harasser who was named personally. The Tribunal concluded that the conduct at issue would normally be considered sexual harassment on the basis of sex and sexual orientation. However, the Tribunal determined that the complainant would not be able to establish that an objective person should have known that she found the comments unwelcome given the degree of her participation in sexualized conversations.

This finding is particularly interesting in the face of the complainant’s allegation that she felt she had to participate to “fit in.” The evidence of very colourful and crude language often used by the complainant (inappropriate to repeat in this

newsletter) probably tipped the scale against her.

The Tribunal made a point of reiterating the employer’s duty to provide a workplace free of sexual harassment and that it was not a defence to say there was a workplace culture of sexualized joking and conduct. This highlights a distinguishing feature of the case. Only in rare cases will the complainant’s own conduct lead the Tribunal to find that there is no reasonable prospect to prove that sexual comments or romantic advances were unwelcome from an objective point of view.

Employers are obligated to take proactive steps to create a harassment free workplace as well as investigate allegations and eliminate harassment when found. Where employees do engage in sexualized banter and conduct, the workplace will probably suffer from morale and retention issues and the employer may be exposed to liability. The absence of overt protest by an employee, or even some participation in sexualized banter, should not be read as condoning inappropriate behaviour. Employers should be proactive in eliminating inappropriate behaviour, particularly behaviour that from an objective view could be seen as unwelcome.

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