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Your Million Dollar Office Party

By John Mullen

The refrain in the old song goes. "A kiss is just a kiss, A sigh is just a sigh.". But when this happens on Company time, the ground rules change. Seemingly consensual romantic contact between company employees can result in unexpected liability for the more senior of the employees, and possibly you, the employer, as well. The law governing workplace behaviour in Ontario can bring swift and often harsh justice to those who cross the line.

No Consent Is Assault – A Kiss is No Longer Just A Kiss

The reason is that, the courts deem that a criminal assault can take place where there is physical contact between two people, without the consent of both of them. If the contact is of a sexual nature, then non-consensual contact can result in a charge of sexual assault. This really raises the stakes and consequences of flirtatious activities in the office and at office parties. Please be warned of the possible consequences to you and your company.

However, there is a wrinkle – the consent involved in seemingly consensual contact will be ineffective if there is such a disparity in the relative positions within the company of the individuals that the weaker party was not in a position to choose freely.

Induced by Power or Authority: Yes Is No

You now have a situation where interaction between a supervisor and an employee could possibly amount to a sexual assault if the contact was caused as a result of the supervisor's power or authority over the other employee.

The result is that even seemingly consensual petting or even friendly shoulder massages could result in criminal charges being laid against a supervisor. The supervisor could be convicted, even if no physical force was used or threatened, if the employee can persuade the Judge that the power or authority of the supervisor induced the consent given.

Your Million Dollar Party

You should be aware of your Civil Liability and the Victim's Bill of Rights.

In addition to the criminal penalties and criminal record that the supervisor could get as result of this "innocent activity", they could then also be on the receiving end of a civil lawsuit, possibly along with you, the employer, for civil damages suffered by the complainant as a result of the unwanted contact or activity.

Under the Ontario statute the Victims Bill of Rights, a person convicted of a crime set out under the statute is liable in damages to every victim of the crime for emotional distress, and bodily harm resulting from the distress, arising out of being found guilty of the crime.

Here is the interpretation – A victim is presumed to have suffered emotional distress if they were a victim of a sexual assault, or attempted sexual assault.

It Gets More Complicated... Criminal Harassment

In addition to sexual assault, the Victims Bill of Rights will make the supervisor liable for damages for emotional distress and bodily harm resulting from the distress, where they are found guilty of, or plead guilty to, a charge of Criminal Harassment.

A conviction for Criminal harassment can be obtained where the Judge finds that the victim fears for their safety as a result of being followed from place to place by the other person, or being communicated with repeatedly by the other person, or by the other person engaging in threatening conduct directed at the victim.

Your Million Dollar Office Party *(continued)*

A Serious Matter For Employees & Yourself

The result is that even seemingly consensual romantic contact between two employees, where one felt pressured by the other's seniority over them, can result in charges for, and a possible conviction for, sexual assault. Even a lack of contact can result in a criminal harassment charge.

Alternatively, a supervisor, not wanting to risk a trial on a sexual assault charge with the resulting notoriety that a record of a conviction on that charge would bring, might even plead guilty to the "lesser" charge of Criminal Harassment.

Convictions on either charge can result in automatic civil liability for any emotional distress, or bodily harm resulting therefrom, suffered by the other employee. And you could be included in the lawsuit.

What You Can Do

First of all, if you are a supervisor, your best advice might be simply not to date anyone in the company who reports to or through you. Certainly, at a minimum, you should avoid any possible suggestion of committing any unwanted sexual solicitation or making any unwanted advance or contact.
IF IN DOUBT – DON'T DO IT.

If you are the employer, apart from not engaging in such conduct yourself, you must take a proactive supervisory role to make sure that none of your employees overstep their bounds. This must be an explicit action on your part, and be a consistent message throughout your company.

The court may determine that your company should be held vicariously liable for the wrongdoing of your employee, if the court finds that your business and the empowerment of the supervisor materially increase the risk of sexual harassment and assault, and hence the harm.

The comments in this newsletter are of a general nature and are not designed to replace the need for professional advice in specific situations. If you have questions about this bulletin, we would be pleased to assist you.
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Avoid Exposure, Consider These Steps

- Introduce a zero tolerance policy with respect to abusive behaviour, such as harassment and unwanted contact;
- Make sure your policy is in writing, is well publicized within your organization to all staff, is made a condition of employment, is consistent and reflects the requirements of the laws in Ontario;
- Clearly communicate to every employee the kinds of behaviours that are forbidden;
- You must create a well known, 'safe', internal mechanism to deal with employee complaints;
- Incidents of abuse should result in discipline, up to and including termination with cause;
- Swiftly investigate and deal with all complaints of abuse that are brought forward, and treat them all seriously;
- Maintain a meticulous written record of all complaints and action taken;
- Talk with a lawyer sooner, rather than later when complaints are received;

Make sure that anyone who crosses the line is held accountable for their actions and that everyone is aware that such behaviour is not tolerated. If you do not have such a policy and wish to create and implement a workplace harassment policy or you wish to review your current policy, please call our office to discuss.

John Mullen is a commercial litigator with significant court experience, whose practice focuses on resolving and preventing disputes arising in businesses of all size.

For more information on this and other topics, you may contact John Mullen directly at mullen@sdslawfirm.com

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