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*Sexual Harassment Investigations: How to Limit Your Liability and More: A Practical Guide*, by Arjun P. AGGARWAL and Madhu M. GUPTA, Ottawa: Harassment Publications, 2004, 207 pp., ISBN 0-9735335-0-1.

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## Recensions

### Book Reviews

***Sexual Harassment Investigations: How to Limit Your Liability and More: A Practical Guide,***

by Arjun P. AGGARWAL and Madhu M. GUPTA, Ottawa: Harassment Publications, 2004, 207 pp., ISBN 0-9735335-0-1.

In spite of years of public awareness and judicial approbation, sexual harassment continues to plague workplaces, big and small, across Canada. Workplaces poisoned by sexual harassment abound. The economic and social costs to employers and employees of these poisoned environments are beyond accurate measure. Employees lose jobs and self-esteem. The targets of harassment often suffer physical and/or psychological damage. The families of victims and perpetrators suffer. Employers meanwhile must pay the financial and organizational costs of repairing the damage. Not only do they face the legal fees and compensation necessary to remediate the target(s), but they must often deal with a workforce disrupted by the distrust and disharmony that often follow the allegations or the discovery of sexual harassment in their midst. At the same time, failure to prevent and redress sexual harassment within a workplace can deplete morale and productivity well beyond the individual targets themselves. Finally, unchecked sexual harassment within a workplace can be a breeding ground, or mask, for other forms of workplace harassment, a phenomenon so clearly on the rise that one province, Quebec, has adopted legislation to address it.

The perniciousness of harassment in the workplace, be it sexual, racial or related to other grounds protected under human rights legislation is seriously compounded by managements' failure to educate themselves and their employees to respect the sexual, racial, and cultural mosaic that our workplaces reflect. The clarion call to "celebrate diversity" must be grounded in ongoing education within workplaces about social diversity, and accordingly what constitutes respectful and equitable treatment of diverse employees.

In reviewing SHI, I draw on several years of practice in human rights law, and current engagement as a university equity and sexual harassment advisor. I have seen first hand the consequences of faulty sexual harassment investigations, be they performed by employers or by human rights commissions. I am certain that the key to prevention of harassment lies in management and employee education and consistent application of strong internal policies. It is equally critical that the process for handling any human rights violation be exemplary.

It is thus that *Sexual Harassment Investigations: How to Limit Your Liability and More* (hereinafter SHI) is an awaited and welcome follow up

to the authors' seminal text *Sexual Harassment in the Workplace* (3<sup>rd</sup> ed., Butterworths, 2000).

Aggarwal and Gupta draw on their earlier text to briefly review the jurisprudence and fundamental human rights principles that inform and determine the effective prevention, investigation and remediation of workplace sexual harassment. The handbook begins with a plain language discussion of sexual harassment, what it is and what it isn't. This is followed by a straight-forward primer on employer's liability for sexual harassment. Moving forward from this legal backdrop, Aggarwal and Gupta address the critical role of senior management and front line supervisors in the prevention of harassment, offering a no-nonsense and doable checklist, as well as policy development guidelines. In Part III the authors bring attention to the role of voluntary mediation in the resolution of harassment complaints, its potential advantage in achieving early resolution of complaints, before the parties to a complaint become fixed in their position and the process becomes (unhelpfully) adversarial. But mediation is neither always appropriate nor effective. Employers must face the fact that investigation of some complaints will be required. In the remainder of SHI, Aggarwal and Gupta set out step by step "the essentials of a good faith investigation", an investigation that will meet the legal and moral requirements for fairness to both complainants and respondents.

One of this book's strengths includes its accessibility to a reader unfamiliar with the subject. However, these same readers must be cautioned that SHI will not make them an expert in sexual harassment law. On this front, SHI simply offers the novice a foundation in terms of the critical concepts needed to develop policy and undertake the investigation of complaints. To go deeper, one should study the authors' earlier text.

The real value then of this handbook is in the relative depth with which it addresses *how* to investigate a complaint of sexual harassment. It offers clear guidelines and useful checklists, which, for the most part, and if followed carefully, should result in a fair and impartial uncovering of the facts essential to establishing a claim of sexual harassment. By the same measure, a fair and impartial investigation will likewise lead to a finding of insufficient evidence to support a claim, if such is indeed the case. What must be acknowledged, however, and bears stronger emphasis by Aggarwal and Gupta, is that conducting an investigation is a skill, and sometimes an art, to which not all are suited. Adherence to a context-specific investigation plan must be coupled with alertness to and allowance for the necessity to change one's course mid-stream, expand certain areas of inquiry while perhaps abandoning others, spot inconsistencies which should lead one to test and re-test what the parties and witnesses really saw and heard first hand, as opposed to what they think happened. It is therefore very important, and this SHI does emphasize, that the person(s) selected to investigate sexual harassment complaints be knowledgeable in human rights law, and be trained and experienced in conducting an investigation. All investigators, and certainly an internally appointed investigator, must also enjoy clear and unequivocal independence from the influence (or perception thereof) of management, and likewise, from any perception of bias in relation to the complaining and responding parties. On that note, Aggarwal and Gupta do suggest that appointment of an external investigator, though not the usual practice, is often the better choice. As human resource and harassment advisors across our network witness perfectly impartial and capable internal investigators themselves become targets for the dissatisfaction of one or more of the parties, or the entire work unit

involved in their investigation, one must seriously question the wisdom of ever using an internal investigator. Surely it makes no sense to expose one's own employee to the wrath of co-workers.

Throughout SHI, case law is used to demonstrate the assertions of the authors. For the lawyers among us, these references will soothe our penchant for "the law". For everyone else, and if nothing else, it should serve as a reminder that faulty investigations are costly to employers and employees alike.

Acknowledgement and discussion within SHI of same-sex and transgendered harassment demonstrate that sexual harassment is not simply the purview or problem of the heterosexuals within the workforce. However, the authors would do well to caution employers to be alert to the possibility that allegations of sexual harassment against someone of the same-sex or a transgendered person may be rooted in homophobia or transphobia. This is in no way to suggest that same-sex and transgendered sexual harassment does not occur. Rather, it is to underscore that workplaces are not one-dimensional in terms of the sexual and gender identity of employees, and that all employees must be treated with dignity and respect, regardless of the prejudices of some. It further underscores that investigators must be attuned to the possibility that some allegations of sexual harassment result from discriminatory attitudes towards co-workers who do not fit the heterosexual norm. Likewise, claims of harassment or poisoned work environments by homosexual or transgendered persons must be viewed through a lens sharp to the prevalence of hostility toward lesbian, gay, bi-sexual and transgendered persons in society, and thus in the workplace. This is especially important for workplaces traditionally dominated by (apparently) heterosexual males.

Turning now to a few potential weaknesses in SHI, the first in sequence is the authors' references to the Equal Employment Opportunity Commission of the United States, and on occasion, American case law. While the law in relation to sexual harassment is clearly very similar in Canada and the US, we have ample legislation and jurisprudence in Canada to support the authors' propositions without conflating two distinct bodies of law that are not binding the one on the other. Moreover, it is sometimes not clear whether it is Canadian or American law which is being referred to, which just adds to the confusion. Meanwhile, while American based employers operating in Canada may need to be reminded of American law, SHI only provides a glimpse.

The authors' treatment of the issue of office romance raises some concerns. While it is true that consensual sexual relations can, upon dissolution, result in a complaint of sexual harassment, the authors' overly brief treatment of the subject, as well as some of their wording, suggest that many complaints may be grounded in revenge on the part of the employee who was dumped by his or her former paramour. This is clearly only one possibility. What needs to be analyzed more thoroughly is that the co-worker or supervisor who is unhappy with the end of the relationship may indeed continue to pursue the subject of their desires, failing to respect their decision to terminate the relationship.

Many of the potential readers of SHI would benefit from a glossary of terms, such as due diligence, poisoned work environment, and so on, as well as from an index for finding where such concepts are discussed in the book itself. Although it is relatively easy to find the terms by flipping through the book, a glossary would also serve as a training tool for readers, in the same way that the checklists and appendices are useful for policy development. On that note,

repeating or locating the checklists in the Appendices section would also be very useful.

Overall, SHI is a big little book, chock-full of need-to-know information on sexual harassment, guidelines for its prevention, and a thorough how-to investigate it. The above mentioned detractions notwithstanding, I readily recommend this book; it is an accessible handbook for employers, senior administrators, human resource professionals, sexual harassment advisors, and neophyte harassment investigators.

Back to the future...employers who are serious about eliminating sexual

and other forms of harassment in the workplace must educate themselves and their employees. I urge Aggarwal and Gupta to turn their expertise now to the development of a handbook for anti-harassment education. It would be particularly helpful for them to help fill the gap in educational resources for reaching employees differentiated by race, religion, sexual or gender identity, and physical or mental illness and disability, both as targets and as potential perpetrators of harassment.

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### *La négociation au travail,*

sous la direction de Michèle GROSJEAN et Lorenza MONDADA, Lyon : Presses Universitaires de Lyon, 2004, 344 p., ISBN 2-7297-0754-9.

L'ouvrage *La négociation au travail* présente de façon claire et intéressante les résultats de deux ans de travail d'un groupe de chercheurs interactionnistes (ICAR-CNRS, anciennement nommé GRIC, Université Lumière, Lyon II) issus de la psychologie et des sciences du langage appartenant à des cadres théorico-méthodologiques assez variés : la pragmatique interactionnelle, l'analyse du discours en interaction, l'analyse conversationnelle d'inspiration ethnométhodologique et la psychologie du travail. Ce qui est au cœur de ces recherches est l'appréhension de la négociation au travail telle qu'elle émerge dans les procédés langagiers utilisés par les acteurs au cours de leurs conduites sociales. Le volume est divisé en deux volets. Dans la première partie (« Modèles généraux »), les modèles théorico-méthodologiques sont présentés et accompagnés d'analyses d'extraits de parole-en-interaction audio et vidéo enregistrés tirés de plusieurs types de contexte : conversations informelles entre amis, réunions de travail, interactions dans les marchés, interventions chirurgicales à distance, interactions

dans les services (hôpitaux, EDF, à la poste). Cette partie a le mérite d'offrir au lecteur un aller-retour immédiat entre cadre théorique et analyse de données mais aussi trois dimensions possibles par lesquelles la notion de négociation est appréhendée et analysée.

La première a trait au conflit et au désaccord et s'inspire des travaux du GRIC (CNRS Lyon II) et de la théorie de la négociation conversationnelle (Kerbrat-Orecchioni). Ainsi, la négociation peut émerger lorsqu'un différend surgit entre les acteurs sur tel aspect de la conversation (Kerbrat-Orecchioni), suite à une cristallisation du désaccord entre deux participants (Traverso) ou comme une tentative de résolution de divergence ou de conflit (Grosjean). Le texte de Grosjean montre également le rôle de l'espace et des objets (ici entendus en tant que ressources culturelles) dans la gestion du conflit au travail. Dans ce cadre, les artefacts sont susceptibles de renvoyer à des règles mobilisables dans la gestion de la négociation.

La deuxième dimension est plus globalisante et investit toute activité