

# THE EMPLOYERS' CHOICE

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## THE DANGERS OF BEING A HOST

### ***Employers Must Take Caution with Summer Events Involving Alcohol***

As summer approaches, many employers' thoughts turn to their annual summer party, barbeque or golf tournament which employees will be attending. Along with ensuring that the function is a successful social gathering, employers should put their mind to the issue of ensuring the safety of employees who have consumed alcohol during the function.

A recent Ontario case which received significant media coverage on this issue involved Sutton Realty (the "Company"). Ms. Hunt, an employee, consumed significant amounts of alcohol during the Company's 1994 Christmas party while on shift and being paid to perform her duties. A forensic alcohol toxicologist estimated that she had more than double the legal limit of alcohol in her blood by the end of her shift. She then left her employer's premises with co-workers, consumed at least two more drinks at a local bar, and attempted to drive home. After leaving the bar, she was involved in an automobile accident which left her with serious physical, as well as permanent brain injuries. The Court found that the Company was negligent and awarded damages to Ms. Hunt.

The Court considered the following factors to be significant:

- Approximately halfway through her shift the Company noticed her inebriated state and offered to call her husband to pick her up.
- At the end of the party, the Company offered taxis to its employees.
- The Company may have specifically offered to have Ms. Hunt driven home.

- Ms. Hunt had to travel a substantial distance home. It was dark and a serious winter storm was in progress.
- Ms. Hunt failed to engage her automobile's four-wheel drive system which may have helped avoid the accident.

The Court, relying on an employer's duty to keep the place of employment safe, rejected the Company's arguments in its defence including:

- The duty does not extend to supervising employees' drinking habits.
- The duty ought not to extend to determining its employees' state of intoxication where no signs of intoxication exist.
- Taking Ms. Hunt's car keys would have amounted to theft.
- Forcibly putting Ms. Hunt in a taxi would have amounted to false imprisonment or kidnapping.

The Court found that an employer's duty extends to supervising employees so that they do not drink

### **ALSO IN THIS ISSUE**

***Labour Board  
Flexes Remedial "Muscles"***

.....Page 2

***The Duty to Accommodate Challenge***

.....Page 3

***Employment Standards Act, 2000 Update***

.....Page 4

alcohol while on work premises, especially while

on duty, so as to impair their ability to drive home. The Company owed Ms. Hunt a duty to personally intervene and prevent her from driving home, especially in light of the weather conditions existing at the time. The Court found that had the Company insisted on Ms. Hunt leaving her keys at the office or taking a taxi home at its expense, she would have done so. It also failed to call her husband, or the police if necessary. Other alternatives included providing her with a room at a local hotel or arranging for her to be driven home by someone who had not been drinking.

In making its decision, the Court criticized the Company's decision to have an open and unsupervised bar as it would make it impossible to monitor the alcohol consumption of employees. The Court also found that the Company should have anticipated that Ms. Hunt would stop for a drink at a bar on the way home.

As some consolation to the Company, the Court found that Ms. Hunt was 75% responsible for the accident and the resulting injuries. As a result, the total award against the Company was reduced by 75%. However, Ms. Hunt's employer was still liable to pay \$281,229.00 to Ms. Hunt for damages as a result of its negligence in failing to prevent her from driving drunk.

While the case deals with the liability of an employer that allows its employees to become intoxicated during working hours, the obligation of an employer to protect the safety of its employees would likely extend to company-sponsored events where attendance is mandatory or "strongly encouraged" and where alcohol is served. Employers should consider the following steps to avoid a similar tragedy and ensuing liability.

- Limit the amount of alcohol available to employees.
- Monitor the state of inebriation of employees.
- Ensure active steps are taken to avoid accidents and their consequences by providing free rides home by taxi or other means, securing car keys to prevent driving, providing free lodging at the location, calling family/friends to provide a ride, or calling the police to prevent driving.

To paraphrase a popular advertisement, "Employers don't let employees drive drunk".

## LABOUR BOARD FLEXES REMEDIAL "MUSCLES"

### *The OLRB Orders A New Vote And Company To Provide The Union With On-Site Organizing Office*

A recent decision by the Ontario Labour Relations Board (the "Board") dated May 4, 2001 is noteworthy in two respects: one, the manner in which the Board reached its conclusion that management initiated the "reprehensible conduct" that intimidated employees; and, two, the scope of remedial relief granted to employees and the union seeking to represent them.

The case involved an application for certification filed on November 6, 1998 by the Steelworkers Union in respect of the employees at Baron Metal Industries (the "Company"). The Company produces steel doors and frames and employs an ethnically diverse group of which approximately twelve percent are of Sri Lankan origin. The certification vote was held on November 16 and resulted in a tie (and hence the Union lost). The Union then filed an unfair labour practice complaint alleging that the vote was not a reliable reflection of the employees' wishes because of intimidation in the workplace created by the Company.

The complaint was based on the conduct of two Tamil men of Sri Lankan origin with past criminal records and gang associations. These two individuals were hired just prior to the filing of the application for certification. Essentially, the Board concluded that the sole reason these two individuals were hired was to intimidate the employees of Sri Lankan origin by directly threatening those employees believed to be the inside Union organizers. In particular, during a period of 3 to 4 days leading up to the certification vote, these two men were able to move freely about the workplace and threaten the employee organizers identified on a list allegedly provided by management. The essence of the threats was that the Union must not win the vote and the Union organizers were to communicate this to the other Sri Lankan employees or risk physical violence or death.

Applying the "reverse onus" requirement in unfair

labour practice proceedings, the Company was required to provide a credible explanation to satisfy the Board that the *Labour Relations Act, 1995* (the "Act") had not been breached. The absence of any credible explanation for the conduct of the two Tamil men led the Board to conclude that management was involved in attempting to influence the vote (though no particular person could be identified as responsible).

The Board then concluded that the Sri Lankan employees made up a significant group within the Steelworkers' proposed bargaining unit and, therefore, the intimidating conduct meant the results of the representation vote did not reflect the true wishes of the employees. As the Board could no longer "automatically certify" the Union for the breach of the *Act* during the organizing campaign, the Board exercised its power "to do anything to ensure that a new representation vote ordered...reflects the true wishes of employees in the bargaining unit".

Apart from a new vote, the Board's remedial order went further than it has previously. The Board went to considerable lengths in providing a remedy to give the union an opportunity to convey to the employees their entitlement to be represented by a union. This included reimbursement of the Union's organizing costs, the distribution of notices to employees setting out the Board's findings of violations of the *Act* and remedies ordered, allowing the Union to hold monthly meetings with employees on the Company's premises for which employees are to be paid while attending, and the provision of a "Union office", accessible to employees, on the Company's premises and at the Company's expense.

Employers who believe that the Board's loss of its "automatic certification power" for unfair labour practices committed during a union organizing drive presented a "low risk" opportunity to interfere with the representation vote should take caution from this recent Board decision. Apart from the onus being on the employer to demonstrate that it did not commit any breaches of the *Act* if such are alleged, the Board clearly is prepared to extend the scope of remedial relief available to unions and employees affected by employer misconduct. Further, some have suggested that in the appropriate circumstances the Board may even go further with its "do anything" power.

## THE DUTY TO ACCOMMODATE CHALLENGE

### *Human Rights Commission Releases New Guidelines On Accommodating Disabilities*

Dealing with employee disabilities and understanding the extent of the employer's obligation to accommodate disabled employees is one of the more challenging workplace issues facing employers today. Recent Supreme Court of Canada decisions have sought to clarify the duty to accommodate employees with disabilities. In response to these decisions, the Ontario Human Rights Commission released new policies and guidelines in March 2001 to help employers identify and fulfill their obligation to accommodate disabilities in the workplace.

The guidelines seek to clarify the definition of handicap under the *Human Rights Code*. Developmental disabilities, learning disabilities, environmental sensitivities and even minor illnesses are considered a "handicap" where an individual can demonstrate that they were treated unfairly because of the perception of a disability. Once an employee has established that he or she is handicapped within the meaning of the *Human Rights Code*, an employer has an obligation to accommodate that handicap to the point of undue hardship. Recent court decisions have emphasized that employees must be considered, assessed and accommodated on an individual basis. In determining whether an employer has met its obligation to accommodate, the courts and the Commission will ask the following questions:

- Were alternative approaches that do not have a discriminatory effect investigated?
- Why were viable alternatives that would accommodate an individual not implemented?
- Can the employer meet its legitimate objectives in a less discriminatory manner?
- Is the standard, policy, practice or rule properly designed to ensure the desired qualification is met without placing undue burden on the affected employees?

- Have other parties obligated to assist in the search for accommodation fulfilled their roles?

Employers, employees and unions all have responsibilities in the accommodation process. Initially, an employee must advise the employer that he/she has a disability, must be prepared to answer questions or provide appropriate medical information in order to assist in the process, and co-operate in workplace initiatives to accommodate the employee. The employer is obligated to obtain expert opinions where necessary, participate in the investigation of alternative solutions, maintain confidentiality, grant accommodation requests in a timely manner and bear the cost of any required medical information. Unions and other professional associations are also obligated to take an active role in the accommodation and not impede the process.

In determining whether an employer's accommodation of a disability will create undue hardship, the Commission will consider only those factors set out in the *Human Rights Code*: cost, any outside sources of funding and any health and safety requirements. Cost will be considered only where it is quantifiable, shown to be related to the accommodation and so substantial that it would alter the essential nature of the employer's business or affect its viability. Business inconvenience, employee morale, customer preference and collective agreement barriers have all been rejected by the Commission as appropriate considerations in determining if accommodation will create undue hardship. However, it is noted that the courts and arbitrators have shown a greater willingness to at least consider such factors.

The recent court decisions and the new guidelines emphasize the need for employers to consider the appropriate method of dealing with employees with disabilities. Maintaining human dignity and eliminating barriers to employment for persons with handicaps remain the cornerstone of the accommodation process. A decision that it is not possible to accommodate a handicap cannot be made without an exhaustive analysis of possible forms of accommodation, the cost to be borne and

the real health and safety risks associated with the accommodation. Employers should seek appropriate advice from outside agencies or professionals before concluding that an employee's disability cannot be accommodated.

Finally, employers should take note of recent comments by the Commission's Chief Commissioner Keith Norton at the time that the Guidelines were released. In response to the growing number of complaints filed with the Commission alleging discrimination on the basis of disability, Mr. Norton warned that "the duty to accommodate is not optional...we have made it clear that meeting the special needs of persons with disabilities is a legal obligation. It is not some sort of voluntary program".

The new Policy and Guidelines can be accessed from our website ([www.ccaemployerlaw.com](http://www.ccaemployerlaw.com)) which provides a link to the Commission's website.

## **EMPLOYMENT STANDARDS ACT, 2000 UPDATE**

The new *Employment Standards Act, 2000* (the "Act") received Royal Assent on December 21, 2000. The legislation made sweeping changes to various provisions of the current legislation, including the hours of work, overtime pay, public holidays, vacation, emergency leave, and termination and severance pay provisions.

The amendments to the pregnancy and parental leave and some of the enforcement provisions were proclaimed into force effective December 30, 2000. The coming into force of the rest of the Act is pending the drafting of the regulations which will include exemptions and special provisions for particular sectors and occupations.

The Ministry of Labour has advised that the stakeholder consultation process on the regulations was completed in March 2001, and draft versions of the regulations are being completed. It is anticipated that the rest of the Act, together with the regulations, will come into force in late summer or early fall 2001.

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