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EMPLOYERS' ADVISOR
A Newsletter from Mathews Dinsdale & Clark LLP December 2011

Termination Warranted for Abuse of Sick Leave

At arbitration, Mathews Dinsdale's Dan Leone successfully defended the termination of a long-service school board employee who went on a business trip with her husband while on paid sick leave.

The events giving rise to this case begin on April 30, when the grievor saw her doctor and subsequently emailed a scanned medical note to advise her employer that she would be off work from May 1 to May 7 due to a foot injury. On May 2, the grievor accompanied her husband on a trip to the Chicago area. Records indicated that the grievor's password had been used to remotely access her office intranet/email account from Chicago.

On June 4, the grievor attended a meeting called by her employer in order to inquire into the nature of her absence. At first, the grievor denied the allegations, instead maintaining that she had been at home during the week of May 1 to May 7. Informed by the employer that her intranet account had been accessed from Chicago during that period, the grievor then claimed that she saw a specialist there about her foot. The grievor, however, could not provide an address or a surname for the specialist she referred to as "Sheila."

The following day, the grievor emailed the Director of Education. She indicated that she had been told by her doctor to stay off her foot and that when her husband called her at the last minute to ask her to accompany him to Chicago, she agreed because she was concerned that she would be unable to get around and care for herself alone at home. The grievor attempted to justify her missteps in the meeting by claiming that she had been intimidated by the employer representative who, she alleged, slammed file folders onto the table with such force that she was scared for her personal well-being.

Despite the grievor's claims that she had been intimidated, on June 8, the employer contacted the grievor in order to indicate that it continued to have serious concerns about the nature of her absence and requested further information about the specialist named "Sheila." When that information was not supplied by June 22, the grievor was terminated.

The grievor, an educational assistant with 19 years of service, grieved her termination. The grievor maintained that she had accompanied her husband on a last-minute business trip to Chicago during her sick leave only so that he could care for her. Likewise, the union maintained that the grievor's activities while on the business trip were consistent with the reason for her absence from work, as she was still convalescing while away. The employer, on the other hand, argued that the grievor had engaged in serious culpable misconduct worthy of termination.

The arbitrator held that there was no reasonable basis to substitute termination with another penalty, and made several important findings of fact. For one, contrary to what she had said, the digital email record showed that the grievor was at the franchisor's headquarters with her husband on May 6, 7 and 8. >

Furthermore, the arbitrator held that the notion that the trip was a last-minute, spur-of-the-moment undertaking was inconsistent with all of the arrangements that had been made in order to facilitate the trip. Lastly, the arbitrator held that nobody was able to corroborate the grievor's claims with respect to the employer representative's alleged intimidation, and that at the very least, the grievor had misrepresented "Sheila's" involvement. In sum, the arbitrator determined that the evidence was sufficiently clear, convincing, and cogent to prove the above facts on a balance of probabilities, stating:

"[The grievor] engaged in very serious misconduct calling into question her trustworthiness, a cornerstone for a continuing employment relationship with the Board. She did not acknowledge any culpability. She did not take responsibility for her actions. She was not contrite or remorseful. Regrettably, the grievor throughout has demonstrated a lack of candour. She misled the Board and its representatives. She misled the union and its representatives. She also attempted to mislead me, without any apparent compunction. The grievor's continuing attempt to mislead heightens concern about her trustworthiness. It casts further serious doubt regarding her rehabilitative potential, and about the viability of a continuing employment relationship."

While each discipline decision must be based on the specific facts related to the case at hand, this decision supports an employer's ability to take strong positions regarding employee dishonesty and fraudulent sick claims.

Some Holiday Party Suggestions

The festive holiday season is a time that most people look forward to with anticipation. In attempting to capture the holiday spirit, employers planning annual holiday parties strive to organize an event that is enjoyable for all employees. However, as an employer you cannot afford to overlook the importance of providing a safe environment for employees, especially if alcohol is involved.

Case law has established that employers owe a duty of care to their employees. If appropriate steps are not taken, an employer may be liable for damages that result from accidents related to intoxication at company parties. Accordingly, employers should implement proactive measures to prevent dangerous activities such as drinking and driving.

The leading case with respect to "employer–host liability" is the 1996 decision of *Jacobsen v. Nike Canada Ltd.* One evening, a supervisor provided the plaintiff and other workers with free beer, and each employee consumed approximately eight to ten beers each. After work, the plaintiff drove to a club where he drank more alcohol. When the night was over, the plaintiff attempted to drive home while drunk. He drove into a ditch and was rendered a quadriplegic.

The British Columbia Supreme Court found that the employer exercised substantial control in the circumstances and owed a duty of care to the employee. The Court determined that the employer failed to meet the standard of care by providing free alcohol, failing to monitor the alcohol's consumption, and failing to prevent the plaintiff from driving home while drunk. The Court stated that the supervisor could have easily asked the employees how much they had to drink, or could have counted the number of empty beer cans in order to estimate how many were consumed.

The Court noted that the plaintiff must have shown signs of intoxication, and the employer ought to have noticed that he was impaired and, therefore, ought to have prevented the plaintiff from driving home.

The issue of an employer's duty of care to its employees later achieved a higher profile in the decision of *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* In *Hunt* the employer hosted a "serve yourself" open bar Christmas party at the workplace. The plaintiff, Ms. Hunt, attended as both a guest and an employee because she was answering the phone, was expected to clean up after the party, and was being paid throughout the event. During the party, the plaintiff consumed alcohol. The employer offered taxi service to its employees, and there was evidence that the employer specifically offered to drive the plaintiff home, as well as offering to call her husband to pick her up. After the workplace party, the plaintiff and a group of co-workers went to a pub for a birthday celebration, where the plaintiff consumed no more than two drinks. The plaintiff left the pub during a winter storm, during which driving conditions were poor. While driving home under the influence, the plaintiff lost control of her car and suffered permanent brain damage in the resulting accident.

Hunt brought an action against Sutton based on the law of "master and servant" and the employer's duty of care with respect to the safety of its employees. The trial judge found that the employer's duty of care was to safeguard its employees from harm. This duty went beyond the simple duty of care owed to the plaintiff while she was on Sutton's premises, and included a "duty to make sure that she would not enter into such a state of intoxication while on [the] premises and on duty so as to interfere with her ability to safely drive home afterwards." The trial judge concluded that the employer did not discharge this duty of care toward the plaintiff, rejecting the employer's argument that the duty of care was discharged by offering a cab to employees generally, and possibly offering the plaintiff a ride home.

The trial judge found that the employer was aware, or ought to have been aware, of Hunt's degree of intoxication, and ought to have been aware that she was being placed in danger when she was allowed to drink and drive.

The practical application of this area of law certainly can put a damper on the intent and spirit of any workplace party. However, it is possible for an employer to organize a party that is both enjoyable and safe for all attendees. The key is for employers to protect their employees, and therefore themselves, as much as possible. If alcohol will be served at your party, here are some tips to remember:

- *Establish a no drinking and driving policy well in advance, and provide transportation, carpools, or taxi vouchers for a trip home.*
- *Be prepared to seize car keys from intoxicated employees.*
- *Confront an intoxicated employee who attempts to drive, and ensure that he or she goes home in a taxi or gets a ride home from a co-worker, spouse, relative, or friend.*
- *Designate specific people to stay sober and monitor alcohol consumption of others, approach people if problems arise, and be prepared to phone the police if the situation requires such action.*
- *Limit the serving of free alcohol and open bars (drink ticket policies are one alternative) and provide non-alcoholic alternatives.*
- *Employ a professional bartender for the event who should be able to identify intoxicated individuals and who can refuse to serve them.*
- *Hire a caterer with an endorsement to serve alcohol, or hold the event at a restaurant, bar, or event hall where the owner has insurance.*

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Reminder of the New Accessibility Standards for Customer Service

Don't forget that if you are an organization with at least one employee that provides goods or services to members of the public and you are not designated as a public sector organization, you are required to comply with the new *Accessibility Standards for Customer Service* under the *Accessibility for Ontarians with Disabilities Act* by January 1, 2012.

Have you met these requirements? If you are not sure, or if you have any questions, please contact us to ensure you reach compliance with these new standards.

Seminars and Presentations

October

On October 12th, **Jacqueline Lund** participated as a panellist at a Health and Safety Conference in Toronto, speaking on the topic of *Privacy and Confidentiality: What's In?*

November

On November 2nd, **Paula Rusak** conducted a seminar for a group of Toronto Nursing Homes on *How to Conduct an Investigation.*

On November 16th, **Walter Thornton** gave a presentation at the Ontario Bar Association's Continuing Legal Education seminar on *Addressing Non-Construction Issues on a Construction Project.*

December

On December 5th and 6th, **Elizabeth Keenan** and **Bill Phelps** will be conducting a two-day client seminar on a variety of topics, including *The Duty to Accommodate, Human Rights Obligations Regarding Harassment, How Unions Organize and Gain Certification,* and *Disciplining Problem Employees.*