DEVRY, SMITH & FRANK *LLP*
April 2010
Volume I, Issue 1

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Employers beware: you need a violence and harassment policy, and you need it now

by Shawna Sosnovich

On June 15, changes to the *Occupational Health and Safety Act* will require most employers to take additional steps to protect employees from workplace harassment and violence.

As a result of these changes, workplace harassment will be defined as a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome. It will not be limited to the prohibited grounds of discrimination in the *Human Rights Code* (e.g., race, religion, sex, etc).

Workplace violence will be defined as physical force or an attempt to exercise physical force that causes or could cause physical injury.

Most employers will be required to do the following:

(a) complete a written risk assessment for workplace violence;

(b) prepare a written workplace violence and harassment policy; and

(c) develop programs and procedures to implement the policy.

The risk assessment must include an evaluation of an employee's personal security during the course of his or her work on or outside the employer's premises.

Employers who are aware or ought reasonably to be aware of a situation of domestic violence are required to take every reasonable precaution to protect their workers from it in the workplace.

The policy and procedures must do the following:

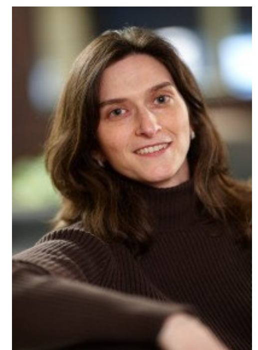
(a) control the risk of violence and harassment as identified by the assessment;

(b) enable workers to get emergency assistance in the case of real violence, its risk or threat, and to report violence and harassment to the employer;

(c) set out a system of how an employer will investigate complaints;

(d) deal with training employees to ensure policy compliance.

Time is running out. By June 15, employers will have to ensure that they are compliant.



Shawna practises commercial litigation and employment law.

Employees beware: if dismissed, you can't file a Ministry of Labour complaint AND start a lawsuit

by Larry Keown

You've been fired and are wondering whether a complaint to the Ministry of Labour makes sense. After all, the Ministry has officers who investigate and adjudicate employee claims under the *Employment Standards Act* ("*ESA*") for failure to pay wages, benefits or termination/severance pay, and they do so at little expense to you.

Sometimes these complaints will make sense, but be careful: if you make a claim to an *ESA* officer, you can lose your right to sue for wrongful dismissal, something which could significantly limit the compensation you can recover. For example, the maximum compensation under the *ESA* for termination to an employee with 15 years of service is eight weeks of pay. By contrast, the same employee may have a wrongful dismissal claim for pay in lieu of reasonable notice of one year of pay.

Also, other claims which could be successful in court (such as claims for bad faith, breaches of the *Human Rights Code*, or mental distress) could also be lost.

Under the previous version of the *ESA*, the Supreme Court of Canada established that in certain circumstances the courts had the right to allow a legal action to proceed in spite of the fact that an employee had made an *ESA* claim. Although there does not yet appear to be a decision of the court which deals with the current *ESA*, its wording seems to expressly override the court's jurisdiction to do this. The moral? Sometimes an *ESA* complaint may make sense, other times it may not. Before doing anything, make sure you know your rights.

In addition to being the firm's managing partner, Larry maintains an active practice in employment law and commercial litigation.

Bankers beware: not all "student loans" are alike

by James Satin

James' practice focuses on secured and unsecured debt recovery, bankruptcy and insolvency and commercial litigation.

People generally believe that making it through the bankruptcy process entitles an individual to a fresh start, free from his or her pre - bankruptcy debts. While this is generally true, s. 178 of the *Bankruptcy and Insolvency Act* sets out that, among other debts, liability under student loans advanced under certain federal and provincial statutes can survive a discharge from bankruptcy.

But what about other types of student loans and student financing?

Can all or some portion of these loans, which have the same general characteristics as loans granted under statute, survive bankruptcy? The short answer is "Yes". Bankruptcy courts have recently been prepared to treat them in the same way; that is to say, a student who has benefitted from a "non-statutory student loan" cannot, barring unusual circumstances, take the money, file for bankruptcy and then walk away free from the debt.

However, the recent decision out of the Bankruptcy court in Nova Scotia dealing with Alfredo Jeremy Abdo, seems to have narrowed the circumstances under which this will be the case.

In Mr. Abdo's case, the court found that although the lender (a bank) had advanced funds under a Student Line of Credit for Mr. Abdo's education, it was judged to have known that Mr. Abdo was using the money for making investments rather than for his education.

Given the use of the funds and the lender's imputed knowledge of this, the court found that Mr. Abdo's Student Line of Credit did not have the same characteristics as a loan granted under statute and, as result, the loan was discharged by the bankruptcy.

Mr. Abdo's case serves as a warning to lenders who think that every student loan will survive bankruptcy. Any particular loan may not, and a lender may need to take reasonable steps to ensure that loans made to students are actually being used to fund education. At the very least, the case suggests that if a lender knows that a student loan is being used for something other than education, there will be a good chance it will be eliminated in bankruptcy.

Family law update: Queen's Park tries to toughen things up

by John Schuman

In response to public outrage about a few unusual incidents related to cases before the Family Courts, the Ontario Government has passed the *Family Statute Amendment Act.* It came into force on March 1, 2010 and it makes three changes to Ontario Family Law. First, it changes "restraining/non-harassment orders" made in Family Court. Second, it requires people seeking custody or access to file new court documents requiring extensive information with the court. Third, it makes specific provision for courts to make orders controlling how people parent children in their care.

The changes to "restraining orders" are designed to "toughen up" the orders and extend more protection to more people. These provisions are already in force. Under the new *Act*, you can get a restraining order against a person you lived with for any period of time (maybe even only a day) or with whom you have a child. The changes have also created standard restraining orders. They will set out exactly who is not allowed to communicate with whom, where a person is not allowed to go and if there will be any exceptions.

Public outrage over the death of a child placed in the custody of a parent's friend resulted in significant new requirements for documents to be filed with the court.

The changes require all the parties to file a parenting affidavit that includes a lot of detail about the children and a detailed parenting plan. If a party is not a parent, he or she will also have to file a criminal record check, provide every address where he or she has lived since birth, and provide authorization for every children's aid society in every jurisdiction where that person has ever lived to search their records and provide information to the court.

The last change is not really much of a change at all. Section 28(1) of the *Children's Law Reform Act* has been amended to allow orders prohibiting: (a) speaking disparagingly about the other parent in front of the child, (b) changing a child's residence, school or daycare with the other parent's consent or a court order, (c) the removal of a child from Ontario; (d) one parent from withholding a child's passport or health card, (e) withholding consent documents to allow the parent to get information about a child; and (f) a parent from blocking contact between a child and another person. The courts have made these orders as part of custody orders for a long time. This change may simply be designed to assist parents in understanding that a judge can make these types of orders.

The changes outlined above respond to public concern about safety and security, codifying some measures and introducing new ones.

John heads the firm's family law group.

More professionals join the team!

Devry, Smith & Frank *LLP* is pleased to welcome eight new members to our family.

Cory Schneider graduated from Osgoode Hall Law School in 2008. Before that, he earned an engineering degree at McGill University, a master's degree at the University of Toronto, and worked several years as a consulting engineer. With others, he has contributed to several learned journals and will be practising in the areas of intellectual property, corporate as well as commercial law and litigation. Cory speaks French.

Maya Krishnaratne earned her Bachelor of Laws from the University of Ottawa's Faculty of Law in 2007 and was called to the Bar in 2008. Also a graduate of Philosophy from the University of Toronto, Maya uses her logic and discourse skills to defend personal injury and accident benefits disputes for our insurance clients. She joins our civil litigation group, continuing the practice she had developed at a prominent firm in Hamilton.

Nick Dimitropoulos studied law at the University of Windsor and Political Science at York University. He has run his own business, managed real estate properties and, since becoming a lawyer in 2003, worked exclusively in the areas of commercial financing as well as corporate and commercial real estate. Nick is fluent in Greek.

Samuel Yoon is joining our commercial litigation group. A 2002 graduate of the Faculty of Law at Queen's University, Sam earned both a B. Sc. (Hons) and an M. Sc. from the University of Toronto. He practises in the areas of commercial and other litigation, including class actions, shareholder oppression, product liability, commercial tenancies and a variety of complex business and other disputes.

Chantal Schultz joins our insurance defence group as a law clerk. With over ten years of experience in the industry, Chantal expertly handles all variety of claims for our insurance clients, including those arising from motor vehicle and slip-and-fall accidents as well as loss or damage to property.

Natalee Pink has become our in-house licensed paralegal, specializing in Small Claims Court and landlord-tenant matters. Providing efficient and cost-effective professional services, Natalee brings with her several years of experience at well-respected legal clinics as well as paralegal and law firms.

Catherine Ma is a graduate of York University. With several years of experience in both real estate and general litigation, she works as a law clerk with our commercial litigation, banking, bankruptcy and insolvency groups. Catherine is fluent in Cantonese.

Alexa Campbell joins us as a mortgage enforcement law clerk. Having graduated from Humber College in 2006, she has worked for the Superior Court of Justice and, more recently, in private practice, handling complex mortgage and debt enforcement.

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From its genesis in 1964, Devry, Smith & Frank *LLP* has grown to a professional corps of 34 lawyers, four licensed paralegals, 19 law clerks and a complement of highly-skilled and dedicated staff, offering a broad range of legal services to our individual, business and institutional clients.

To learn more, please visit our website at **www.devrylaw.ca** or call us at 416-449-1400.

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