McGREGOR STILLMAN'S

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Presenting Legal News, Views and Updates from
McGregor Stillman LLP
Barristers & Solicitors

EDITOR'S NOTE

Please contact Karen Wood at 484-4445 with any suggestions for future articles, or with any comments you may have.

HEADS UP

Heads Up is a column which appears in each issue of the McGregor Stillman's Legaleye, highlighting new or proposed legislation in the Province of Alberta.

An Employer has a Duty to Accommodate Alcoholism and Drug Addiction

Under the *Charter of Rights and Freedoms* and the *Alberta Human Rights, Citizenship and Multiculturalism Act*, an employer has a duty to take reasonable steps to accommodate an employee's individual needs where those needs arise from the following grounds: race, religious belief, age, mental disability, physical disability, colour, gender, marital status, family status, source of income, ancestry, place of orientation or sexual orientation. Not only must the conditions of work, and work policies be non-discriminatory, the employer must take additional reasonable steps if necessary to accommodate their employees.

There are two areas in which discrimination is justified. Discrimination is allowed where it can be shown to be reasonable and justifiable. For example, requiring a teacher of catholic faith to teach in a Catholic school is considered reasonable and justifiable in the circumstances. In addition, if a condition of employment is discriminatory but is also a "bona fide occupational requirement" then the employer will have no duty to accommodate. For the purposes of explanation only, consider the following: a blind person cannot be a patrol officer. While this is discriminating against this individual on the basis of a physical disability, it is a bona fide requirement of employment. However, a firewoman does not have to meet the same running requirements as a fireman. It cannot be shown that the same running requirement is necessary to perform the duties of employment.

While most employers and individuals have a fairly good understanding of Human Rights Legislation and not discriminating on the basis of sex, race, or religion, many would be caught off guard in the area of physical and mental disability. Alcohol and drug addiction is legally considered to be a physical and mental disability. Discrimination on this basis is prohibited unless it is a legitimate occupational requirement. As such employers cannot request that employees or potential employees disclose past substance abuse problems. Random or blanket drug testing of employees is on its face discriminatory, *even for safety sensitive positions*, because it does not accurately assess actual

INSIDE:

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or future impairment on the job. A test should only be given where the employer has reasonable cause to believe that the employee's ability to safely and satisfactorily perform their job duties is impaired. Further, merely finding that an employee has a drug addiction *is not cause* for termination. The employer must take steps to accommodate the employee within the work place such as providing the employee with access to rehabilitative programs and/or treatment and transferring the employee to a less safety sensitive position. Breathalyzer testing for alcohol consumption as part of a larger screening process has been upheld by the courts. A positive breathalyzer result can measure *current* job impairment. However, the employer must still take all reasonable steps to accommodate and assist this employee. Finally, in non-risk sensitive positions neither drug nor alcohol testing are allowable. Even in a safety sensitive position, automatic dismissal policies following a single positive test are contrary to the law.

The trend to drug and alcohol testing began as a result of employers attempting to avoid liability and increased expense by accidents caused by impaired employees. However, employers need to be wary that if the position being tested is not risk-sensitive, testing is contrary to the employee's privacy rights. In risk sensitive positions, testing should be part of a broad based program. In addition, the employer needs to have clear policy guidelines as to what will happen in the event of a positive test and the steps that they will take to assist the employee. Finally, they need to follow those guidelines.

CAUSES CÉLÈBRES

By Richard D. Smith

The Insurer from Hell

Whiten v. Pilot Insurance Co. (Supreme Court of Canada)

The Plaintiff Whiten discovered a fire in the addition to her house just after midnight in January 1994. She, her husband and her daughter fled the house wearing only their nightclothes on a night where the temperature dropped to minus 18 degrees Celsius. The fire totally destroyed their home and contents. The Defendant insurer made a single $5,000.00 payment for living expenses, and covered their rent for a small winterized cottage that the Whitens had rented after the fire. The Whitens were in very poor financial shape, and the Defendant insurer without telling the Whitens, stopped making the rent payments and thereafter refused to payout any money to the Whitens on the basis that the Whitens had torched their own home. The local fire chief, the Defendant insurer's own expert investigator, and it's initial expert all concluded that there was no evidence of arson. The Defendant insurer maintained their position that the fire was caused by arson. In the spring of 1995, the Whitens offered to take a polygraph test administered by an expert selected by the Defendant insurer, in an attempt to satisfy the insurer that they did not set the fire. The insurer refused, without giving any reasons. The Whitens lived in a small community and people were aware that their home was not being rebuilt because the insurer was alleging arson, and the stigma of this belief in the community persisted.

At trial in 1996, a jury in the Ontario Court (General Division) awarded the Whitens $318,252.32 in compensatory damages, and $1,000,000.00 in punitive damages. The insurer appealed to the Ontario Court of Appeal, and the Ontario Court of Appeal reduced the punitive damages award to $100,000.00. The Whitens appealed to the Supreme Court of Canada. The Supreme Court allowed the Whitens appeal and reinstated the punitive damages award of $1,000,000.00. Justice Binnie, writing for the majority of the Supreme Court held that the denial of the claim by the insurer was designed to force the Pilot's to make an unfair settlement of less than what they were entitled to and that their conduct was planned and deliberate and continued for over two years while the financial situation of the Whitens' grew increasingly desperate. He found that the original jury had obviously concluded that people who sell peace of mind should not try to exploit the family in crisis. Justice Binnie noted that the power imbalance between the Whitens and the Defendant insurer was highly relevant and that Pilot Insurance held itself out to the public as a sure guide to a "safe harbor". Insurance contracts are sold by the insurance industry and purchased by members of the public for peace of mind. The more devastating the loss, the more the insured may be at the financial mercy of the insurer, and the more difficult it may to challenge a refusal to pay the claim. The obligation of good faith dealing means that the Whitens' peace of mind should have been Pilot's objective, and their vulnerability ought not to have been aggravated as a negotiation tactic.

The Insurance Council of Canada intervened on the Appeal of the Supreme Court of Canada and argued that reinstating the award of punitive damages would over deter insurers from viewing claims with due diligence, thus leading to payment of unmeritorious claim and in the end driving up insurance

premiums. Justice Binnie rejected this argument. He stated that he preferred to believe that insurers generally take seriously their duty to act in good faith, and it will only be rouge insurers that will incur such a financial penalty. The extra economic cost inflicted by punitive damages will either cause the delinquents to mend their ways or, ultimately, move on to a different line of work that does not call for a good faith standard of behavior.

FIRM NOTES

Mark Stillman and Terry McGregor are pleased to welcome Richard Smith as a partner in the firm. Richard had been an associate with McGregor Stillman since May of 2000, with a practice in family law and other types of civil litigation. He assumes managerial responsibilities for personnel/human resources. Terry McGregor assumes responsibility for technology and computer systems.

McGregor Stillman LLP has now completed its move from the second to the third floor of Centurion Plaza. The greatly expanded space will now accommodate future staff requirements and expanded client service areas.

We welcome Chris Hoose to our firm for the summer of 2002. Chris is going into third year of law school in September and will be joining us as an articling student in the spring of 2003.

We also welcome Sabrina Houle to our office. Sabrina will be providing secretarial assistance in the corporate/ commercial and real estate areas.

We will be assisted during the summer by two junior clerks, who will be covering for staff summer holidays, and performing general duties for the legal support staff.

The firm has opened another satellite office in addition to our offices in Barrhead and Westlock. Our new office is in Mayerthorpe, commencing June 1, 2002.

AS WE SEE IT

By Rod Duncan

Money Laundering - Why me?

Money laundering is defined as,

"any act or attempted act to disguise the source of money or assets derived from criminal activity."

Criminals, who earn "dirty money", require to launder that money and make it clean without disclosing the criminal origin of that money.

Money laundering involves placing "dirty money" in the legitimate financial system, converting that "dirty money" into a different form, disguising an audit trail, and ultimately cleansing, and making legitimate, the money.

The wholesale drug dealer generates large amounts of cash from each transaction he makes. If that cash remains in the criminal world to finance the next transaction then he is not concerned. How does he legitimately buy his house and car? How does he legitimately put his kids through college? He has to launder his money. How is this done?

- The launderer might use legitimate and trustworthy friends and relatives -"nominees"- to conduct transactions.
- Small inconspicuous deposits might be made to a number of bank accounts, with the balances being transferred ultimately to one account.
- Assets might be purchased using cash - maybe being registered in a nominee's name to distance the launderer from the transaction.
- Foreign currency is bought for transfer to another country - the purchase of large amounts of foreign currency may not be so unusual as to draw attention.
- Gambling. The launderer buys chips, uses only some of them, and converts what is left back into cash - asking for a casino cheque.

There are endless variations in money laundering. Businesses should be aware that wherever money transactions occur there is the opportunity for money laundering.

So why me?

The Canadian Criminal Code makes it an offence for anyone to conceal or convert property or the proceeds of property (i.e. money), knowing or believing that these were derived from the commission of an offence.

If you know, or ought to have known, that you are assisting

in the laundering of money then you commit an offence. It is no defence to say, "How was I supposed to know?" The law does not protect willful ignorance.

The Proceeds of Crime (Money Laundering) Act looks to find ways of detecting and deterring money laundering, allowing investigation and prosecution of those responsible.

The following institutions are subject to the Act and are required to keep records that allow investigation:-

- Financial entities (banks, credit unions, trust and loan companies etc)
- Life insurance companies
- Foreign exchange dealers
- Money services businesses
- Lawyers
- Accountants
- Real estate brokers
- Certain casinos, and
- Employees of all of the above.

The maintained records must allow the identification of persons making a transaction. This allows investigation and prosecution.

The institutions above are also obliged to report "suspicious transactions" to the Financial Transactions and Reports Analysis Centre of Canada - FINTRAC.

FINTRAC is a national body set up by the Act to monitor and investigate money laundering across the country - and to liase and cooperate with similar bodies internationally.

We should all be aware of the money laundering legislation - if we are involved in anyway in financial institutions and business then we should be actively complying with its requirements.

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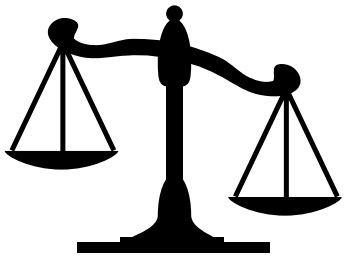

The law firm of McGregor Stillman LLP is a five lawyer general law firm, with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, Wills and Estates, and Family Law. The firm has represented clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories and Ontario. The firm has a well established network of agent connections in Canada, including Vancouver, Calgary, Regina, Saskatoon, Winnipeg, and Toronto and environs. The firm has an affiliation with Goodman, Lister & Peters of Detroit, Michigan. McGregor Stillman LLP also has established contacts with various other law firms throughout the United States and Great Britain.