

MEMORANDUM

TO: Nicole Doyle

FROM: Scott McEachern

DATE: March 25, 2011

RE: *Stevens v. Get-A-Job Career College*
Discrimination on Basis of Marital Status

FACTS

Mark Stevens was hired as a housekeeper at the Get-A-Job Career College. At the time of hiring, Mr. Stevens' wife was already employed in the housekeeping department at Get-A-Job. Mr. Stevens was hired by Sharon Jones during an absence of the school principal John Smith. Mr. Smith usually makes hiring decisions; however, filling the housekeeper position had been delegated to Ms. Jones. Upon return from absence Mr. Smith became aware of Mr. Stevens' hiring. Subsequently Mr. Smith instructed Ms. Jones to terminate Mr. Stevens stating that school policy forbids spouses from working within the same department. Mr. Stevens alleges that the policy is a form of marital status discrimination.

ISSUE

Is the Get-A-Job employment practices policy prohibiting spouses from working in the same department a form of marital status discrimination?

BRIEF ANSWER

In accordance to s.5(1) of the Ontario *Human Rights Code* as well as similar legislation from other jurisdictions, marital status or family status discrimination in employment matters is unlawful. The jurisprudence is supportive of the legislation. In the cases where it is shown that consideration of familial relations as an employment qualifier or disqualifier has taken place the courts have found such consideration of these factors wrongful. Consequently it is expected that Mr. Stevens will succeed in this action.

ANALYSIS

Issue: Employment Practices – Discrimination

The Law

The applicable statute law is the *Human Rights Code* of Ontario which states:

Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.¹

In *Brossard (Town) v. Quebec (Commission des droits de la personne)*² the Supreme Court of Canada considered ss.10 and 16 of the Quebec *Charter* and found that an anti-nepotism employment policy, specifically discrimination on the basis of civil status, constituted a breach of the Quebec *Charter*.³

In *Lang v. Canada (Employment & Immigration Commission)*⁴ the Federal Court of Canada (Appeal Division), upheld the Canadian Human Rights Tribunal decision where it was determined that an anti-nepotism policy within the qualification criteria for consideration of grant funding from the Canada Employment and Immigration Commission (“CEIC”) was a breach of ss. 3 and 5 of the *Canadian Human Rights Act*⁵.

In *Fitzherbert v. Underhill*⁶ the Canadian Human Rights Tribunal decided that employment termination for lack of a familial relationship constituted a discriminatory practice contrary to the *Canadian Human Rights Act*. In this case the tribunal considered whether a distinguishing differentiation exists between having family status versus lacking family status in respect of the employment discrimination assessment. Upon review, the tribunal referred to the decision in *Brossard* and deemed that dismissal for reasons of either nepotism or anti-nepotism was a breach. In effect, the tribunal identified the existence of discrimination where family status is favoured as well as where family status is disfavoured.

¹ *Human Rights Code*, R.S.O. 1990, c. H.19, s.5(1)

² [1988] 2 S.C.R. 279

³ *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12

⁴ 80 D.L.R. (4th) 637

⁵ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6

⁶ 13 C.H.R.R. D/105

Synthesis

As shown by the cases, the criteria to determine whether an employment practices policy is a form of unlawful marital status discrimination are: (1) is there an applicable statute forbidding employment discrimination on the basis of marital status; (2) was the person adversely affected with respect to an employment opportunity; and (3) did the adverse affect occur due to consideration of a spousal relationship as a factor.

Application

The legislation and jurisprudence must now be used to evaluate whether Mr. Stevens has suffered employment discrimination. Mr. Stevens sought employment in Ontario and therefore is entitled to the terms as prescribed by the *Human Rights Code*. At s.5(1) of the *Code*, Mr. Stevens is provided the right not to be discriminated against on the basis of marital status. In accordance to *Brossard* and *Lang*, an anti-nepotism employment policy is established as discrimination on the basis of marital status. Similarly in *Fitzherbert*, it is decided that marital status considerations are discriminatory. Using marital status consideration, Get-A-Job Career College implemented or enforced an anti-nepotism employment policy and terminated the employment of Mr. Stevens. With the right not to be discriminated against in the course of employment on the basis of marital status, and with discrimination by marital status encompassing the enforcement of an anti-nepotism policy as in *Brossard*, *Lang* and *Fitzherbert*, it is apparent that Mr. Stevens has been discriminated against and the dismissal is unlawful.

CONCLUSION

It is probable that Mr. Stevens will succeed in this action. Get-A-Job Career College based its decision to terminate the employment of Mr. Stevens solely upon an unjustifiable concern involving marital status contrary to applicable legislation and the supporting jurisprudence. It is recommended that advisement be given to Mr. Stevens informing that his rights have been unlawfully violated. As Mr. Stevens may wish to pursue compensatory damages resulting from breach of these rights suggestion to seek counsel that may assist in a wrongful dismissal action is prudent.

LEGISLATION

Canadian Human Rights Act, R.S.C. 1985, c. H-6 (CanLII)

Charter of Human Rights and Freedoms, R.S.Q. c. C-12 (CanLII)

Human Rights Code, R.S.O. 1990, c. H.19 (CanLII)

JURISPRUDENCE

Brossard (Ville) v. Quebec (Commission des droits de la personne), [1988] 2 S.C.R. 279 (Westlaw Canada)

Fitzherbert v. Underhill, 13 C.H.R.R. D/105 (Westlaw Canada)

Lang v. Canada (Employment & Immigration Commission), 80 D.L.R. (4th) 637 (Westlaw Canada)

SECONDARY MATERIAL

“Civil Status” *Justice Quebec* (1 May 2009), online: Justice Quebec

<<http://www.justice.gouv.qc.ca/english/sujets/glossaire/etat-civil-a.htm>>