

You Tweeted What?!

Tips on Effectively Managing Social Media in the Workplace

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With Assistance from Emily Quail

Agenda

1. Social Media and the Law
2. Recent Case Examples
3. Key Takeaways
4. Social Media Policy

The Law

- Technology is quickly blurring traditional distinctions between on and off-duty conduct.
- Social Media is powerful:
 - 82% of Canadians use social networks.
 - 53% of employers have a formal policy on Social Media.
 - 1/3rd of Canadians don't go a day without checking Social Media.
- Inappropriate postings or communications can cause significant – and immediate – damage to an employer's reputation

The Law



The Law

- Regulating Social Media and other electronic communications – or disciplining employees in relation to Social Media and electronic communications – requires consideration of complex legal issues:
 - **Off-duty conduct**
 - **Privacy, Human Rights, and Labour Issues**
 - **Defamation**
 - **Harassment**
 - **Legislation/Regulation**
 - **Policies**

The City of Toronto and Toronto Professional Firefighters Association, Local 3888, 2014

CarswellOnt 8009

- Grievor worked as a firefighter for Toronto Fire Services (“TFS”)
- TFS recently released its diversity and inclusiveness initiative
- The National Post reported on a number of tweets by the Grievor, including one suggesting giving a woman “a swat in the back of the head” to “reset the brain” for using the word “like” too many times
- Grievor’s dismissal for cause was not upheld
- The tweets were not directed at anyone in the workplace and appeared to be an isolated incident
- The Personal Use of Social Media Policy was not well publicized in the organization

Tenaris Algoma Tubes Inc. and United Steelworkers of America, Local 9548, 2014 CarswellOnt 8009

- Grievor posted comments on Facebook that were sexually explicit and physically threatening about a co-worker
- Co-worker was not identified by name but by a distinct physical characteristic
- Grievor's dismissal for just cause was upheld
- Progressive discipline is not appropriate in every case, particularly in cases involving threatened sexual assault on a co-worker
- Grievor had only three (3) years of service and had received training on Harassment and Discrimination Prevention in the Workplace
- Grievor's Facebook profile was public

Tremblay v 1168531 Ontario Inc, 2012 HRTO 1939

- Former employee settled case with employer at mediation and signed minutes of settlement containing confidentiality clause
- Following the settlement, the employer discovered that the employee had posted remarks on Facebook referencing the mediation and settlement
- Employee remarked that she didn't get what she wanted but "still walked away with some..." and following the mediation she posted "...my mother always said something is better than nothing"
- Human Rights Tribunal of Ontario found that she breached confidentiality provision of the settlement agreement and reduced her original settlement by \$1000.00

Kim v International Triathlon Union, 2014 BCSC 2151

- Worker tweets about her co-workers, work events, and frustration about her job.
- Employer terminates the employee's short term employment. The inappropriate use of Social Media and related unprofessionalism were the grounds for cumulative cause for termination.
- Employee alleged there was no Social Media policy.
- Employer's complaints about Social Media were not found by the Court to be a cumulative cause for the termination because the plaintiff was not given an "express and clear" warning that her Social Media posts were inappropriate and unacceptable.

Key Takeaways: Is discipline warranted?

Consider the following factors:

1. Seriousness of the misconduct
2. Adverse effect on employment relationship
3. Prejudicial to employer or the employee's ability to properly carry out job functions
4. Repeated or isolated activity
5. Intention of harming employer
6. Showing remorse, or dishonest and uncooperative
7. Provocation may be a mitigating factor

Key Takeaways: Preventative Measures

- Employment contracts that clearly address duties and policies
- Confidentiality and professional standards of behaviour
- Ongoing and continuing obligations to not disparage the employer, its business and employees
- Social Media Policy
- Technology usage policy and practice

Key Takeaways: Preventative Measures — cont'd

- Privacy policy
- Severance agreements may reference continuing contractual and legal duties post employment
- Assignment and other written agreements that acknowledge the ownership of the intellectual property and other property of the employer

Social Media Policy

- Clear statement that employees should not engage in certain types of conduct
 - Disclosure of company secrets / confidential information
 - Workplace gossip
 - Posting racially or sexually offensive language or graphics
 - Disparaging co-workers, vendors and customers
- Policy should:
 - Encourage responsible use of Social Media
 - Promote use of privacy settings/controls
 - Outline what to do in the event of a complaint
 - Describe consequences including discipline and possible dismissal where Social Media is improperly used in the workplace

Social Media Policy — cont'd

- Explain potential problems resulting from reference to the employer's name even where access to social networks is outside of workplace
- Outline employer's right to monitor
- Describe consequences of breach of standards and policies
- Provide training
- Obtain employee acknowledgment and acceptance of terms of the Policy
- Require management control of passwords for corporate Social Media accounts

Social Media Policy — cont'd

- Employer should have a policy which addresses monitoring the employee's computer use:
 - Employer may monitor computer use
 - Outline the circumstances when monitoring may occur and in what circumstances an investigation will be conducted
 - Employees have no expectation of privacy at work
 - Confirm whether and to what extent they can speak on behalf of the employer

Social Media Policy — cont'd

1. Post the policy in high traffic areas.
2. Put advisory notice on computer login screen.
3. Have employee acknowledge receipt of a copy of the policy.
4. Review the policy with the employee.
5. Provide a contact person for the employee at the organization.



Signs of the social networking times.

Questions?

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