ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

WORK MATTERS

Volume 13, No. 4 – June 2012 Labour & Employment Law Section

Social Media and Workplace Discipline: Bringing employee free speech and reasonable expectations of privacy into the analysis

*By Denis Ellickson & Meg Atkinson**

With the proliferation of social networking sites, the extent to which people are connected is growing to unprecedented, and often unexpected, levels. Imprudent uses of social media have led to consequences for many Canadians at work, even where the employee was off duty and away from the workplace when a post was made. In a growing number of reported cases, arbitrators and adjudicators have found social media posts to have formed a proper basis for discipline and discharge from employment, for a number of different reasons. Some examples include posts that are insubordinate to managers,[1] injurious to the employer's business operation,[2] or in violation of workplace policies and agreements.[3]

However, arbitrators and adjudicators have also reversed or lessened employers' disciplinary responses to posts on social media in certain circumstances. Perhaps the most important factor that will lead to such a result is the employee's subsequent behaviour. Removing posts, apologizing, and exhibiting remorse has helped terminated employees to be reinstated,[4] or reduced the degree of discipline imposed.[5] In addition, where employers are inconsistent, unfair or fail to implement appropriate progressive discipline in responding to improper uses of social media, such will be helpful for employees to reduce the punishment.[6]

One important factor some decision makers recognize is the nuances of social networking implements, and the extent to which posts are public, in the determination of the justness of discipline. An excellent

---

[1] See for example *Chatham-Kent (Municipality) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 127 (Clarke Grievance)*, [2007] OLAA No. 135 at para. 25 (Williamson)(*Chatham-Kent*) and *Alberta v. Alberta Union of Public Employees (Re R)*, [2008] AGAA No. 20 (Ponak)(*Alberta*), upon judicial review, the outcome was varied in *Alberta v. Alberta Union of Public Employees (R Grievance)*, [2011] AGAA No. 58 (Ponak)(*Alberta #2*).

[2] See for example *Chatham-Kent, supra* and *Alberta* supra.

[3] See for example *Chatham-Kent, supra*; *Saskatchewan (Ministry of Corrections, Public Safety and Policing) and SGEU (Hawryluk) (Re)* (2009), 106 CLAS 157 (Denysiuk); *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services) (Aboutaeib Grievance)*, [2011] OGSBA No. 167 (Johnston)(*Ontario*); *Wasaya Airways LP v. Air Line Pilots Association, International (Wyndels Grievance)*, [2010] CLAD No. 297 (Marcotte) (*Wasaya Airways*); and *Credit Valley Hospital v. CUPE Local 3252 (Braithwaite Grievance)*, [2012] OLAA No. 29 (Levinson).

[4] *EV Logistics v. Retail Wholesale Union, Local 580*, [2008] BCCAAA No. 22 (Liang), *Hydro One Network Inc. v. Society of Energy Professionals*, [2010] OLAA No. 76, and *Ornge v. Ontario Public Service Employees Union, Local 505 (Champeau Grievance)*, [2011] OLAA No. 232 (Monteith).

[5] *Wasaya Airways, supra.*

[6] See *Wasaya Airways, supra, Alberta, supra* and subsequent decisions; and *Groves v. Cargojet Holdings Inc.*, [2011] CLAD No. 257 (Somers)(*Cargojet*).

example of this kind of analysis can be found in the unjust dismissal case of *Cargojet*.[7] Given the important principles and rights that are at stake for employees, this factor ought to be central to the analysis in social media and discipline cases: when an employer relies on an employee's off-duty posts on social networking sites to justify discipline, the employee's right to free speech and the employee's reasonable expectation of privacy are undermined.

All persons within Canada's boundaries are entitled to freely express thought and expression through the operation of s. 2(b) of the *Charter*.[8] Indeed, free speech is a particularly protected principle in the labour relations context: most jurisdictions in Canada have labour statutes that protect employee's freedom to speak about the workplace, and the Supreme Court of Canada has repeatedly stressed the importance of guarding the free speech of employees.[9] Social media is an important means by which employees can communicate about work matters and mobilize in an effort to improve their working conditions. Indeed, social media will play a growing role in the productive discourse that leads to better employment relations outcomes for employees. Decision makers should weigh this important value in determining the appropriate disciplinary response to employees' expressions over social media, and avoid overly penalizing communications that were visible only to a limited audience.

In addition to the value of free speech, the protection employees' reasonable expectations of privacy should also be carefully guarded. Most often, it is off-duty communications on social media sites that form the subject of discipline and dismissal. Civil and arbitral jurisprudence, as well as federal and provincial statutes, set limits on how much an employer is permitted to probe into an employee's private life. It is widely accepted that an employer's investigation into employees' conduct must be reasonable.[10] In *R. v. Cole*[11] the Ontario Court of Appeal found that employees who are permitted to use work computers for personal use have a reasonable expectation of privacy in the absence of a clear workplace policy to the contrary. In *Jones v. Tsige*, the same Court confirmed that the tort of breach of privacy, or "intrusion upon seclusion," is a cause of action in Ontario.[12] Applied to the social media context, these decisions should cause decision makers to apply a keen concern for employee privacy. Simply by participating in social media, an employee does not sacrifice all reasonable expectations of privacy. It is therefore important to carefully weigh the extent to which a communication over social media was public, or intended to be public, in determining whether discipline is warranted.

While there is no doubt that, in the age of social media, employees must be vigilant to avoid publicly posting inappropriate information through social media, employers must also be held to their duties to employees when using social media as a basis for disciplining employees. The important values of free

---

[7] *Supra*, see in particular paragraphs 74-83. Adjudicator Somers found that "a Facebook posting is different from a website blog," noting that Facebook users can limit their audience and many view Facebook as "analogous to sharing a beer with colleagues and friends, or getting together with friends to confide details about their jobs." The employee's postings were made visible to only the employee's Facebook friends and the employee's boyfriend's Facebook friends, and as such was distinguishable from the entirely public blog postings in *Chatham-Kent* and *Alberta*.

[8] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*).

[9] See for example *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8.

[10] *Canadian Pacific Ltd. v. BMWE (Chahal, Re)*, 59 L.A.C. (4th) 111 (Picher).

[11] [2011] OJ No. 1213 (C.A.).

[12] *Jones v. Tsige*, 2012 ONCA 32, OJ No 148. Justice Sharpe, for the majority, made the following comment regarding the rationale for such a tort:

Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the *Charter*, has been recognized as a right that is integral to our social and political order (at para. 68).

speech, employees' reasonable expectations of privacy, and employer's duties to discipline employees progressively and consistently should remain central to the analysis in dealing with discipline stemming from social media. An employee's right to lead a free, private, independent life outside work should not be forgotten.

Denis Ellickson & Meg Atkinson, Partner, CaleyWray and Meg Atkinson, Articling Student, CaleyWray