Social Media and the Workplace

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Whether we like it or not, social media is here to stay. It impacts and affects not only our personal lives, but also our employment relationships. What is becoming apparent, however, is that when social media is involved, the line between our work lives and personal lives is not always clearly defined. Whether we are talking about Facebook, blogs, MySpace or Twitter, issues arise with respect to privacy rights, workplace harassment and bullying, client/customer confidentiality and the employer's business reputation. As the following three decisions illustrate, if an employee's use of or commentary on social media can be viewed as insubordinate, harassing and/or disparaging of co-workers, or damaging to the employer's business, then discipline, including termination, can result even if the comments were not made at work or during working hours.

FACEBOOK FOLLIES RESULT IN TERMINATION

West Coast Mazda

Union certification drives often beget strong emotional responses. As two employees who had been supportive of a union certification application discovered, it is unwise to vent those emotions on a public forum like Facebook.

In Re: *Lougheed Imports Ltd.* (c.o.b. West Coast Mazda) and *UFCW Local 1518*, [2010] B.C.R.B.D. No. 190, the UFCW complained that the employer had breached the British Columbia Labour Relations Code by terminating two employees in the bargaining unit within a month of the union being certified to represent the employees at West Coast Mazda.

On August 27, 2010, the same day the employer was given notice of the union's application for certification, a manager with the employer discovered one of his employees had written about the workplace on Facebook, and ended the Facebook post with the vague threat that "sometimes accidents DO happen, it's unfortunate, but that's why they're called accidents, right?" Over the course of the following month, this employee continued to post messages on Facebook that were threatening and belittling toward management. A second employee also began posting on Facebook and, along with the first employee, they posted warnings about the quality of goods and services provided by their employer.

As a result of these Facebook postings, the employer decided to terminate the two employees for cause. The union alleged that, in dismissing the two employees, the employer did not have cause and was motivated by an anti-union sentiment. In essence, the union argued that the employer fired the two employees to get back at them for bringing in the union.

The British Columbia Labour Relations Board disagreed with the union and accepted that the employer had cause to terminate the employees on two grounds. First, "the comments made by the complainants on Facebook were damaging comments about the employer's business, such as don't spend your

money at West Coast Mazda as they are crooks out to hose you and the shop ripped off a bunch of people I know." Second, since the threatening and belittling comments posted about management personnel were able to be viewed by other employees who were also on Facebook, the Board accepted the employer's argument "that these comments are akin to comments made on the shop floor. The comments about the supervisors amount to insubordination . . . since they were 'used as a verbal weapon to degrade a supervisor in front of others.'"

What is most interesting about the decision is the fact that, because the employees who were posting comments about management on Facebook had "friended" other employees from the workplace, the Board was prepared to treat these Facebook discussions between these employees essentially as "shop talk," notwithstanding the fact the discussions took place online and after hours. Since the online comments made by the terminated employees in this case were admittedly egregious, it will be interesting to see whether future labour boards and arbitrators are prepared to go so far in characterizing online chatter as "shop talk."

BLOGGERS BLOOPERS CAN RESULT IN DISCIPLINE

EV Logistics v. RWU

A British Columbia Arbitrator held in *EV Logistics v. Retail Wholesale Union, Local 580,* [2008] B.C.C.A.A.A. No. 22, that the Employer had the right to discipline an employee as a result of his "off-duty" blogging, but because of a number of mitigating factors, the Employer was wrong in terminating the employee.

The Employer had received an anonymous complaint from one of its employees concerning the content of a blog that was authored by another employee (the "Griever"). The Employer reviewed the blog and observed that it contained violent, offensive and racist material including photos of Nazi paraphernalia. It also identified the Employer by name and included pictures of the Griever at his workplace. Because of the violent contents of the blog, the Employer immediately became concerned for the protection of the workplace and contacted the RCMP. The RCMP reviewed the blog and then visited the Griever at his home to determine if he was suicidal or violent. Following the RCMP's visit to his home, the Griever deleted the blog and posted an apology in its place.

When he returned to work, the Employer met with the Griever to discuss the content of the blog. The Griever took full responsibility and told the Employer that the blog had since been deleted. Following this meeting, the Griever submitted a letter of apology to the Employer.

After having fully investigated the matter, the Employer chose to terminate the employment of the Griever. The Arbitrator held that, because of the violent, offensive and racist content of the blog and the fact that the Employer was named in the blog, there was the potential for a negative impact on the Employer's business and its reputation. This was serious enough to warrant discipline. However, there were a number of mitigating factors suggesting that termination was excessive. The mitigating factors noted by the Arbitrator included:

- The Griever's young age;
- The fact that the Griever did not have a prior disciplinary record;
- The Griever's immediate acceptance of responsibility; and
- The Griever's sincere apology.

After having considered all of the above factors, the Arbitrator determined the Griever was capable of successful reintegration into the workplace. The Arbitrator explained that the numerous mitigating factors justified a reduction in the disciplinary penalty of termination. The Griever was reinstated to his former position without compensation for the wages and benefits from the date of discharge to the date of the arbitration.

Alberta v. AUPE

In *Alberta v. Alberta Union of Provincial Employees (2008),* 174 L.A.C. (4th) 371, an employee who made derogatory and negative comments about her co-workers on her blog was dismissed by her employer.

The employee began writing a blog after being told by a therapist to write down her feelings after a personal loss. The blog was originally about running, however there were a few posts to the blog in which she made very negative comments about her co-workers and supervisors.

Although the employee used pseudonyms instead of actual names of co-workers, the identities of the individuals were quite clear upon review of the specific posts. There were comments about working in a lunatic asylum, reference to a supervisor as "Nurse Ratched" (a character from the movie One Flew Over the Cuckoo's Nest, the setting of which took place in a mental institution) and "lunatic in charge", and she made references to working with imbeciles and idiot savants. She also used the first name of another supervisor and specified that she worked in the public sector in Alberta, Canada. When questioned about the blog by the employer, the employee was hostile and expressed no remorse.

In the Board's decision, they upheld the employer's dismissal of the employee. During the hearing, her co-workers stated that they were offended by her comments and did not wish to work with her again. The Employee never fully apologized to her co-workers and, at the time of the hearing before the Board, had three new blogs. The Board found that her expressed contempt for her managers, ridiculing of her co-workers, and denigrating administrative processes, constituted serious misconduct that irreparably severed the employment relationship, thus justifying discharge.

The termination was later overturned on judicial review because the employer had not followed the collective agreement requirement that an employee has a right to union representation at a meeting that could result in discipline. While the employee was reinstated, the decision nevertheless illustrates that inappropriate blogging can result in adverse consequences to an employee.

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