FACEBOOK: WHAT EMPLOYERS NEED TO KNOW ABOUT WORKPLACE PRIVACY, DISCIPLINE & DISMISSAL

TERRI SUSAN ZURBRIGG

Despite the fact that Facebook has over 400 million users worldwide, cases on the impact of Facebook in the workplace are just starting to work their way through the legal system.

Until there is a well-established judicial framework for dealing with workplace issues arising from the use of Facebook and other social networking sites, principles emerging from cases involving blogs and e-mail provide a helpful and applicable starting point.

Facebook and Employee Expectation of Privacy

Privacy settings enable Facebook users to have sites that are either publically available, in which case any one with a Facebook account will have access, or available only to that person's friends, thereby enabling the Facebook account-holder to control who has access to his or her site. Some employees may argue that privacy settings imply some expectation of privacy in the content of Facebook posts.

The Ontario Superior Court decision of *Murphy v. Perger* provides a strong refutation to the argument that employees have a reasonable expectation of privacy in their Facebook posts. In that case, the Court found that a plaintiff with 366 "friends" on Facebook had no reasonable expectation of privacy in that site given the number of people who had been granted access.

The nature of social networking as a form of online communication may also work to refute any expectation of privacy in the content of posts. As Arbitrator Naylor stated in *Naylor Publications Co. (Canada) v. Media Union of Manitoba, Local 191*, the "reality of email and the Internet is that privacy can never be guaranteed…the technology creates real limitations on the privacy and security of an email message… However, email users ought to know that when they put out sensitive or offensive material into cyberspace, they can never be sure where the message will ultimately come to rest." Further, as was stated in *Lakehead University and Lakehead University Faculty Association*, "one should consider email communications as confidential as are postcards." If this is the approach taken with respect to personal email, which often requires password access, then surely publicly available Facebook pages are more akin to billboards than postcards.

Facebook and Employee Discipline

Because of the public and communicative nature of Facebook and other social networking posts, and because of the likely relevance of the evidence of Facebook posts where they relate to workplace issues, such evidence will likely be admissible in court and arbitration proceedings relating to employee discipline.

Two cases dealing with employee blogging are instructive.

In *Re Municipality of Chatham-Kent and Canadian Auto Workers, Local 127*, an employee, who worked at a retirement facility, maintained a blog on which she posted comments that undermined the authority and reputation of management of the facility and posted information about particular residents. Arbitrator Williamson upheld the termination of the employee for insubordination and breach of confidentiality based on the information posted on her blog.

In *Re Government of Alberta and Alberta Union of Provincial Employees*, Arbitrator Ponak upheld an employee's dismissal due to insulting comments she made on her blog about co-workers and supervisors identified only by pseudonyms. What's particularly of note is that theme of the blog was not work-related; rather the grievor created it to provide a forum to discuss her long-distance running pursuits. The Arbitrator held that despite a right to blog, and to have opinions, there are nevertheless consequences to the employment relationship

EDMONTON
2000, 10235 - 101 STREET
EDMONTON AB T5J 3G1
PH 780 423 3003
FX 780 428 9329

CALGARY
400, 604 - 1 STREET
CALGARY AB T2P 1M7
PH 403 260 8500
FX 403 264 7084

YELLOWKNIFE
201, 5120 - 49 STREET
YELLOWKNIFE NT X1A 1P8
PH 867 920 4542
FX 867 873 4790

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when such thoughts are publically aired and will have consequences if they irreparably harm the employment relationship.

Principles for Employers to Keep in Mind:

The analysis provided in cases dealing with workplace monitoring and surveillance emphasizes the importance of employees being informed not only about the methods, but also about the uses to which the information collected by those methods may ultimately be put. It is good practice to remind employees about the potential consequences that inappropriate Facebook posts can have on the workplace, the employer's business interests, and their employment in terms of discipline, or potentially, termination. Employers must consider the relevant privacy legislation, as their gathering of social networking posts made by employees is likely to constitute a collection of the employee's personal information.

- Even if Facebook posts are made while an employee is not at work, the content of the posts may, like other forms of off-duty conduct, adversely affect the employment relationship and thus make an employee liable to discipline;
- Address social networking proactively by creating workplace policies. Inform employees that Facebook and other online posts that contain insulting or insubordinate remarks or information that breaches confidentiality standards can result in workplace discipline and even dismissal;
- If your workplace will use social networking as a marketing or recruitment tool, ensure that policies are in place to ensure authorized employees are using the tools appropriately; and
- If you learn about problematic Facebook posts created by an employee, consider proper documentation of the evidence contained on the Facebook page, such as by way of screen shots, so that there is a record of the date, time, and content of the post. ▲