

SOCIAL MEDIA AND OFF-DUTY MISCONDUCT: WHERE ARE WE @?

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I. Introduction

The use of social media has seen dramatic increases in the last five years. Recent statistics are particularly telling in terms of its use by some Canadian employers:

- 51% of employers use social media to research whether a candidate will be a “fit”;
- 45% of employers are using social media to research a particular candidate’s qualifications;
- 83% of employers are dissuaded by illegal drug use and references on a candidate’s social media profile;
- 71 % of employers are dissuaded by social media posts of a sexual nature;
- 51% are dissuaded by references to guns; and
- 61% of employers are dissuaded by poor grammar and typos.¹

While some employers have been proactive in using social media for screening candidates during the recruitment process, the inappropriate use of social media by employees remains a considerable workplace issue. In many instances, employees are being disciplined for inappropriate social media use on an ad-hoc basis and after-the-fact, rather than in a proactive manner and by way of a social media policy. A survey conducted in the United States by the Society of Corporate Compliance and Ethics (SCCE) and the Health Care Compliance Association (HCCA) found that in 2009, 24% of the respondent employees had been disciplined for social media conduct.² In 2011, the number had increased to 42%.³

Disciplining employees for misconduct, whether on or off-duty, is not a novel issue. In fact, in *Pearce v. Foster* (1886), 17 Q.B.D 536 (C.A.) (“*Pearce*”), the English Court of Appeal recognized that any conduct that is inconsistent with the implied term of the employment relationship to faithfully discharge his or her duty can justify

¹ Workopolis, *The Top Three Things that Employers Want to See in Your Social Media Profiles*, April 5, 2015, Accessed online: <http://www.workopolis.com/content/advice/article/the-three-things-that-employers-want-to-find-out-about-you-online/>

² netWORKed, *New Study on Social Media Shows Many Employers Not Proactive in Managing Employee Use*, June 2, 2011, Accessed online: <http://www.networkedlawyers.com/new-study-on-social-media-shows-many-employers-not-proactive-in-managing-employee-use/>

³ *Ibid.*

immediate dismissal. This is particularly so if the misconduct is prejudicial or is likely to be prejudicial to the interests or reputation of the employer.

The *Pearce* decision, amongst other older cases, has been adapted by Canadian courts and arbitrators to matters involving social media use. While there are a number of recent cases involving the dismissal or attempted dismissal of a unionized employee for cause as a result of the employee's off-duty social media activities, cases involving non-unionized employees are less prevalent. As such, the general principles emerging from the reported case law are predominantly from the unionized setting; however most are transferable to the non-unionized workplace.

A first principle is that inappropriate social media postings and use may give rise to disciplinary action, and, depending on the severity of the misconduct, discharge or termination will be upheld, even where the inappropriate activity occurs off-duty. Although the analysis is very contextual, fact-driven and will depend on both the nature of the business and the alleged misconduct, the following factors are most often considered when assessing off-duty conduct as grounds for the discharge or termination:

- Has the off-duty conduct harmed the employer's reputation or legitimate business interests?
- Has the off-duty conduct rendered the employee unable to perform his/her duties satisfactorily?
- Has the off-duty conduct lead to other employees refusing to work with him /her?
- Has the off-duty conduct demonstrated a breach of the law or the employer's workplace policies?⁴

A second general principle emerging from the reported case law is that there is no expectation of privacy surrounding an employee's use of the various social media outlets, be it Twitter, LinkedIn or Facebook.⁵

This paper reviews selected court, arbitration and labour board decisions from the past year, where the issues of social media, off-duty misconduct and discipline are addressed. The paper will also provide an overview of how employers can respond and improve an employee's understanding of social media use, both inside and outside the workplace.

⁴ *Re Millhaven Fibres Ltd. v Oil, Chemical & Atomic Workers Int'l Union, Local 9-670 (Mattis Grievance)* ("Millhaven"). This case is considered the seminal decision and "test" an employer will need to meet before imposing discipline for off-duty conduct.

⁵ *Leduc v Roman*, [2009] O.J. No. 681 at para. 25.

II. Recent Jurisprudence

a) **A Tale of Two Fire Fighters: *Toronto (City) v Toronto Professional Fire Fighters' Association, Local 3888 (Edwards Grievance)*, (October 14, 2014) and *Toronto (City) v Toronto Professional Fire Fighters' Association, Local 3888 (Bowman Grievance)* (November 12, 2014)**

The Toronto Fire Service (the “TFS”) discharged two fire fighters on September 16, 2013, for posting racist, inappropriate and disparaging tweets about women, homosexuals, people with disabilities and other groups, while they were off-duty. A number of the tweets were brought to the attention of the TFS when the National Post published an article entitled “As fire department looks to recruit women, sexist tweets suggest some firefighters may not be so welcoming” in August 2013. An investigation following the publication of the article unearthed more inappropriate tweets, which the TFS relied upon in discharging the two fire fighters. Grievances were filed by both men. The arbitrator in the *Edwards Grievance* substituted the discharge for a three-day suspension. In the *Bowman Grievance*, the arbitrator upheld the discharge.

Over a two-year period during which he was employed as a fire fighter, Matt Bowman tweeted a number of sexist, misogynist and racist posts, as well as offensive references to homeless people and people with disabilities, and a number of “jokes, juvenile in nature, with sexual themes”. None of Bowman’s tweets were directed at anyone in the workplace and no colleagues complained about his tweets. In his Twitter profile, Bowman identified himself as a TFS fire fighter and his Twitter profile picture was a photo of Bowman in TFS bunker gear. Bowman’s Twitter account was open to the public and some of Bowman’s followers were TFS employees. The National Post published three of Bowman’s tweets in its August 2013 article:

*“Reject a woman and she will never let it go. One of the many defects of their kind.
Also weak arms.”*

*“I’d never let a woman kick my ass. If she tried I’d be like HEY! You get your bitch
ass back in the kitchen and make me some pie.”*

“The way to a woman’s heart is through anal.”

Other offensive tweets came to the attention of the TFS during a subsequent investigation, including: “*if you were deaf I would rape you and then break your fingers so you can’t tell anyone...*”; a tweet the arbitrator wrote was, “perhaps, the most unfortunate example of the extent to which [Bowman’s] awareness eluded him.” The arbitrator upheld the discharge, finding Bowman’s tweets had impaired his ability to fulfill the complete range of responsibilities of a fire fighter and that his serious violation of the TFS Human Rights and Anti-Harassment policy rendered his conduct injurious to the general reputation of his employer.

Conversely, in the *Edwards Grievance*, the arbitrator substituted the discharge for a three-day suspension. The arbitrator found that two of the three tweets the TFS relied upon in terminating Edwards were not problematic. The third tweet, which was published by the National Post in August 2013, queried whether swatting a woman in the back of the head would be considered abuse, or a way to reset her brain. Edwards had an open Twitter account at the time, had previously tweeted about being a fire fighter, and his profile mentioned he was a Toronto fire fighter. In her decision, the arbitrator found that, while the tweet was inappropriate, the decision to terminate was too harsh a penalty. In her view, the TFS had not done enough to publicize its policies about social media use by employees; the tweet was not directed at anyone in the workplace and appeared to be an isolated instance of a disrespectful comment about the treatment of woman; the tweet was not an attempt to challenge TFSs' efforts to create a more inclusive and welcoming workplace for women; and compared to other cases, the circumstances were on the low end of the spectrum of unacceptable behaviour.

b) Threats to Management Not Lost in Translation – Arbitrator Upholds Termination for Facebook Post: *Corner Brook Pulp and Paper Ltd. and CEP, Local 64 (Stokes), Re, 2013 CarswellNfld 468, 117 C.L.A.S. 71, 239 L.A.C. (4th) 87*

On September 16, 2012, Victoria Stokes, a casual employee with 13 years seniority at Corner Brook Pulp and Paper (CBPP), and another CBPP employee were cleaning a vacuum pump with a pressure washer. The pump was connected to an unsealed electric motor. Stokes' supervisor had instructed Stokes and her colleague to aim the pressure washer away from the motor, but while they were cleaning the pump, something caused the electric motor to arc and shut down. CBPP investigated in the days following. Stokes was concerned about the incident, and had nightmares and trouble sleeping afterwards. She had recently stopped taking anti-depressants.

On September 19, 2012, Stokes wrote a Facebook post in which she made a number of threats and disparaging comments about two superiors and suggested CBPP did not take employee safety seriously. Excerpts from the post, which identified her superiors by name, include:

“The safety attitude at CBPPL is really awesome, 2 employees barely escaped death after a motor they were cleaning around arced out [...] these half retarded baymen management they think it's cheap...er to replace the employee than the equipment. I was one of these Employees”

“I am going to Jamaica now for two weeks to be with half the people who will MAKE SURE the expense of my life shuts more than ur fucking paper machine.

When I get back John Meaney and Chrisn Pembroke, be sure you KNOW, I won't stop until You draw a welfare check or are behind bars."

[...]

"Lets see how insignificant you feel when you Got a rope around ur neck and ur balls soaking in gasoline..."

[...]

"Fucking stupid retarded half French bayman. That's what you get when you put little boys in big boy jobs. Don't normally like revenge but by the Jesus I'm goin to fucking REAM you. Fuckin guzzlers Of le sperme du francais. I hope u choke on les poils pubiens! Half breeds."

CBPP terminated Stokes for making the post on October 25, 2012. Stokes' union grieved her termination. Stokes did not deny she made the post and her union did not dispute that discipline was appropriate. However, they argued that the safety incident and its effect on Stokes, as well as Stokes' mental health, were mitigating circumstances. The union requested that she be reinstated with a one month suspension.

Stokes' argument that the post was the act of a "crazy and delusional" person, explained by her lack of sleep after the accident and the effects of stopping her anti-depressant medication, was rejected by the arbitrator. Rather, the arbitrator noted that the post was well structured and indicated an organized writing process. The arbitrator upheld the termination, finding there were insufficient mitigating factors to support a penalty other than discharge given the offensive, threatening, insolent, disrespectful and harassing nature of the post and the fact that the two supervisors named in the post were seriously affected by the posting (both reported Stokes to the police, although no charges were laid). In the arbitrator's view, "the posting reasonably caused Mr. Meaney and Mr. Pembroke to be concerned about their safety and the safety of their families."

c) Employees Do Not Necessarily Get One Free Sexual Harassment Before Losing Their Job:

Tenaris Algoma Tubes Inc. and USWA, Local 9548 (D.), Re, 2014 CarswellOnt 8009, [2014] O.L.A.A. No. 180, 119 C.L.A.S. 57, 244 L.A.C. (4th) 63

The United Steelworkers of America, Local 9548 (the "USWA") filed a grievance on behalf of "D", alleging oil and gas tube maker Tenaris Algoma Tubes Inc. ("Tenaris") had terminated D's employment without just cause. On February 24, 2014, D, a crane operator, was working with "X", a "stocker" whose job involved signalling the crane

operator. D complained to his Team Leader that X was not following procedures and he refused to keep working with her unless someone spoke to her. When the Team Leader spoke to X, she said that D was not following procedures either. The Team Leader offered to move X, but she declined since she knew she would end up working with D again in the future.

When D got home that night, he posted a complaint about his “stocker” on Facebook. X was not named in the post, but D referenced a specific physical characteristic that would identify her to colleagues. Fellow Tenaris employees commented on the post, including P, who suggested performing a physically aggressive act with the physical characteristic described by D. D replied in agreement and went further, using a slang term to suggest a “violent and humiliating sex act be inflicted upon X.” The entire exchange took place over a couple of hours.

X was made aware of the post the next day and complained to Tenaris. Although D apologized, said he was embarrassed, and deleted the posts within 10 hours, Tenaris conducted an investigation and terminated D for violating the Tenaris Code of Conduct, the Collective Agreement and Ontario’s Bill C-168.

At the grievance hearing, the USWA argued Tenaris should have used progressive discipline and that D was a good candidate for reinstatement. The USWA also submitted there were several mitigating factors including: X had not been following procedures at work; D did not use X’s name in the Facebook post; D apologized; Tenaris’ anti-violence and anti-harassment policies were not updated and were locked behind glass; Tenaris’ policies did not specifically mention Facebook or other social media; and D had not harassed anyone in his previous three years of employment with Tenaris.

The arbitrator rejected the majority of the USWA’s submissions, finding that the vicious and humiliating nature of the comments were threatening and that this was not an appropriate case for progressive discipline. D had sexually harassed X by suggesting she should be sexually assaulted, and this created a poisoned work environment. As a relatively new employee, Tenaris could not trust that D would not harass another colleague and the company is obligated to maintain a workplace free from harassment. The arbitrator denied the grievance, noting in her reasons “an employee does not necessarily get one free sexual harassment before he loses his job.”

d) Ring the Alarm! Progressive Discipline Should Include Warnings as to the Content of Social Media Posts: *Kim v. International Triathlon Union* (2014 BCSC 2151)

Kim v. International Triathlon Union (“Kim”) demonstrates that social media issues can arise with non-union employees. In *Kim*, the International Triathlon Union (“ITU”) dismissed the plaintiff after she made a number of allegedly derogatory and defamatory comments about the ITU on social media. Although the ITU offered two

weeks' pay in lieu of notice, along with an additional amount after signing a release, the plaintiff alleged that she was wrongfully dismissed and was entitled to a greater amount of notice. The ITU responded that the plaintiff's unprofessional behaviour was unacceptable given her position as Senior Communications Manager.

The ITU's main concern was a blog post written by the plaintiff, dated October 5, 2012, which she titled "taking shit". The post, which was quite long and compared the plaintiff's supervisor to a domineering and abusive mother, included a number of inflammatory statements, such as:

- "Today for the first time in a long time I felt like that kid all over again; beaten, discouraged, alone and scared, after the most disappointing conversation you could possibly have with your boss. the same horrible, sickly feeling of someone above you kicking you down with lies and senseless put downs and insults and zero reality all flooded back in a horrible, despicable wave of nostalgia;"
- "Of course she's right, how can I possibly be right when I'm not the authority figure!";
- "Her perception of reality is so clouded and distorted that all she sees is her own version and not the real version of truth. in the end some people will only believe what they want to believe and and [sic] not what's real. These same people will never find fault in their own actions, no matter how wrong and inappropriate it was"; and,
- "Sometimes people change for the worst and sometimes people are just evil pieces of shit and just need to bring you down to make themselves feel more powerful or better than you."

The ITU also took issue with three tweets (Twitter postings) made by the plaintiff: one which referenced alcohol consumption at an ITU event after-party, one in which she joked about "flying off the handle", and one which referred to ITU advertising as "propaganda."

In evaluating the case, the B.C. Supreme Court reasoned that a contextual approach should be applied to determine whether an employee's misconduct constitutes just cause, and that the court must be proportional in striking a balance between the severity of the misconduct and the sanction imposed.

Perhaps the most important feature of *Kim* is that the ITU did not attempt to rely on one incident or act to justify dismissal for cause. Although counsel for ITU submitted that the October 5th blog post was, alone, grounds for dismissal for cause, the ITU ultimately relied on multiple incidents as cause for termination.

The Court wrote that the following elements must be present in evaluating cumulative cause:

1. "The employee was given express and clear warnings about his performance.

2. The employee was *given a reasonable opportunity to improve his performance after the warning was issued.*
3. Notwithstanding the foregoing, the employee *failed to improve his performance.*
4. The cumulative failings would prejudice the proper conduct of the employer's business.” (emphasis in original)

In this case, the Court found that the plaintiff was not given an oral or written warning prior to termination that her social media posts were inappropriate and her employment would be terminated if they did not cease. Therefore, the Court found that ITU did not meet its onus of proof to demonstrate cumulative cause.

While the Court was mindful that the plaintiff, as a communications manager, ought to have known better than to use social media to criticize her employer, its decision hinged on the fact that Ms. Kim was never specifically reprimanded about her social media posts.

The *Kim* decision has yet to be cited. It is likely, however, that other courts will adopt similar reasoning with respect to an employer's obligation to give employees a clear and express warning that further improper commentary on social media may result in termination, and further, that any such warning(s) should be documented and kept on record.

e) Social Media and Human Rights – Derogatory Comments by Union Protected by Charter:

Taylor-Baptiste v. OPSEU (2014 ONSC 2169)

Taylor-Baptiste v. OPSEU suggests that potentially abusive and discriminatory social media posts may be protected by the Charter, if they are made by a union. Unlike the other cases discussed in this article, *Taylor-Baptiste* did not involve a wrongful dismissal claim. Rather, the applicant (and appellant) brought a claim against OPSEU alleging discrimination with respect to employment and freedom from harassment under s. 5 of the *Human Rights Code*, RSO 1990, c H.19. The applicant's claim was dismissed by the Human Rights Tribunal of Ontario (“HRTO”), and her subsequent appeal to the Ontario Divisional Court was also dismissed.

The applicant was a manager at the Toronto Jail. Her complaint stemmed from two posts published on a blog overseen and managed by the President of the OPSEU Local 530 (“Dvorak”), of which Ms. Taylor-Baptiste was a member. The posts contained the following statements, which impugned Taylor-Baptiste's performance and linked her attainment of her position to her former relationship with another employee:

- “... Perhaps our senior administration should reconsider there [sic] hiring practices for deputy’s [sic] and change the qualifications from having intimate knowledge off [sic] another deputy to something like maybe some experience doing the job...”; and,
- “... Maybe she should go back to her maiden name, or Gray, so as not to besmerch [sic] the good ‘union’ name of Taylor-Baptiste.”

Dvorak himself wrote the first post and approved the second, which was written by another employee. Both overtly referenced the applicant’s relationship with her former spouse, a well-known union member. Both posts were made in fall 2008, and removed at the behest of Toronto Jail management in February 2009. However, because issues related to the posts, as between the union and management, were resolved through a “workplace restoration process”, Ms. Taylor-Baptiste’s only avenue for personal redress was a complaint to the HRTTO.

HRTTO Decision

While the HRTTO recognized that discrimination “with respect to employment” may be broader in its scope than conduct “in the workplace”, and that blog posts could constitute discrimination, it dismissed the discrimination complaint by relying in large measure on the *Charter* protected rights of freedom of expression and freedom of association of Dvorak and OPSEU. The Tribunal found that the posts were communications to union membership on issues of labour/management relations, made by the local union president in the course of his duties and “close to the core” of the union’s constitutional rights under the *Charter*.

Divisional Court Decision

The Divisional Court held that the HRTTO’s decision was reasonable. It found that because Dvorak’s comments were made in the context of his duties as a local union president, and were related to management, they warranted protection under ss. 2(b) (freedom of expression) and 2(d) (freedom of association) of the *Charter*.

The applicant and the Attorney General, as an intervener, unsuccessfully argued that the HRTTO’s decision essentially created a “human rights-free zone” with respect to union speech. They argued that the blog posts were not only offensive and written by one employee about another, but were also widely communicated to many other union and non-union employees and, therefore, constituted “discrimination with respect to employment”.

The Divisional Court found that the matter required consideration beyond the facts that Dvorak was co-worker and that his comments were linked to the applicant’s employment. However, the Divisional Court’s reasoning seems to

suggest that the situation may have been different had the local president been acting exclusively as an employee in making the impugned comments.

f) The Company's Values Matter: *Wasaya Airlines LP v. Air Line Pilots Association, International* ([2010] CLAD No 297)

Wasaya Airlines LP v. ALPA (“*Wasaya*”), one of the more frequently discussed cases regarding off-duty use of social media, is instructive as to both the importance of possible harm to an employer's reputation and the risk of damage to the employment relationship caused by derogatory postings on social media.

In this case, an employee of Wasaya Airlines was discharged after posting a note titled “You know you fly in the north when...”, containing derogatory terms about First Nations people on Facebook. Wasaya Airlines was particularly concerned because it was owned by a number of First Nations and largely serviced First Nations communities in Northern Ontario. The airline had also incorporated “First Nations Values”, which required employees to respect First Nations peoples, into its employee handbook and other policies. Nevertheless, the union argued that the termination was excessive and sought the grievor's reinstatement.

As in other cases where off-duty social media usage was relied upon for discharge of a unionized employee, the adjudicator considered the following factors set out in *Millhaven*:

- Whether the conduct of the grievor harms the employer's reputation or product;
- Whether the conduct renders the employee unable to perform his duties satisfactorily;
- Whether the conduct leads to refusal, reluctance or inability of other employees to work with the grievor;
- Whether the grievor has been guilty of a serious breach of the *Criminal Code*, which rendered his conduct injurious to the general reputation of the Company and its employees; and,
- Whether the conduct negatively impacts the Company's ability to properly carry out its function of efficiently managing its works and efficiently directing its workforce.

Ultimately, the Arbitrator ruled that termination was too severe a punishment and substituted a 4-month, unpaid suspension. However, he also found that the grievor would not be able to work effectively, as a pilot, with the owners of the airline or its customers. As a result, the grievor was required to resign from his employment.

In reaching his conclusion, the Arbitrator deemed the derogatory post to be more harmful as a result of the employer's increased awareness of and focus on First Nations values, as well as its efforts to have employees recognize those values.

More generally, the Arbitrator emphasized the importance of the broad reach of social media posts, reasoning that "where the internet is used to display commentary or opinion, the individual doing so must be assumed to have known there is potential for virtually world-wide access to those statements."

III. Conclusion

From a legal standpoint, the cases discussed in this paper confirm that the framework for assessing off-duty misconduct and social media use, including reliance on the *Millhaven* "test", will vary even where similar facts are present. As such, identifying what examples of social media use or social media activities can constitute misconduct, both on or off-duty, and grounds to justify discipline or termination is impossible.

From an employee-employer perspective, not only do the cases demonstrate poor judgment by certain employees but also a lack of understanding of how conduct on social media outlets can have considerable negative repercussions on their employment. Our partner, George Waggott, commented that both employees and employers need to better understand how "social networking fits into traditional employment and labour concepts".⁶ One of the first steps is to define social media expectations by creating and integrating social media policies within an employer's existing policies on privacy, code of conduct and workplace safety.

Below are some of the guidelines and recommendations proposed by our partner, George Waggott⁷:

- **Best practice is to involve all departments when drafting a social media policy.** Information technology, human resources, public relations/marketing and corporate managers and executives should collaborate to create a policy that works for everyone.
- **Keep the social media policy broad enough to allow for technological advances and future changes.** Not only should a policy cover content on the company blog, or company Facebook or Twitter account, but should equally address the appropriate use of an employee's personal blog, Facebook page, or Twitter

⁶ Jennifer Bond and George Waggott, *Social Media Policies in the Workplace: What Works Best?*, August 2011, Accessed online: <http://www.mcmillan.ca/social-media-policies-in-the-workplace>

⁷ *Ibid.*

account. The policy should be unequivocal in stating that the scope is not restricted to work computers but also applies to use of social media on employee time.

- **Do not underestimate the positives of social media.** A social media policy should recognize the popularity of new technologies and allow access to social media while preserving productivity and protecting the company.
- **Keep employees aware of the risks of social networking.** Employers should keep their employees informed of the inherent risks related to social networking and what safeguard measures are available. Employers should also encourage employees to use a disclaimer, especially if referring to the company name.
- **Be clear about “acceptable social media use” – both on and off-duty.** A policy should expressly address social media use that can affect the legitimate business interests of the employer.
- **Confirm consequences and discipline for breach of social media policy.** The policy and its enforcement should be clearly communicated to all employees, including what disciplinary action will be taken, up to and including termination, if the policy is not followed.
- **Have a written social media policy.** Employers should have a written social media policy. Employers should also consider training and having employees acknowledge and/or track acceptance or receipt of the policy to ensure they have read its contents.
- **The social media policy should be simple and accessible.** Employers should frequently circulate the social media policy and have a copy available to employees both electronically and hardcopy.

In the past, employees' off-duty complaints about workplace situations were typically only heard by their close circle of friends and family members. Now, such grievances are routinely aired on social media platforms where they can be viewed by a potentially unlimited audience. Adjudicators have demonstrated that they recognize the reality that such postings can have a harmful impact on the employer's business and/or can irrevocably destroy an employment relationship. Although some employees object to strict social media policies or discipline related to off-duty social media activity on the basis of freedom of speech, they must recognize that attacks on their employer, or its business, customers and/or employees, can have consequences for the employment relationship. A good social media policy can strike a balance between employees' rights and the employer's legitimate interest in protecting its business and other employees.