

FACEBOOK - FRIEND OR FOE? THE IMPACT OF SOCIAL MEDIA ON HIRING AND FIRING

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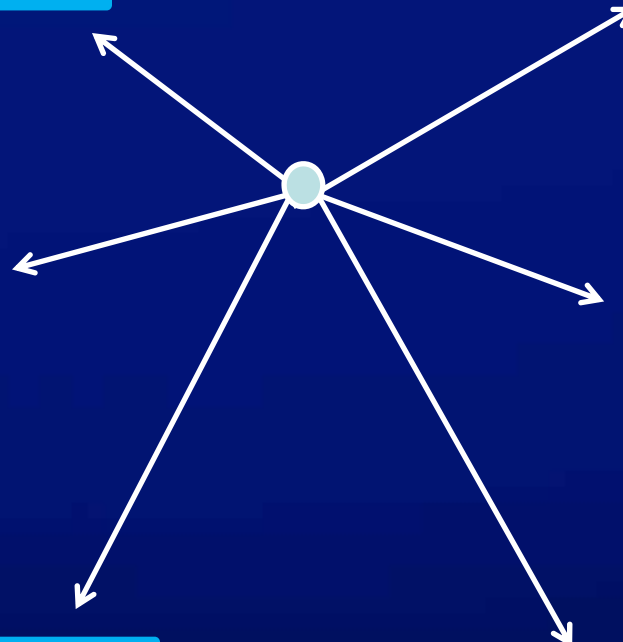


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What do we mean by Social Media?



Social Media: The Employment Context

- 1) Social media as means of screening potential employees
- 2) Employer policies for social media usage by employees
- 3) Reliance on social media in employee terminations

Facebook: the stats

- More than 800 million active users
- More than 50% of active users log on to Facebook in any given day
- More than 250 million photos are uploaded per day
- More than 350 million active users currently access Facebook through their mobile devices
- Average user has 130 friends

Source: <http://www.facebook.com/press/info.php?statistics>

Why Employers Reject Applicants:

- Provocative or inappropriate photographs or information - 53%
- Content shows drinking or drug use - 44%
- Posted negative comments about former employers, co-workers or clients - 35%
- Showed poor communication skills - 29%
- Posted discriminatory comments - 26%
- Lied about qualifications - 24%
- Posted confidential information from previous employer - 20%

Source: <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr519&sd=8/19/2009&ed=12/31/2009>

Why Employers Hire Applicants:

- Good feel for personality and fit - 50%
- Supported professional qualifications - 39%
- Showed creativity - 38%
- Demonstrated solid communication skills - 35%
- Came across as well-rounded - 33%
- Other people posted positive references - 19%
- Candidate received awards and accolades - 15%

Pitfalls of Screening Applicants

➤ Human Rights Issues:

- Reliance on protected class information (religion, sexual orientation...)
 - If question is improper to ask in an interview, what is effect of voluntary disclosure of equivalent information on a Social Media site?
 - What about...
 - Since LinkedIn is intended as a professional networking tool – is voluntary disclosure there equivalent to just announcing it unasked in the interview?

➤ Employer Policy:

- Should Employers develop policies as a means of declaring what HR/recruiters may do vis-à-vis Social Media postings of potential employees?

Employee Conduct - Employer Policies: setting up a social media policy



Ponderables:

- What is the boundary between purely private life and the employer – employee connection?
- Is it enough that someone is simply employed?
- How about if the employer is identified on the employee's profile?
- Can policies help employees control impulses – reduce likelihood that an embarrassing posting goes viral, encourage sober second thought, etc.?

A Social Media Policy

What Might be Covered?

- Purpose: **Prevent** the spread of damaging “information”
- Scope:
 - Personal / Professional: Should policy apply to all personal use of social media or only when employees are clearly linked to the employer?
 - What technologies are covered?
- Specific Requirements: confidentiality, disassociation of personal views, disclaimer re opinions stated, consent of HR or marketing department, compliance with the law

A Social Media Policy

What Might be Covered?

- Guidance: further recommendations regarding the use of social media by employees
- Consequences: If breached - discipline up to and including termination
- Signature: have employees read and sign the policy

Disassociation of Personal Views

- Example:



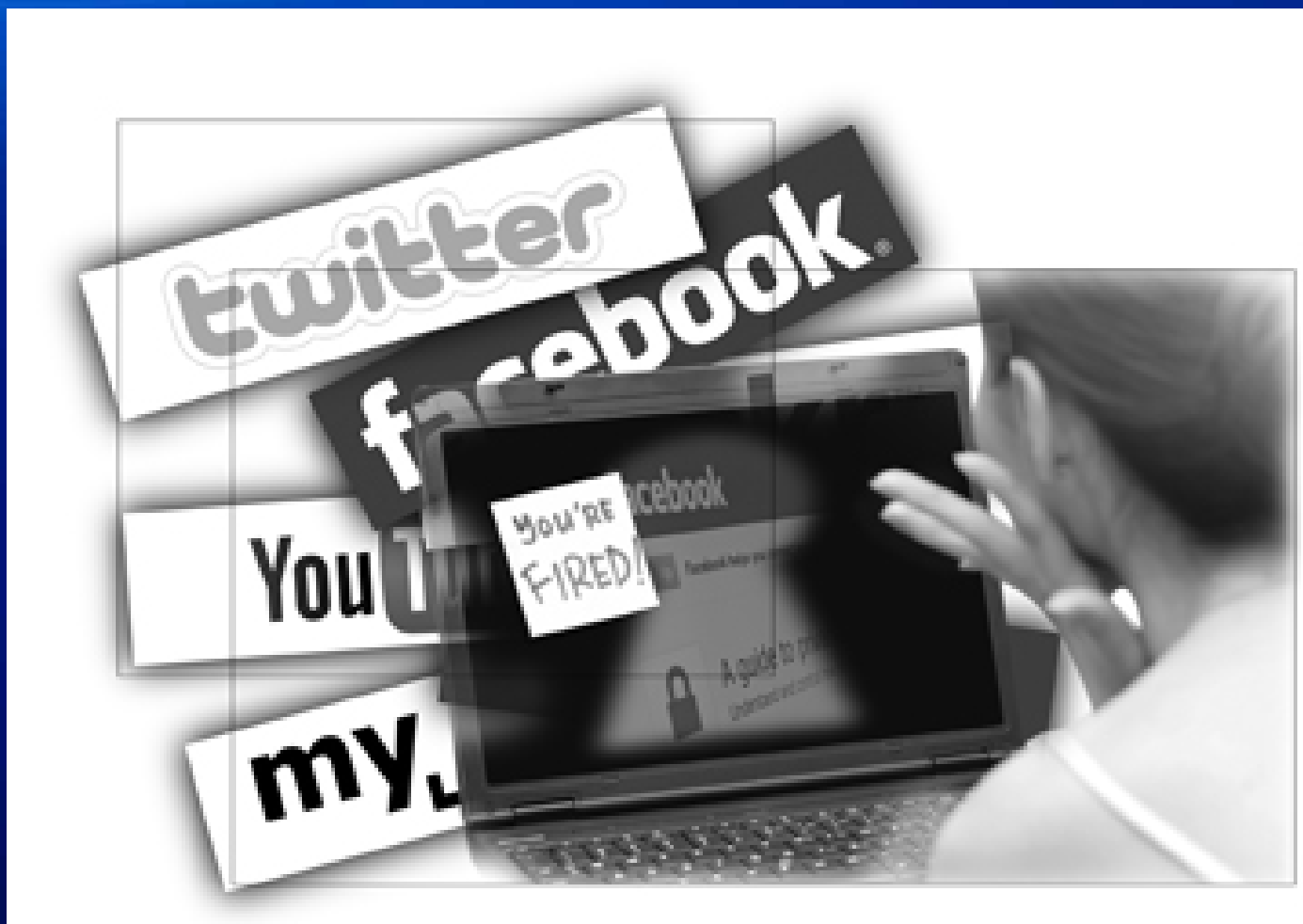
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Social Media Related Employee Termination



Social Media and the Expectation of Privacy (or lack thereof)

- *Leduc v. Roman* (2009) (ON SCJ)
 - Postings on Facebook are documents within the meaning of the law regarding disclosure of evidence, so a Party must produce any of his Facebook postings that relate to any matter at issue in a case.
 - Photographs of parties posted to Facebook are admissible as evidence to show one's ability to engage in sports and other recreational activities where they have put his enjoyment of life or ability to work in issue.
 - A party cannot have a serious expectation of privacy when posting comments on Facebook.

Lougheed Imports Ltd. v. U.F.C.W., Local 1518

(British Columbia Labour Relations Board)

- First clear Facebook firing case in Canada
- Facts:
 - Employer terminated 2 employees, claiming cause arising from comments posted on Facebook.
 - Both employees were known union supporters in recent certification drive.
 - The employees had both current and former employees as Facebook friends.
 - Comments included threats, homophobic slurs and disparaging remarks about the employer's business.
 - Investigative meetings were conducted prior to the terminations. Both employees denied making the Facebook postings in question.
- Issue: Was termination driven by anti-union animus, or was there proper cause for termination?

➤ Decision: Termination upheld.

➤ Reasons:

- Following *Leduc v. Roman*: No reasonable expectation of privacy.
- Employer carefully investigated and allowed the employees a chance to have Union representation and see copies of the Facebook postings before being asked about them.
- The dishonesty of the employees at the investigation meetings compounded the misconduct.
- Employee #1's comments towards the supervisors were offensive, expressing contempt and ridicule of manager and supervisors.
- Employee #2's comment named the Employer and attempted to encourage people not to spend money at the Employer's business.
- In both cases, this amounted to cause.
- Conduct was such as to counter any suggestion of anti-union animus.

I.U.E.C., Local 50 v. ThyssenKrupp Elevator

(Ontario Labour Relations Board, Construction Industry Grievance)

➤ WARNING:

- Any case that begins with an opening paragraph like this one is not for the faint of heart.

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“The responding party dismissed the grievor from employment when a video posted on the internet showing the grievor with his genitals exposed and being stapled to a 4 x 4 wooden plank came to its attention.”

I.U.E.C., Local 50 v. ThyssenKrupp Elevator

(Ontario Labour Relations Board, Construction Industry Grievance)

- The incident took place outside of working hours (at lunch).
 - But it occurred at the worksite and several employees could be seen wearing the employer's uniform on the video.
 - The incident was part of an escalating series of stunts.
 - The employer was not aware of the other stunts before the video was posted.
 - No other employees were disciplined.
 - The video became the talk of the construction industry.
 - It was not the grievor who posted the video online.
 - The grievor had been employed for 9 months with no previous history of discipline.
 - The Union did not argue that the incident did not warrant discipline.
-
- **Issue:** Should the Board substitute a lesser penalty for the dismissal?

I.U.E.C., Local 50 v. ThyssenKrupp Elevator

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- Decision: termination upheld.
- Reasons:
 - Grievor's conduct was offensive and shocking.
 - The employer was easily identified in the video.
 - The reputation of the employer was significantly prejudiced in a safety sensitive industry (employer is elevator contractor).
 - The employer has a significant interest in preventing, if not an obligation to prevent, its employees from engaging in stunts, pranks or horseplay in the workplace. See *Occupational Health and Safety Act*, ss. 22 (5)(h) and 28(2)(c).
 - Discipline free record irrelevant in the circumstances.

I.U.E.C., Local 50 v. ThyssenKrupp Elevator
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- Standard for just cause for discipline for off duty conduct:
 - Whether the conduct “is sufficiently business related in that it can be proven to be prejudicial or harmful to the employer’s legitimate business interests.”

Other examples of social media related terminations that have gone viral on the internet



Source: <http://www.thestar.com/news/world/article/681635>

The Case of Kevin Colvin

- Colvin was an Intern with the North American arm of the Anglo Irish Bank (now the Irish Bank Resolution Corporation).
- He did not show up to work on Halloween 2008, citing a family emergency.

-----Original Message-----

From: Kevin Colvin [mailto:kevin.colvin@angloirishbank.com]

Sent: Wednesday, October 31, 2007 3:55 PM

To: Jill Thompson (North America)

Cc: Paul Davis (North America)

Subject:

Paul/Jill -

I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.

Kind regards,

Kevin

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Colvin's Boss found this photo, posted on Facebook from the Halloween party Colvin apparently missed work to attend, and attached it to his reply, copying the rest of the office on the email.

From: Paul Davis (North America)
Sent: Thursday, November 01, 2007 4:54 PM
To: Kevin Colvin; Jill Thompson (North America); Kevin Colvin (North America)
Subject: RE:

Kevin,

Thanks for letting us know--hope everything is ok in New York. (cool wand)

Cheers,
PCD



Colvin's employment was subsequently terminated.

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Lessons Learned

- The capacity of some human beings to do truly dumb things is only exceeded by their capacity to make it public.
- Perhaps regrettably, dumb, in and of itself, is not cause. But if it is sufficiently public, linking dumb things to one's employer might just tip the balance.

Lessons Learned

- It is relevant to consider reasonable expectations of privacy in a communication, before relying upon it.
- Due process – an opportunity to respond to accusations or explain circumstances – can be a critical factor in assessing the employer's actions, especially where employer motive is at issue (*Lougheed*).

Questions?

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